Michigan Law Review

Volume 86 | Issue 8

1988

The Practice and Discourse of Legal Scholarship

Edward L. Rubin

University of California, Berkeley

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Legal Writing and Research Commons](#)

Recommended Citation

Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988).

Available at: <https://repository.law.umich.edu/mlr/vol86/iss8/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE PRACTICE AND DISCOURSE OF LEGAL SCHOLARSHIP

*Edward L. Rubin**

This Article is an attempt to evaluate the enterprise of legal scholarship. It might appear that an enormous amount has been written about the subject in recent years, but the majority of the discussions actually focus on the law itself, on legal theory, or on the validity of new approaches, such as law and economics, law and literature, and critical legal studies. The concern here is the remainder — that great mass of work that discusses contemporary legal issues in a manner that is difficult to describe but easy to recognize.¹ It can be referred to, without any implicit condemnation, as standard legal scholarship.

These are not cheerful times for standard legal scholarship. In fact, the field is widely perceived as being in a state of disarray. It seems to lack a unified purpose, a coherent methodology, a sense of forward motion, and a secure link to its past traditions. It is bedeviled by a gnawing sense that it should adopt the methods of other disciplines but it is uncertain how the process is to be accomplished. The field even lacks a conceptual framework within which to criticize itself.

One reasonable way to develop such a framework is to rely upon the same approach that has been used to reevaluate other forms of scholarship. In fact, the reevaluation of scholarship has been a central theme in twentieth-century thought. Its most consistent development is to be found in continental philosophy: the phenomenology of Husserl,² Schutz,³ and Merleau-Ponty,⁴ the linguistic analysis of the

* Professor of Law, University of California, Berkeley. I am grateful to Richard Buxbaum, William Fletcher, Richard Hyland, Sanford Kadish, Robert Weisberg and Franklin Zimring for reading and commenting on various versions of this Article, and to the participants in Berkeley's Jurisprudence and Social Policy seminar, where one version was presented.

1. A more precise description can only be given once the framework of analysis is presented, for reasons stated in the text at notes 21-41 *infra*. To anticipate, standard legal scholarship adopts a prescriptive approach, *see* text at notes 45-49 *infra*, is grounded on normative positions, *see* text at notes 52-56 *infra*, and is expressed in judicial discourse, *see* text at notes 74-85 *infra*.

2. The work that deals most directly with the problem of scholarship is E. HUSSERL, *THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY* (D. Carr trans. 1970) [hereinafter *HUSSERL, EUROPEAN SCIENCES*].

3. A. SCHUTZ, *COLLECTED PAPERS* (1962) [hereinafter *SCHUTZ, PAPERS*].

4. M. MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION* (C. Smith trans. 1962).

later Wittgenstein,⁵ followed by Peter Winch,⁶ A.R. Louch,⁷ and, in some sense Thomas Kuhn,⁸ the hermeneutics of Heidegger,⁹ Ricoeur,¹⁰ and Gadamer,¹¹ the critical theory of the Frankfurt School¹² and Habermas¹³ and, to some extent, the poststructuralism of Foucault¹⁴ and Derrida.¹⁵ A somewhat related strand is American pragmatism as developed by Pierce,¹⁶ Dewey¹⁷ and James,¹⁸ and, recently, to some extent, Richard Rorty.¹⁹ Although these approaches vary greatly among themselves, their analysis of scholarship has cer-

5. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. Anscombe trans. 3d ed. German and English 1968) [hereinafter WITTGENSTEIN, *INVESTIGATIONS*]. See note 26 *infra*.

6. P. WINCH, *THE IDEA OF A SOCIAL SCIENCE* (1958); Winch, *Understanding a Primitive Society*, 1 AM. PHIL. Q. 307 (1964).

7. A. LOUCH, *EXPLANATION AND HUMAN ACTION* (1969).

8. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1st ed. 1962) [hereinafter KUHN, *SCIENTIFIC REVOLUTIONS*]; Kuhn, *Reflections on My Critics*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* (I. Lakatos & A. Musgrave eds. 1970) [hereinafter Kuhn, *Reflections*].

9. M. HEIDEGGER, *BEING AND TIME* 29-31, 67-77 (J. Macquarrie & E. Robinson trans. 1962) [hereinafter HEIDEGGER, *BEING AND TIME*]; M. HEIDEGGER, *Modern Science, Metaphysics, and Mathematics*, in *BASIC WRITINGS* 247 (D. Krell ed. 1977) [hereinafter HEIDEGGER, *Modern Science*]; M. HEIDEGGER, *The Question Concerning Technology*, in *id.* at 287 [hereinafter HEIDEGGER, *Technology*]. The explicit analysis of scholarship in *Being and Time* is relatively brief, but the book's emphasis on everyday human experience and the primacy of preempirical knowledge was extremely influential in the reevaluation of scholarship.

10. P. RICOEUR, *THE CONFLICT OF INTERPRETATIONS* 3-96 (D. Ihde ed. 1974) [hereinafter RICOEUR, *INTERPRETATIONS*]; Ricoeur, *The Model of the Text*, 38 SOC. RES. 529 (1971) [hereinafter Ricoeur, *The Model of the Text*].

11. H. GADAMER, *TRUTH AND METHOD* (1975) [hereinafter GADAMER, *TRUTH AND METHOD*].

12. See, e.g., M. HORKHEIMER, *CRITICAL THEORY* (1972) [hereinafter HORKHEIMER, *CRITICAL THEORY*]; M. HORKHEIMER, *THE ECLIPSE OF REASON* (1974) [hereinafter HORKHEIMER, *ECLIPSE*]; M. HORKHEIMER & T. ADORNO, *DIALECTIC OF ENLIGHTENMENT* (1972); H. MARCUSE, *ONE DIMENSIONAL MAN* (1964).

13. Most particularly, J. HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (T. McCarthy trans. 1981) [hereinafter HABERMAS, *COMMUNICATIVE ACTION*]; J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* (J. Shapiro trans. 1971) [hereinafter HABERMAS, *KNOWLEDGE*].

14. Most notably, Michel Foucault, at least to the extent that the term does not include deconstruction. The problem of scholarship is most central in M. FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (1972) [hereinafter FOUCAULT, *ARCHAEOLOGY*]. But it is discussed at length in his other works as well. See, e.g., M. FOUCAULT, *DISCIPLINE AND PUNISH* 195-308 (1977) [hereinafter FOUCAULT, *DISCIPLINE*].

15. See J. DERRIDA, *OF GRAMMATOLOGY* (G. Spivak trans. 1976) [hereinafter DERRIDA, *GRAMMATOLOGY*]; J. DERRIDA, *WRITING AND DIFFERENCE* (A. Bass trans. 1978) [hereinafter DERRIDA, *WRITING*]. The reasons for the qualification with respect to Foucault and Derrida are discussed in notes 35, 36 & 39 *infra*.

16. 5 C. PIERCE, *COLLECTED PAPERS: PRAGMATISM AND PRAGMATICISM* (C. Hartshorne & P. Weiss eds. 1934).

17. J. DEWEY, *EXPERIENCE AND NATURE* (1926); J. DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC* (1953).

18. W. JAMES, *PRAGMATISM* (1947); see also W. JAMES, *THE WILL TO BELIEVE* (1897).

19. R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

tain common themes, which will be referred to here as the critique of methodology.

Continental philosophy has influenced a number of movements in legal scholarship, including the critical legal studies movement, the law and literature movement, and a more recent movement that can be called law as practical reason.²⁰ But the major concerns of all three movements have been legal theory and the law itself, not the analysis of legal scholarship. To be sure, one can discern what the members of these movements think of standard scholarship, but indirect skepticism or condemnation is quite different from sustained analysis. More importantly, there is no need for indirection; since one of the major strands of continental philosophy, the critique of methodology, is centrally concerned with scholarly activity, it can be applied directly to the problem of legal scholarship, rather than being refracted through an analysis of law and legal institutions.

The present Article is an effort to use the central insights developed by the critique of methodology in assessing standard legal scholarship. Interestingly, this assessment suggests that the negative elements of the critique, which have struck telling blows against the self-satisfied certainty of natural and social science, are largely inapplicable to legal scholarship. But the general approach to scholarship that the critique of methodology advances can be used to formulate an independent critique, based on the internally defined purposes of the scholarship itself. The critique can then be reapplied to provide constructive, and essentially pragmatic methods for resolving some of the problems that currently beset the entire field. Not only does this offer prospects for improving legal scholarship, but it suggests that this effort is an unusually important one. The critique reveals that legal scholarship is not simply a subject for assessment, but also a crucial element in the assessment of other academic disciplines. It is through law, as much as through epistemology, that we determine the social role and purpose of these disciplines.

The logical way to begin this discussion might appear to be a de-

20. One important contemporary mode of scholarship for which the critique of methodology does not provide a basis is law and economics. Law and economics is largely positivist in its conception, and thus represents an opposing approach to that of the critique. In fact, economic methodology has been vigorously attacked by those who share the critique's perspective. See H. KATOUZIAN, *IDEOLOGY AND METHOD IN ECONOMICS* (1980); D. MCCLOSKEY, *THE RHETORIC OF ECONOMICS* (1985); Schumpeter, *Science and Ideology*, 39 AM. ECON. REV. 345 (1949). For related attacks on law and economics, see Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 668 (1979); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Left, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974). The place of law and economics in legal scholarship is discussed in text at notes 152-58 *infra*.

scription or characterization of standard legal scholarship. But that would immediately violate the principles developed by the critique of methodology itself, which holds that something cannot be described without implicating the conceptual framework on which the description is based. To describe standard legal scholarship, one must know the aspects of it that should be described, and the terms in which to describe them. This Article, therefore, begins by discussing the critique of methodology, and then describes standard legal scholarship according to the terms of that critique. As it proceeds, the description is elaborated through further development of the theory. In effect, then, the description is not complete until the analysis is complete; one cannot fully know what is being described until one has identified its defects and decided how those defects should be remedied. This makes sense, because a socially relevant critique must emerge from the subject matter, and the subject should not be regarded as fully described unless one has described its problems, and its prospects for improvement.

Thus, the Article begins with a discussion of the critique of methodology, a characterization of standard legal scholarship in terms of the critique, and an exploration of the critique's relevance for this form of scholarship. The next section discusses the modes of legal analysis represented by the critical legal studies, law and literature, and law as practical reason movements, which draw from many of the same philosophic sources as the critique. Despite their common origin, these movements do not rely on the critique of methodology itself, and do not focus on standard legal scholarship. The Article then proceeds to offer a critique based on the internally defined purposes of legal scholarship, concluding that this scholarship is often ineffective on its own terms. Finally, the insights of the critique of methodology are used to develop a set of practical suggestions for increasing the field's effectiveness in achieving those self-defined purposes.

I. STANDARD LEGAL SCHOLARSHIP AND THE CRITIQUE OF METHODOLOGY

A. *The Critique of Methodology*

The body of thought that is referred to here as the critique of methodology²¹ is enormously varied and complex, resisting either

21. "Methodology," in this phrase, means any independent, systematic set of arguments or criteria which claims to arrive at a true or accurate account of the subject matter under consideration. Its use, as a defining characteristic of the mode of thought that modern continental philosophy opposes, is taken mainly from P. FEYERABEND, *AGAINST METHOD* (1975), and GADAMER, *TRUTH AND METHOD* *supra* note 11, at 414-47.

summary or paraphrase. One common element, however, is its attack on positivism, and more generally its attack on the claims of objectivity that have been advanced by a broad range of academic disciplines. Such claims were rather fashionable as recently as half a century ago. Natural scientists believed that they were accurately describing physical reality and discovering its underlying regularities, while social scientists — particularly economists and political scientists — believed that they were describing with similar, if more modest accuracy, the behavior of human beings and the operation of human society. Historians viewed themselves as developing an account of what had really happened in the past, and literary critics felt that they were discovering the real, and generally intended, meanings that lay embedded in literary texts. All these scholars recognized that their state of knowledge was incomplete, and all, with the possible exception of natural scientists, acknowledged that this would always be the case. Nonetheless, the claims to objective description on which they based their work seemed irresistibly persuasive at the time. In fact, such claims survive to this day as working assumptions in most of these fields.²²

Positivist philosophy, or logical positivism, which flourished in the 1920s and 1930s, was built on these self-confident foundations. Prior to its appearance, the philosophic treatment of empirical knowledge, at least in continental Europe, had been dominated by idealism, which regarded empirical knowledge as a grimy, janitorial affair, far removed from the true knowledge of the mind, the spirit, and the Absolute.²³ The positivist response was that the only true knowledge of the natural world was empirical, consisting of knowledge that could be verified by experience. Transcendental philosophy, they claimed, was a series of impressionistic assertions that were endlessly elaborated without leading in any particular direction, an artifact of language, combining words in startling or pleasing patterns to express the personal opinions of the philosopher. In other words, it was, as the positivists gently pointed out, Absolute nonsense.²⁴

This emphasis on language proved, in part, to be the positivists'

22. See generally R. BERNSTEIN, *THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY* 3-31 (1978) (discussing the development of empirical theory in the social sciences).

23. The most influential proponent of this view was Hegel; see G. HEGEL, *THE PHENOMENOLOGY OF MIND* (J. Baillie trans. 2d ed. 1931); see also J. FICHTE, *THE SCIENCE OF KNOWLEDGE* (1889); A. SCHOPENHAUER, *THE WORLD AS WILL AND IDEA* (R. Haldane & J. Kemp trans. 6th ed. 1907). See generally, J. ROYCE, *THE SPIRIT OF MODERN PHILOSOPHY* (1892).

24. See, e.g., A. AYER, *LANGUAGE, TRUTH AND LOGIC* (2d ed. 1946); R. CARNAP, *PHILOSOPHY AND LOGICAL SYNTAX* (1935); R. VON MISES, *POSITIVISM: A STUDY IN HUMAN UNDERSTANDING* (1951). On the general history and development of this movement see J. JOERGENSEN, *THE DEVELOPMENT OF LOGICAL EMPIRICISM* 2 *International Encyclopedia of Unified Science* No. 9 (1951); V. KRAFT, *THE VIENNA CIRCLE* (1953).

undoing. As their critics,²⁵ and at least one of their own number, Ludwig Wittgenstein,²⁶ soon recognized, positivist claims were also couched in language, and could be just as readily described as nonempirical expressions of a viewpoint. The modern critique of methodology went further, however, by combining this epistemological insight with social theory and speculative philosophy. It is not only the theory of knowledge that is couched in language, the critique suggested, but knowledge itself, including all the allegedly empirical disciplines. Language, moreover, is intertwined with personal and cultural experience, so that these disciplines are products of that experience as well. The problems people perceive, the categories they establish, the hypotheses they generate, the methodologies they employ, the arguments they use, and the criteria of validity they accept are all specific choices, made in the midst of history, as part of ongoing intellectual traditions. In fact, our very perception of reality, the things "out there" that empirical disciplines believe themselves to be describing, is also a product of our thought processes, and possibly our language. There is disagreement among the proponents of this critique about whether some transcendent or inherent structures unify all human consciousness.²⁷ But they generally agree that there is no uniform, objective referent by which we can determine whether our thought patterns are right or wrong. Rather, our sense of reality is determined by those thought patterns, by the cognitive constructs that make thinking possible. It is these constructs, which exist within our

25. See, e.g., W. ALSTON, *PHILOSOPHY OF LANGUAGE* (1964); B. BLANSHARD, *REASON AND ANALYSIS* (1962); J. WISDOM, *PHILOSOPHY AND PSYCHO-ANALYSIS* (1953); Wisdom, *Metaphysics and Verification Pt. 1*, 1938 *MIND* 452.

26. Wittgenstein began as a logical positivist of sorts. See L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (D. Pears & B. McGuinness trans. 1961). This work was certainly central in the development of the Vienna Circle. See J. HARTNACK, *WITTGENSTEIN AND MODERN PHILOSOPHY* 43-57 (1965); J. URMSON, *PHILOSOPHICAL ANALYSIS: ITS DEVELOPMENT BETWEEN THE TWO WORLD WARS* 99-129 (1956). Wittgenstein's shift to linguistic philosophy is presented in L. WITTGENSTEIN, *INVESTIGATIONS* *supra* note 5, a book whose influence was felt as a result of Wittgenstein's lectures at Cambridge. These lectures were published, also posthumously, as L. WITTGENSTEIN, *THE BLUE AND BROWN BOOKS* (1958).

27. Husserl advances the idea of a transcendental unity, see HUSSERL, *EUROPEAN SCIENCES*, *supra* note 2; E. HUSSERL, *CARTESIAN MEDITATIONS* (D. Cairns trans. 1977) [hereinafter HUSSERL, *MEDITATIONS*]. Derrida and Wittgenstein treat human thought as a culturally particularized phenomenon. See J. DERRIDA, *SPEECH AND PHENOMENA* (1973); L. WITTGENSTEIN, *INVESTIGATIONS*, *supra* note 5, at 2-172. On the relationship between the two, and their joint response to Husserl's phenomenology, see H. STATEN, *WITTGENSTEIN AND DERRIDA* (1984). Hermeneutic writers generally attempt to mediate between these positions. See GADAMER, *TRUTH AND METHOD* *supra* note 11, at 345-446; HEIDEGGER, *BEING AND TIME*, *supra* note 9, at 91-148, 225-72. More generally, however, it can be said that all the thinkers discussed here are attempting different approaches to this same mediation. Husserl, for example is insistent on the significance of culturally determined versions of the lifeworld, see HUSSERL, *EUROPEAN SCIENCES*, *supra* note 2, at 103-89, while Wittgenstein focuses on the general features of culturally determined rules.

minds or within our culture, that must be explored to achieve either understanding or wisdom.²⁸

According to the critique of methodology, an academic discipline is not a body of objective information, or a set of techniques for discovering such information, but a practice; a system of socially constituted modes of argument shared by a community of scholars.²⁹ The defining characteristic of a practice, in contrast to a methodology, is that its determinations of validity ultimately must be made on the basis of judgment, and perhaps intuition, rather than according to fixed rules. Being based on judgment, a practice is necessarily embedded in a culture and a language.³⁰ As a result, the conclusions that any scholarly discipline produces are bounded by a cultural horizon that is

28. See generally P. BERGER & T. LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY* (1967); DERRIDA, *WRITING*, *supra* note 15, at 31-63, 278-93; FOUCAULT, *ARCHAEOLOGY*, *supra* note 14, at 21-76; GADAMER, *TRUTH AND METHOD* *supra* note 11, at 153-341; C. GEERTZ, *THE INTERPRETATION OF CULTURES* (1973) [hereinafter GEERTZ, *INTERPRETATION*]; HABERMAS, *KNOWLEDGE*, *supra* note 13, at 67-186; J. HABERMAS, *Technology and Science as "Ideology"*, in *TOWARD A RATIONAL SOCIETY* 81 (1971); HORKHEIMER, *CRITICAL THEORY*, *supra* note 12, at 253-72; HUSSERL, *EUROPEAN SCIENCES*, *supra* note 2, at 67-135; KUHN, *SCIENTIFIC REVOLUTIONS* *supra* note 8, at 43-51, 110-34; A. LOUCH, *supra* note 7, at 50-60; I. SCHUTZ, *PAPERS* *supra* note 3, at 3-66; C. TAYLOR, *THE EXPLANATION OF BEHAVIOR* (1964); P. WINCH, *supra* note 6, at 7-65; WITTGENSTEIN, *INVESTIGATIONS* *supra* note 5, at 56-88; Geertz, *Blurred Genres: The Refrigeration of Social Thought*, 49 *AM. SCHOLAR* 165 (1980); Taylor, *Interpretation and the Sciences of Man*, 25 *REV. METAPHYSICS* 3 (1971). A major figure in this general intellectual movement is Max Weber, but his position can be described as unclear, or more respectfully, as multi-faceted. See R. BENDIX, *MAX WEBER* (1962); HABERMAS, *COMMUNICATIVE ACTION*, *supra* note 13, at 143-271; A. KRONMAN, *MAX WEBER* 11-14 (1983); W. RUNCIMAN, *A CRITIQUE OF MAX WEBER'S PHILOSOPHY OF SOCIAL SCIENCES* (1972); A. SCHUTZ, *THE PHENOMENOLOGY OF THE SOCIAL WORLD* (G. Walsh & F. Lehnert trans. 1967); P. WINCH, *supra* note 6, at 45-51; Parsons, *Value-Freedom and Objectivity in MAX WEBER AND SOCIOLOGY TODAY* 27 (O. Stammer ed. 1971).

29. See, e.g., R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM*, 109-18, 223-29 (1983); M. FOUCAULT, *LANGUAGE, COUNTER-MEMORY, PRACTICE* 199-217 (1977) [hereinafter FOUCAULT, *LANGUAGE*]; GEERTZ, *supra* note 28 at 3-30; H. GADAMER, *What is Practice?: The Conditions of Social Reason*, in *REASON IN THE AGE OF SCIENCE* 80 (1981); GADAMER, *TRUTH AND METHOD*, *supra* note 11, at 274-89; J. HABERMAS, *THEORY AND PRACTICE* (J. Viertel trans. 1973); HABERMAS, *COMMUNICATIVE ACTION*, *supra* note 13, at 295-319; W. JAMES, *PRAGMATISM*, *supra* note 18, at 197-217; KUHN, *SCIENTIFIC REVOLUTIONS* *supra* note 8, at 110-34; A. MACINTYRE, *AFTER VIRTUE* 169-89 (1981); R. RORTY, *supra* note 19.

30. The linguistic nature of scholarly research, and of thought in general, is clearly a dominant theme in modern philosophy, and one that is not restricted to hermeneutics or linguistic analysis. For particularly definitive statements, see J. DERRIDA, *GRAMMATOLOGY*, *supra* note 15, at 3-57; FOUCAULT, *ARCHEOLOGY* *supra* note 14, at 79-131; GADAMER, *TRUTH AND METHOD* *supra* note 11, at 345-447; J. HABERMAS, *COMMUNICATIVE ACTION*, *supra* note 13, at 94-101, 366-99; M. HEIDEGGER, *ON THE WAY TO LANGUAGE* (1971); RICOEUR, *INTERPRETATIONS* *supra* note 10 at 11-16, 236-66; I. SCHUTZ, *PAPERS* *supra* note 3, at 260-86; WITTGENSTEIN, *INVESTIGATIONS*, *supra* note 5. Cf. G. EBELING, *WORD AND FAITH* 305-32 (1963) (theological hermeneutics). This emphasis on language is also found in other major traditions of modern thought, such as analytic philosophy. See, e.g., J. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1975); J. SEARLE, *SPEECH ACTS* (1969), and structuralism, see, e.g., N. CHOMSKY, *SYNTACTIC STRUCTURES* (1957); F. SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (1966). See generally *THE LINGUISTIC TURN* (R. Rorty ed. 1967).

finite, although not necessarily unchanging.³¹ Any other claim that we might make for the methodology developed in an academic discipline is itself a product of that field's practice, and thus its conceptual framework. The one general statement that can be maintained is that the conclusions of our academic disciplines, whether they are a truth we have discovered or a mythology that we believe, are primarily and irreducibly the result of an ongoing practice among a community of scholars.

Because scholarship is a practice that is carried out by a community, its statements are best regarded as a mode of discourse.³² Contrary to the positivist viewpoint, such statements are not disembodied utterances, existing in some neutral space where they can be objectively evaluated. Rather, they are acts of speech, initiated by a particular speaker, or kind of speaker, and directed toward a particular audience. They have a particular voice, or approach, which can be descriptive, as in natural science, interpretive, as in literary criticism, or prescriptive, as in moral philosophy. Whatever voice they use, these acts of scholarly speech are intended to persuade their audience. They do so by making certain arguments that are recognized as valid ones by the community of scholars who are engaged in the practice. Such judgments of validity are generally determined by the methodology that the practice recognizes, and the role of empirical information is determined by that methodology.

This emphasis on scholarly communities, discourse and explicitly selected methodologies does not lead to solipsism, or an idealist contempt for empirical information.³³ Rather it emphasizes the inherent

31. The term "horizon" is used by Gadamer as an image for a cultural vision that is bounded by one's historical position, but can nonetheless change as one moves through history or alters one's perspective. See GADAMER, *TRUTH AND METHOD* *supra* note 11, at 267-74. The process of understanding a previous culture involves expanding one's horizon by joining one's perspective to theirs.

32. The term discourse is widely used but, as might be expected, each writer tends to use it for his or her own purposes, with consequent divergences in meaning. Here it refers to a specialized mode of oral and written communication that is used by an identifiable group of speakers. This definition largely follows Ricoeur, *The Model of the Text*, *supra* note 10, at 530-37; see also RICOEUR, *INTERPRETATIONS* *supra* note 10, at 83-88. For related, but not identical usages, see FOUCAULT, *ARCHEOLOGY* *supra* note 14, at 21-30 (similar to Ricoeur's definition, but Foucault maintains discourse can be provisionally isolated from other aspects of culture); HABERMAS, *COMMUNICATIVE ACTION*, *supra* note 13, at 42, 117-18 (rational argument aimed at renewed agreement in response to breakdowns in communication); HEIDEGGER, *BEING AND TIME*, *supra* note 9, at 203-14 (communication leading to understanding); MARCUSE, *supra* note 12, at 84-120 (general mode of social communication).

33. Much of the hostility that Anglo-American scholars often experience toward continental philosophy stems from the belief that it is solipsistic — that it denies the existence of external reality. But this is a complete misimpression. In fact, one of the central features of this tradition is its recognition of the comprehensive, overwhelming nature of the "world," as we perceive it. According to Husserl, all understanding must begin from the "life-world" in which we are totally immersed. See HUSSERL, *EUROPEAN SCIENCES*, *supra* note 2, at 103-35; E. HUSSERL, *IDEAS*

limitations on our ability to perceive and gather information, and counsels an awareness of those limitations.³⁴ In this sense, the critique can be regarded as an effort to improve our understanding of the information gathering process, by recognizing that the nature of the information we discover depends upon the methodology by which we gather it.³⁵ To sanctify empirical information, to claim that it can structure our perceptions rather than being structured by them, is simply a bit of twentieth-century mythology. Moreover, it is a mythology that will not only engender undesirable norms,³⁶ but will also distort and mislead the process of research itself.

But our effort to understand our scholarly endeavors requires that we do more than recognize the limits of our mental frameworks. We must comprehend the way that we construct or select those frameworks. This difficult but necessary project requires collective self-awareness, the ability of a community of scholars to develop an understanding of their own pattern of thought, and to evaluate its op-

101-11 (1931) [hereinafter HUSSERL, IDEAS]. Heidegger's position is even stronger; we are "thrown" into the world, by a sort of forcible immersion. BEING AND TIME, *supra* note 9, at 219-24; *see also id.* at 78-148. The problem, in their view, is to struggle out of empirical reality's iron embrace, either by a conceptual process (Husserl's reduction) or an existential one (Heidegger's care). Thus, they aspire to a nonempirical transcendence, but they recognize it as a task of considerable difficulty precisely because the empirical world is so insistently present for us. The problem for scholars would be to free themselves from some of the pregiven structures which their own existence within the lifeworld produces through a process of collective self-awareness, so that they can achieve a better understanding of their own thought process, or the thought process of other people.

34. With respect to natural science, *see, e.g.*, P. FEYERABEND, *supra* note 21; KUHN, SCIENTIFIC REVOLUTIONS *supra* note 8, at 52-65; N. HANSON, PATTERNS OF DISCOVERY (1961). With respect to social science, *see* note 9 *infra*.

35. This may appear to be an inapposite characterization of Derrida, whose project is relentlessly critical. But it is clear from his discussion of Saussure, *see* DERRIDA, GRAMMATOLOGY, *supra* note 15, and his response to Searle, *see Limited Inc abc . . .*, 2 GLYPH 162 (1977), that his goal is to discern the nature of language through deconstruction. In fact, deconstruction, with its reversal of ordered oppositions such as pure/impure or serious/nonserious, is not very distant from Winch's effort to reverse the priority we give to our own culture (which is "present" to us, in Derrida's terms). *See* Winch, *supra* note 6. Generally speaking, there have not been many efforts to apply Derrida's techniques to social science, *but see* C. NORRIS, THE CONTEST OF FACULTIES 19-47 (1985); M. RYAN, MARXISM AND DECONSTRUCTION (1982); Derrida, *The Conflict of Faculties*, in LANGUAGES OF KNOWLEDGE AND INQUIRY (M. Riffaterre ed. 1982). Still, Derrida's work is quite new, and has not been fully assimilated by other disciplines outside literary criticism.

36. This is a major area of normative agreement among the writers identified here with the critique of methodology. *See, e.g.*, HABERMAS, KNOWLEDGE, *supra* note 13, at 3-5, 67-90; J. HABERMAS, *Technical Progress and the Social Life-World*, in TOWARD A RATIONAL SOCIETY 50 (1971) [hereinafter HABERMAS, *Technical Progress*]; HEIDEGGER, *Technology*, *supra* note 9; M. HORKHEIMER & T. ADORNO, *supra* note 12, at 31-57; HORKHEIMER, CRITICAL THEORY, *supra* note 12, at 188-243; HORKHEIMER, ECLIPSE, *supra* note 12, at 61-82, 173-79; HUSSERL, EUROPEAN SCIENCES, *supra* note 2, at 21-68; H. MARCUSE, *supra* note 12, at 144-99. *See also* FOUCAULT, DISCIPLINE, *supra* note 14, at 195-228; M. FOUCAULT, THE HISTORY OF SEXUALITY (1980) [hereinafter FOUCAULT, SEXUALITY]. Foucault does not draw explicit normative conclusions from his analysis, but it is virtually impossible to read these works without perceiving an implicit condemnation.

eration.³⁷ In doing so, the critique advances from being an attack on positivism to being a generalized analysis of methodology. Its position is that methodologies must be selected on the basis of culturally embedded judgments, and that real knowledge becomes possible only when we abandon our idea that a methodology can autonomously generate the criteria of its own validity.

The view of scholarship that the critique of methodology suggests, therefore, is not despairing, but skeptical and cautious. It asserts that we can achieve understanding within our culturally defined horizons, but only through a scrupulous process of analysis and self-awareness.³⁸ It also asserts that we can expand our horizons, but only by gradual increments and collective effort.³⁹ The critique does not rec-

37. It is this aspect of the continental approach that distinguishes it from the consensus truth theories of American pragmatism, and from the closely allied reader-response approach to literary criticism, *see, e.g.*, S. FISH, *IS THERE A TEXT IN THIS CLASS?* (1980). Pragmatists are generally content to accept the social consensus as an adequate definition of truth, but the continental thinkers, however persuaded they may be that one cannot transcend one's context (*e.g.*, Derrida, Gadamer), regard the effort to conceptualize, control and often change that context as central to their enterprise.

38. The account of this process varies from one writer to another. Indeed, these differences are often the defining feature for each of the particular philosophical approaches that contribute to the critique of methodology. But virtually all those who have formulated the modern attack on positivism propose an alternative that is related to the process of self-awareness, the focused analysis on our own frameworks of understanding. *See, e.g.*, J. DERRIDA, *POSITIONS* (1981) (deconstruction); FOUCAULT, *ARCHAEOLOGY*, *supra* note 14 (archaeology, that is, analysis of underlying discursive structures); GADAMER, *TRUTH AND METHOD* *supra* note 11, at 305-41 ("the hermeneutically trained mind . . . will make conscious the prejudices governing our own understanding . . . ; so long as our mind is influenced by a prejudice, we do not know and consider it as a judgment" *id.* at 266). HABERMAS, *COMMUNICATIVE ACTION*, *supra* note 13, at 366-99 (self-awareness as a path to linguistically established intersubjectivity); HABERMAS, *KNOWLEDGE*, *supra* note 13 ("[T]he pursuit of reflection knows itself as a movement of emancipation. Reason is at the same time subject to the interest in reason. We can say that it obeys an *emancipatory cognitive interest*, which aims of the pursuit of reflection." *Id.* at 128.); HORKHEIMER, *CRITICAL THEORY*, *supra* note 12, at 209-43 ("Critical thinking . . . is motivated today by the effort really to transcend the tension and to abolish the opposition between the individual's purposefulness, spontaneity, and rationality, and those work-process relationships on which society is built. Critical thought has a concept of man as in conflict with himself until this conflict is removed." *Id.* at 210.); HUSSERL, *IDEAS*, *supra* note 33, at 107-14 (phenomenological reduction); *cf.* HEIDEGGER, *BEING AND TIME*, *supra* note 9, at 225-73, 312-48 (care, and the call of conscience). It should be noted that self-awareness refers to a process, or an experience of human thought, but not necessarily to the subject of that thought. For Husserl, thought, or the mind, is also the primary object of that process, but for Heidegger and Gadamer, it is the world. Habermas attempts to combine the two approaches in HABERMAS, *COMMUNICATIVE ACTION*, *supra* note 13.

39. This is particularly true in the human sciences, where the object of research is itself a discourse. To achieve the understanding of human action which we seek, we must understand that it constitutes a meaningful construction of reality by the actors, and that we can approach it only through the medium of our own construction of reality. *See* GEERTZ, *INTERPRETATION*, *supra* note 28; A. LOUCH, *supra* note 7; I. SCHUTZ, *PAPERS*, *supra* note 3, at 3-66; C. TAYLOR, *supra* note 28; P. WINCH, *supra* note 6, at 72-109; M. MERLEAU-PONTY, *Phenomenology and the Sciences of Man*, in *THE PRIMACY OF PERCEPTION* 43 (J. Edie ed. 1964) (interpretation of Husserl). The process is generally called "empathetic understanding," a translation of the German word *verstehen*. *See also* HEGEL, *supra* note 23, at 180-213.

"*Verstehen*," in both its original and translated forms, has been a source of some confusion,

commend that the existing methodologies of scholarship be abandoned or transcended. Given the fact that these methodologies are generated by the ongoing tradition of the scholarship itself, and by the broader cultural context in which that scholarship exists, such transcendence is not possible. To recommend it, moreover, would require either an alternative methodology, which contradicts the essence of the critique, or a chimerical rejection of our organized bodies of knowledge. Instead, what the critique suggests is that we become conscious of the assumptions built into our various methodologies, recognize their limitations, develop an ability to move from one of those available methodologies to another, and engage in a process that can gradually transform those methodologies in directions suggested by our underlying norms.⁴⁰

since it is used in at least two different ways. It is clear to virtually everyone that some fairly sophisticated mental effort is involved in attempting to understand a different culture, or a separate subgroup within one's own culture. Those who assert the objective nature of social science treat this mental effort as a form of empathy, a cognitive technique that must be employed when dealing with people as opposed to protons. See, e.g., Abel, *The Operation Called Verstehen* 54 AM. J. SOC. 211 (1948); Parsons, *supra* note 28. The countervailing position, which is the one that belongs to the critique of methodology, is that the term refers to the mental effort involved in recognizing one's own system of understanding, and approaching the behavior of others through that recognition. See, e.g., GADAMER, TRUTH AND METHOD, *supra* note 11, at 235-74; HABERMAS, COMMUNICATIVE ACTION, *supra* note 13, at 107-41; 1 SCHUTZ, PAPERS, *supra* note 3, at 48-66; McCarthy, *On Misunderstanding "Understanding"*, 3 THEORY & DECISION 351 (1973). Since the position being described here is that of the critique, the term "empathetic understanding" is intended in the latter sense of *verstehen*.

40. This project is perhaps the most important feature that distinguishes the critique of methodology from structuralism. Structuralism's basic claim is that individuality, and the individual consciousness, is not a preempirical prerequisite to knowledge of the world, as hermeneutics and phenomenology assert, but a product of forces that exist within the world. See, e.g., C. LEVI-STRAUSS, THE SAVAGE MIND 245-69 (1966); C. LEVI-STRAUSS, THE RAW AND THE COOKED (1970); J. PIAGET, STRUCTURALISM (1970); F. DE SAUSSURE, *supra* note 30. Understanding, according to the structuralists, lies in perceiving these forces, not in a process of self-revelation.

Despite these differences, structuralism is related to the critique of methodology in the shared belief that knowledge, more specifically scholarship, is a product of culture. Thus, both approaches locate a society's claims to objectivity within the discourse of that society. Both recognize the social construction of the self, although certain elements of the critique allow for a transcendent self. See, e.g., HEIDEGGER, BEING AND TIME, *supra* note 9, at 225-348; HÜSSERL, EUROPEAN SCIENCES *supra* note 2, at 184-89. Structuralism, however, must ultimately rely on some form of positivism; since social and cultural forces create the human mind, they must exist independent of it, although at a deeper level than the reality perceived by the members of the society itself. This, of course, leads to one of structuralism's major weak points: what is it that perceives these forces, and how is that perception achieved?

Foucault guardedly identifies himself as a structuralist at certain points, see, e.g., FOUCAULT, ARCHAEOLOGY, *supra* note 14, at 15, but his work seems more correctly based midway between structuralism and the critique of methodology. Cf. H. DREYFUS & P. RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS (1982) (identifying Foucault's techniques of archaeology and genealogy as "interpretive analytics," a combination of structuralist and hermeneutic approaches). Foucault's attack on positivism has the pointed quality of the critique, see, e.g., FOUCAULT, ARCHAEOLOGY, *supra* note 14, at 21-76; FOUCAULT, DISCIPLINE, *supra* note 14, at 216-28; FOUCAULT, THE ORDER OF THINGS 344-87 (1973). In addition, he attempts to develop methods for achieving self-awareness of the forces he perceives, see FOUCAULT, ARCHAEOLOGY, *supra* note 14, at 24-30; M. FOUCAULT, *Truth and Power*, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, at 172-77 (1980).

This description of the critique of methodology is not intended as a claim that the critique is the only proper view of scholarship, or that its attack on positivism and objectivism is irrefutable. Its application to natural science, in fact, seems somewhat implausible in the face of technology. The point, rather, is to present the critique, and then to explore its implications for legal scholarship. The critique itself suggests that its value can only be determined through such an exploration. What seems unarguable, however, is that the effort should be made. When a broad philosophic movement specifically devotes much of its energies to the analysis of scholarship, and generates such a comprehensive vision as the critique of methodology, its possibilities for any field should not be ignored.

There is, moreover, one major point of contact between the critique of methodology and more familiar, or traditional views of scholarly endeavor. Both approaches recognize scholarship as a subject, a distinguishable enterprise that merits separate intellectual attention. The primary feature that distinguishes this enterprise as a discourse used by a group of culturally identified practitioners is that it relies on structured argument. Scholars are not supposed to prevail by exercising power, and while this technique is not unknown in academic circles, it is generally regarded as a distortion of the discourse, rather than an aspect of it. Similarly, scholars are not supposed to use strategic arguments designed to persuade by their emotional effect on the listener. Instead they are expected to frame arguments that can be evaluated through the use of other arguments, or alternatively, by means of a cognitive faculty that we identify as reason.⁴¹ This view of reason may itself be culturally dependent, but it is universal in our culture, and it distinguishes our view of scholarship from many other social practices.

A frequently expressed idea is that scholarship operates as part of the existing power structure, and contributes to its continuation or extension; within the tradition that has produced the critique of meth-

[hereinafter FOUCAULT, *Truth and Power*], although he generally refuses to assert that self-awareness will lead to any desirable results. For a lapse, see FOUCAULT, *LANGUAGE*, *supra* note 29, at 205-33 (revolutionary vision based on conjunction of self-awareness and action).

41. This typology is derived from Habermas, who distinguishes between strategic and communicative action. The former is an argument that is designed to influence a rational opponent, and is thus oriented toward success. (Another category of success-oriented actions are what he calls instrumental ones, which intervene in circumstances and events.) Communicative action, in contrast, is oriented toward reaching understanding. HABERMAS, *COMMUNICATIVE ACTION*, *supra* note 13, at 284-95. Although Habermas' notion of "understanding" is complex, it includes, at least in part, the idea of persuasion through reasoned argument. The use of the term in this Article is not meant to imply any sense of objective validity; it refers to the kind of appeal that the speaker makes.

odology, the most forceful proponent of this position is Foucault.⁴² But that is not inconsistent with the view that scholarship is a separate enterprise, whose discourse is based on reasoned argument. The mere fact that there exists a dominant power structure does not preclude a division of labor within that structure. Presumably, the President, the members of Congress, and the chief executive officers of the Fortune 500 companies are all members of the American power structure, but they obviously fill different roles within it. Scholars also constitute a distinguishable role, and this remains true whether or not they are part of the power structure.⁴³ What distinguishes them is that their explicit discourse consists of reasoned argument, not the exercise of political authority or the control of natural resources. In fact, it is this reliance upon reason that makes the assertion that scholars support the power structure both controversial and provocative. To assert that the President is part of the power structure would not be very interesting; the assertion is interesting with respect to scholars precisely because their role and discourse is explicitly grounded upon reason as opposed to power.⁴⁴

B. *Legal Scholarship as Prescriptive and Normative Discourse*

When viewed as an academic discourse, the most distinctive feature of standard legal scholarship is its prescriptive voice, its consciously declared desire to improve the performance of legal decision-makers. As Paul Brest, George Fletcher and Mark Tushnet,⁴⁵ among

42. Specifically, he treats the human sciences as elements of the "bio-power" that modern society exercises over its members. See FOUCAULT, *DISCIPLINE* *supra* note 14; FOUCAULT, *SEXUALITY*, *supra* note 34; FOUCAULT, *Truth and Power*, *supra* note 40.

43. Of course, scholars sometimes serve as advisors to public officials, or become public officials themselves, but we generally have little difficulty distinguishing these roles. For example, we would not describe a memorandum by a law professor, advising the State Department on a point of international law, as scholarship.

44. For an application of Foucault's approach to legal interpretation, which recognizes the same distinction, see Hutchinson, *Part of an Essay on Power and Interpretation (With Suggestions on How to Make Bouillabaisse)*, 60 N.Y.U. L. REV. 850 (1985). There is an ambiguity in the use of the word "power," which can mean direct control over others through social institutions, a control which scholars generally do not possess, or the more general ability to influence events, which they sometimes do possess. It will be used here in the former sense, but there is no avoiding the ambiguity. ("Authority" is even worse, because it has a purely intellectual component. We do not describe Williston as a power, but we do say that he is an authority.)

45. See Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1067-89 (1981); Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 995 (1981); Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1208-15 (1981). These articles are all part of a symposium, *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955-1296 (1981), that represents one of the most extensive and significant discussions of legal scholarship in recent years. A somewhat similar point is advanced in Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 775-78 (1986); Munger & Seron, *Critical Legal Studies versus Critical Legal Theory: A Comment on Method*, 6 LAW & POLY. 257, 260-61 (1984).

others, have suggested, the point of an article about a judicial decision is usually to remonstrate with the judge for the conclusion reached and for the rationale adopted. The point of an article about a statutory provision or a regulation is to expose the errors made in drafting it, and to indicate what should have been done instead. Occasionally, an article will actually speak about a legal decision with total approbation, but that does not alter its prescriptive quality. The point is then to recommend the same course of action to other decision-makers, or to encourage the original decision-maker to keep up the good work. This prescriptive voice distinguishes legal scholarship from most other academic fields. The natural sciences and the social sciences characteristically adopt a descriptive stance,⁴⁶ while literary critics adopt an interpretive one.⁴⁷ Only moral philosophers seem to share the legal scholar's penchant for explicit prescription.

Since standard legal scholarship is intimately involved with legal doctrine, and generally couches its prescriptions in doctrinal terms, it includes many descriptive or interpretive statements about doctrine. But the descriptive material is often prolegomenous; scholars must describe an opinion so that their readers will know what they are attacking. Legal history and legal anthropology are exceptions, being predominantly descriptive, but their compound names reveal their uncertain status; whatever their value, these subjects do not fall within the boundaries of standard legal scholarship.⁴⁸ The same is generally

46. In other words, the basic discourse of these fields is that they are describing a knowable reality. That is not to say that positivism is a universal stance of natural and social scientists. Modern particle physicists find themselves confronting experimental results which they often explain by interactions between the observation mechanism and the object. See N. BOHR, *ATOMIC PHYSICS AND HUMAN KNOWLEDGE* (1958); P. DAVIES, *THE FORCES OF NATURE* (1979); W. HEISENBERG, *PHYSICS AND BEYOND* (1971); J. POLKINGHORNE, *THE PARTICLE PLAY: AN ACCOUNT OF THE ULTIMATE CONSTITUENTS OF MATTER* (1979). Similarly, social scientists have begun to use insights from the critique of methodology in the investigation of social phenomena. See, e.g., G. BATESON, *NAVEN* (1958); A. CICOUREL, *METHOD AND MEASUREMENT IN SOCIOLOGY* (1964); J. FAVRET-SAADA, *DEADLY WORDS: WITCHCRAFT IN THE BOCAGE* (C. Cullen trans. 1980); H. GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* (1967); GEERTZ, *INTERPRETATION*. *supra* note 28. Nonetheless, the dominant discourse of natural and social science remains essentially descriptive.

47. Habermas divides cognitive interests into the technical (descriptive), the practical (interpretive, or hermeneutic) and the emancipatory (normative). See HABERMAS, *KNOWLEDGE*, *supra* note 13, at 301-17. See also note 49 *infra*. Here, however, the terms are not used to represent a definitive taxonomy of human thought, but only the types of claims which various scholarly communities advance about their own statements. For this reason, any one of these claims can underlie any of the others; these are not absolute categories, but only modes of discourse. In HABERMAS, *COMMUNICATIVE ACTION*, *supra* note 13, at 273-337, Habermas gives a somewhat different taxonomy, see note 40 *supra*, and places it on a more discursive, less definitive basis, but he continues to assert that his categories have a significance beyond their use in discourse.

For a discussion of the types of claims that underlie the prescriptions of legal scholarship, see text at notes 52-56 *infra*.

48. An important exception is a series of descriptive studies of our corporate and business-

true for so-called trade literature, which is equally descriptive. The summary of last year's cases on Topic A, or the list of regulations issued under Statute B, are viewed as appropriate material for practitioner journals, or continuing legal education, but legal academics generally do not regard them as scholarship. Like legal history and legal anthropology, they are viewed as a separate discourse by both their own authors and by the participants in the practice of legal scholarship.

Similarly, the interpretation of doctrine generally serves as a basis for prescription, rather than an independent goal of scholarship. There is relatively little academic writing that simply explicates the meaning of a judicial decision. More typically, the interpretation of meaning is used to criticize a decision that relies upon a differing interpretation. This can be a powerful criticism in a legal culture where texts serve as the basis of judicial authority. But the general stance of legal scholarship, as opposed to practitioner literature, is to prescribe an alternative decision to the judge, not to explore the meaning of a legal text as a final, inherently valid expression of the law.⁴⁹

related laws by Robert Clark. See, e.g., *Abstract Rights versus Paper Rights Under Article 9 of the Uniform Commercial Code*, 84 YALE L.J. 445 (1975); *The Four Stages of Capitalism: Reflections on Investment Management Treatises* (Book Review), 94 HARV. L. REV. 561 (1981); *The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform*, 87 YALE L.J. 90 (1977). Clark assesses his methodology, and calls for its more general use, in an article in the Yale Symposium, *The Interdisciplinary Study of Legal Evolution* 90 YALE L.J. 1238 (1981). The absence of any response to his call suggests how committed legal scholars are to prescriptive discourse. In addition, Clark's approach, once stated in explicit terms with claims to "scientific" validity — he actually uses the word, *id.* at 1238 — creates some formidable difficulties, as the critique of methodology suggests.

To begin with, his central concept, evolution, is a cultural construct even in natural science; it is, in effect, a metaphor that depends on preempirical understandings about change and causality. Applied to social science or legal history, it is a second-order metaphor. Legal doctrines are not recognizable physical entities, like the plants and animals in the natural science version, nor is there any clear relationship between Clark's notion of economic causation and the causal mechanism of physical evolution. Use of the metaphor thus depends upon further nonempirical assumptions that call its scientific quality into question.

Moreover, the evolution Clark describes is an evolution of cultural conceptions; Winch would argue that one must participate in these conceptions in order to describe them. While this may be disputed, the fact is that Clark, as a law-trained scholar, does participate in them; he understands them from the inside, as it were, which renders his discussion of them rather different from a biologist's discussion of the evolution of the barnacle.

Finally, we inevitably perceive Clark's statements about corporate law as inherently normative, whether Clark thinks they are or not. For this reason, it is conceivable for another legal scholar, Duncan Kennedy, to respond to Clark's call for scientific objectivity by stating that "there ought to be more women and more blacks on the Yale faculty." *Cost-Reduction Theory as Legitimation*, 90 YALE L.J. 1275, 1283 (1981).

49. The distinction among prescriptive, descriptive and interpretive legal discourse, while derived from Habermas, see note 47 *supra*, is closely related to Max Weber's taxonomy in the *Sociology of Law*. This essay, which appears as part 2, chapter 7 of 2 M. WEBER, *ECONOMY AND SOCIETY* 641 (G. Roth & C. Wittich eds. 1978), is the subject of a recent study, A. KRONMAN, *MAX WEBER* (1983). Weber divides the study of law into moral evaluation, sociological analysis and legal dogmatics, the last being what we would call doctrinal interpretation. The term

In addition to a prevailing voice, or approach, a scholarly discourse is also characterized by the identity of its speakers, the identity of its audience and its criteria for determining the validity of the speakers' statements. There is no particular difficulty identifying the speakers, or originators of legal scholarship, but the field's reliance on a prescriptive approach raises some complex issues in identifying its audience and the nature of its validity claims. At one level, the audience for legal scholarship might be seen as consisting primarily of other scholars. It is certainly the writer's intention to persuade those scholars, and academic reputations often depend on the success of the effort. But this is an observation about the nature of individual motivation, not about the nature of the discourse. Other scholars have no abstract interest in being persuaded; the determinative factor is not the intended audience of a particular scholar, but the mutual, or "inter-subjective"⁵⁰ audience of the discourse as a whole. A discourse that views other scholars as its primary audience is necessarily one that is making descriptive claims, or has a consensus theory of truth, with those scholars comprising the relevant community that defines consensus. This is not the case with legal scholarship. Being prescriptive, its mutually recognized audience is the group of public decision-makers to whom the prescriptions are addressed. Standard legal scholarship is typically directed toward a judge, and occasionally to a legislator, administrator, or equivalent public decision-maker. The declared intention of the work, the perspective which controls its language, is to persuade one of these decision-makers to adopt its prescriptions.

Given this choice of audience, the validity of the prescriptions in a work of legal scholarship can be measured in one of two ways. First, the work might be regarded as valid if it actually did persuade the

"moral" is Kronman's; Weber uses "political," but as Kronman points out, this is misleading, because Weber's category refers to any evaluation of law on a nonlegal basis. *Id.* at 8-10. Legal dogmatics includes pure descriptions of legal concepts, as well as critical assessments from an internal perspective, while sociology consists of pure, and perhaps value-free description from an external perspective. *Id.* at 10-14.

There is an awkwardness to Weber's terminology in modern usage; for example, Professor Kronman notes that a legal practitioner's article describing a recent line of cases would fall under the rubric of legal sociology. *Id.* at 9-10. But the main differences between Weber's taxonomy and the one presented here is that prescription, being discursively defined as any recommendation to a legal decision-maker, is a broader category than moral evaluation.

50. This term is most closely associated with mutual, or shared experience. Husserl uses it because he begins from a position of absolute subjectivity. He then constructs the experience of perceiving others, and relating to them through one's own subjective experience. When a group of people go through this process in relation to each other, the result is intersubjectivity. HUSSERL, *MEDITATIONS* *supra* note 27, at 89-151. Although the term is awkward, it is widely used, see, e.g., HABERMAS, *COMMUNICATIVE ACTION*, *supra* note 13, at 386-99; 1 SCHUTZ, *PAPERS* *supra* note 3, at 10-15; Taylor, *supra* note 28, because it carries a recognition of the subjective starting point that is lacking in terms like "shared" or "mutual."

decision-maker, perhaps with the qualification that no calamitous result followed too quickly upon the decision-maker's action. More often, however, its validity will depend on whether other scholars generally agree that the decision-maker should be so persuaded. The fact that other scholars serve as a measure of success does not change the nature of the audience. The mutually recognized, or intersubjective audience is the decision-maker, and the work's success depends on what the group of scholars think the decision-maker should do. In a descriptive field, like natural science, the audience is the group of scholars themselves, and determinations of validity are based on their own evaluations, without reference to the views of reactions by a separate group of people.⁵¹ Of course, all research requires funding in our complicated era, so the scientist must appeal to the judgment of whomever society or commerce has endowed with economic resources. But the issue remains essentially the same. If the funders evaluate a research project by standards internal to the discipline, we would say that they are acting like scientists. If they rely on the views of those outside the scholarly community, we would describe their decisions as political, or religious, or otherwise unscientific. But legal scholarship does not become nonlegal because it is addressed to judges, legislators, or administrators. Its basic nature is to structure its statements as recommendations to decision-makers of that kind.

Prescriptions of the sort that characterize legal scholarship can be based on norms, instrumentalism, or authority; one can prescribe a course of action because it is morally desirable, because it will achieve a particular result, or because it is commanded by some established source of power. Legal prescriptions make use of all three types of claims. Of these, however, the normative basis is by far the most important one at present. The prescriptions of contemporary legal scholarship are predominantly based on policy arguments — beliefs about the way society should be organized or operated. When legal scholars address judges with calls for fairness, or freedom, or economic efficiency, or protection of the environment, they are basing their prescriptions largely on normative considerations. When they address legislators, a considerably rarer occurrence,⁵² their arguments are even more likely to be normative ones.

Instrumental arguments can also serve as the basis for legal pre-

51. See P. FEYERABEND, *supra* note 21; KUHN, *SCIENTIFIC REVOLUTIONS* *supra* note 8, at 77-109; C. PIERCE, *supra* note 16; Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* 91 (I. Lakatos & A. Musgrave eds. 1970).

52. See text at notes 129-46 *infra* (discussing aspects of legal scholarship that orient it toward addressing judges, not legislators).

scriptions. Scholars sometimes argue a judge should reach a given decision because certain consequences will flow from that decision, or that the legislature should enact a given statute because it will produce particular results. But normative arguments almost always underlie the instrumental ones; the legal scholar needs to persuade the judge or legislature that those consequences and results are desirable. Of course, all instrumental arguments ultimately rest on normative choices, but the crucial question for a scholarly field is how controversial these choices are, how far below the surface of the discourse they reside. Medical scholarship is often prescriptive ("to stop seizures, prescribe phenobarbital") but it rests on a descriptive theory of the human body. The normative basis of the prescription, that good health is a good thing, is well accepted and provokes controversy only in limited areas, like mental illness.⁵³ For legal prescriptions, the normative basis of instrumental arguments is much more controversial, and this controversy tends to draw those arguments into the normative arena.

Authority-based arguments exhibit a similar drift toward normativity. These arguments are generally addressed to judges, who are supposed to interpret legally binding texts, rather than to legislators, who derive their power from the electorate, and are largely free of textual constraints. Even when the audience is a judge, however, prescriptions cannot be based exclusively on precedents or statutes, to say nothing of the Constitution. Precedents are reinterpreted or overruled, statutes must evolve, and the Constitution is almost limitlessly protean. The choice of interpretive style, and the relative importance to be given to the text in general, is an essentially normative issue. Again, the question is how far below the surface of the discourse these normative issues lie. In some societies, they were too deeply immersed to be within the scholar's conscious grasp,⁵⁴ but in our society they are ever-present. Judges might attempt to obscure them in the interest of political legitimacy, but the scholar's commitment to rational dis-

53. See, e.g., T. SZASZ, *THE MYTH OF MENTAL ILLNESS* (rev. ed. 1974); Daniels, *The Social Construction of Military Psychiatric Diagnosis*, 2 *RECENT SOC.* 118 (1970). Again, this general normative agreement does not prove the objective validity of the good health norm, or even of the concept of health itself. See M. FOUCAULT, *THE BIRTH OF THE CLINIC* (1975). It is simply a dominant discourse, with a mutually or intersubjectively understood terminology.

54. At many periods of Western European history, for example, moral philosophy was based on the interpretation of the Bible, and the normative question about whether the Bible should be used as the basis of morality was not within the conscious horizon of those who participated in the discourse. This does not mean that normative considerations did not enter into the interpretive process (or, to put the matter more precisely, modern scholars would generally claim that normative considerations did in fact enter). But the discourse of the medieval scholars was perceived by those scholars themselves as interpretive (or, more precisely, we would describe their perception of what they themselves were doing as interpretive).

course forbids this strategy. Consequently, the major import of prescriptions that are explicitly based upon authority is often their normative argument about the status of the source.

The reason for this irreducible normativity is that the subject of legal scholarship is law, and law is a mechanism through which our society operationalizes its normative choices. In a society like ours, moreover, these choices are a matter of conscious and continual debate. Any discussion of our legal system necessarily joins that debate, even if its arguments are mediated by instrumental or authority-based assertions. It may be possible, at least in theory, to escape by writing legal anthropology or legal history. But when analysis focuses on our own society, the discussion will be almost inevitably normative.

The normative quality of legal scholarship is not equivalent to the frequently observed and much-debated connection between law and politics, although there is an undeniable relationship. Politics, as the term is used in ordinary language, is the active practice of statecraft, and necessarily involves the exercise of power, or the aspiration to do so. A strong case can be made for treating judges as political figures, according to this characterization,⁵⁵ but the same cannot be said of legal scholars. Our conception of the scholarly enterprise precludes direct exercises of power, and regards reasoned argument as its defining feature. What can be said is that there is a close connection between the underlying normative systems of modern politics and modern legal scholarship; their visions of the state, of human life, and of such crucial concepts as freedom, equality, fairness, and well-being are notably related. But this does not make politics and legal scholarship a single mode of social discourse. They are separate modes, built on closely related normative foundations.⁵⁶

55. This is, of course, a central tenet of the critical legal studies movement. See, e.g., M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977); R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

56. It might be said that the scholarly study of an essentially political field, like law, makes legal scholarship equivalent to political science. That is not the case, however; the discourses are inherently different. Political science generally adopts a consciously descriptive stance. As a result, it not only studies the legal decision-makers that legal scholars address, but also devotes much attention to other political actors, such as voters or lobbyists, who cannot be usefully addressed in prescriptive terms. Voting behavior, for example, one of the major areas of scholarship in political science, is almost totally absent from legal literature. Thus, legal scholarship is a separate discourse from both politics and political science, although it displays substantial connections with each of them.

C. *The Recognition of Normativity and the Inapplicability of the Critique*

Speaking very roughly, therefore, the critique of methodology suggests that legal scholarship, like all scholarship, is a mode of discourse, but that it differs from most other disciplines because of its inherently normative aspect. The critique is much more than a convenient means of describing or characterizing academic disciplines, however. It represents a basic challenge to our prevailing conception of these disciplines and to the validity of their assertions. The idea that social science and history are culturally based projections, rather than accurate descriptions of reality, is a disconcerting one; the idea that the same is true of natural science may seem either disorienting or absurd, depending on one's point of view. Of course, the actual impact of the critique is more limited than its philosophic implications. In general, it has affected scholarship only when the ongoing discourse of that scholarship produced problems of validity that were independently recognized within the discourse.⁵⁷ But the challenge that the critique of methodology poses to our prevailing notions about objective truth and the enterprise of academic scholarship runs much deeper than its observable effects.

This challenge, however, does not apply to the central claims of standard legal scholarship. Because their discourse is a normative one, legal scholars are not attempting to describe an allegedly objective reality, and most of them are not even attempting to discover real meanings embedded in authoritative texts. Their purpose is to address prescriptions to public decision-makers. They are reasonably clear that they are addressing a specific audience, and advancing culturally contingent arguments as methods of persuasion. In other words, legal scholarship already concedes the primacy of the normative realm, and thus regards itself as a practice, not a disembodied declaration of objective truths. However disconcerting the critique of methodology may seem when applied to natural or social science, it represents our ordinary understanding of contemporary legal scholarship.

Not every work of legal scholarship, to be sure, exhibits the same level of sophistication. Very often, scholars speak of law as if it has some fixed existence, or treat texts as repositories of unambiguous meanings that quietly await discovery inside their web of words. But the question is how these scholars explain their enterprise when called upon to do so, not how they express themselves on all occasions. Be-

57. For a general account of this process with respect to social science, see R. BERNSTEIN, *supra* note 22. With respect to particle physics, see note 46 *supra*.

cause they are operating within an ongoing discourse, many scholars tend to lapse into a conceptual shorthand, reifying law or texts in ways that they would not defend. In addition, there are undoubtedly a number of scholars who are not particularly sophisticated about the nature of their own activities. But a serious critique must aim at the most advanced, well-reasoned portions of its subject matter, rather than trying to pick off waifs and stragglers.

There was once a time when legal scholars did lay claim to objectivity. They believed they were engaged in the process of discovering true legal principles that stood above and beyond the ordinary sphere of law, or that they were tracing the implications of principles that had been discovered.⁵⁸ This doctrine is now known as "formalism." In part, it was an ideal that was never quite achieved; in part it was a generalization that captured one aspect of the prevailing scholarship; and in part, it was a post hoc characterization by its opponents, as might be expected of anything so named. In any case, it is now essentially defunct; current scholarship, at least in its more sophisticated and self-conscious form, maintains that social choices determine our legal system, and that the very grandest forces that inform these choices are cultural norms, not general and enduring principles of Law itself.

Ironically, the asserted objectivity of formalism was decisively refuted by a form of positivism, the very same intellectual movement that championed the objectivity of other academic disciplines. The legal realist movement, which flourished during the 1920s and 1930s and ended the formalist era, was essentially a positivist approach to law. This was true in two senses. Within the scope of legal discourse, legal realism was positivist because it rejected the transcendental principles of formalism, and insisted that all law was created by some identifiable human agent.⁵⁹ In more general terms, it was positivist because it claimed that the existing legal rules were a fixed reality that

58. See G. GILMORE, *THE DEATH OF CONTRACT* 35-44 (1974) (discussing Williston); R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, 56-60 (1983); Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1728-31 (1976); White, *The Impact of Legal Science on Tort Law, 1880-1910*, 78 COLUM. L. REV. 213 (1978). For classic examples of the formalist approach, see J. BEALE, *A TREATISE ON THE CONFLICT OF LAW* (1935); C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* (2d ed. 1880); S. WILLISTON, *THE LAW OF CONTRACTS*, (1st ed. 1931).

59. See J. FRANK, *LAW AND THE MODERN MIND* (1930); R. POUND, *JUSTICE ACCORDING TO LAW* 32-61 (1951); Bingham, *What Is the Law?*, 11 MICH. L. REV. 1 (1912); Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 22 (1927); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). See also *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign . . . that can be identified. . . .")

could be discovered by empirical methods.⁶⁰ Such empiricism could not be sustained, because of the inherent normativity of law. Legal scholars, who saw themselves as participants in the effort to improve the law, or improve society through the use of law were not satisfied to treat law as a fixture of a folkway. Consequently the whole approach unravelled fairly rapidly,⁶¹ although not without leaving an imprint upon legal scholarship strongly affecting social science analysis of the law and most significantly for present purposes, destroying formalism.

Thus, the positivist mood of the 1920s and 1930s, which celebrated the objective claims of other disciplines, proved fatal to the asserted objectivity of legal scholarship. This apparent contradiction between positivism's effect on legal scholarship and its effect on scholarship in other disciplines is readily explained. Objectivity in legal scholarship was not an empirical concept, but a transcendental one. And this follows in turn from the scholarship's normative character; any claim to objectivity that it advances must assert the existence of universally valid ethical statements, rather than objectively accurate descriptions. It was formalism's assertion of objective norms that legal realism successfully destroyed. By the time the critique of methodology took aim at the asserted objectivity of academic disciplines, therefore, there was one discipline — law — whose claim to objectivity was already a smoldering ruin. In short, the critique of methodology's attack on positivism would have been devastating for the legal scholarship of eighty years ago, but it does not have much impact at the present time.⁶²

The effect of the realist movement on legal scholarship can be restated in terms of the connection between law and politics. Legal realism did not introduce normatively-based discourse into legal

60. See, e.g., Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Moore & Sussman, *The Current Account and Set-Offs Between an Insolvent Bank and Its Customer*, 41 YALE L.J. 1109 (1932); Moore, Sussman & Corstvet, *Drawing Against Uncollected Checks* (pts. 1 & 2), 45 YALE L.J. 1, 260 (1935); Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931). On the empirical orientation of the legal realist movement, see E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* 74-94 (1973); Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979) [hereinafter Schlegel, *American Legal Realism*]; Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195 (1980) [hereinafter Schlegel, *Underhill Moore*].

61. See Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1159-90 (1985); Schlegel, *Underhill Moore*, *supra* note 60.

62. In fact, leading figures in the critique of methodology do not even seem to be aware that such a thing as prescriptive legal scholarship exists. See, e.g., GADAMER, *TRUTH AND METHOD* *supra* note 11, at 289-305 (discussing "legal hermeneutics" in terms of judges and legal historians); HABERMAS, *COMMUNICATIVE ACTION*, *supra* note 13, at 243-71 (discussion of the conflict of values in legal decision-making and jurisprudence). At one point, Habermas does state that the discipline of jurisprudence can "be transposed into professional practices, for example . . . into the administration of justice or legal journalism." *Id.* at 253. Precisely what he means by legal journalism is not explained.

scholarship, since formalism displayed a highly, if not exclusively normative perspective.⁶³ But realism brought the normative grounding of the scholarship into more direct contact with the normative grounding of political action. The norms of formalism, which centered around questions of individual obligations and commercial rights, were generally conceived as transcendental and objective, rather than being related to the political issues of the day. But modern legal scholarship is centrally concerned with the same questions of social organization, wealth distribution and personal rights that loom large in the political arena. The change that realism brought about, therefore, is not an identity of law and politics, but a coordination of their underlying normative concerns. That was enough, however, to discredit formalism's transcendental norms, and thus eliminate the scholarly claims that would be vulnerable to the critique of methodology.

Not only is the critique inapplicable to the normative claims of current legal scholarship, but it does not even have much impact on its descriptive or interpretive elements. Most scholarly descriptions of the law, after all, no longer claim to be describing either nature, natural law, or enduring transcendental principles. They are describing statements made within a larger practice, and in a discourse for which the scholars, by virtue of their training, are "native speakers." To put the matter more precisely, most thoughtful legal scholars recognize that their work is a discourse about a related discourse, not about a set of external, or nondiscursive phenomena. While descriptive problems certainly arise, even in this context, they pose fewer theoretical issues. The critique of methodology is committed to the idea that members of society can understand each other's statements, and that members of a subgroup who share a particular discourse can understand the statements made within that discourse.⁶⁴

The critique of methodology also applies to the interpretation of legal texts with less force than it applies to interpretation generally. Its general assertion is that meanings are not embedded inside texts,

63. For a discussion of the relative position of the normative perspective in formalist and post-formalist discourse, see text at note 81 *infra*.

64. See, e.g., GADAMER, *TRUTH AND METHOD*, *supra* note 11, at 345-97; GEERTZ, *INTERPRETATION* *supra* note 28, at 87-141; HABERMAS, *COMMUNICATIVE ACTION*, *supra* note 13, at 8-101; HEIDEGGER, *BEING AND TIME*, *supra* note 9, at 149-68; KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 8, at 23-51; A. LOUCH, *supra* note 7, at 159-232; I. SCHUTZ, *PAPERS*, *supra* note 3, at 7-27; P. WINCH, *supra* note 6, at 57-65; L. WITTGENSTEIN, *INVESTIGATIONS*, *supra* note 5, §§ 1-64, 138-242, at 2-31, 53-88. Wittgenstein's argument against the existence of a private language is a variation of this point. *Id.* §§ 199-298. Nor is Husserl an exception; although there is a predominant emphasis on subjective experience in his work, he emphasizes the intersubjective nature of social experience (the "communalization" of the lifeworld). See HUSSERL, *EUROPEAN SCIENCES*, *supra* note 2, at 161-72.

like pearls in oysters; rather they are generated by the interaction of the text and the interpreters, and must be continually reconstructed as the interpreters move through history. But this is precisely the way most legal scholars view interpretation these days. Their general view is that texts are sources of authority for legal decision-makers, but not sources of inherent meaning. The meaning of the text is to be constructed by active interpretation, and continuously renewed as social conditions evolve.⁶⁵

There are of course some scholars, particularly constitutional scholars, who adopt "originalism" — the belief that the proper understanding of the relevant text can be reached by looking at its literal language, in the light of its author's actual intentions.⁶⁶ And schools of thought associated with the critique of methodology, specifically hermeneutics, have been invoked as an answer to this claim.⁶⁷ But since the originalist position exists within a normative discourse, rather than standing nakedly by itself as an interpretive assertion, it can be readily reconstituted in the face of hermeneutic criticism. All that sophisticated originalists need to say is that they are adopting their stance in order to achieve some normative goal, like securing majority rule, or preventing judicial tyranny.⁶⁸ Having done so, the underlying basis of their assertions is no longer a direct argument about the text; if they can agree what strict construction means — which they can, sometimes — the critique of methodology would re-

65. See Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). Professor Eskridge's view of statutory interpretation is derived from the "legal hermeneutics" of Gadamer, Eskridge, *supra* at 1506-11. While he argues that the recognition of this approach, as an explicit theory of interpretation, would improve the process, he also argues that it is already implicit in the modern view of law. *Id.* at 1497-538.

66. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1 (1981); Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525 (1987). The term "interpretivism" is often used for the same approach, see, e.g., Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975), but it will be avoided here, because "interpretation" is widely used for obviously different purposes in the law and literature movement, see, e.g., R. DWORKIN, *LAW'S EMPIRE* 45-68 (1986); Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676 (1979), and in hermeneutic theory, see, e.g., GADAMER, *supra* note 11, at 345-97.

67. In this case, however, the argument is being invoked within the discourse as a critique of one particular position, rather than as a critique of the discourse as a whole. See, e.g., Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Levinson, *Law as Literature*, 60 TEXAS L. REV. 373 (1982); Weisberg, *Text Into Theory: A Literary Approach to the Constitution*, 20 GA. L. REV. 939 (1986).

68. See, e.g., Grano, *supra* note 66, at 18-24; Kmiec & McGinnis, *supra* note 66, at 527-29; Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

gard their approach as perfectly coherent. The response to this reconstituted originalism, and probably the dominant position among legal scholars, is that it fails to take account of changing circumstances, fails to reflect our moral framework, fails to give judges an adequate role, and so forth.⁶⁹ That may be true, but it is a normative critique rather than an epistemological one. As with description, the critique of methodology has much less impact upon the interpretation of legal texts than it does upon interpretive work in other fields.

D. *The Unity of Discourse and the Applicability of the Critique*

The problem with legal scholarship, therefore, does not reside in any outmoded claims of objectivity, any positivist vision of the sort that the critique of methodology attacks. The field is self-consciously normative, and in that sense recognizes itself as a practice based on judgment, not a methodology based upon objectively determined rules. But the attack on positivism does not constitute the entire significance of the critique of methodology; there is also the critique's emphasis on collective self-awareness. According to the critique, academic discourse must not only abandon positivism, but must achieve self-awareness of its own discourse, and reassess its features on a continuous basis.

Here, the difficulty with standard legal scholarship emerges. While scholars have abandoned formalism as a means of justifying their arguments, and have recognized the normative character of their enterprise, they have not been similarly critical of the discourse that they continue to employ. Instead, they have reflexively adopted the discourse of their subject matter. Legal scholars not only analyze the work of judges, but they also tend to think of themselves as judges, and to speak like judges. They address a court on the court's own terms, offering alternative rationales for the decision reached, or arguments why a different decision was preferable. In doing so, they invoke the same range of justifications, based on precedent, statutory intent or social policy. They structure these justifications the same way, treating the authority of cases similarly, and discovering social policies by a similar methodology. They employ the same legal terms, and treat them with comparable levels of respect or disdain.⁷⁰ This shared conceptual framework between legal scholars and their subject

69. See J. ELY, *DEMOCRACY AND DISTRUST* 11-41 (1980); Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984); Brest, *supra* note 45, at 1090-92; Ely, *supra* note 66 at 412-48; Grey, *supra* note 66 at 710-14.

70. See M. DAN-COHEN, *RIGHTS, PERSONS AND ORGANIZATIONS*, 1-2 (1986).

matter may be referred to as a unity of discourse.⁷¹

Although legal scholars seem to regard this unity of discourse as an inevitable feature of the field, it is far from common in other disciplines. There is no identity of discourse between the critic and the author, the historian and the politician, the anthropologist and the villager or the psychologist and the individual, to say nothing of the scientist and the slime mold. Typically, scholarly disciplines develop their own frameworks of analysis. Social scientists, even if they strive for an empathic understanding of the people they are studying, do not speak the language of their subjects when describing or evaluating them. Medical scholars must write in terms that are comprehensible to the doctors who constitute their audience, but they are studying diseases, not doctors. It is social scientists who study doctors, and while they need to understand medical terminology to do so, they carry out their scholarly analyses in different terms.

This unity of discourse distinguishes standard legal scholarship from movements in legal scholarship that have developed a distinctive voice, most notably law and economics, law and literature and critical legal studies. Although these movements have attracted a great deal of attention, their work still represents a relatively small proportion of the total scholarly output. In addition, only law and economics has engaged in sustained discussion of contemporary legal issues; the others have been largely concerned with exploring their own theoretical justifications, or attacking law and economics. Given the prevalence of economics, hermeneutics, and neo-Marxism in other fields, it is far from surprising that these movements have emerged. The more surprising fact is that the bulk of legal scholarship has not developed a new discourse, but remains bound to the discourse of its subject matter.

What renders unity of discourse problematic is that it is grounded in the ideology and attitudes of legal formalism, the very doctrine that legal scholarship has apparently abandoned. In the formalist era, scholars and judges shared a vision of law as a system of rules that could be derived from fixed, enduring principles. The effort to understand these principles and derive the proper rule generated a unified

71. This term is adapted from M. FOUCAULT, *ARCHAEOLOGY*, *supra* note 14, at 21-30. Foucault uses it, in the plural, to refer to certain concepts that assert the continuity or similarity of various phenomena. Foucault's examples include the terms tradition, influence, evolution, spirit, and book, as well as the divisions of knowledge such as science and literature. According to his view, the judiciary's unities of discourse would include tort, contract, procedure, case, precedent, and so forth. The point here is that there is a unity between the judiciary's "unities of discourse" and those of legal scholars. But since a "unity of unities of discourse" is an impossible locution, Foucault's terminology has been altered.

discourse that was simultaneously interpretive, descriptive and prescriptive in its stance. It was interpretive because legal scholars, like judges, saw themselves as interpreting general principles that were filled with meaning and worthy of sustained attention. Being universal, these principles were accessible to scholars, judges and anyone else with the legal training necessary to perceive and understand them. The discourse was descriptive because legal scholars recognized judges as fellow-interpreters, working side-by-side to translate these principles into operative legal doctrine. To the extent that such judicial efforts were seen as creditable, which was often the case, a description of them contributed to the elaboration and development of law. And the discourse was prescriptive because the principles could be interpreted rightly or wrongly. Since the scholar and the judge based their conclusions on shared principles, scholars could both teach judges and learn from them about the proper way to decide specific issues. All these methods of formalist scholarship depended on the scholars' sense that they were engaged in a joint enterprise with the judiciary, and that their role was to assist judges in their interpretive task, to describe approvingly their valid efforts, and to correct decisively their mistaken ones.

As has been stated, formalism was discredited by legal realism in a process that gave rise to the prescriptive approach that dominates contemporary legal scholarship. But as a number of observers, including Bruce Ackerman,⁷² Donald Gjerdingen,⁷³ Thomas Grey,⁷⁴ and Gary Peller⁷⁵ have pointed out, formalism never really died, despite its rejection as a legal theory. It lives on as an operative methodology by which judges formulate decisions and as a legitimating discourse for those decisions. When confronted by a statutory issue, judges typically begin by parsing the language of the statute, and of subsequent judicial interpretations; when confronted by a common law issue, they tend to begin their analysis with reference to judicial precedent. They still speak as if statutory language and judicial decisions are an essentially autonomous and comprehensive framework that can generate acceptably accurate results. They justify and legitimate their conclusions by identifying holdings and dicta, by balancing the weight of authority, and by analyzing the internal logic of legal texts. And they

72. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 6-22 (1984). Professor Ackerman treats legal realism as an effort by the legal community in general to preserve formalist categories — the only ones it possessed — in the face of the transformation wrought by the New Deal.

73. Gjerdingen, *The Future of Legal Scholarship and the Search for a Modern Theory of Law*, 35 *BUFFALO L. REV.* 381, 395-97 (1986).

74. Grey, *supra* note 58, at 47-53.

75. Peller, *supra* note 61, at 1259-90.

continue to rely, in large measure, on the conceptual tools of tort, contract, property and crime, with their informal psychology of intent, reasonableness, notice, and mistake.

This is not to say that judicial decision-making has remained unchanged since 1886. Change has occurred, but it is nothing like the radical transformation of the decision-making process that modern theories such as law and economics or critical legal studies urge. Instead, it is best characterized as a gradual seepage of progressive ideas into the existing structure. Contemporary judges are more attuned to policy arguments than their formalist predecessors, more willing to make allowances for social inequality, and more conscious of institutional relationships.⁷⁶ But these evolving views do not provide a comprehensive framework for analysis. In most cases, they are ways of tempering or readjusting the existing framework and ensuring its legitimacy. Thus, the intellectual history of judicial decision-making in the twentieth century reflects the relatively gradual trends of American politics in general, rather than the more dramatic and mercurial developments in legal theory. Judges have retained formalist analysis because it provides them with a framework for legal reasoning, while modifying it in order to achieve normatively acceptable results.

The modified formalism of judicial decisions has allowed legal scholars to retain the same discourse as judges, while abandoning the underlying theory of that discourse in favor of a consciously normative approach. It is true that legal scholarship now grounds its arguments on social policy, not on formalist notions of doctrinal coherence or enduring principles. But judicial discourse has itself abandoned its claim to those enduring principles. It still relies heavily on doctrinal, or coherence arguments, but it has jettisoned their formalist justification to become an essentially pragmatic system of structured decision-making. In the process, judicial discourse has absorbed enough social policy modifications to serve as points of attachment for the normative arguments of legal scholars. For example, a scholar who wants to advance nondoctrinal arguments about the social policy that tort law serves need no longer reject judicial discourse. There is enough language about cost spreading in the decided cases, and enough modification of the common law negligence standard, to accommodate the

76. For characterizations of contemporary adjudicative methodology, see R. DWORKIN, *supra* note 66, at 176-86, 276-399; M. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988); M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1-64 (1981); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *The Supreme Court 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960).

argument.⁷⁷ Of course, the judiciary is quite far from abandoning traditional tort law, but it has changed the law enough to make arguments based on other principles fit within the framework of its discourse.

There is also a reverse phenomenon that preserves the unity of discourse. Just as judicial formalism has proved sufficiently flexible to accommodate the scholar's normative discourse, so normative discourse is flexible enough to assimilate the unchanged elements of judicial formalism. This stems from the ability of normative discourse to reconstitute descriptive or interpretive arguments. The part of formalism that survives unchanged in judicial discourse is the use of doctrinal coherence arguments; judges no longer claim to be framing arguments in accordance with transcendental principles, but they often claim that they are framing arguments that are derived from an existing body of decisional law.⁷⁸ Within a normative discourse, however, scholars can recast these arguments in nonformalist terms; they simply assert that doctrinal coherence is a strategy designed to satisfy a norm of judicial restraint, or legal predictability. That is in fact how modern scholars tend to justify doctrinal arguments.⁷⁹ Of course, they have a tendency to lapse into pure doctrinalism, to make reflexive use of the formalist categories that are still so much a part of every lawyer's thought process. But they would respond with normative arguments if they were challenged, or otherwise induced to reflect upon their methodology.

While formalism's devolution from a theoretical justification to an operative methodology has preserved legal scholars' ability to speak in the same terms as the judiciary, it has compelled an alteration of the voice with which they speak. An interpretive approach no longer makes sense for legal scholarship. Specific decisions, statutes, or regulations can be interpreted, of course, but these interpretations do not possess intrinsic legitimacy for legal scholars. To the extent that judges are compelled by their position to restrict themselves to inter-

77. See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169 (1st Cir. 1947) (Hand, J.); *Greenman v. Yuba Power Prods.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (Traynor, J.); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (Ct. App. 1981) (Ford Pinto case).

78. See R. DWORKIN, *supra* note 66, at 238-58.

79. See R. DWORKIN, *supra* note 66, at 225-354; Faller, *Everyman's Jurisprudence: In Search of a Common Sense Theory of Legal Justification*, 63 WASH. U. L.Q. 433 (1985); Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Fiss, *supra* note 65; Greenwalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975); Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis*, 2 LAW IN TRANSITION Q. 134 (1964). Cf. text at notes 67-69 *supra* (normative reconstruction of constitutional originalism).

pretation, they are speaking in a discourse that scholars can no longer share. Neither scholars nor judges regard legal doctrine as being derived from interpretations of enduring, transcendental principles; some judges may find doctrine adequate, because of its legitimating force, but the scholar's task is hardly limited to legitimating judicial decisions. A descriptive approach is similarly unappealing. This is not to say that legal scholarship does not contain descriptions of judicial decisions; it does, and those descriptions are important because judges are important state officials. But pure description rarely counts as an academic contribution these days, because scholars do not believe that they are describing a process that runs parallel to scholarly analysis. As a result, essentially descriptive treatises are no longer regarded as leading academic contributions, and they are certainly not regarded as the apogee of scholarly achievement.⁸⁰

The voice that remains to legal scholarship is the prescriptive one. But the range of the prescriptions has increased greatly as the modifications of formalism have expanded the boundaries of the preexisting legal doctrine. Thus, scholars no longer limit the basis of their prescriptions to legal principles; they invoke a wide range of process values and social policy considerations. Since these are the same values and considerations judges use to modify their formalist tradition, however, and since judges gradually incorporate the modifications into the legal doctrine they employ, the unity of discourse has survived these alterations. Scholars may focus more heavily on the modification process than on the doctrinal substratum, but they find a sufficient basis for both analysis and argument in the discourse of the decisions they are studying.⁸¹

The unity of discourse has continued as a dominant approach to legal scholarship without sufficient reevaluation. To be sure, the formalist philosophy which underlies it was discredited by an attack that parallels the critique of methodology's attack on positivism. In fact, it is this parallel development in legal scholarship that renders that attack on positivism largely irrelevant to standard scholarship. But the critique has another element as well — the self-awareness and continuous reevaluation of scholarly techniques themselves. Due to its instinctive and pragmatic tenor, the legal realist attack did not include this theoretical element. As a result, legal realism's transformation of

80. See Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 668-78 (1981). For several of the treatises that were regarded as the pinnacles of scholarship in the formalist era, see note 58 *supra*.

81. See Friedman, *supra* note 45, at 773-80 (explaining why social science scholarship in law reviews remains relatively rare); Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981); Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984).

legal scholarship was incomplete. It eliminated the formalist basis of the scholarship, and substituted normative argument, but it did not replace formalism's unity of discourse. The critique of methodology's significance for standard legal scholarship, therefore, is not its attack on positivism. Legal scholars have already won that battle on their own. Rather, the critique's potential is that it can complete the process legal realism began, that it can free legal scholarship from its quasi-formalist unity of discourse through a process of self-awareness. This will enable scholars to be more effective in achieving their self-defined objective, which is to frame persuasive recommendations for public decision-makers.⁸²

II. THE EXISTING USES OF THE CRITIQUE

It might appear that the effort to apply the critique of methodology to legal scholarship has already been undertaken. Three of the major movements in modern legal thought, critical legal studies, law and literature, and law as practical reason display direct connections to elements of this critique. Many aspects of critical legal studies are derived from critical theory,⁸³ and draw on hermeneutics and deconstruction as well.⁸⁴ Law and literature invokes the hermeneutic theory of interpretation, and, less directly, the more generalized implications of this theory for human experience.⁸⁵ The idea of law as practical

82. See Part IV *infra*.

83. See, e.g., Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1982); Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985); Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984). Roberto Unger's general restatement of critical legal studies, *supra* note 55, while it does not contain either citations or a bibliography, seems to be directly based on Habermas, particularly KNOWLEDGE AND HUMAN INTERESTS, *supra* note 13. Both books begin by attacking objectivism, or positivism (UNGER, *supra* note 55, at 5-14; HABERMAS, KNOWLEDGE, *supra* note 13, at 67-90), fashion an alternative based upon collective action or understanding (UNGER, *supra* note 55, at 15-32; HABERMAS, KNOWLEDGE, *supra* note 13, at 91-160) and seek some internal dynamic through which this alternative could be realized in the midst of an ongoing historical process (Unger, *supra* note 55 at 36-42; HABERMAS, KNOWLEDGE, at 214-317).

For an in-depth analysis of the relationship between critical theory and one representative critical legal studies article (Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984)), see Brosnan, *Serious But Not Critical*, 60 S. CAL. L. REV. 259, 332-60 (1987).

84. See, e.g., Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Levinson, *supra* note 67; Peller, *supra* note 61; Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363 (1984). See Brosnan, *supra* note 83, at 360-88.

Another, although probably subsidiary, source of critical legal studies is pragmatism. See, Singer, *supra* note 83 (relying on the pragmatism of R. RORTY, *supra* note 19). Singer's interpretation of Rorty is challenged in Stick, *Can Nihilism be Pragmatic?*, 100 HARV. L. REV. 332 (1986).

85. See R. DWORKIN, *supra* note 66, at 45-73; J.B. WHITE, *WHEN WORDS LOSE THEIR*

reason draws upon the critique's view of scholarship as a social practice, whose validity claims must ultimately be evaluated by judgment or intuition.⁸⁶ In these efforts, therefore, might be seen the theoretical grounding, and perhaps the self-awareness, that was lacking in the legal realist attack on formalism.

In fact, none of these movements really apply insights derived from the critique of methodology to legal scholarship, nor do they provide any sustained analysis of legal scholarship in general. All three are theories of legal decision-making, rather than theories of legal scholarship. They appear relevant to scholarship only because there is a unity of discourse between scholars and judges. Attacks on decision-making, particularly on judicial decision-making, and most particularly on the language of judicial decision-making, have surface relevance to legal scholarship. But the underlying shift from formalism to normative discourse has eliminated any deeper applications. To the extent that they claim to be relevant to legal scholarship, the critical legal studies, law and literature and law as practical reason movements have been misled by the same unity of discourse that has afflicted the scholarship itself. Applying the insights derived from the critique of methodology to the problem of scholarship itself, rather than to the problem of legal decision-making, produces a rather different perspective from the one that any of these movements offer.

A. *Critical Legal Studies*

The critical legal studies movement, like the critique of methodology, asserts that law is a social discourse. Its dominant discursive features, according to critical scholars, are the assertion that it is separate from politics, that it is guided by authoritative texts, and that it can use its operative categories, like tort or contract, as a basis for coherent argument. The movement is enormously complex, with many different strands, but most of its attacks on this legal discourse cluster around two basic themes. The first theme is conceptual: it asserts that the categories legal doctrine uses, and the claims it advances about the

MEANING (1984); Dworkin, *Law as Interpretation*, in *THE POLITICS OF INTERPRETATION* (W. Mitchell ed. 1983); Levinson, *supra* note 67; Weisberg, *supra* note 67; White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669 (1984). While Professor White, unlike others in this field, does not explicitly invoke the hermeneutic tradition, it seems to have influenced his view of literary interpretation.

86. For explicit references, see Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367, 376-79 (1987); Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 24-36 (1986); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 543-49 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 58-59 (1985). The dominant influences on this movement, however, are not continental philosophy but Aristotle and American political theory.

autonomy of that doctrine, are incoherent on their own terms.⁸⁷ The second theme, which is political, asserts that despite our claims of freedom and equality, our society is highly stratified and subtly, but powerfully, oppressive. Legal discourse, which figures prominently in the justifications for this system, thus becomes an instrumentality of those who dominate it.⁸⁸

In attacking the coherence of legal categories, the ability of legal texts to determine governmental action, and the assertedly apolitical nature of doctrinal argument, the conceptual theme of the critical legal studies movement is attacking our legal system, but not the scholarship that studies it. Standard scholarship, having abandoned formalism, simply does not rely on legal doctrine for its validity claims. While it still uses the doctrinal terminology that judges use, it makes no assertion that this terminology is self-justifying, or objectively valid. Rather, the claim of standard scholarship is that its normative arguments should be couched in doctrinal terms because these are the terms that are used by its primary audience. Most standard scholarly works, moreover, do not assert the validity of legal doctrine as a whole. They are arguing for the modification of that doctrine along paths that their normative position recommends. Thus, they do not rely on doctrine as a source of justification, but take it as a given social fact, and use it as a context for their arguments.

An article about reforming tort law doctrine, for example, need not assert that the doctrine is conceptually coherent, or politically value-free. The scholar can simply argue that the body of doctrine, in its present form, should change in a particular direction. She may believe, as a normative matter, that the concept of individual responsibility on which tort law rests is completely wrong, and that the whole system should be replaced by social insurance. On that basis, she could recommend an incremental change in tort law doctrine that replaced negligence with strict enterprise liability.⁸⁹ To be sure, a similar article could be written by someone who believes that tort law is a conceptually coherent or politically desirable system, once a few de-

87. See, e.g., Dalton, *supra* note 84; Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *Stan. L. Rev.* 591 (1981); Peller, *supra* note 61; Singer, *supra* note 83; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *HARV. L. REV.* 781 (1983).

88. See, e.g., M. HORWITZ, *supra* note 55; Frug, *The City as a Legal Concept*, 93 *HARV. L. REV.* 1037 (1980); Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 205 (1979); Klare, *supra* note 55; Simon, *Visions of Practice in Legal Thought*, 36 *STAN. L. REV.* 469 (1984).

89. Again, the incremental nature of the suggested change would depend on a normatively justified respect for precedent (e.g., as a means of controlling judicial behavior). See text at notes 67-79 *supra*.

limited modifications are made. The point is that the scholarly enterprise rests upon its own normative basis, whatever that is, not the normative basis of the doctrine it is analyzing. The apparent relevance of critical legal studies to legal scholarship stems from the field's unity of discourse with its subject matter.

Critical legal scholars might claim that the whole concept of tort law is so incoherent that one cannot even talk about it in meaningful terms. But of course one can. The concept exists within a culturally established discourse, and it is coherent to the extent that the speakers in the discourse can agree on what it means. Only agreement is required; even if one does not believe in a consensus theory of truth, one can hardly dispute a consensus theory of cultural artifacts, which is what legal doctrines are. In other words, as long as speakers in the discourse agree that particular decisions constitute "tort law," they can meaningfully argue about whether such decisions are desirable on the basis of the speakers' shared norms.⁹⁰ To be sure, agreement about a particular term might break down, at which point that term will either be reformulated or pass out of the discourse. But since the process of legal scholarship includes the revision of doctrinal language, the existence of such revision can hardly be regarded as a fatal defect.

The political theme of critical legal studies is essentially an attack on the systems of governance and control in our society. Some observers maintain that it is unrelated to the movement's "nihilist" attack on legal discourse; if this is correct, it would provide an easy way to separate this political theme from legal scholarship.⁹¹ In fact, there is a

90. This point is made by Professor Stick in his critique of the nihilist wing of critical legal studies. Stick, *supra* note 84. See also, Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1691-95 (1986). But in this article the argument applies exclusively to legal scholarship. The ability of a group of speakers to achieve a consensus about the meaning of terms can render a discourse coherent. That is a necessary precondition for scholarly debate, particularly if one follows Habermas' view that scholarly communication is designed to produce subjective agreement by means of reasoned argument (*i.e.*, "understanding"). J. HABERMAS, COMMUNICATIVE ACTION, *supra* note 13, at 287. But it is not as clear that a consensus about meaning is necessary for state officials to act. Indeed, in some cases, such a consensus, if established by those who exercise power, can act as an instrument of oppression by closing off routes of opposition. See M. FOUCAULT, DISCIPLINE, *supra* note 14, at 257-308; HABERMAS, KNOWLEDGE, *supra* note 13, at 67-90; MARCUSE, *supra* note 12. That is why Habermas is so concerned to identify the "emancipatory interest" that can emerge from within the dense medium of consensus, and why Unger is equally concerned to establish "destabilization rights," see, UNGER, *supra* note 55, at 52-56.

91. The view that the nihilist aspect of critical legal studies is unrelated to its political aspects, and useless for constructing a legal theory, is advanced in R. DWORKIN, *supra* note 66, at 76-85, 266-75. See also Stick, *supra* note 84.

Dworkin bases his argument on a distinction between the view that there are no objective interpretations and the view that there is no coherent interpretation for a particular set of social practices. The first he calls external skepticism, the second, global internal skepticism. External skepticism is irrelevant, he says, because the interpretive process of legal decision-making is an established practice that does not require commitment to an absolute or metaphysical objectivity.

close connection between the two themes. Critical legal studies, like the critical theory from which it is derived, sees the use of a rationale that lacks inherent justification as a cause and symptom of social abuse. First, it asserts that claims about the apolitical, coherent and determinative nature of law are necessarily a means of justifying the status quo, particularly its regime of private property that relies so heavily on judicial enforcement.⁹² A breakdown in this means of justification reveals that the status quo emerges from the self-interest of the class that it favors, rather than from any general normative agreement. Second, as Habermas suggests, the mere assertion that legal doctrine is apolitical, coherent and determinative is itself a form of oppression — not the oppression of one class by another, but the oppression of our moral, or emancipatory instincts by a regime of technocratic objectivism. And if judges no longer believe that legal doctrine truly possesses these “emancipatory” characteristics, but simply adopt it as an operative methodology, their attitude can be regarded as a misuse of social symbols and communication that implies both the class-oriented and technocratic modes of oppression.⁹³

Despite its connection to critical legal studies’ conceptual theme, the movement’s political theme is not particularly relevant to legal scholarship. Even though this political theme validly focuses on legal

Id. at 80-85, 266-67. Global internal skepticism, although relevant, is questionable, in his view, because it assumes that competing principles are the same as contradictory principles, which is not necessarily true according to Dworkin. So, global internal skepticism fails to appreciate that the interpretive task is specifically designed to prioritize and integrate the conflict of principles on which this skepticism rests. *Id.* at 271-75, 440 n.19, 441 n.20.

The difficulty is that Dworkin assumes the very point that the critical legal studies movement places at issue, namely, the political legitimacy of the judiciary. If the judiciary is legitimate, then we must distinguish between proper and improper decisions, and resolve conflicts between principles, rather than merely announcing them. That would indeed render the nihilist attack irrelevant; one can only take a constructive stance toward a concededly legitimate decision-maker. But critical legal studies challenges judicial legitimacy, and its two elements can be viewed as two different kinds of challenges. First, it offers a political analysis, which attempts to demonstrate that judges are members of a morally unacceptable state. Second, it offers a legal analysis, which attempts to show that existing legal doctrine is incoherent (Dworkin’s internal skepticism) and that any body of thought that is organized as legal doctrine will inevitably be incoherent (Dworkin’s external skepticism). The legal analysis clearly follows from, and supports the political analysis. Once one recognizes that nihilist writing relates to the project of challenging, or at least reevaluating the political legitimacy of judges, Dworkin’s criticism seems unpersuasive.

92. See, e.g., HOROWITZ, *supra* note 55; UNGER, *supra* note 55, at 5-14; Dalton, *supra* note 84.

93. HABERMAS, KNOWLEDGE, *supra* note 13, at 87-90; J. HABERMAS, *Technical Progress*, *supra* note 36; J. HABERMAS, *Dogmatism, Reason and Decision: On Theory and Praxis in Our Scientific Civilization*, in J. HABERMAS, *THEORY AND PRACTICE*, *supra* note 29, at 253-56; Habermas, *The Scientization of Politics and Public Opinion*, in *TOWARD A RATIONAL SOCIETY* 62 (J. Shapiro trans. 1971); M. HORKHEIMER & T. ADORNO, *supra* note 12, at 31-57; M. HORKHEIMER, *ECLIPSE*, *supra* note 12, at 76-82. See generally note 36 *supra* (citing sources that attack “objectivism” as foreclosing self-knowledge or social transformation).

discourse, the attack depends upon the use of that discourse by power holders, such as judges. Judges do not simply express their views when writing a decision, as both Robert Cover⁹⁴ and Richard Posner⁹⁵ have pointed out; they transfer tracts of land, confer or deny monetary benefits, and send men with guns crashing through the doors of private homes. It is this exercise of power that requires a definitive connection between the power holders' discourse and their justification for action. What exempts legal scholarship, but not legal decision-making, from the political strand of critical legal studies scholarship, is that scholarship, while it sometimes justifies state power, does not exercise that power. Consequently, it is not subject to the same moral obligations: we expect scholars to be sincere, but there is no underlying set of actions that their language is required to reveal or explain. The thrust of the political theme of critical legal studies is to challenge the legitimacy of legal power-holders on the basis of their discourse; to evaluate every member of mainstream society in the same terms simply trivializes the challenge, and diffuses the special moral obligation of those who deploy force or control material resources.

Critical legal scholars might assert that standard scholarship, even if it does not rest directly upon the normative premises of legal doctrine, or try to justify the doctrine's use, is condemned by its complicity. In translating their arguments into doctrinal terms, this argument would run, legal scholars are supporting and legitimating the norms embedded in the doctrine. Or, more starkly, a discipline which frames prescriptions for an oppressive regime can be regarded as a party to that process of oppression. This is a familiar claim, but it is highly complex. To be sustained, it requires a serious analysis of the social role of the scholarship in question, its relationship to its audience, its relationship to its subject matter, and its own social dynamics as an academic discipline. To date, no such analysis of legal scholarship has been advanced. Its absence results from the fact that the critical legal studies movement has accepted, and to some extent been blinded by, the unity of discourse between scholars and judges. Because the two groups use the same terminologies, it is easy to conclude that they employ the same method of justification. But this is not the case; scholars and government officials are in different moral positions, even if they speak in similar or identical discourses. Thus, one cannot simply assume that legal scholarship that speaks to the judiciary is either assisting or legitimating it.

94. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815 (1986).

95. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1370-71 (1986).

In fact, the hypothesis that legal scholarship is an instrumentality of social control does not seem to be a particularly promising one. The discourse of the scholarship is explicitly normative, and places in issue those very attitudes and mechanisms that constitute the structure of control. Formalist legal scholars may have supported the tort law system, but modern legal scholars debate it. The debate is carried out in terms of basic questions about social organization, economic efficiency, personal responsibility, and the role of law.⁹⁶ One can always imagine a higher level of debate, from which the existing scholarship seems limited, and thus an effort to support a certain status quo. But the real issue is whether that higher level would be meaningful in our existing cultural context. Critical legal scholars who have attempted to reach this level, by treating all existing scholarship as one particular point of view, have generally found that they cannot maintain that altitude for any useful period of time. They either drift off into vague claims about unimagined alternatives,⁹⁷ or fall back into proposals that are little different from progressive liberalism.⁹⁸

The inability of critical legal studies to provide a critique of prescriptive legal scholarship is underscored by the rather striking absence of such a critique from the philosophic sources it invokes. The political or neo-Marxist theme of critical legal studies is most closely related to the Frankfurt School, while the conceptual or "nihilist" theme draws its inspiration largely from French deconstruction. But

96. See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970) (reevaluation of tort law in terms of normative choices and economic efficiency); Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982) (arguing that concept of negligence should be replaced by principles of autonomy and equality); Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973) (reanalyzing negligence rules in terms of economic efficiency); Cooter & Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067 (1986) (justifying emerging doctrine on economic grounds); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) (recommending fault rules be replaced with strict liability); Hutchinson, *Beyond No-Fault*, 73 CALIF. L. REV. 755 (1985) (arguing that compensation for accidents must be rethought in terms of a democratic community of mutual care and respect); Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CALIF. L. REV. 677 (1985) (deriving tort rules from psychological analysis of individual behavior); Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555 (1985) (recommending abolition of tort law, on grounds that it fails to deter or compensate effectively, and substitution of social insurance scheme).

97. For explicit recognitions that these alternatives are indeed unimagined, see Brest, *supra* note 45, at 1109; Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 197-98 (1984); Tushnet, *An Essay on Rights*, *supra* note 83, at 1394-403 (1984).

98. Roberto Unger's general statement of the critical legal studies movement, UNGER, *supra* note 55 ends up championing greater political accountability of government officials, *id.* at 32, a shift from equity financing of corporations to publicly funded debt financing, *id.* at 35, the expansion of individual rights, *id.* at 39-40, the recognition of entitlements to greater participation in government and to certain economic benefits, *id.*, and the expansion of interdisciplinary studies in law school, *id.* at 112-13. This is not to demean Unger's recommendations, which are both comprehensive and refreshingly specific, but only to indicate how securely they fit within the existing scholarly discourse.

the Frankfurt School does not really offer a critique of normative discourse; it is positivist discourse, particularly as it appears in technology and social science, that incites its members' ire.⁹⁹ Habermas, in many ways the most direct philosophic progenitor of critical legal studies, concentrates his attack on the specifically positivist features of social and natural science. Not only is normative discourse excluded from this attack, but it lies at the center of the affirmative vision he advances. For Habermas, hope resides in the possibility of emancipatory discourse, which he explicitly links to self-reflection and to psychoanalysis.¹⁰⁰ The analysis of social norms that characterizes standard legal scholarship today would seem to be a practical application of the emancipatory process he envisions. It compels us to evaluate our governing structures, and explicitly combats the view that technical knowledge can generate our social goals. In other words, the normative analysis of law, unlike law itself, would be regarded as delegitimizing, rather than legitimating, precisely because of its potential for producing social self-awareness.

Deconstruction would appear to be a more promising basis for a critique of legal scholarship, since its critique is not limited to positivism. But there are other limits to the deconstructive approach. While Derrida articulates a rather devastating attack on established and assumed dichotomies, he believes the categories constituting these dichotomies can never be escaped.¹⁰¹ What he offers, therefore, is a system for continuous reevaluation of existing categories,¹⁰² essentially the task that modern legal scholarship has undertaken.¹⁰³ Because the

99. See, e.g., HABERMAS, *KNOWLEDGE*, *supra* note 13, at 3-5, 67-90; HABERMAS, *Technical Progress*, *supra* note 36; HORKHEIMER, *CRITICAL THEORY*, *supra* note 12, at 194-210; HORKHEIMER, *ECLIPSE*, *supra* note 12, at 61-82; MARCUSE, *supra* note 12, at 144-99. A similar attack on positivist discourse is advanced by Foucault. See FOUCAULT, *ARCHAEOLOGY*, *supra* note 14; FOUCAULT, *DISCIPLINE*, *supra* note 14, at 195-308. Foucault, who seems to regard every social phenomena as an expression of oppressive power, does extend this attack to certain modes of normative discourse. See *id.* at 73-131. But even here, he emphasizes that scientific or positivist aspirations of this discourse, and his general, or theoretical critique are explicitly limited to positive social science. FOUCAULT, *ARCHAEOLOGY*, *supra* note 14, at 14-17.

100. HABERMAS, *COMMUNICATIVE ACTION* *supra* note 13, at 254-71.

101. See DERRIDA, *GRAMMATOLOGY*, *supra* note 15, at 5-65. DERRIDA, *WRITING*, *supra* note 15, at 3-30, 278-93; *id.* at 281: ("[W]e cannot do without the concept of the sign, for we cannot give up this metaphysical complicity without also giving up the critique we are directing against this complicity . . .").

102. DERRIDA, *WRITING*, *supra* note 15, at 28 (emphasis in original):

Emancipation from this language must be attempted. But not as an *attempt* at emancipation from it, for this is impossible unless we forget *our* history. Rather, as the dream of emancipation. Nor as emancipation from it, which would be meaningless and would deprive us of the light of meaning. Rather, as resistance to it, as far as is possible.

103. This does not mean that Derrida's approach has nothing to teach legal scholars, but only that it does not invalidate their basic enterprise, as it exists today. In fact, deconstruction seems like a particularly useful technique for legal scholars because it deals with the relationship

reality of law is so heavily linguistic, the normative debate that characterizes modern scholarship necessarily focuses on the contingency of legal categories. The reality of the distinction between tort and contract,¹⁰⁴ or between property and privileges,¹⁰⁵ is precisely what is at issue among legal scholars. Thus, deconstruction is more 'a description of contemporary legal scholarship than a critique of it,'¹⁰⁶ what distinguishes standard legal scholarship from critical legal studies from this perspective, is the intensity of its deconstructive efforts, not the basic stance that it adopts. Here again, the intellectual sources that provide the critical legal studies movement with a critique of law itself does not serve as a critique of legal scholarship.¹⁰⁷

between the terms we use and our general conceptual frameworks. J.M. Balkin suggests these possibilities in *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

104. See, e.g., G. GILMORE, *supra* note 58; Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, 12 J. LEGAL STUD. 241 (1983); Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1 (1985). See also I. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980) (challenging dichotomy between contract and noncontractual business relations).

105. See, e.g., Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Cohen, *supra* note 59; Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. 159 (1938); Reich, *The New Property*, 73 YALE L.J. 733 (1964). Peller argues, in a persuasive and explicitly deconstructionist analysis, that American legal thought is dominated by the subject/object dichotomy, the view that there exists a separate private or public realm, one of which takes lexical and causal priority over the other. Peller, *supra* note 61, at 1259-74. This is probably true, but it also has been extensively debated in legal scholarship. See, e.g., A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed. 1968); Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987); Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289-609 (1982). As with the other examples, Peller's analysis is a critique of legal decision-making (which is what he intends) but not of legal scholarship.

106. The deconstructive arguments of the critical legal studies movement do not acquire their political force from deconstructive theory itself. Rather, their political force comes from the nature of the texts that are being deconstructed; namely, judicial opinions that claim to derive political legitimacy from the coherence of their reasoning. As Balkin points out, see note 103 *supra*, Derrida's work itself is an attack on our conception of truth, not on a political position, because it focuses on other scholarly works in fields such as linguistics (Saussure), psychology (Freud) and philosophy (Foucault, Husserl). In other words, deconstruction is a critical technique, whose political significance depends largely on the nature of its object.

107. Another overlap between the contemporary analysis of scholarship and critical legal studies involves structuralism. This relationship is discussed in Heller, *supra* note 97. Heller associates critical legal studies with post-structuralist thought: it accepts the structuralist vision of a self as the cultural artifact, but rejects the philosophic implications of that vision in favor of some form of conscious social action. In this sense, it treats structuralism the same way that the critique of methodology does, incorporating its insights, but adding the element of self-awareness. Heller argues that legal scholars, specifically critical legal scholars, can play a role by delegitimizing existing institutional arrangements and their theoretical justifications. *Id.* at 182-92. The way to do this, he suggests, is not to propose an alternative theory, but to replace the existing approach by "a local set of theoretical practices" that are "analyzed as nothing more than one system of practices among others, with dynamics of reproduction and environmental interaction similar to those of nonsymbolic practices." *Id.* at 196. Again, if this is the lesson of structuralist and post-structuralist thought, it does not provide a criticism of legal scholarship, whatever it asserts about the use of theory by power-holding officials. Contemporary scholarship

B. *Law and Literature*

The law and literature movement is less obviously an application of the critique of methodology than critical legal studies. In fact, traditional interpretation, which sought to find objective meanings in received literary texts, would seem to be just as relevant to legal analysis as the more modern belief that meaning is constructed within the individual's horizon of understanding, or through the intersubjective understanding of an interpretive community. But traditional interpretation provides law only with an evocative analogy,¹⁰⁸ like the comparison between judges and priests. Modern interpretive theory, on the other hand, supplies an entire method of analysis, a vision of judges and lawyers as applying existing texts to current circumstances in a constrained and yet creative way.¹⁰⁹ It thus offers an enticing middle ground between the narrowness of strict construction and the nihilism of the legal realists.

Thus, while critical legal studies invokes the critique of methodology to attack our legal status quo, the law and literature movement invokes this same critique to justify it.¹¹⁰ But the justification, like the attack, is primarily applicable to law itself, and not to legal scholarship. Its apparent relevance to scholarship arises, once again, from the unity of discourse between scholars and judges. At first, it might appear that the result of this perceived unity is that the law and literature movement would treat judges as powerless scholars, engaged in a polite and thoughtful effort to be "ideal readers" of legal texts or to create the best possible meaning for those texts.¹¹¹ In response, the proponents of this movement point out that the judges' adoption of a

tends to treat theory precisely as a localized practice, because it has abandoned the grand generalities of formalism. For example, Heller trenchantly critiques the concept of property rights in legal decisions, using a post-structuralist analysis, *id.* at 174-81, but the existence and structure of those rights is a point at issue in modern scholarship, not an underlying assumption of its theory.

108. See generally B. CARDOZO, *Law and Literature*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE 338 (M. Hall ed. 1947); Axelrod, *Law and the Humanities: Notes from Underground*, 29 RUTGERS L. REV. 228 (1976); Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224 (1942); Smith, *Law and the Humanities: A Preface*, 29 RUTGERS L. REV. 223 (1976).

109. As Miller points out, literary criticism in general is too varied, or diffuse, to provide a united frame work of analysis. Miller, Book Review, 52 U. CHI. L. REV. 255-56 (1985). The current movement derives its force from the range of modern interpretative theories that focus on the interaction of the reader and the text.

110. The tendency of the law and literature movement to legitimate existing judicial practice is illustrated by R. DWORKIN, *supra* note 66; Dworkin, *Law as Interpretation*, 60 TEXAS L. REV. 527 (1982); Weisberg, *supra* note 67; White, *supra* note 85. However, techniques of literary criticism have been used for other purposes. See, e.g., Levinson, *supra* note 67 (critical legal studies analysis using literary techniques).

111. R. DWORKIN, *supra* note 66, at 49-53; White, *Judicial Criticism*, 20 GA. L. REV. 835, 868-70 (1986); White, *supra* note 85, at 868-70; Weisberg, *supra* note 67, at 979-85.

literary approach is a political act, a means of mediating between slavish submission to the language of the text, and cavalier dismissal of the language in favor of their predilections.¹¹² This response avoids the error of treating judges as scholars, to be sure, but only by succumbing to the converse error of treating scholars as judges.

In fact, scholars play a different social role, because they do not exercise coercive power. There is no particular reason for scholars to seek the balance that is appropriate for judges, unless they find it justified on independent normative grounds. They commit no act of social callousness by being slavish, or of political irresponsibility by being cavalier; they simply offer legal decision-makers an argument for a particular position. In other words, the law and literature movement has articulated reasons judges should adopt an interpretive stance toward legal texts or legal principles, but they have not advanced any reasons why scholars should adopt this stance. They have demonstrated that such a stance is possible, that scholars can read Judge *A*'s decision the way they believe Judge *B* should read Judge *A*'s decision. But there is no necessity for the scholars to do so, unless they are committed to the unity of discourse.

An interpretive stance is not only unnecessary for legal scholars, its widespread adoption would be positively harmful. Interpretation is a self-imposed constraint, which sets the boundaries of inquiry no further than the culturally possible understandings of the text in question.¹¹³ But the scholar is often in a position to go beyond the text, and ask whether it should be ignored or altered rather than interpreted. This would certainly be true of a work that addresses the legislature as opposed to the judiciary, for the legislature is primarily a creator of texts, not an interpreter of them. Even in cases where the scholar is addressing the judiciary, moreover, there is always a question about which texts are relevant, and how those texts should be treated. We always want to know whether the decision should emerge from our understanding of the text, or from nontextual arguments like social policy. No matter how contextual our theory of interpretation, the question always remains, because social policy is a separate mode of argument that simply cannot be encompassed by interpretation,

112. R. DWORKIN, *supra* note 66, at 190-216.

113. This is Habermas' basic criticism of Gadamer's hermeneutics. See HABERMAS, COMMUNICATIVE ACTION, *supra* note 13, at 130-41; Habermas, *A Review of Gadamer's Truth and Method*, in UNDERSTANDING AND SOCIAL INQUIRY 335 (F. Dallmayr & T. McCarthy eds. 1977). One of Habermas' arguments is that Gadamer assumes that the text, or the author of the text, is somehow superior to the reader, and entitled to respect on that basis. This may be incorrect, but if so, it is only because Gadamer is using literature as an example of an essentially nonliterary analysis of understanding. See text at note 114 *infra*.

even if interpretation can be defined so broadly that it reaches similar results.

Consequently, the interpretive stance must continually be argued for. It is a perfectly respectable argument, as a prescription for judges, but that does not render it a useful prescription for scholars. The scholar's task is to carry out that very argument about the value of interpretation in specific cases; to adopt interpretation as a scholarly stance would constrain, if not preclude the argument, and truncate the entire enterprise. Nor is this merely a matter of high legal theory, that can be settled at the metalevel and then, if the law and literature movement has its way, adopted as a universal stance. It is present at every level of legal scholarship. The most mundane discussions of a legal text, down to the lowly case note, remain a contest between interpretation and its alternatives. And this problem can never be interred, because it is the legal scholar's audience that possesses power, not the text, and that audience can always act according to some other principle.¹¹⁴

Although law and literature invokes the hermeneutic strand of the critique of methodology, the evolution of modern hermeneutics points toward an approach to legal scholarship which is quite remote from literary criticism. Hermeneutics originated in the study of the Bible,¹¹⁵ but it does not refer to the substance of Biblical interpretation. That is exegesis. Hermeneutics is the study of the principles that make exegesis or interpretation possible; in other words, it began as an analysis of Biblical interpretation itself.¹¹⁶ From there, the concept expanded to the analysis of how any text is understood, and then to a general analysis of understanding.¹¹⁷ While hermeneutics continues to be concerned with understanding texts, it is by no means limited to literary products. More importantly, its central theme is that we must approach the text, if it is a text we are trying to understand, with our total being. The process of understanding does not depend on a technique but an experience, an experience that requires our participation

114. See Miller, *supra* note 109, at 257-58. For the related argument that legal scholars should not be concerned with the literary elegance of their writing, but with its conceptual coherence, see Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599 (1986).

115. See, e.g., E. BLACKMAN, BIBLICAL INTERPRETATION (1957); R. GRANT, A SHORT HISTORY OF THE INTERPRETATION OF THE BIBLE (rev. ed. 1963); J. WOOD, THE INTERPRETATION OF THE BIBLE (1958).

116. See GADAMER, TRUTH AND METHOD *supra* note 11, at 153-73; R. PALMER, HERMEUTICS 34-38 (1969).

117. GADAMER, TRUTH AND METHOD *supra* note 11, at 151-341.

as historically, culturally and temporally grounded human beings.¹¹⁸

To be sure, the law and literature movement, which is influenced by hermeneutics, does contain numerous passages that reflect this broader vision of interpretation.¹¹⁹ But to the extent it does, it ceases to have any particular relationship to literature, or to the process of literary criticism, and simply merges into the more general theory of socially constructed meaning.¹²⁰ In fact that is Gadamer's position; he regards art as a particularly good example of his theory, but the subject of his theory is not art, but understanding.¹²¹ Thus, Gadamer does not think that a judge should act like a literary critic. His view, rather, is that the literary critic should act like a judge, who "adapts the transmitted law to the needs of the present."¹²² Legal scholars, presumably, would have even more latitude, since they would be evaluating the very process of relying on a text.

The idea that scholars should approach legal texts armed with a set of literary techniques is thus the antithesis of modern hermeneutics. Rather, the scholar's task is to relate the text to the totality of our historical and cultural experience. Questions about the political function of the text, its historical setting, and its practical effects are as relevant as the judge's use of legal reasoning. Hermeneutics, in other words, is a theory of understanding that applies to the entire range of

118.

[Hermeneutics] denotes the basic being-in-motion of there-being [Heidegger's Dasein] which constitutes its finiteness and historicity, and hence includes the whole of its experience of the world. . . . [T]he experience of the work of art always fundamentally surpasses any subjective horizon of interpretation, whether that of the artist or that of the recipient. *Id.* at xviii-xix.

119. See, e.g., R. DWORKIN, *supra* note 66, at 167-75; White, *Law and Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985).

120. See Moore, *Metaphysics, Epistemology and Legal Theory*, 60 S. CAL. L. REV. 453, 467-70 (1987); Stick, *Literary Imperialism: Assessing the Results of Dworkin's Interpretive Turn in Law's Empire* 34 UCLA L. REV. 371, 376-401 (1986).

121. GADAMER, *TRUTH AND METHOD*, *supra* note 11, at xix to xx.

122. *Id.* at 292 ("Legal hermeneutics is able to point out what the real procedure of the human sciences is. Here we have the model for the relationship between past and present that we are seeking.") For a direct application of Gadamer's approach to the judicial role, see Eskridge, *supra* note 65.

Gadamer's approach, although broader than the law and literature movement, nonetheless gives more deference to the text than scholars need to give. The reason, as stated above, is that the legal scholar is not bound by the constraints implicit in the exercise of a judicial role. That is, being bound by the text, to some extent, is part of the judge's job description, but not part of the scholar's. Gadamer does not make this distinction, probably because he does not have an elaborated theory of political power. Indeed, he overlooks the entire body of prescriptive, or standard legal scholarship. His extended discussion of legal hermeneutics concerns only judges and legal historians. GADAMER, *TRUTH AND METHOD*, *supra* note 11, at 289-305. Gadamer's relevance to legal scholarship lies in his general theory, not in his discussion of legal hermeneutics. The legal scholar would be subject to constraints, in Gadamer's view, but they would be the general constraints of tradition (he uses the term "prejudice"), not the particular constraints of legal texts. See *id.* at 235-74.

issues raised in standard legal scholarship. It seems fair to say that it refuses to treat literature as literature, in the belles-letters sense, and it certainly would not recommend that legal decisions be treated in that fashion.

C. *Law as Practical Reason*

A third theme in modern legal thought that is related to the critique of methodology may be called the law as practical reason movement. This is a more amorphous phenomenon than either critical legal studies or law and literature, perhaps because it is newer, perhaps because its members have not consciously identified themselves as a group, or perhaps because its content discourages its articulation as a movement or an ideology. It is characterized by its vision of the law as an embedded social practice, whose provisions are supported by a complex set of norms, traditions, and pragmatic compromises that lack overarching theoretical justifications, but can be evaluated by judgment or intuition.¹²³ Politically, the practical reason movement is closer to law and literature than to critical legal studies, since it is at least incrementalist, if not directly supportive of the status quo.¹²⁴ But it differs from both movements in that it does not represent a sharp break with the discourse of standard scholarship. In fact, it merges into standard scholarship quite smoothly, since its defining feature is a mood, and not a method.

Clearly, the practical reason movement adopts the critique of methodology's conception of academic fields as socially embedded practices.¹²⁵ But there is a much less direct relationship between the two than there would appear to be at first. The problem, once again, lies in the unity of discourse. Practical reason is a prescription for legal decision-makers, and specifically for judges. It makes a great deal of sense to regard judges as decision-makers who operate within a tradition, using judgment and intuition to resolve the succession of issues that are presented to them. Of course, it also makes sense to

123. See, e.g., Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987) [hereinafter Farber & Frickey, *Practical Reason*]; Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEXAS L. REV. 873 (1987); Hawthorn, *Practical Reason and Social Democracy: Reflections on Unger's Passion and Politics*, 81 NW. U. L. REV. 766 (1987); Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985); Michelman, *supra* note 86; Sherry, *supra* note 86; Sunstein, *supra* note 86; Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985). A new, albeit, partial, recruit, is Richard Posner. See Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988).

124. See Kronman, *supra* note 123, at 1608-10 (disputing conservative nature of practical reason, but treating it as incrementalist).

125. See note 86 *supra*.

regard judges as powerful state officials who use coercive force to maintain the established order, the way critical legal studies does, and to regard them as interpreters of authoritative texts, the way the law and literature movement does. But it does not make as much sense to use any of these perspectives when assessing legal scholarship. The value of the practical reason perspective, like the value of critical legal studies and law and literature, depends upon the fact that judges exercise state power. If we want judges to use judgment, it is because that is their socially assigned role, or the best way for them to reach just decisions. But scholars have a different role, and their use of the same discourse as judges is a defect in their approach, not a basis for holding them to the same standards of analysis.

In fact, practical reason does not provide a particularly good program for legal scholarship. One difficulty with it is its lack of content; it clearly rejects claims to absolute truth, or abstract theoretical unities, but its affirmative program is less certain. The deeper difficulty, for present purposes, is that practical judgment, whatever its value for judges, is the wrong approach for scholars. The scholar's specialty is not practical judgment but structured argument, not general intuition but specialized knowledge, not ad hoc decision-making but systematic analysis. Scholars who join judges in the use of practical reason are likely to find themselves, as Meir Dan-Cohen suggests, acting "as a kind of deputy-judge, presiding over moot courts, or a shadow lawyer writing mock briefs for hypothetical or past disputes."¹²⁶

This is not the approach that the critique of methodology suggests. It is true that the critique characterizes academic scholarship as a practice carried out by a community whose ultimate choices depend on judgment, not fixed rules. But the community is a community of scholars, not of society in general, and the choices are being made between elaborated theories or rival methodologies. The defining feature of a scholarly community is that it has a unique and specialized discourse, with its own rules for advancing arguments, and for determining their validity. Judgment serves to provide criteria for evaluating those underlying rules, not as a substitute for academic discourse, or the methodology which it employs. The type of judgment Kuhn is concerned with, for example, is whether the wave theory or the particle theory best accounts for the observed behavior of light.¹²⁷ This judgment could only be made by someone who is well versed in the academic discourse that has generated the rival theories.

126. M. DAN-COHEN, *supra* note 70, at 1-2. Cf. Hyland, *supra* note 114 (arguing for the importance of concepts in legal discourse).

127. See KUHN, *SCIENTIFIC REVOLUTIONS* *supra* note 8, at 154.

It is true, therefore, that judgment has a role to play in both judicial decision-making and legal scholarship, but different kinds of judgment are involved. One is the judgment that is exercised by a public official, who is required to resolve disputes between parties with conflicting interests, and to declare rules by which future disputes can be resolved. The other is the evaluation of scholars' arguments about the basis on which judicial decision-makers and other public officials should act. These two types of judgment will tend to merge only when there is no independent scholarly discourse, when scholars are advancing the same arguments, and using the same evaluative criteria, as the subject matter they are studying. But there is nothing in the concept of a practice, as advanced by the critique of methodology, that endorses such a merger. If anything it implies the opposite: that each distinctive community has its own practice, and that the judgments within each practice can only be made by those who are part of the particular community, and speak in its distinctive voice.

III. THE PROBLEM OF STANDARD LEGAL SCHOLARSHIP

To summarize thus far, the first part of this Article discussed the relationship between the critique of methodology and standard legal scholarship. The critique's attack on positivism, it was suggested, is not relevant to legal scholarship because the field has abandoned its own formalist claim to objectivity in favor of a normatively-based prescriptive discourse. But the affirmative emphasis of the critique on collective self-awareness is highly relevant, because legal scholarship retains an unexamined unity of discourse with its subject matter as a result of its formalist origins. Part II then argued that the three contemporary bodies of legal thought that invoke the critique of methodology have in fact ignored its central insight for the analysis of legal scholarship. Rather than developing a critical self-awareness of the field's unity of discourse, they reflexively adopt it. Thus, critical legal studies, law and literature, and law as practical judgment tend to conflate law itself with legal scholarship and assume that the two can be evaluated with a single theory. In fact, the unity of discourse, the shared framework of analysis between legal scholars and their subject matter, is an atavism that merits skeptical assessment.

The following two Parts of the Article apply the critique of methodology, particularly its emphasis on self-awareness, to standard legal scholarship. Part III is essentially critical: it analyzes the unity of discourse, and illustrates its deleterious effects on the scholarship's ability to achieve its self-defined purposes. The next Part then

presents an affirmative program for legal scholarship, based on the self-awareness that the critique suggests.

The analysis presented in this part is an internal one. Rather than imposing a purpose or criterion on legal scholarship, it suggests that the scholarship should become aware of its own purposes, and use them as a standard for evaluation. As previously discussed, legal scholarship is a practice, whose discourse consists largely of prescriptions that scholars address to public decision-makers for the purpose of persuading those decision-makers to adopt specified courses of action.¹²⁸ This does not mean that the brute fact of influence is the principle measure of academic quality; too many adventitious and strategic factors intervene between a scholarly work and its reception by public decision-makers. Rather, the concept of influencing decision-makers becomes a way of structuring the practice. Quality is determined on an internal basis, by the scholars' perception that the work ought to persuade, or that it would persuade if its audience were a rational decision-maker. The effectiveness of standard legal scholarship, in its totality, can be evaluated according to this same criterion.

A. *The Unity of Discourse and the Nature of Prescription*

The greatest single impediment to legal scholarship's ability to achieve its self-defined purpose is its unity of discourse. This places two major limitations on the content of the scholarship's prescriptive statements. First, the normative basis for the statements will often be unclear. Judges have a certain commitment to normative clarity, but they have a countervailing need, as public officials, to justify their exercise of power. The process of justification is often better served by leaving the awkward unsaid and the incongruent unexplained, by generating a sort of normative haze in which implications drift about without coherent moorings. Thus, judges often declare that they are basing their decision on precedent, but that social policy supports their reading of the precedents, and that the precedents were not very clear

128. It might be assumed that critical legal studies, being a self-consciously radical approach, does not exhibit this orientation toward existing decision-makers. In fact, that is precisely its orientation. Unlike orthodox Marxism, a tradition notably absent from legal scholarship, critical legal studies does not address a revolutionary class, like the proletariat. Rather, it follows critical theory in relying on an immanent critique, an effort to demonstrate to existing decision-makers the inherent contradictions of their own approach. See HABERMAS, KNOWLEDGE, *supra* note 13, at 274-300; J. HABERMAS, LEGITIMATION CRISIS (1975); HORKHEIMER, ECLIPSE, *supra* note 12. This sort of critique becomes particularly plausible, or perhaps enticing, when directed toward liberal decision-makers, who feel an obligation to justify their actions in rational discourse, and are sympathetic to claims based on equality and freedom. Critics of the movement have noted the fairly traditional nature of this appeal, see Brosnan, *supra* note 83, at 352-57; Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 266-80 (1984).

anyway, and besides, since judges created these precedents in the first place, judges can change them. To the extent that legal scholars speak in the same terms judges do, they will tend to become immersed in the same normative farrago. They strive to be clearer, of course, but the judicial style acts as a counterweight, if not a positive temptation. Thus, arguments that reflect rather different normative perspectives tend to agglutinate into a single, turgid mass, without much internal structure or conceptual differentiation.

A second limitation that the unity of discourse places on scholarly prescriptions is that it tends to restrict their empirical basis, their ability to use the kinds of materials that other disciplines recognize as data. Prescriptions themselves are normative, not empirical, of course, but they often rely on empirical data to explain their consequences. Since very few normative arguments in our society can be freed from consequentialist justifications, these consequences are important.¹²⁹ In addition, many legal prescriptions are directed toward results that require empirical analysis to achieve. We may agree that fairness to consumers is more important than economic growth, but we need to know precisely which laws will carry out that choice. The result is that norms and consequences become closely intertwined; our normative choices have pragmatic limitations, while our pragmatic strategies have normative reverberations.

Judicial discourse is ill-suited to explore these empirical issues. To begin with, an empirical haze may be as useful for maintaining legitimacy as a normative one. Judges who are devoted to the principle of free speech on moral grounds, for example, generally assume that it will produce precisely the instrumental results that they desire.¹³⁰ Even if judges are genuinely interested in empirical data, their formalist discourse continues to suggest the primacy of doctrinal assertions — assertions that provide no useful framework for structuring the collection of data. As the critique of methodology suggests, the lack of such a framework means that data cannot even be perceived and assimilated by the discourse, at least in any coherent fashion. Apart from this conceptual difficulty, the organizational structure of the courts impedes empirical analysis. Most judges' staffs are limited to three recent law school graduates and a legal secretary, their data base is limited to Lexis, and they write their opinions in a room lined with

129. On the pervasive instrumentalism of American legal discourse, see R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982); Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought — A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981).

130. This point is discussed at greater length in Rubin, *Nazis, Skokie, and the First Amendment as Virtue* (Book Review), 74 CALIF. L. REV. 233, 237-41 (1986).

legal reporters and some autographed pictures of the judges they themselves clerked for. Scholars make greater efforts to achieve empirical clarity and obtain empirical data but once again, judicial discourse operates as a counterweight and a distraction.

Apart from these effects on the prescriptions of legal scholars, the unity of discourse generates several subsidiary effects. One such effect is what Bruce Ackerman describes, in a more general context, as reactivity.¹³¹ The agenda for the discipline is generally set by external events: a court or legislature acts, and a series of commentaries and criticisms quickly precipitate from the scholarly environment in response to that action. Thus, a few cases in a row that lessen the effect of doctrine X will engender a law review article entitled "Is doctrine X dying a slow death?", while the promulgation of Statute Y or Regulation Z will be followed by the ineluctable exegesis on "The New Statute Y (or Regulation Z): Does It Solve the Problem?"

The events to which legal scholarship reacts should not be confused with empirical data, which the field is reluctant to employ. What distinguishes data from events is that data is generated, defined and given significance by the academic discipline that studies it.¹³² Natural scientists generate their data by experiment or structured observation;¹³³ they then define its nature and extent by applying the conceptual structure of their discipline. Moreover, scientists determine the significance of the data they have thus generated and defined. It is the scientist who tells us whether a newly discovered dinosaur bone is just a piece of Cretaceous garbage that some local museum can

131. See B. ACKERMAN, *supra* note 72, at 24-28. "[T]he *reactive constraint*: No legal argument will be acceptable if it requires the lawyer to question the legitimacy of the military, economic, and social arrangements generated by the invisible hand." *Id.* at 25. Thus, Ackerman uses the term for a mode of legal discourse in which the political agenda is set by an external force. Here, the agenda-setting relates largely to topics; once the topic is chosen, contemporary legal scholars are no longer bound by the political reactivity that Ackerman describes in connection with lawyers, see *id.* at 28-37. See also R. KATZMAN, *REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY* 27-35 (1979) (contrasting reactive and proactive styles of prosecution).

132. This is a central claim of the critique of methodology. See note 46 *supra* (citing sources with respect to natural and social science); note 28 *supra* (citing sources with respect to social science).

133. For a discussion of the role of experiment and observation in natural science, see I. HACKING, *REPRESENTING AND INTERVENING* 149-275 (1983); K. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (1959); Lakatos, *supra* note 51. Hacking goes further than Popper in this regard. He not only maintains that scientists often "create the phenomena which then become the centrepieces of theory," I. HACKING, *supra* at 220, but also suggests that the technological, or manipulative aspect of experimentation makes it independent of theory. This is an interesting claim, which Hacking concedes is inconsistent with much of modern philosophy in a sense that Popper's is not. But whether data is structured by a theoretical framework, as Popper and Lakatos believe, or by a technological process as Hacking maintains, it does not have autonomous force in either view.

display to visiting boy scout troops, or whether it changes our basic understanding of what dinosaurs were like.¹³⁴ Judicial decisions, on the other hand, are a discourse of their own; they generate themselves, structure themselves, and declare their own significance, quite apart from the efforts of legal scholars. Scholars can certainly affect these determinations of significance, and they can occasionally raise some mute, inglorious decision to epic proportions. But these are secondary influences; they may vary the prevailing pattern of significance somewhat, but the basic pattern is determined by the scholar's subject matter, not the scholar.

This reactivity of standard legal scholarship, its perception that the world is filled with events, rather than data, is a product of the unity of discourse between judges and legal scholars. When the subject of the scholars' studies speaks the scholar's own language, when it defines its boundaries and declares its significance in the scholars' own terms, when it uses the same method of analysis, and, most of all, when it explicitly approves or rejects the scholars' works, scholars will be virtually compelled to respond. The world of legal scholars is intensely alive with meaning, like the natural environment of neolithic tribes, where every mountain, tree, and river whispered messages to its inhabitants.

Most other disciplines are nonreactive precisely because they do not possess this unity of discourse with their subject matter. A volcano may be a dramatic historical event, but it does not rumble forth with an explicit refutation of Professor Magma's theory; it simply and inchoately explodes, leaving the Professor, his graduate students, and his academic rivals to determine whether clambering across its steaming sides will be of any value. Literature and social behavior, being of human origin, are more closely related to their corresponding disciplines, but their discourse remains distinct. Novelists do not declare that they are initiating the hermeneutic circle, politicians do not welcome lobbyists with declarations of group theory, and criminals do not recruit accomplices with analyses of deviant behavior. At the very least, this compels scholars in these fields to develop their own standards for significance, and in most cases, it requires greater initiative in structuring a research agenda. Interestingly, when exceptions to the general pattern occur — when a politician adopts an economist's theory, for example — the result is often to throw the economist into a reactive frenzy.¹³⁵

134. See, e.g., HABERMAS, *KNOWLEDGE*, *supra* note 13, at 113-39; KUHN, *SCIENTIFIC REVOLUTIONS* *supra* note 8, at 10-90.

135. See, e.g., R. HEILBRONER, *THE WORLDLY PHILOSOPHERS* 254-81 (rev. 5th ed. 1979)

Another characteristic of legal scholarship may be called its compartmentalized, or noncumulative structure. The ordinary article in many other disciplines begins with a catalogue of prior research on the subject in question. Within the first few paragraphs the author indicates what issues this prior research has resolved, what problems remain, and how the present article will solve them. But the ordinary legal article begins with an account of an event, such as a judicial decision, a new statute, or an issue of public concern, and then presents a self-contained framework of analysis. The initial citations are generally designed to demonstrate that other scholars have not considered the issue, or have not adopted the proposed approach. The reason is that legal scholars must demonstrate that they are saying something new, but they are not required or expected to demonstrate the relationship between their article and prior scholarship, apart from the mere fact of novelty.

Of course, legal scholarship is not completely static, nor do the individual articles exist in purely anchoritic isolation. General movements of ideas can be discerned over the course of relatively long periods of time, and each article tends to rely on a shared background of legal concepts. But these trends and relationships are distinguished from the internal structure of a cumulative discipline by their generality. The movement of ideas is a gradual evolution, rather than conscious development from one work to the next; the shared concepts on which scholarly works rely are broad characterizations of the field, rather than the specific conclusions of prior researchers. In other words, legal articles are linked to each other, and to their general background, in the same way that any identifiable set of human behaviors is so linked. But they do not display that higher degree of internal structure that characterizes many other academic fields, and that would be recognized as a cumulative tradition.

The compartmentalization of legal scholarship, like its reactivity, appears to be a product of the unity of discourse. To begin with, reactivity itself causes compartmentalization. Lacking a research agenda, legal scholars do not pursue sustained lines of inquiry, but engage in self-contained, dyadic colloquies with specific judicial decision-makers. More generally, the judicial discourse which scholars have adopted is essentially noncumulative. It does not build on prior deci-

(discussing John Maynard Keynes' involvement with government, including his book *HOW TO PAY FOR THE WAR*); *id.* at 181-88 (discussing Henry George, who went so far as to run for mayor of New York City *twice*); T. McCRAW, *PROPHETS OF REGULATION* 222-99 (1984) (discussing Alfred E. Kahn's participation in deregulation efforts); D. ROBYN, *BRACING THE SPECIAL INTERESTS* 57-91, 182-257 (1987) (discussing participation of Kahn and other economists in trucking deregulation).

sions, but revises or adopts those decisions as the current situation warrants. If the critique of methodology teaches us anything, it is that the process of cumulation is a way of thinking, and one that requires real commitment to, and concentration on, that very process.¹³⁶ Academic discourses have that commitment because it is central to their conception of validity, and to their belief that they are engaged in a collective enterprise, rather than a running argument. But for judges, the collective enterprise is governing the nation, and their sense of progress and achievement is derived from entirely different sources. If they are in control of the discourse, it will be designed for purposes quite distinct from cumulation.

B. *The Effectiveness of Legal Scholarship*

The characteristics of legal scholarship that are derived from its unity of discourse include a certain vagueness about the normative basis of scholarly prescriptions, a shortage of empirical grounding for those prescriptions, a reactivity to external events, and a compartmentalized, or noncumulative style. Undoubtedly there are others, including some that do not sound quite so pejorative. What is significant about these particular characteristics, however, is their impact on the enterprise of legal scholarship, the self-defined goal of speaking persuasively to legal decision-makers.

The most basic problem with the current mode of standard legal scholarship is that it is addressing a decision-maker that the modern state has demoted to a subordinate position. The discourse of the scholarship derives from, and relates to, the discourse of judges. But law these days is made predominantly by legislators and administrative rule-makers, not by judges. Judges are important state officials, more important in the United States than most other nations, but many of the major decisions that shape our society and our law are legislative and administrative ones. In a number of crucial areas, the courts have been relegated to the secondary role of updating and gap-filling, a role which steadily shrinks as the pace of legislative action increases, and as implementation becomes an increasingly administrative task.¹³⁷

The predominance of statutes and regulations places standard legal

136. With respect to natural science, our most cumulative discipline, see KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 8, at 35-51 (validity claims based on paradigms, which act as a definitional structure for puzzle-solving activity of normal science); R. RORTY, *supra* note 19, at 315-56; Lakatos, *supra* note 51. For an effort to assimilate Karl Popper, generally viewed as a defender of positivism, to this position, see R. BERNSTEIN, *supra* note 29, at 61-71.

137. See, e.g., G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); J. HURST, *DEALING WITH STATUTES* 1-29 (1982).

scholarship in a difficult position, because it is ill-suited to address policy-oriented rule-makers. Its unity of discourse is a unity of discourse with the courts, not legislatures or administrative agencies. It relies on the sorts of arguments that courts deploy — arguments based on the coherence of legal doctrine, or the way that social policy can modify that doctrine. It translates its normative positions into judicial terms, thus obscuring their social policy implications, and strives for a finely wrought incrementalism that is irrelevant to the blunderbuss of legislation.

To speak to a legislature or an agency, legal scholars must first identify the social policies which their recommendations seek to implement. They are unlikely to persuade a government decision-maker to adopt a specific policy, of course, but since these decision-makers think in policy terms, the scholar's recommendations will not seem relevant, or even comprehensible, unless they are articulated in those terms. Secondly, the recommendations must be supported by empirical data, not by doctrinal argument. Data provides the intellectual framework of legislative or administrative action,¹³⁸ just as doctrine provides the framework of judicial action. That does not mean that legislators always reach their decisions on the basis of data, any more than judges reach their decisions on the basis of doctrine. What it does mean is that the discourse of legislative debate is heavily empirical as well as normative. To the extent that scholars can persuade policy-oriented decision-makers, they will do so only by presenting empirical arguments, connected to clearly stated normative positions.¹³⁹

138. For example, data collection is one of the basic steps in standard policy analysis. See, e.g., G. EDWARDS & I. SHARKANSKY, *THE POLICY PREDICAMENT: MAKING AND IMPLEMENTING PUBLIC POLICY* 6-10 (1978). More informal approaches to administration also rely on data; they claim a relative advantage because their data requirements are less extensive, but data collection is central to their methodology as well. See E. BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES LAW* (1977); H. SIMON, *ADMINISTRATIVE BEHAVIOR* 154-71 (1955); Lindblom *The Science of "Muddling Through,"* 19 *PUB. ADMIN. REV.* 79 (1959).

139. The legislature's interest in data is a matter of serious debate at present. Some observers believe that legislators are genuinely concerned about acquiring the information necessary for responsible decision-making. See, e.g., R. FENNO, *CONGRESSMEN IN COMMITTEES* (1973); W. MUIR, *LEGISLATURE* 105-37 (1982); Dechert, *Availability of Information for Congressional Operations in CONGRESS: THE FIRST BRANCH OF GOVERNMENT* 154 (A. de Grazia ed. 1967); Marvin, *Evaluation for Congressional Committees: The Quest for Effective Procedures*, in *EVALUATION IN LEGISLATION* 45-56 (F. Zweig ed. 1979); Melnick, *Survey Research and Legislative Assessment*, in *EDUCATING POLICYMAKERS FOR EVALUATION* 146 (F. Zweig & K. Marvin eds. 1981). Other observers, notably those associated with the public choice movement, believe that legislators are exclusively concerned with maximizing their chances of re-election. See, e.g., J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); M. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); M. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL*

An equally serious, if more mundane, impediment arises from the reactivity of legal scholarship. Being reactive, legal scholarship tends to follow important events, rather than preceding them. This is not a serious disadvantage in addressing judges because judicial decision-making is an incremental process. A case of first impression rarely resolves definitively the issue it addresses; more typically, it initiates a series of decisions in which the original decision is refined, revised or rejected. Reactions to this first decision, therefore, will be highly relevant to the succeeding cases, and thus to the judicial efforts that determine the doctrine's evolution over time. But statutes and regulations establish law by means of a single large event, not an incremental series of smaller ones. By the time legal scholars have had a chance to react, the process is likely to be complete, and the scholars will be left, with the judiciary, to tidy up the remaining details.¹⁴⁰

The compartmentalized nature of standard scholarship tends to make the timing problem still more serious. Because they are reactions to external events, not elements of a cumulative scholarly tradition, legal articles possess all the interest of last year's newspaper once the particular event has passed. When the next issue arises, none of the prior commentary seems particularly relevant. It is hard even to imagine anyone but a legal historian reading scholarly analyses of fifty-year-old statutes.¹⁴¹ Certainly, legislatures will not do so; the issues that impel them to act are likely to have arisen last year, or last

MARKETS (1981); D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); M. OLSON, THE LOGIC OF COLLECTIVE ACTION (rev. ed. 1971).

140. One example is the standard legal scholarship dealing with payments law, a branch of commercial law. In the 1940s, the American Law Institute, under the direction of Karl Llewellyn, began a comprehensive codification of commercial law, including a revision of the uniform law regarding negotiable instruments. No commentary on this project appeared until the late 1940s, when a few student notes and a few articles by the drafters were published. Leary, *Some Clarification in the Law of Commercial Paper Under the Proposed Uniform Commercial Code*, 97 U. PA. L. REV. 354 (1949); Note, *Bank Credit as Values: The Commercial Code Article III*, 57 YALE L.J. 1419 (1948). Extensive critical commentary did not begin until the statute had been promulgated. Similarly, there was very little discussion of electronic funds transfers by academics until legislative efforts were initiated in 1974. Once that occurred, there was a virtual explosion of academic interest, but most of this came too late to affect the legislative effort. See, e.g., *Electronic Funds Transfer Systems*, 25 U. CATH. L. REV. 687 (1976); *Electronic Funds Transfers*, 35 MD. L. REV. 3 (1975); *A Primer on Electronic Funds Transfer Systems*, 37 U. PITT. L. REV. 613 (1976); *EFT Symposium*, 13 U.S.F. L. REV. 225 (1979); *Computers in Law and Society: Government Regulation of the Computer Industry, Electronic Funds Transfers*, 1977 WASH. U. L.Q. 499.

141. In the area of payments law, for example, the leading articles which critiqued superceded statutes are virtually never cited despite the contemporary attention they received, and the prestige of their authors. See, e.g., Ames, *The Negotiable Instruments Law*, 14 HARV. L. REV. 241 (1900); Beutel, *The Proposed Uniform Bank Collections Act and Possibility of Recodification of the Law on Negotiable Instruments*, 9 TUL. L. REV. 378 (1935); Brannan, *Some Necessary Amendments of the Negotiable Instruments Law* (pts. 1 & 2), 26 HARV. L. REV. 493, 588 (1913); Townsend, *The Bank Collection Code of the American Bankers' Association* (pts. 1-3), 8 TUL. L. REV. 21, 236, 376 (1933-34).

month, and to display little apparent connection to those that evoked scholarly discussion in the past. However classic the original analyses were in their time, they will be forgotten because they were reactive and compartmentalized, and thus lacked a framework on which subsequent scholarship could build.

If standard legal scholarship seems ill-adapted to addressing legislatures and administrative rule-makers in a persuasive manner, one would imagine that it would be ideal for addressing judges. It is with judges, after all, that legal scholars share their discourse, and it is to them that the large majority of scholarly efforts are explicitly directed. The difficulty is that the fit is all too good. Do judges really need to be told how to interpret prior cases, or how to construct a legal argument? That is the very essence of their job, after all, and most people tend to believe that they can do their job reasonably well on their own. Of course, scholars can acquire a reputation that allows them to speak as authorities, or articulate an argument that possesses a persuasive power of its own. And judges are quite willing to cite scholarly articles in support of positions they have already decided to adopt. But since the general discourse of scholarship is so similar to the judge's, the general impression will be that there is nothing particularly distinctive about the scholar's contribution.

There are areas where judges clearly need assistance, but they do not involve doctrinal reasoning. The modified formalism of the present era has changed judicial reasoning from doctrinal analysis to a more broad ranging consideration of how legal doctrine and social policy interact.¹⁴² While the doctrine itself is familiar to judges, the process of modifying it requires them to enter new and unfamiliar territory, for which they are concededly ill-prepared. Scholarship that spoke to them about these matters would provide much-needed normative clarification and empirical information.

To begin with, modern judges regularly invoke social policy, but they possess no general framework for determining the content of that policy, or the way that it should interact with doctrinal argument. While this lack of clarity permits policy to be used as a kind of *deus ex machina*, whose sudden appearance produces the desired result, it also generates a sense of discomfort among conscientious judicial decision-makers.¹⁴³ Because they must decide cases one at a time, however, most judges cannot articulate a comprehensive policy approach in ad-

142. See note 76 *supra* (citing sources).

143. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1 (1986); Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200 (1984).

vance of their decisions, nor can they trace the normative implications of the policy that they articulate in each decided case. Only legal scholarship is likely to produce a sustained elaboration of social policy approaches, and an exploration of their interaction with existing doctrine.

In addition, judges are increasingly concerned with the empirical basis and the real world effects of their decisions.¹⁴⁴ But they have no systematic way to gather data, or to measure those effects. The principal sources of data that are available to a judge are the facts of the specific case, which must be discerned from amidst the shouted claims of the plaintiff and defendant, and the facts of the reported cases, which some prior judge discerned from similarly tendentious arguments.¹⁴⁵ The principal means of determining the effects of a decision is to receive a petition from one side to enforce or modify its terms. Judges generally cannot commission research on alternative solutions, they cannot conduct experiments concerning their preliminary choices, and they cannot evaluate the impact of their ultimate conclusions.¹⁴⁶ Given the current structure of our judicial system, empirical information of this kind will not be available unless it has appeared in published scholarship.

But the characteristics of standard legal scholarship preclude it from providing judges with these needed forms of normative and empirical assistance. Its unity of discourse produces generalized advice on how the case should be decided, unanchored in either articulated social policy or empirical research. The reactivity of the scholarship tends to generate articles that argue with the court's reasoning in the same speculative and delimited terms the court itself employs, rather than constituting an independent research program. The scholarship's compartmentalization precludes either comprehensive social policy analysis or sustained empirical research, since both require efforts that exceed the limits of a single book or article. Scholarship of this nature is ultimately too dependent on the judicial process to have much influ-

144. See, e.g., D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); J. MONAHAN & L. WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* (1985); M. SAKS & R. VAN DUZEND, *THE USE OF SCIENTIFIC EVIDENCE IN LITIGATION* (1983); Davis, "There is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987).

145. See Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

146. See, e.g., Davis, *Judicial, Legislative and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1 (1986); Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643 (1985). For efforts to do so, see, e.g., D. HOROWITZ, *supra* note 144; C. JOHNSON & B. CANON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* (1984); Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1 (1984).

ence on it. What judges need is not an iteration of their own approach, but assistance in those areas where the demands of that approach have outrun their institutional and conceptual resources.

IV. THE PROSPECTS FOR STANDARD SCHOLARSHIP

If the somewhat shop-worn discourse that legal scholars have borrowed from the judiciary is inadequate for the enterprise in which they are engaged, a new discourse should be developed. Such a discourse is presented below, but not as a pure proposal; rather, it is both a proposal for standard legal scholarship, and a means of continuing the description of that scholarship. As stated, description and critique are symbiotic processes, which cannot proceed without each other. The proposal for a new type of discourse, therefore, is also a description of certain trends within the existing discourse. The point, then, is to identify and clarify those trends, not to imagine a completely different style of scholarship.

Such an approach is necessary for any descriptive and prescriptive analysis of scholarship, at least according to the critique of methodology. No major academic field is monolithic and unchanging; they all contain innumerable contradictions, cross-currents, emerging trends and decaying traditions. This renders any static characterization of the field incomplete, and demands some effort to identify its dynamic features, especially those features that seem to display systematic tendencies for future change.

The converse is that proposals cannot be effective unless they are related to existing trends and tendencies. It is impossible to stand on an Archimedian point and to effect the total, sudden transformation of a scholarly tradition. Rather, change is likely to be incremental. Moreover, in the absence of a major social dislocation, it is most likely to be generated by forces within the tradition itself, through the process of collective self-awareness. The best way to facilitate this process is by identifying and articulating an existing trend, so it becomes more clearly present to the minds of those who have created it. This is likely to amplify the trend, and ultimately increase the chance that it will become a significant or dominant feature of the scholarship.

A. *The Basis of a New Discourse*

The critique of methodology's negative element provides the basis for its affirmative possibilities. This negative element — the attack on positivism — suggests that we abandon the quest for objective reality and definite, unchanging truth, particularly in the human sciences. In-

stead we are required to accept the vision of academic disciplines as practices that generate validity claims on the basis of culturally determined judgments. This represents something of a defeat, because objective truth possesses an undeniable appeal. But in return we acquire a certain collective power over the discourse of our disciplines. We become aware that these disciplines construct our vision of reality, and in doing so, project a system of cultural beliefs that give meaning and order to the subjects that they study. Thus, the rules are no longer dictated to us by external, impersonal verities. We take control, and gain the power to transform our own conceptions of validity, however gradually and painfully, through a process of collective self awareness.

As previously stated,¹⁴⁷ legal scholarship long ago abandoned the formalist ideology that it was discovering objectively true law. This occurred through a process of critique that paralleled the critique of methodology's attack on positivism. In place of formalism, it developed a normatively-based discourse of the sort that the critique of methodology would recommend. But that discourse lacks the quality of self-awareness that lies at the center of the critique's affirmative vision. Instead of acknowledging and elaborating its normative basis, the scholarship has masked it with the vague and diffuse norms of judicial discourse. This disables legal scholarship from achieving the purposes that its own, normatively-based vision has generated.

The greatest impediment in developing a new discourse would appear to be the absence of a unified theory of law. It has long been clear to legal scholars that the hazy neo-formalism of the judiciary is an unsatisfactory basis for normatively-based analysis. The most obvious solution is to clarify the analysis by identifying the norms that serve as the basis of prescription. But doing so would seem to require normative agreement, and such agreement is obviously lacking. The essential nature of the field is an ongoing debate among competing norms. Approaches based upon these norms — critical legal studies, law and economics, progressive liberalism, and a variety of others — are each presented and elaborated by their proponents in an effort to achieve consensus, to persuade those with opposite perspectives. But there is no consensus, and it seems unlikely that there ever will be one.¹⁴⁸

Self-awareness cannot supply a particular consensus; what it does supply is a recognition of the legal scholarship's normative conflict as such, and a validation of this conflict as a practice. By becoming aware of the inherently normative nature of the field, scholars can ac-

147. See text at notes 58-69 *supra*.

148. See Brest, *supra* note 45.

knowledge that there is no consensus, and that lack of consensus itself provides the unified vision that defines the practice. In other words, the conflict of norms is the essence of normatively-based scholarship; this conflict constitutes its meaning, and establishes its significance. The entire point of standard legal scholarship is to explore and contrast the pragmatic implications of conflicting normative positions. Normative agreement, therefore, would not provide a basis for legal scholarship; rather, it would extinguish the field as we know it, and substitute a bland expanse of detail. The fact that such agreement cannot be achieved thus validates the enterprise itself.

Normative conflict not only constitutes the discourse of legal scholarship, but also reflects the field's subject matter. Law, after all, is the mechanism through which society restructures itself, or at least restructures those elements of itself that are subject to collective control. In an open, pluralistic society such as our own, that process involves the contest of differing views, not simply as a result of grim necessity, but as a matter of affirmative belief. We believe that the best way for a society to restructure itself is through an ongoing debate about its goals and strategies. To be relevant to that debate, legal scholarship must advocate and critique all the positions represented within it. If legal scholars, as a group, were to align themselves with one position, they would not only be overlooking important elements of the political process, but would be excluding themselves from the very essence of that process which is its contest of opposing views.

The most promising discourse for standard legal scholarship, therefore, is not the vaguely articulated neo-formalism of the courts, but prescriptive arguments based on consciously acknowledged normative positions. This would emphasize conflict, rather than its resolution, but it is in such conflict, properly defined and channelled, that the meaning of the practice lies. The collective self-awareness that would generate such an approach operates at two levels. First, it enables scholars to perceive the normative grounding of their own individual positions, and to express that grounding with increased clarity. Second, it provides them with a general vision of the field, and an understanding of ongoing, ever-evolving normative interplay that characterizes it.

There is certainly no shortage of normative positions in existing legal literature; in fact, the tendency to identify and rely on such positions has become increasingly prominent in recent years. Law and economics rests on the belief that the purpose of the law is to increase aggregate wealth or to maximize the efficiency of legal mechanisms. Critical legal studies rests on the belief that law should be an instru-

ment for the relatively rapid transformation of society in the direction of social equality, and the growth of community. Other approaches are less clearly identified, but probably would be more congenial to most legal scholars. Liberalism, now almost an imprecation, but nonetheless our dominant political philosophy, generally treats law as a means of securing individual liberty; its progressive version asserts that economic well-being is an essential element of such liberty, to be balanced against freedom from state control. As Donald Gjerdingen points out, there is an emerging body of scholarship that adopts progressive liberalism as its normative basis.¹⁴⁹ More specific normative choices attach an independent value to natural environments, to families, or to legal institutions. And one can champion the coherence of the law itself, as Ronald Dworkin does, thus adopting modified formalism as a consciously recognized norm.¹⁵⁰

Recognition of these different normative positions within the corpus of legal scholarship does not imply that individual scholars should assume an agnostic, bloodless attitude toward their own work. On the contrary, normatively-based scholarship makes sense only if the scholars believe in what they recommend, if they engage in what George Fletcher calls committed argument.¹⁵¹ The fact that validity is ultimately determined through an ongoing contest among alternative views, rather than definitive discovery of objective truth, results from the field's basic character as a practice, not from any unfortunate loss of a unified value system. By becoming aware that validity is determined in this way, scholars should be able to commit themselves more fully to their normative positions. The continuing existence of the debate among alternative norms, and the maintenance of its conflicting strands, gives legal scholarship its meaning; if it ended, the field would be as desiccated and pointless as it would be if no one believed in his or her own arguments. Consequently, scholars can recognize the character of their enterprise as a debate among competing norms, while at the same time remaining fully aware of and committed to the particular norms that they have chosen.

The risk inherent in clear, self-conscious norm definition is not that scholars will stop believing in those norms, but rather that they will

149. Gjerdingen, *supra* note 73, at 422-67. To some extent, Gjerdingen treats the scholarship based on this norm as equivalent to the more general rejection of formalism. As he points out, however, scholarship based on other normative premises, such as critical legal studies, incorporates most of the same methodological elements. In addition, progressive liberalism can certainly make use of other methodologies, such as law and economics.

150. See R. DWORKIN, *supra* note 66, at 151-275. For a more delimited endorsement of doctrinal coherence, see Fiss, *supra* note 65.

151. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970 (1981).

stop believing in the practice of legal scholarship. In other words, the practice might be held together by its ambiguities, and increased clarity might only cause its different subgroups to drift off in opposite directions. But this danger is counteracted by the subject matter of the scholarship. Law involves the organization of society itself; because we have an open, pluralist culture, the way we organize our society will always be subject to normative debate. Such debate comes naturally to us, and is as likely to be integrative as divisive. A scholarly field that deals directly with the themes of this debate will tend to be equally unfazed by its continuation. In fact, the clash of normative positions within the scholarship, since it accurately reflects the field's subject matter, may well produce its own sort of coherence.

B. *The Nature of the Discourse*

This view of legal scholarship can serve as the ground for a new discourse, one that is separate from the discourse of the judiciary. Its first element is the organization of scholarly efforts around clearly stated normative positions. These norms serve as starting points; they can themselves be argued for, of course, but then the basis of those arguments must be stated as well. Once a normative position is identified, a variety of arguments can be grounded on it. These would include purely legal arguments about doctrine or statutory interpretation, but the discourse of those legal arguments would differ from judicial discourse because they begin from a norm, not a judicial decision or the preexisting body of decided law. When judges decide cases by referring to prior cases, they do not state the rationale for doing so; they do not need to, since the rationale comes with the robe. But legal scholarship will only be effective if its arguments, including its legal coherence arguments, are based on clearly stated rationales.

To constitute legal scholarship, the normative positions of the scholar must be translated into legal terms. They must be located in the existing body of law, and explain their points of contact and their points of difference with it. This seems obvious — in fact, legal scholarship currently suffers from an excess of legal language and contextualization, rather than the lack of it. What must be recognized, however, is that the legal language is being used as a means of communicating with legal decision-makers, not as a conceptual framework. The framework comes from the scholarship itself, and must be developed in terms of the scholar's normative position.

The second element of the scholarly discourse which the critique of methodology suggests is the conscious deployment of doctrinal and empirical arguments for the elaboration of the scholar's normative

premises. Doctrinal arguments are already part of legal scholarship, to say the least. The contribution that the critique provides is to increase the scholar's awareness of these arguments as particular discursive strategies. They implement norms, rather than demonstrating or containing them. By viewing doctrinal arguments in this way, scholars can assess the relative value of translating their normative premises into existing doctrine, as opposed to displacing that doctrine through legislative or administrative means.

Secondly, self-awareness allows legal scholars to make more extensive, but more controlled use of empirical data. Data is generally structured by a methodology, that is, a set of rules that determine whether the data support the validity of a particular hypothesis. Although legal scholarship has abandoned its own claims to objectivity, it often makes the positivist assumption that social science methodologies, like economic analysis or sociological surveys, have some autonomous existence, rather than being techniques that are used to support normative or other preempirical judgments in a variety of fields. As a result, there is a tendency to perceive these methodologies, and the data they would generate, as foreign to the practice of legal scholarship. In discussing the effects of a judicial decision, for example, legal scholars tend to opt for speculations that are structured by their own legal discourse, rather than searching for a methodology that can be used to determine these effects on empirical grounds.

When legal scholars do make use of data, they often assume, on similarly positivist grounds, that particular empirical methodologies necessarily lead in predictable directions, rather than providing means of arguing for a variety of normative positions. Economic analysis, for example, is often seen as being linked to a norm of wealth maximization,¹⁵² while textual deconstruction becomes the servant of social transformation norms.¹⁵³ But those who champion wealth maximization need not, and often should not, limit their analysis to economics. For example, economists have been arguing for years that usury laws are inefficient, in part because they restrict the supply of credit to the very people they are intended to protect.¹⁵⁴ The point can be taken as

152. This is true for both those who favor the norm and those who oppose it. See, e.g., Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221 (1980); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); Kennedy, *supra* note 20; Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

153. See, e.g., Dalton, *supra* note 84; Singer, *supra* note 83; Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984); Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984). For the argument that deconstruction does not imply a particular political position, see Balkin, *supra* note 103.

154. See, e.g., Crafton, *An Empirical Test of the Effects of Usury Laws*, 23 J.L. & ECON. 135

established, yet the laws persist. Clearly, the argument could be advanced at this point by a political analysis, which explored the ways to decrease the staying power of these laws. Conversely, microeconomics can readily serve to undercut existing power structures and wealth distribution patterns. The consumer movement arose out of an informal analysis of market failure that could readily be developed along more systematic lines.¹⁵⁵

In general, increased self-awareness could be expected to increase the ability of legal scholars to employ a wider variety of methodologies, and thus to collect and apply empirical data that is now reflexively regarded as irrelevant. The critique of methodology would recommend this approach, as an element of scholarly self-awareness. As previously noted, the critique does not suggest that existing methodologies should be abandoned, but that we become more conscious of them, so that we can use them more effectively, and choose among them with more freedom.

This conscious control of methodology distinguishes the approach suggested here from the law and economics movement. Rather than beginning from a norm and employing a range of methodologies, law and economics scholars begin from a methodology, and sometimes claim that it generates the norm. In fact, these scholars generally have a preexisting normative premise, but they often try to hide it, and then treat that norm as a conclusion that can be derived by means of methodology.¹⁵⁶ The critique of methodology suggests that we think in terms of a normatively-based economic efficiency or wealth maximization movement, rather than a law and economics movement. In doing so, of course, proponents of this movement would be abandoning the effort to prove that their normative premises are the only justifiable basis for legal prescriptions, and also abandoning their aspiration to monopolize economic analysis. The recompense, however, is the ability to make use of other methodologies in the elaboration of their norms, and to jettison their claim to objectivity that alienates their

(1980); High, *Consumer Credit Regulation in Texas — A Rejoinder by an Economist*, 50 TEXAS L. REV. 463 (1972); Shay, *The Impact of State Legal Rate Ceilings Upon Availability and Price of Credit*, in AN ECONOMETRIC ANALYSIS OF CONSUMER CREDIT MARKETS IN THE UNITED STATES (D. Greer & R. Shay eds.) 387 (The National Commission on Consumer Finance, Technical Studies, vol. 4 1974).

155. For some of the leading work that initiated the modern consumer movement, see, e.g., D. CAPLOVITZ, *THE POOR PAY MORE* (1963) (information asymmetry, small scale monopoly); J. MITFORD, *THE AMERICAN WAY OF DEATH* (1963) (same); R. NADER, *UNSAFE AT ANY SPEED* (1965) (information asymmetry).

156. The classic text, along these lines, is R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986). See also Posner, *supra* note 153; Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987).

sympathizers¹⁵⁷ and fools no one at all.¹⁵⁸

A discourse which begins from normative premises, and proceeds by empirical data as well as legal analysis, might be regarded as viewing the legal system from an external perspective, or as relying on the incorporation of other disciplines into legal scholarship.¹⁵⁹ With respect to normative premises, however, the critique of methodology suggests a different perspective, although largely by analogy. The critique's attack on positivism emphasizes that all natural and social sciences are grounded in the preempirical linguistic structures, cultural attitudes and individual perceptions of their human originators.¹⁶⁰ While these preempirical phenomena do not belong to science but underlie it, their existence does not deprive the natural or social sciences of their integrity as academic disciplines. Rather, they make these disciplines possible.¹⁶¹ Similarly, the normative positions on which legal scholarship depends are the prelegal groundings that make possible such scholarship. While these normative positions are generally considered "political," not legal, they are the necessary starting point for any legal analysis, and thus do not reflect a dilution of the field's legal character.

Nor should the more empirical manner in which the analysis is elaborated be regarded as an abandonment of law to other disciplines. Economics, sociology, political science and all the other empirical disciplines that have been appended to the dangling conjunction of "law and" can support legal analysis, but legal scholarship must supply the organizing principles. It must generate its own problems, establish its own categories, identify its own audience, and develop its own validity

157. See, e.g., Leff, *supra* note 20; Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655 (1974).

158. The normative basis of economic analysis has been clearly noted by those who use its methodology, see Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591 (1980); Polinsky, *supra* note 157; those who seem neutral about it, see Cass, *Coping with Life, Law and Markets: A Comment on Posner and the Law-and-Economics Debate*, 67 B.U. L. REV. 73 (1987); Leff, *supra* note 20; and those who reject it, see Kennedy, *supra* note 20; Kelman, *supra* note 20.

159. See Posner, *The Decline of Law as an Autonomous Discipline 1962-1987*, 100 HARV. L. REV. 761 (1987).

160. See note 29 *supra*.

161. It must be emphasized that none of the thinkers identified here as participating in the critique of methodology were idealists. See note 33. All of them, including Heidegger, conceded that natural science, and even social science, are coherent disciplines capable of telling us interesting and useful things about the world. Their claim is that they cannot tell us everything about the world and, in particular, they cannot explain their own assumptions. See, e.g., HABERMAS, KNOWLEDGE, *supra* note 13, at 113-39; HEIDEGGER, BEING AND TIME, *supra* note 9, at 71-76, 244-56; HEIDEGGER, *Modern Science*, *supra* note 9; HUSSERL, EUROPEAN SCIENCES, *supra* note 2, at 103-32; I. A. SCHUTZ, PAPERS *supra* note 3, at 34-47; Taylor, *supra* note 27; Winch, *supra* note 6. See also FOUCAULT, ARCHAEOLOGY, *supra* note 14, at 71-76 (usefulness of human science not explicitly conceded).

claims. There are both pragmatic and theoretical reasons for this. Pragmatically, legal scholars are not trained to be social scientists and do not have the necessary resources available to them in their institutional setting.¹⁶² Both personally and institutionally, they can much more readily apply empirical data to legal problems, once the data is developed. In terms of theory, an independent legal discourse is a prerequisite for effective interdisciplinary efforts. Before legal scholars make use of insights from other disciplines, they must possess principles of selection and adaptation, principles that can only be supplied by their own academic practice. In the absence of such principles, standard scholarship would either limit its use of other disciplines to scattered citations,¹⁶³ or give itself over to those disciplines in a way that precludes its basic project of addressing legal decision-makers. With such principles in place, interdisciplinary work, of the sort that is becoming increasingly common in legal scholarship, creates no real possibility that the discourse of legal scholarship will become nonlegal.

But the critique of methodology suggests another, somewhat deeper sense in which law exists as an independent discipline. For the field's involvement with empirical data, and even its reliance on normative presuppositions, to be regarded as a loss of independence, one must assume that influence is flowing in one particular direction — from other fields toward law. In fact, it often flows the other way. While legal analysis begins from nonlegal normative premises, the elaboration of their implications, through legal analysis, can have an effect upon those premises. Over time, the pragmatic operation of our legal system alters our deepest social norms. The relationship is an interactive one, and the direction of significant effects is not necessarily the same as the internal organization of individual scholarly works.

Similarly, law has a powerful effect on empirical disciplines. One cannot assume from the mere admixture of these fields that legal scholarship is a passive recipient of methodology and wisdom. It is the law, after all, that determines how we employ the knowledge generated by other disciplines. Law determines whether businesses use race to determine creditworthiness,¹⁶⁴ or test-taking ability to deter-

162. Friedman, *supra* note 45, at 774; Posner, *supra* note 81, at 1121-22. In terms of resources, legal scholars generally do not have students who are writing dissertations, their teaching assignments typically involve discussions of doctrine, not empirical investigation, and they have less access to funding sources to support such investigation.

163. See text at notes 34-36 *supra*. Without a methodology, fact gathering becomes a mechanical or incoherent process that has little intellectual appeal. The most notorious case of brute fact gathering is the work of Underhill Moore. See, e.g., Moore & Sussman, *supra* note 60; Moore, Sussman & Corstvet, *supra* note 60. See generally Schlegel, *Underhill Moore*, *supra* note 60.

164. The Equal Credit Opportunity Act 15 U.S.C. § 1691 (1982) prohibits the use of race, or

mine job eligibility,¹⁶⁵ no matter what social scientists claim about the predictive value of these measures. It determines the conclusions that we draw from evolution or from economics, how we use the techniques that they develop, and whether we will invest social resources in the further development of those techniques. The law will decide whether we will find out what happens when sexual psychopaths receive shock therapy, or what effects man-made microbes have when they are sprayed on broccoli. The normative debates of standard legal scholarship, therefore, are more than an application of the critique of methodology. They are the critique itself, the very process of collective moral inquiry that it urges society to institute. When law adopts the perspectives or methodologies of another discipline, therefore, it is not simply attaching itself to a superior and predetermined system. It is evaluating that system, testing its techniques to see whether they are socially acceptable or relevant. In the final analysis, the future of the empirical disciplines will be determined by such preempirical normative determinations, perhaps more decisively than it is determined by the validity claims that these disciplines generate within their discourses.

C. *The Effectiveness of the Discourse*

A legal discourse that begins from normative premises and is elaborated through consciously deployed empirical and doctrinal argument is likely to be more effective in achieving the self-defined goal of legal scholars, that is, to speak to public decision-makers in a persuasive manner. For legislators and administrative rulemakers, a discourse of this nature would be directly relevant, at least to the extent that they are engaged in the pursuit of public policy. Public policy, after all, is the application of normative choices to the practical problems of government, and elaboration of normative premises through legal analysis and empirical data is precisely such a process. Legislative and administrative decision-makers need to know how to express their policies in legal terms, and to integrate them into the remaining legal context that they have no desire to disrupt. They also

proxies for race (such as home zip code) as criteria for creditworthiness determinations. These factors, as developed and measured by the social science of statistical analysis, have high predictive value, but we have made a normative decision that they may not be used.

165. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982), prohibits discrimination in employment. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court held unanimously that professionally prepared aptitude tests could not be used when they have discriminatory effects. The predictive value of these tests is open to question, *see, e.g.*, S. GOULD, *THE MISMEASURE OF MAN* (1981), but the decision indicates that they will be judged in terms of legally operative norms, whatever social scientists say about their quality.

need to know the pragmatic choices for implementing these policies, and the real world effects of each choice on both the legal system and the world at large.¹⁶⁶ Of course legislators and administrators also act on the basis of strategic considerations unrelated to their sense of public policy. Scholars can describe this behavior, but that is generally not the mission that legal academics identify for themselves. Rather they take a prescriptive stance, which is necessarily addressed to some particular decision-maker. To the extent that they do so, it is the public policy-oriented behavior of that decision-maker to which the scholar is appealing.

The fit is less precise for judicial decision-makers, but it remains superior to the unity of discourse of existing scholarship. It is true that judges tend to begin their analysis from authoritative legal texts, rather than independently articulated normative premises. But the difficult part of their role is the modification of textually derived doctrine, not the application of that doctrine. Scholarship based on clearly stated, normative premises speaks directly to the process of modification. It provides arguments and data in those areas where judges will be receptive to scholarly recommendations, rather than reciting the analysis that judges can carry out perfectly well — at least in their view — by themselves.

Moreover, judicial decision-makers themselves may be developing a style that relies on identified normative positions and empirical elaboration. Philippe Nonet and Philip Selznick perceive such a development in the movement from “autonomous” to “responsive” law.¹⁶⁷ In their view, responsive law represents “a decline of artificial reason, a convergence of legal and policy analysis”¹⁶⁸ as judges replace their ideal of impartial fairness with principles for analyzing the “characteristic institutional problems that are associated with carrying out different kinds of mandates.”¹⁶⁹ To the extent that this process occurs, the fit between normatively-based legal scholarship and judicial decision-making would become much closer.

The value of normative clarity, however, does not depend on the

166. Of course, this is an ideal, probably one that cannot be approached in most circumstances. However, less optimistic accounts of the policy process move in the same direction. See H. SIMON, *supra* note 138; J. MARCH & H. SIMON, *ORGANIZATIONS* (1958) (limits on number of options and amount of available information, leading to “satisficing” or finding merely satisfactory alternatives rather than optimal ones); Lindblom, *supra* note 138 (norms and information usable only for incremental decisionmaking).

167. P. NONET & P. SELZNICK, *LAW AND SOCIETY IN TRANSITION* (1978).

168. *Id.* at 110.

169. *Id.* at 111. Nonet and Selznick describe this process as a movement from “fairness to competence.” *Id.* at 104-13. They see the evolving, although not necessarily inevitable concept of law as less formal, more purposive and more interdisciplinary.

willingness of public decision-makers to begin from normative premises themselves, either when initially formulating policy, or as a means of modifying doctrine. Public decision-makers often muddle through, acting by an intuitive process in which policies are chosen on the basis of their real world elaborations.¹⁷⁰ They may genuinely not know whether they favor economic efficiency or social equity, because those choices are too abstract for their decision-making framework. Instead, they may prefer to choose among elaborations, to evaluate policy on the basis of its effect upon small towns, or consumers, or legal doctrine. One can always regard these views as norms of their own, but it is usually impossible to construct a normative system from them. They are intuitions or emotional reactions, and while it is easy to be scornful of their logic, it would be unwise to dismiss their practical significance.

To the extent that these choices are nonstrategic — and they often are — normatively-based legal scholarship is fully relevant to them as well. We often choose our norms on the basis of their implications; in fact, a large part of the debate about public policy consists of comparing the elaborated versions of those policies, in an intuitive or emotive framework. Legal scholarship that develops these elaborations also speaks directly to this decision-making context. It cannot exercise direct control of our collective intuition, but it can explain the nature and limits of the choices that are based upon those intuitions. Once we see what economic efficiency, for example, means for consumers or the environment, we may be in a better position to decide whether we want it or not. If we decide that we do not, particularly if we once thought we did, that decision is likely to generate a process of defining new norms, with different implications. Normatively-based legal scholarship can participate in this process of evaluating and redefining basic policy choices. It is here that the concept of law as practical judgment plays a role, by suggesting that legal decision-makers can make use of the conclusions reached by legal scholars without retracing the more systematic steps by which these conclusions were reached. Without clearly stated premises, however, the scholarship simply swirls around in the intuitionist melange. It fails to fulfill its unique role in demonstrating how practical effects are linked to policy choices, how those effects relate to each other, or how general policies can be constructed from them.

The articulation of norms, and their legal and empirical elaboration, also serves to control the dysfunctional aspects of legal scholar-

170. Lindblom, *supra* note 138, Farber & Frickey, *Practical Reason*, *supra* note 122, at 1643-47.

ship that have resulted from the unity of discourse. To begin with, this approach is likely to reduce the compartmentalization of legal scholarship. Once the underlying assumptions of scholarly works are explicitly stated, and once that process has continued long enough for a reasonably consistent vocabulary to emerge, analysis stemming from each major type of normative assumption will tend to constitute a cumulative tradition. This is not the universal cumulation of the sort that occurs in natural science, but rather the sort of divided cumulation along parallel paths that characterizes social science. Both law and economics and critical legal studies, being the most conscious of their normative basis, already exhibit a certain tendency toward cumulation. For normative systems that lie closer to mainstream liberal thought, the effect has been considerably weaker, presumably because the norms in question are so easily relied upon without explicit articulation.

The explicit statement of normative assumptions would also facilitate cumulation in a manner more directly linked to the cumulation of the natural sciences. As stated above, normative premises provide a means of organizing empirical data. They do not dictate a specific methodology, but they establish criteria by which methodologies can be selected. Given such an organizing principle, data collection is an inherently cumulative activity. The normative premise provides a set of issues to be resolved or hypotheses to be proved, and the methodologies employed supply a standard for verification or falsification by empirical evidence. In effect, the premise and its attendant methodologies becomes a means of structuring the world, and interpreting its otherwise aleatory phenomena. The data generally will not cumulate across normative boundaries, in the manner that natural science data developed in one field can be adopted by another, but within a given boundary, the enterprise will generally progress.

A normatively explicit approach to standard legal scholarship would also entail a major decrease in the field's reactivity. The characteristic most immediately derived from the unity of discourse between judges and scholars, reactivity means that judges, and to a lesser extent legislators, establish the agenda for academic investigation. But a scholarship which explores the implications of specified normative assumptions through consciously selected methodologies will necessarily set its own agenda. It will define a set of issues, and specify the legal analyses and empirical data that will confirm or disconfirm its hypotheses about those issues, rather than lying in wait for events that allow the theory's further elaboration. Thus a norm provides a way of structuring reality, and can be elaborated by observations or analyses that

are structured by the norm itself. Hence, it generates a research program that speaks directly to the concerns of legislators and administrators, while providing judges with needed perspectives and information for modifying legal doctrine.

Of course, the reactive quality of legal scholarship will never be entirely abandoned. As long as judges can transfer millions of dollars, or give orders to people with guns, the temptation for scholars to debate or analyze their statements will be irresistible. Conceivably, however, such topical colloquy will be seen as a subsidiary mode of scholarship, and the consistent exploration of normative premises will replace it as the dominant mode of discourse. While legal scholarship would continue to relate its findings to current legislation or court decisions, it would set its agenda for research internally, rather than reacting to external events.

V. CONCLUSION

Despite its current malaise, legal scholarship is not really in such a parlous state as many of its practitioners believe. In response to the decline of formalism, it has developed a new voice, an essentially prescriptive approach that acknowledges its normative basis. Contemporary legal scholars are now generally aware that their work consists of recommendations addressed to legal decision-makers, recommendations that are ultimately derived from value judgments rather than objective truth. In this sense, they have already arrived at the general conclusion that contemporary philosophy suggests for other fields.

The great defect in legal scholarship is that scholars tend to speak the way judges do, that they have adopted a unified discourse with their subject matter. This prevents them from addressing the legal decision-makers, specifically legislators and administrators, who are in fact more important in the modern state. In addition, it prevents them from developing a distinctive voice, and an independent research agenda, that would constitute a more relevant contribution, even for the judiciary. What the contemporary critique of methodology can contribute, therefore, is not an attack on positivism, but a heightened sense of self-awareness. By becoming more conscious of the nature of their discourse, legal scholars can continue the process of developing an autonomous scholarly tradition. It is this process, rather than the critical legal studies, law and literature, or law as practical reason movements, that represents the real message of modern philosophy for legal scholarship.

The scholarly discourse which this philosophy suggests is one that begins from clearly articulated norms. The purpose of the scholarship

is not to disprove everyone else's norms, but to elaborate the implications of one's own. These elaborations are both legal and empirical; they employ a range of methodologies to translate the norm into a legal context, and to generate or organize empirical data. The elaboration process has cumulative properties, although only within the ambit of the chosen norm. At the same time, it constitutes a research agenda; topics are generated by the interaction of the norms with general social trends, rather than by yesterday's statute or decision. In this way, legal scholars can develop a discourse that speaks effectively to modern decision-makers, and thus fulfills the purpose that the field has created for itself.