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Paul Horwitz

*University of Alabama - School of Law*, [phorwitz@law.ua.edu](mailto:phorwitz@law.ua.edu)

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# INSTITUTIONAL PLURALISM AND THE (HOPED-FOR) EFFECTS OF CANDOR AND INTEGRITY IN LEGAL SCHOLARSHIP

PAUL HORWITZ\*

My contribution to this discussion of the ethics of legal scholarship begins with a confession that complicates my treatment of these questions. It is a lengthy confession and may appear to be a digression. But it seems to me both a necessary context for the rather simple recommendations I ultimately make here, and a potentially useful contribution to this conversation in itself.

I am an institutional pluralist, both between and within institutions.<sup>1</sup> Different institutions—churches, “the press,” religious institutions, and others, including universities—have different functions, norms, and traditions. They fill different roles in the architecture of civil society. They draw on different purposes; make use of different forms of expertise and training; and add in different ways to public discourse and social structure. Each contributes to a healthy, vibrant civil society. They may even aid in working toward whatever it is that we call “justice.” But they do so in different ways. Each institution contributes best by serving its own particular calling, not by trying to do everything. Universities do not exist to save souls; the information the press provides, and the means it uses to obtain it, are quite different from the kind of information provided by the academy and the means used to seek knowledge within that institution.

These institutions and their practices are not fixed. They change and adapt in response to both internal and external developments, including changes in both other institutions and the larger society. Members of these institutions hold internal debates about their norms and practices and their proper function. Some of their roles, norms, and practices may change dramatically over time, albeit in a way that is influenced by their particular histories and traditions. Other aspects of these institutions may be treated as part of the unchanging core of what it *means* to be a particular institution.

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\* Gordon Rosen Professor, University of Alabama School of Law. I thank the editors of the *Marquette Law Review* for their hard work and patience and for their efforts in putting on this Symposium. I am especially grateful to Chad Oldfather and Carissa Byrne Hessick, the prime movers behind this Symposium.

1. See generally PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013).

Two related conditions ought to be true of this process of change. First, these changes should belong primarily to the institutions themselves, drawing on their own norms, practices, traditions, and current debates.<sup>2</sup> Of course the press (for example) is not immune from market forces, social changes, the effects of technological change, and so on.<sup>3</sup> But changes in institutional practices and functions should come primarily as a result of considered internal debate, not dictation from external authorities.

Second, these institutions need not—almost certainly *should* not—serve as exact replicas of general social institutions and liberal democratic norms. They should resist the “logic of congruence,” the insistence that “the internal life and organization of associations [should] mirror liberal democratic principles and practices.”<sup>4</sup> Every citizen has an equal right to speak in a liberal democratic society, and both the liberty and equality inherent in this right rest in part on the

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2. See Gail J. Hupper, *Educational Ambivalence: The Rise of a Foreign-Student Doctorate in Law*, 49 NEW ENG. L. REV. 319, 319 (2015) (citing *Yale Law School Introduces Innovative New Program—Ph.D. in Law*, YALE L. SCH. (July 11, 2012), <https://law.yale.edu/yls-today/news/yale-law-school-introduces-innovative-new-program-phd-law> [<https://perma.cc/SRB5-EZPS>]). This suggests that institutions and their members ought to have some sense of their own history and traditions. This is not always true, to say the least. Institutions and their members, like the rest of society, seem to display an increasing ignorance of, or indifference toward, their own history, a lack of sound training and inculcation in their particular practices, and either ignorance of, or a positive contempt for, institutional tradition. This is certainly true in legal education. Some of that has to do with general developments that apply to various institutions. Some of it is specific to legal education. Law schools (Yale notwithstanding) train lawyers, not law professors, and are often focused on practical learning rather than conscious inculcation of their students in a tradition as such. And, at least until recently, there was no guarantee that potential law professors would be steeped in any kind of legal academic tradition or canon. Law professors went from law school to clerkship to a smidgeon of practice to teaching, with perhaps an LL.M. in a particular subject. They were not required to read the legal and legal scholarly canon, to the extent that one exists, in its entirety, as graduate students in other fields in the humanities and social sciences generally do. It is true that more law professors today emerge from fellowships and graduate programs, at least some of which promise to “give students a broad foundation in the canon of legal scholarship.” *Id.* For a general description of Yale’s doctorate in law, see *Ph.D. Program*, YALE L. SCH., <https://law.yale.edu/studying-law-yale/degree-programs/graduate-programs/phd-program> [<https://perma.cc/W2TB-P5JY>] (last visited Jan. 26, 2018). But doctoral programs in law, even if they actually deliver on such promises, are rare, and fellowships vary greatly in nature. I have not found much evidence that fledgling law professors emerging from fellowship programs are much steeped in a legal scholarly canon or legal tradition *qua* American law professors, aside (perhaps) from having read some of the key texts in their own specialized area of work. It is difficult to respect a tradition of which one is only vaguely aware.

3. See generally, e.g., FRANKLIN FOER, *WORLD WITHOUT MIND: THE EXISTENTIAL THREAT OF BIG TECH* (2017) (discussing changes in institutional journalism and the forces that helped bring them about).

4. NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 36 (1998).

notion that everyone is capable of contributing usefully to public discourse and equally entitled to do so. In law, this view is reflected in, among other things, the general First Amendment doctrine holding that government cannot regulate speech in a way that discriminates on the basis of the identity of the speaker or the content of the speech.<sup>5</sup> In our culture, as Michael Kagan has recently suggested, an emblem for this is Norman Rockwell's poster *Freedom of Speech*, in which "a slightly ruffled man in working class clothing—he literally wears a blue collar—stands to speak at a crowded public meeting," while "an older, gray-haired man in a black suit and tie looks up intently to listen."<sup>6</sup> Whatever their differences in education, class, or other matters—and we would certainly today insert other differences, such as race and gender—they are "both alike in dignity"<sup>7</sup> and equally valued for their contribution to democratic discussion.

It is common today to believe that "because we live in a democratic [and egalitarian] society, the institution[s] we inhabit should embody democratic [and egalitarian] principles."<sup>8</sup> Common, but wrong. It is *certainly* wrong about the academy, which is a non-democratic, non-egalitarian institution. Students do not (and should not) enjoy equal status with professors. Professors themselves must prove their expertise and worth in order to be hired, to be promoted, and to earn prominence in their field.<sup>9</sup> A doctorate in astronomy is only the beginning of the ability to call yourself an academic astronomer; now more than ever, a doctorate certainly will not lead inevitably to a position in the academy. And that position is itself limited in scope: academic astronomers do not get a vote about who gets to become an academic sociologist.<sup>10</sup>

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5. See, e.g., *L.A. Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 47 n.4 (1999) (Stevens, J., dissenting) ("Our cases have repeatedly frowned on regulations that discriminate based on the content of the speech or the identity of the speaker.").

6. Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 769 (2015).

7. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act I, prologue.

8. STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* 110 (2008) (describing but not endorsing this view).

9. Of course, there is such a thing as unearned prominence. In the short run, at least, and probably the long run too, academics—especially legal academics—often judge by professional credentials rather than intellectual worth, or at least pay disproportionate attention to the former.

10. The same is true of other institutions. A religious body may be egalitarian *by choice*, although even those bodies are rarely democratic: a church that follows the principle of *sola scriptura* may believe that each person is obligated to read and limn the Bible for him or herself, but it does not necessarily believe each reading is equally legitimate, or put the meaning of disputed Bible passages up for majority vote. And in hierarchical churches, the laity do not have the same right to interpret and declare doctrine as the leadership, which itself is not necessarily selected by democratic or egalitarian means. The laity and leadership of such a church can certainly contend over whether to change this norm, but this is strictly a matter of internal debate. The law has no business dictating that hierarchical

So, at the broad level, institutions—some institutions, at least, and especially those, like universities, that fulfill valuable and *particular* social functions and operate according to long (if changing) tradition, norms, and practices—are varied and valuable. Whether they would agree with this expressly or not, many members of such institutions, and members of the broader public, would have little trouble with this proposition. More controversially, perhaps, I believe there is also room for pluralism *within* institutions: that is, that there is room for a diversity of values and approaches within particular institutions such as universities or the press. Not all newspapers or magazines cover the same subjects in the same way, or have an identical sense of mission. They may agree on certain fundamental norms or practices, such as not plagiarizing, or ensuring that sources are quoted accurately. Beyond such general commonplace norms, however, they vary greatly. By saying there is room for such intra-institutional pluralism, however, I am going a step beyond simply recognizing the *fact* of such differences. I believe this intra-institutional pluralism is a good thing.<sup>11</sup>

Within the legal academy, the usual focus of arguments on this subject is the role of religiously affiliated law schools.<sup>12</sup> That focus artificially limits and distorts the discussion. Other law schools focus on other specific missions as well: serving and advancing particular populations such as African-Americans, emphasizing particular fields (such as environmental law) or methodologies (such as law and economics), concentrating on training lawyers for a particular region (the many state schools—although this is truer in theory than in practice), or emphasizing particular goals and ideologies such as “social justice.”<sup>13</sup> These different projects, focuses, and functions suggest different

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churches become Congregationalist entities, let alone liberal democratic ones, any more than it has the right to tell *The New York Times* to get rid of its executive editor and become “an autonomous collective” in which various staffers “take . . . turns to . . . act as a sort of executive-officer-for-the-week.” See *Monty Python and the Holy Grail* (Python Pictures 1974).

11. Cf. Paul Horwitz, *Positive Pluralism Now*, 84 U. CHI. L. REV. 999, 1016–17 (2017) (reviewing JOHN D. INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* (2016)) [hereinafter Horwitz, *Positive Pluralism*] (arguing generally that pluralism is a good in itself, not simply a sociological fact); Paul Horwitz, *Against Martyrdom: A Liberal Argument for Accommodation of Religion*, 91 NOTRE DAME L. REV. 1301, 1302–05 (2016) (writing to similar effect).

12. See, e.g., *AALS Symposium on Institutional Pluralism: The Role of Religiously Affiliated Law Schools*, 59 J. LEGAL EDUC. 125 (2009). The subtitle in this example is hardly incidental.

13. See, e.g., Gwynne Skinner, *A Clinical Model for Bringing International Human Rights Home: Human Rights Reporting on Conditions of Immigrant Detention*, 7 SEATTLE J. FOR SOC. JUST. 649, 651 (2009) (describing “the arena of equal justice and social justice advocacy” as “central to the mission of Seattle University School of Law”).

ways of approaching the “academic” mission: different practices, norms, and rules.

It is certainly possible to argue that some of these are simply not proper “academic” missions, and that whether these institutions are good or bad, to the extent that they pursue these goals they are not truly academic institutions. They may be condemned outright, or they may be judged by a different set of standards: by religious standards, for example, or social justice standards, but not conventional academic standards. But, on this view, they should not be treated as genuine academic institutions as such. I confess, albeit with some ambivalence, that this is not my own preference. Part of the internal debate and slow change or evolution of institutions at the broad level, such as the press or universities, involves different practices and views held and practiced by different individual entities, such as individual newspapers or law schools. These are serious debates and practices about what it means to do academic work. I do not think it is enough, or always accurate, to simply call some of these views “non-academic.” “[C]ultivating differences” may be “a better thing for legal education” than forcing them into a narrow box.<sup>14</sup> With more than 200 law schools in the United States, there is room for that kind of diversity or pluralism within the legal academy as an institution.

The problem with this sort of institutional pluralism—and not the only one, although I continue to avow it—is that it makes judgment and prescription on questions of the ethics of legal scholarship difficult if not impossible. At the least, it renders such judgments “problematic,” to use the popular lingo of the day. How is an ethics of legal scholarship possible if one believes the legal academy can be many things? How can anything be forbidden if everything is permitted?

I have two answers to this question. Each may dissatisfy in its own way, although I worry about the first kind of dissatisfaction and rather enjoy the discomfiture that might result from the second answer.

The first is potentially unstable but not necessarily paradoxical. Institutional pluralism is neither pure relativism nor indifference to the forms that institutional practices take. More than one set of institutional practices or norms may fit under the general umbrella of a particular institution, and some degree of humility and deference is required when evaluating those potential paths. One might acknowledge that a newspaper or church or university might take an approach that one does not favor oneself, but retain a sense of the limits of one’s own vision and withhold hasty judgment about it. But it doesn’t

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14. John Garvey, *Introduction*, 59 J. LEGAL EDUC. 125, 127 (2009).

require one to believe that *every* practice or norm properly belongs under that umbrella—that *everything* is permitted.

The limits I am interested in here, however broad or imperfectly understood, are *internal* institutional limits.<sup>15</sup> One may believe that journalism is a sufficiently diverse institution to permit both openly partisan news organs and others that attempt to remain above or outside the political fray and to report as disinterestedly as possible, while believing that *any* kind of magazine or newspaper that deliberately lies or buries inconvenient facts is not engaged in “journalism,” but a different practice altogether, such as propaganda. One can recognize that institutions change over time and that their practices are subject to contestation, and acknowledge the difficulties of fixing the point at which a practice or norm is unacceptable, while doing one’s best to derive from those institutions’ practices, norms, traditions, history, and development, *some* basis for, and sense of, the outer boundaries.

To that extent, one can believe in pluralism within institutions while still believing that some practices fall outside even capacious boundaries, and that there is *some* common ground for all members of that institution. An institutional ethics can be built on that ground. I suspect it *is* built on that ground all the time. Legal academics take a variety of approaches to scholarship, but not an endless variety, and nearly all of them agree that some practices are unethical. And many or most legal academics, whether they would put the point in ethical terms or not, show a fair amount of dissatisfaction with many current practices—including some that they engage in themselves. Hence, this Symposium itself. The number of legal academics who express a sense that something has gone wrong with the enterprise and that various practices—puffery, exaggerated claims of “novelty,” failure to give due attention to counter-arguments, abuse of history or precedent, and others—is substantial. And it includes within its ranks legal academics who hold widely

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15. Although they are not my focus, there are also potential *external* limits to institutional pluralism. These are Holmes’s “can’t helps”—our “deepest values . . . [that] live below thought and provide warrants for action even when we cannot give those values a compelling or perhaps any rational justification.” Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 447 (1992) (quoting Letter of Oliver Wendell Holmes, Jr., to Harold J. Laski (Jan. 11, 1929), in MARK DEWOLFE HOWE, 2 HOLMES-LASKI LETTERS 1124 (2d ed. 1953)). One might insist, for example, that child sacrifice is an unacceptable practice for religious institutions. One must be wary, however, of equating such moral “can’t helps” with normative conclusions about the nature and practices of *institutions* as such. One can believe that a church cannot be allowed to practice child sacrifice without drawing any conclusions about whether such a church is still properly described as a church. A law school that practiced child sacrifice, however, would be departing from both our external, moral commitments and any reasonable understanding of the current or historical institutional practices of the legal academy (at least so far as I am aware).

varied—in other words, *plural*—positions about the purpose and functions of the legal academy: those who favor normative work and those who deplore it, those who see legal scholarship as a form of legal and political advocacy and those who strongly disagree with that view, and many others.

Moreover—and this is my second, perhaps more discomfiting answer to the question whether it is possible to believe in an ethics of legal scholarship despite being an institutional pluralist—belief in intra-institutional pluralism does not preclude taking one’s own stand on preferable institutional norms, practices, and traditions. It does not prevent one from taking normative positions on the *ethics* of legal scholarship, in short. This too may be a difficult position to occupy stably and confidently, but it’s hardly impossible. My belief that there is more than one way for a law school or a legal scholar to function does not stop me from holding my *own* professional beliefs about better or worse, and more or less ethical, ways to function as a legal scholar.

Put more strongly, despite my general belief in institutional pluralism, I remain *compelled* to argue for particular norms, practices, and approaches and against others. I think there are indeed proper professional and ethical practices for legal academics, both in the classroom and in teaching and service. Every day I read law review articles and abstracts—or read the abstracts and throw away the articles themselves, more in anger than in sorrow—that seem very different indeed from my sense of what those practices and norms should be. I react similarly to many of the extra-academic writings by law professors that I encounter: the op-eds and pieces in *Slate* or *The Atlantic*, the tweets<sup>16</sup> and other social-media writings. These writings routinely trade on the ostensible expertise, authority, and title of the writer while far exceeding the author’s actual expertise. They display little of the care, nuance, and awareness of counter-arguments that characterize academically responsible work, even to the extent that the different length and format of these writings might easily permit. I see intelligent and talented people with legal academic positions doing what I think they should not do, and what I think *they* think (or *know*) they should not do either. I have views and take public stands on these matters.

Despite other areas of disagreement, my own view is similar to that of another contributor to this Symposium, Stanley Fish. Academics—including legal academics—should do their own jobs. That job is to do the work of an academic: not a social engineer, a party apparatchik, a paid or unpaid “amicus” to some petitioner or respondent, or an enlisted soldier in the culture wars. (Doing one’s academic work properly and with scholarly integrity *is* a form of

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16. I believe the proper word is “tweets,” not “twits,” but I much prefer and insist on my alternate version, which is more descriptively accurate. I write this despite having and using a Twitter account myself, for which I am heartily sorry.



service in the culture wars, however. Among other things, in hewing closely and truly to one's narrow professional obligations, one builds institutional islands in which time and discourse proceed at a different pace and in a different way: an other-directed way, touched but not subsumed by the clash of ignorant armies, driven deeply by ostensibly urgent and *present-oriented* social and political concerns, that takes place outside those institutions.) The job is not to seek justice or righteousness, but understanding, clarity, and the advancement of knowledge. Ours is the job of "academicizing": "[T]o detach [a topic] from the context of its real world urgency, where there is a vote to be taken or an agenda to be embraced, and insert it into a context of academic urgency, where there is an account to be offered or an analysis to be performed."<sup>17</sup>

How does one reconcile this with a sense of pluralism *within* institutions, a sense that there is more than one path or set of practices even within a single institution, like universities or law schools? "Uneasily and unstably," would be one short and blunt answer. "Falsely" or "impossibly" would be another, as blunt but more accusatory. On this view, to not only practice and avow a particular set of institutional practices, but argue for them and criticize others, is to take sides in the contest of academic visions. In the end, all that talk of "institutional pluralism" is just hawking or denial. The first answer I think is unquestionably true, and I cannot deny that the second one *may* in the end be true as well.

My own sense of the matter is different. That difference matters at a day-to-day or year-to-year level, although I reserve judgment about whether it *ultimately* distinguishes it from simply taking sides. Part of the difference has to do with humility, or perhaps mere uncertainty, and with a sense of the *possibility* of valid alternative paths and practices. Arguments about the impossibility of setting absolute borders around the "academic," or about the permeability of those borders and the inevitability of politics, do not impress me much. There is surely a difference between acknowledging these difficulties and viewing them as an excuse, or license, not to act as an ethical academic professional.<sup>18</sup> Nor do arguments about the urgency of the present moment, which are more or less literally all the rage these days: what used to

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17. FISH, *supra* note 8, at 27.

18. Cf. ALBERT CAMUS, *The Absurd Man*, in *THE MYTH OF SISYPHUS AND OTHER ESSAYS* 66, 67 (First Vintage International ed., Vintage International 1991) (1955) ("'Everything is permitted' does not mean that nothing is forbidden."). We are, in this Article and within our own institution of legal academia, at least one step removed from the philosophical, ethical, and existential complexities of such a proposition. Within institutions, including the legal academy, and despite the wide variety of views about what constitutes the function of a legal academic, we do not think *everything* is permitted. At least in practice, even those who believe that it is difficult to define with precision the borders of what is permitted or forbidden within academic work still believe that some things *are* forbidden.

be called the *argumentum ad Hitlerum* and today might be called the *argumentum ad Trumpum*.

But someone who thinks that a single institution, such as the press or the university, can (at least up to a point) contain under its umbrella more than one vision, more than one set of practices and norms, will be reluctant to reach a final and definitive judgment that there is *one* right way for academics to act. He may insist on borders and limits, but he will resist the urge to make them too detailed or confining. Rather than reject those alternative visions and practices immediately and entirely, he may be interested in learning more about them, examining how they function, asking whether they have a place in the university, and wondering what ethics such practices might demand. He may learn from some of these positions and even accept some of them. He may also, to be sure, end up rejecting them, in whole or in part.

Moreover, the institutional pluralist's vision of certain vital institutions is that they are profoundly important but not unchanging—that they *have*, in fact, changed and developed (not “evolved,” at least insofar as that vastly overused word suggests a Whiggish notion of progress) repeatedly over the centuries. Awareness of that fact will place him *somewhat*, although certainly not entirely, outside the fray. It will lead him to academicize even his notion of the academy itself. This vision need not lead him to conclude that everything is permitted and nothing forbidden. Institutional change is always as much a function of a larger process of history and tradition as it is of contemporary contestation. Whatever external factors and urgencies—political, cultural, economic, and so on—affect the process and the debate, the process also draws on decades or centuries of *internal* norms, traditions, and arguments.

One may conclude that there are core functions beyond which some practices simply do not belong within a particular institution, such as the academy. For that institution, some practices must be counted as unethical, unprofessional, or simply wrong. But awareness that the institution and its norms and practices are part of a process of change over time may make the institutional pluralist leery of being too prescriptive too soon, or too broad in those prescriptions. Institutionalists, and academics, operate in the present and participate in its struggles, as they must. But they also operate—or should—on a different and much longer time scale. The institutional pluralist's sense of internal debates over norms and practices will have a touch of “Zhou Enlai time”<sup>19</sup> to it. I firmly believe that certain practices and norms are wrong for the

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19. See Paul Horwitz, *Freedom of the Church Without Romance*, 21 J. CONTEMP. LEGAL ISSUES 59, 128 n.390 (2013) (discussing and noting the provenance of Chinese premier Zhou Enlai's possibly apocryphal response to a question posed to him in 1972 about the effects of the French Revolution; Zhou said it was “too early to say”).

legal academy: that academicizing is our job, not pressing—in our capacity as academics, at least—for social or political change in a way that risks putting scholarship second, or writing with a political or ideological goal in mind. But I also think it is too early to tell for sure.

The result of this belief in institutional pluralism need not be that one withdraws altogether from disputes over these questions, any more than pluralistic views about the relationship between equality and religious liberty require one to disclaim *any* position on, say, the equal dignity of LGBTQ individuals or the moral or legal rightness of same-sex marriage. On my blog and elsewhere, I have identified and criticized practices by other legal academics that I believe are worthy of criticism. Nor, certainly, does my belief in institutional pluralism liberate me to violate my *own* sense of what constitutes ethical legal scholarship, on the grounds that I might be wrong in those views. I continue to try—imperfectly, to be sure—to research and write in accordance with what I believe is the proper function of legal scholarship and the responsibilities, obligations, and constraints that go along with it. In short, notwithstanding my belief that there are different possible practices and views concerning how to do legal scholarship, I attempt (again, imperfectly) to follow and advocate for what I think is the right way of doing things.

But my belief in institutional pluralism does affect my sense of the *goal* of advocating for a particular vision of sound legal scholarship. In the case of pluralism's relationship to debates over LGBTQ equality and religious liberty, and to culture-war issues more generally, I have written that while it is difficult to describe why pluralism is a good in itself, as opposed to "a mere 'claim of descriptive sociology' to be managed,"<sup>20</sup> there is a difference between treating some value (like liberty, or equality) as *the* master value, and thus treating pluralism as something to be accommodated only after the fact and only insofar as it is consistent with that master value, and "an approach that starts with pluralism as a positive feature of our society and treats liberty or equality as factors to be weighed and considered as means of helping pluralism itself flourish."<sup>21</sup> Something similar can be said about intra-institutional debates about what the university (or the press, or some other institution) is for, and how it should function.

The difference can be felt in the heat and fierceness of our current cultural and political debates, the assurance with which they are pursued, and the eagerness of some of the disputants to insist, through the logic of congruence,

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20. Hortwitz, *Positive Pluralism*, *supra* note 11, at 1017 (citing JACOB T. LEVY, RATIONALISM, PLURALISM, AND FREEDOM 27 (2015)).

21. *Id.*

that their position not only win the public debate but that such victories be irreversibly entrenched through law, including constitutional law. They insist on total, permanent victory. Similarly, whatever their actual goals or purposes, conservative legislators and others who have pushed for an “Academic Bill of Rights,”<sup>22</sup> or laws ensuring political diversity in faculty hiring,<sup>23</sup> or other rules for the university, are not just arguing for a particular vision of academic ethics—one with which, on a number of points, I am fairly sympathetic. They also insist that this vision be entrenched, and competing visions extirpated from the university. I feel compelled both to practice and to argue for what I think is the proper function of the university and of (legal) academic ethics. Because I begin from a vision of institutional pluralism, however, and because I think there is a fair amount of room for the contestation of competing visions of the university, I feel no compulsion to press urgently for *total* victory for my own vision—even if I think it’s the right vision.

I am more than willing to argue firmly for what I think is the right approach and against other approaches. If the vast majority of my colleagues in the legal academy adopted a different vision of legal scholarship or other legal academic rules and practices, or treated certain practices—puffery about the “novelty” of a law review article, for example—as a good thing or at least as no big deal, I would continue to argue against them and do my best to deny them a final victory. But my interest is in preventing *their* final victory, not ensuring my own.

This cautious approach is not absolute. Some practices might be so far from what I think of as the core of the academic institution properly understood that I would fight without hesitation to cast them, and their practitioners, out of the academy. In his book on academic freedom, Fish tells the story of Denis Rancourt, officially a physics professor at the University of Ottawa but really a political activist, who was ultimately removed from his job and prevented from teaching because he engaged in “what he call[ed] ‘academic squatting’—turning a course with an advertised subject matter and syllabus into a workshop

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22. See, e.g., Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1551–53 (2007).

23. See, e.g., William Petroski & Brianne Pfannenstiel, *Political Diversity Among Faculty Won’t be Required. Here are Some Bills That Died in the 2017 Iowa Legislature*, DES MOINES REG. (April 25, 2017), <https://www.desmoinesregister.com/story/news/politics/2017/04/22/political-diversity-among-faculty-wont-required-here-some-bills-died-2017-iowa-legislature/99624024/> [https://perma.cc/4JC2-9BB3] (discussing a failed bill instituting a hiring freeze at Iowa’s public universities until rough parity was achieved between registered Republicans and registered Democrats on those universities’ faculties).

for revolutionary activity.”<sup>24</sup> Rancourt’s dismissal was the right thing. For the most part, however, I would allow competing visions and practices to continue, including many that I think are not consistent with the correct vision of academic functioning, while arguing against them. If this is not broad or firm ground on which to stand, so be it.

Again, this approach raises serious questions about, and difficulties in, making recommendations for a sound ethics of legal scholarship, including the suggested principles that my fellow Symposium participants and I have published here.<sup>25</sup> Someone with the pluralist views I have described has a number of options. She *could* decline to issue any recommendations, although I have argued that this is not required by my stance. She could focus only on what she thinks are the *core* principles of ethical scholarly practice, leaving anything outside that small core for ongoing debate. She could, conversely, issue prescriptions so broad as to be virtually meaningless, like a doctor recommending that a headache be treated by aspirin, acetaminophen, morphine, acupuncture, Chinese herbs, psychiatry, biofeedback, or meditation.<sup>26</sup> Such a recommendation may be valid<sup>27</sup> but is not terribly helpful. Finally, she might confidently issue specific recommendations based on her own view of what constitutes sound ethics in legal scholarship, while adding the caveat that other prescriptions, even radically different ones, are not necessarily beyond the pale. This last approach is not so much a prescription or description as it is an argument, one that takes the implicit position that although it would be good on the whole if people complied with it, they need not do so.

My approach here is closest to the second approach listed above. I focus on two core values that arguably are essential to sound functioning for *any* academic. These values are not only basic but fairly banal. But their implications, if taken seriously—a big “if,” to be sure—are not.

The two core values are *candor* and *integrity*. By candor, I mean not just honesty and sincerity, but a willingness to exhibit the honesty and sincerity required to make a statement and its motives sufficiently transparent to be fully

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24. STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* 14 (2014).

25. See *Draft Principles of Scholarly Ethics*, 101 MARQ. L. REV. 897 (2018).

26. See *Headaches: Treatment Depends on your Diagnosis and Symptoms*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/chronic-daily-headaches/in-depth/headaches/art-20047375> [<https://perma.cc/Y6DB-X93E>] (last visited Jan. 26, 2018) (mentioning almost all of these treatments).

27. I have my doubts about some of these treatments, and in keeping with some of my general complaints about the nature of professional ethics today, it is not clear that all of them are based on meaningful *medical* expertise.

understood by the recipient of the communication.<sup>28</sup> It thus involves, as Micah Schwartzman has written, elements of both “sincerity and disclosure.”<sup>29</sup> By integrity, I mean especially coherence between belief, word, and deed. I follow roughly Stephen L. Carter’s definition of integrity, which has been summarized as requiring “(1) carefully reflecting on right and wrong in a particular context (a process he calls ‘discernment’); (2) acting on the outcome of this reflection; and (3) avowing the coherence between one’s reflection and conduct.”<sup>30</sup>

In the context of the ethics of legal scholarship, what candor and integrity, taken together, demand are that the legal scholar: (1) reflect on her approach to legal scholarship, generally and/or in a particular case; (2) reflect on the implications of that approach; (3) reflect on her motives in engaging in a particular legal scholarly activity (an activity I define in certain circumstances, described below, to include things other than scholarly articles or books); (4) act consistently with those reflections; and (5) do so with enough *transparency* and *openness* that the reader can judge for himself the purpose of the argument being made and its authority or reliability.

Candor and integrity, thus defined, are consistent with the fairly traditionalist, “deflationary,”<sup>31</sup> “do your job” approach to legal scholarship. That argument is pursued elsewhere in the contributions to this Symposium.<sup>32</sup> I want to focus here on what these core values might mean for approaches to legal scholarship that depart, in whole or in part, from that conventional model.

These include approaches to legal scholarship that view our task as that of rendering expert advice to judges and other lawmakers, with the goal of advancing the “right solution of . . . social problems.”<sup>33</sup> They also include those academics who may confuse their job or function with their personal virtues,

28. See *Candor*, OXFORD ENGLISH DICTIONARY 828 (2d ed. 1989). Much of this is inherent in the fifth definition of “candor” in the *Oxford English Dictionary*: “Freedom from reserve in one’s statements; openness, frankness, ingenuousness, outspokenness.” *Id.* For my purposes, freedom from reserve, openness, and ingenuousness are the key concepts.

29. Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 994 (2008).

30. Martin Benjamin, Book Review, 552 ANNALS AM. ACAD. POL. & SOC. SCI. 180, 180 (1997) (reviewing STEPHEN L. CARTER, *INTEGRITY* (1996)).

31. FISH, *supra* note 24, at 20.

32. See, e.g., Nicola A. Boothe-Perry, *The Truth of the Matter: Why the Social Contract Dictates Legal Scholars’ Sincerity, Candor & Thoroughness*, 101 MARQ. L. REV. 1063 (2018); Neil Hamilton, *Legal Scholars’ Ethical Responsibilities Concerning Neutrality and Objectivity, Candor and Exhaustiveness*, 101 MARQ. L. REV. 1045 (2018).

33. FISH, *supra* note 25, at 11 (alteration in original) (quoting AAUP, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915)); accord ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012).

extolling themselves as fearless truth-tellers and superb *critical thinkers* possessed of a unique wisdom that tempts, if not entitles, them to pronounce on a wide range of issues, not as citizens but *as academics*, always with their academic titles displayed prominently.<sup>34</sup>

Not least, these approaches include the view of those legal scholars who assert that “[t]he legal scholar’s rightful aim is not simply to speak the truth . . . . It is to *speak the truth to power*.”<sup>35</sup> The ideal legal academy, in this view, is “an ethical community of scholars and activists committed to combating injustice.”<sup>36</sup> On this view, the job of the legal scholar is not to academicize politically controversial questions, but to use academic work to wage politics, identifying and attacking injustice and securing vital legal and political victories. The injustice may involve racial or other forms of inequality, the subordination of the disenfranchised and powerless, the growth of big government, the spread of legal abortion or threats to reproductive rights, and so on. The cause served may be libertarianism, values conservatism, progressivism, leftism, or what have you. In the legal academy the cause is more likely to lean left than right, and more likely to lean toward a fairly bourgeois version of progressivism than a radical political revolutionary program; but it certainly can and does include conservatives or libertarians of various stripes. Whatever the cause, the goal is its *achievement*, not just its academic study.

For various reasons, in the legal academy this often means that the legal academic becomes a scholar-activist, a scholar-advocate, or a “public” legal academic, one whose arguments are advanced not only through conventional legal scholarship, but through op-eds, amicus briefs, scholars’ letters, tweets<sup>37</sup> and blog posts and other uses of social media, and other tools in the apparatus of public political discourse and advocacy. Importantly, these activities are undertaken as a legal academic and under the auspices of one’s legal academic title and ostensible authority. Using—I would say trading on—one’s title and ostensible authority or expertise as a legal *academic* is an essential part of this

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34. See, e.g., FISH, *supra* note 24, at 11–12, 50–51, 95–96. There is some relationship between this conception and Fish’s description of “academic exceptionalism.” *Id.* at 74. It is also connected to Fish’s description of the “[a]cademic freedom as critique” school, which he describes thus: “If academics have the special capacity to see through the conventional public wisdom and expose its contradictions, exercising that capacity is, when it comes down to it, the academic’s real job; critique—of everything—is the continuing obligation.” *Id.* at 12.

35. Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2347 (1999).

36. Elizabeth M. Iglesias & Francisco Valdes, *Expanding Directions, Exploding Parameters: Culture and Nation in LatCrit Coalitional Imagination*, 5 MICH. J. RACE & L. 787, 788 (2000).

37. Again, one may read that word as “tweets” here.

form of activity. A blog consisting of posts critical of the Trump administration that is authored by various American citizens or residents, many of whom happen to hold law degrees or positions in the legal academy, is one thing. It may get some attention and might convince some readers by virtue of the strength of its arguments, but does not seek to bludgeon its readers with (sometimes questionable) authority. A blog with the same posts that trumpets that its “contributors include many preeminent legal authorities, as well as rising stars within the profession,” all of whom “stand united in their desire to protect and defend the rule of law in America,” is quite another.<sup>38</sup>

How would the twin values of candor and integrity affect these common alternate approaches to legal scholarship? As I have suggested, I do not favor these alternate approaches, but neither am I willing to argue strongly for their elimination, or for their being cast out from the general category of “academic” work or “scholarship.” But it is possible to imagine what a scholar following one of these paths would write, and how he would act, if he were committed to acting with candor and integrity. The result, I think, would be a commendable gain in the ability of readers to judge this sort of scholarship better, and an equally commendable deflation of the ostensible *academic* “authority” of this approach to scholarship or public advocacy.

Imagine, for instance, a law review article written by a legal scholar who believes that her job requires her to use her expertise for the purpose of social betterment, to advance the cause of finding the “right solution of social problems”—to serve, in short, as a kind of roving, one-woman law reform commission, recommending fixes to statutes, changes in existing law and policy, or better judicial doctrine in a particular area. This is, of course, a very common approach to legal scholarship—perhaps the dominant mode.<sup>39</sup> The law review article in this common mode always culminates in what Pierre

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38. *Announcing Take Care*, TAKE CARE BLOG (Mar. 16, 2017), <https://takecareblog.com/blog/announcing-take-care> [https://perma.cc/22DU-LZGT]; see also Orin Kerr, *New Legal Blog, Take Care*, WASH. POST: THE VOLOKH CONSPIRACY (Mar. 16, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/16/new-legal-blog-take-care/?utm\\_term=.554f68e4673d](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/16/new-legal-blog-take-care/?utm_term=.554f68e4673d) [http://perma.cc/537J-H296] (“The list of bloggers is long and impressive, consisting mostly of prominent liberal constitutional law professors.”). It is worth noting that although the early announcements from and about the blog, and the early versions of its “About Us” page, were vigorous in promoting the impressive credentials of its contributors, in terms not too different from a marriage between the *US News & World Report* law school rankings and *US* magazine, the current version of the “About Us” page has eliminated the gross credentialism that used to appear there. See *About Us*, TAKE CARE BLOG, <https://takecareblog.com/about-us> [https://perma.cc/VZJ2-CMGH] (last visited Jan. 27, 2018).

39. See, e.g., Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 808 (1991) [hereinafter Schlag, *Normativity*].



Schlag calls “the law review equivalent of the prayer for relief—namely, the normative prescription, the ‘And therefore the court should or the legislature should or we should or the zeitgeist should’” section.<sup>40</sup> This is the approach that always figured in the advice of my late friend Dan Markel, who was among other things a canny thinker about the mechanics of legal scholarship and placement and who, for both sincere and strategic reasons, frequently reacted to friends’ article drafts by asking, “What’s the normative payoff?”

This is not a *necessary* format. There is nothing wrong with a legal academic asking questions she cannot answer, or describing a problem without offering any solutions. But it is a common format. That is understandable, given that lawyers are trained to be problem-solvers. It may also have something to do with how law professors are produced. Harvard Law School, for instance, still generates a large number of future law professors, many of whom serve on the *Harvard Law Review*. There, they are trained to write case comments that, with awful regularity, follow the same format: (1) Courts/legislatures/officials/society are dealing with problem *X*; (2) In *Jones v. Smith*, the federal appellate court (or, occasionally, a state court, legislature, or administrative agency) held that *Y*; (3) Although the actor [insert mild flattery here], its opinion [insert criticism here]; (4) If the court had instead held *Z*, we would have been much better off. Having absorbed this format and repeated it *mutatis mutandis* as a federal law clerk, and given the conservatism, cynicism, or path-dependence of the legal academic profession and of the prospective academic’s mentors in the job-seeking process, the budding scholar will rinse and repeat, perhaps not indefinitely (several legal scholars have told me they abandon this approach at least once they have won tenure), but certainly *ad nauseam*.

To repeat, this is not the only available approach.<sup>41</sup> But it is probably the most common, and it is repeated and perpetuated, in slightly more sophisticated versions, through at least the job-hunting and tenure-seeking stages of the

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40. Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing (A Report on the State of the Art)*, 97 GEO. L.J. 803, 813 (2009) [hereinafter Schlag, *Spam Jurisprudence*]; see also Shari Motro, *Scholarship Against Desire*, 27 YALE J.L. & HUMAN. 115, 116 (2015) (suggesting that law professors are taken more seriously if they follow a scholarly model that “ask[s] questions [they can] solve rather than ones that merely invite[ ] a conversation”).

41. Yale Law School, for example, is another common breeding ground for law professors. Its major credentializing organization, the *Yale Law Journal*, does not invariably follow this format for its student pieces, which are more often notes than case comments. (The *Harvard Law Review* also publishes notes, and not all its notes follow the mechanical approach of its case comments. But many do.) Although many of its student notes culminate in the standard prayer for relief, they do not invariably do so, and they certainly do not follow a recognizable, mechanical, standard format. Some might suggest that they do not follow a recognizable *anything*.

typical legal academic career. The problems may get bigger, and the tools and methods brought to bear on studying and solving them more varied and less doctrinal, but they still usually culminate in a “prayer for relief.”

Because this approach is so common, the applicable ethical norms are fairly standard and well known, and need not be rehearsed much here. At its best, or even at the average level, scholarship of this sort meets most of the requirements of candor and integrity. The scholar is expected to write in her area of expertise. The problem discussed is expected to be addressed fully and fairly. The costs and benefits of the proposed solution are supposed to be canvassed, and an argument made for why the fix is worthwhile.<sup>42</sup> Existing and potential criticisms and counter-arguments are supposed to be examined. All this is standard fare.

Given that all this is quite well-known, I am not suggesting that this rather mechanical, reformist format of legal scholarship displays a general failure or absence of candor and integrity, or that a renewed emphasis on those values would require radical change. But there are certainly always cases in which such articles fall short by the measure of candor and integrity, and would look different if they lived up to it better.

One of the most obvious ways in which such articles could be improved is by clearly stating their animating premises. If *Z* is a better solution than *Y*, it must be because it does a better job of satisfying some set of desiderata: equality, liberty, efficiency, autonomy—even, at an absurdly general level, “justice.” Even if some criteria are given, they are often given at a lower level of generality than that: *Z* is better than *Y* because it provides greater access to abortion rights, or fewer class certifications, or something else. To say the least, it would help evaluate such scholarship if the author is explicit about his or her criteria or animating values, and either attempts to justify them or at least states them bluntly and makes clear that he will make no effort to justify them. In the latter case, especially, it would help ensure that readers who reject those premises or values are not taken in and/or do not waste more time than is necessary reading the article.

Another way in which such articles could display greater candor and integrity would be to be clearer about what we might call the author’s endgame. It is fairly common for prescriptive articles of this sort—the Court should rule *this* way in a forthcoming case; the policy actor should take *that* approach to a

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42. It is probably true, however, that much legal scholarship does not address sufficiently the transition costs involved in legal change. See generally Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002) (discussing the costs of transitioning from one legal norm or rule to a new one and urging that those costs be taken into account when considering whether a change, even one that seems substantively preferable, is worthwhile).

problem—to be deliberately modest and narrow in their scope. Sometimes—often, one hopes—this is a result of sound scholarship. If you are limited in your expertise or powers of prediction, or focused narrowly on a particular problem, it makes sense to confine your work to the problem at hand.

Sometimes, however, it seems clear that this is a strategic choice. The author has a much more sweeping end in mind, and knows it, and knows that the proposal offered is meant to push legal actors in the direction of that change—perhaps even to attempt to make that final step inevitable and unavoidable. If your goal is, say, to reduce the legal effect of the Establishment Clause to a bare minimum and allow government to come as close to theocracy as possible, you are probably better off not saying so off the bat. These kinds of statements tend to put readers on their guard. Better to dismantle the wall one brick at a time, disclaiming any wider implications in each case, until you have reached a logical tipping point.

Again, there is more than one reason to employ a common caveat like, “This article is not intended to address the following question,” or “I bracket the important question of *X*.” It can be offered in good faith, out of modesty or care. But it can also be a deliberate attempt to conceal: to hide one’s hand, to avoid frightening the reader or inducing her to ask broader skeptical questions, to lead her down the garden path while doing your best to obscure the intended final destination. That may be a sound strategic choice in litigation. But scholarship is not litigation, and such an approach lacks genuine candor or integrity. The scholar who takes this approach knows that debate, criticism, and resistance to her proposals would increase if she made clear where she intends the line of argument to go. Her goal is precisely to avoid that kind of criticism, skepticism, and strong resistance. It is to seduce by degrees. I am not objecting to scholars *having* such an endpoint in mind. But they should say so, and accept the consequences of saying so.

Another common—and increasing—failure of candor and integrity in this format of scholarship, in my opinion, is as closely related to professional ambition as it is to any sort of political goals. That is the failure or unwillingness to tease out, or even acknowledge, the *varied* implications of a proposed solution. I have seen this approach more often in recent years in job talks, including talks presenting highly polished and already “well-placed” papers. It is evident both in the text of the article and in the answers to questions during the job talk. Job candidates, it would appear, want simultaneously to be able to boast of the substantial implications of their thesis or normative conclusion *and* to deny them as necessary. This desire is related to the job-seeker’s professional goals and concerns. He wants to please politically sympathetic allies on the faculty without causing any worry about potential politically “negative” consequences made possible by the argument, *and* to

avoid causing offense to potential political opponents on the faculty by boasting too openly of the sweeping nature of the changes his argument might require.

A writer may, for instance, argue that courts should employ strict scrutiny in reviewing a new category of claims. She may argue early in the article—especially in the abstract and introduction, the material most likely to be read by law review editors and busy hiring faculty alike—that such an approach will have “sweeping implications” for the area. Or she may ground her proposal for strict scrutiny on a broad set of arguments suggesting that judges should use strict scrutiny much more widely in constitutional review, again flagging early on the “important and novel implications” of such an argument. When asked *sympathetically* about the implications of such an approach for a neighboring area in which the presenter knows the questioner would love strict scrutiny to be adopted, the author will muse enthusiastically about the possibilities for its application there. When asked a similar question about an area—say, admissions policies at public universities—that the author knows is politically sensitive, or where a substantial number of the faculty would object to strict scrutiny, or where her implicit suggestion of a sympathetic political orientation will be muddied, she will answer that she hasn’t thought closely about that question yet, or that it is outside the scope of her article, and will pivot as quickly as possible to some other, less controversial issue or question.

Of course, in one sense this is simply bad scholarship. It may be *honest* bad scholarship; maybe the scholar really hasn’t thought enough about the implications of her arguments. If hiring faculties and law review editors were angels, this bad scholarship would be judged as such. Of course, they are not. Regardless of the reaction, though, the approach itself, at least when it is deliberate and strategic, is wrong *in itself*. Normative scholarship that exhibits candor and integrity, and that wants to argue that its recommendations are valuable because of their sweeping implications, will not hesitate to enumerate *all* of those implications, including the ones that will run directly contrary to her own priors or the perceived priors of her audience. If the author doesn’t like those implications, or knows they are bound to offend more readers than she would like, she can either find and present sound reasons why the logic of her position does not extend to those implications, or write a different—and probably less “sweeping” or “revolutionary,” and thus for some readers less impressive—paper.

One can imagine similar implications of candor and integrity for the scholar who imagines that his job is to “speak truth to power,” or engage in that trendy academic phrase, “critical thinking,” or both. In my view, speaking truth to power is a political goal, not an academic one. Speaking *truth* is an academic goal. Peter Finley Dunne famously wrote that “the job of the newspaper is to

comfort the afflicted and afflict the comfortable.”<sup>43</sup> Some legal scholars insist that this is their job too,<sup>44</sup> but I think they are wrong.<sup>45</sup> The scholar’s job is neither to comfort nor afflict, nor to be concerned overmuch with the identity of those who happen to be comforted or afflicted by some piece of scholarship. Comforting the afflicted is among the worthiest and highest activities one can undertake in life. But it is a *different* undertaking—as different from scholarship (including legal scholarship) as bandaging a wound at a neighborhood medical clinic is from doing pure research into the incidence of infections from wounds. There is something to be said for afflicting the comfortable too. I rather hope some of my scholarship achieves that result, and I confess that I’m pleased when the comfortable parties who are afflicted by my work are my fellow academics. But that should be incidental.

Again, that is my understanding of scholarship: its goals, its norms, its proper practices and ethics. I am happy to argue against those who see their work as “speaking truth to power”—largely because I think it misunderstands the purposes of academic work, but not least because the phrase is so rarely used with real accuracy or honesty. But I am not seeking to oust from the academic profession those who think otherwise. What I *would* recommend is that if they are intent on pursuing this goal, they do so candidly and with integrity. One can state one’s goal clearly and explain how it applies to and affects a particular piece of scholarship. One can admit up front that one is ignoring counter-arguments or logical implications of one’s work because they might discomfit the “afflicted”—or, perhaps more accurately, because a complete treatment of that argument might discomfit other (comfortable) academics who believe one should never discomfit the afflicted. One can, in short, be explicit about what one is doing as a scholar and why, and how that affects the arguments and observations that are being made—and those that are being ignored or omitted. If the work is being undertaken on behalf of or subsidized by a particular interest group, one can say so. One can ask oneself what it means to do such work with integrity, and act accordingly.

The primary effect of carrying out work of this kind with candor and integrity is that it gives the reader a yardstick with which to judge its usefulness

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43. For the proper quote, see David Shedden, *Today in Media History: Mr. Dooley: ‘The Job of the Newspaper is to Comfort the Afflicted and Afflict the Comfortable’*, POYNTER (Oct. 7, 2014), <https://www.poynter.org/news/today-media-history-mr-dooley-job-newspaper-comfort-afflicted-and-afflict-comfortable> [https://perma.cc/D323-4Z8S]. I have paraphrased it to omit the homespun dialect of Dunne’s fictional character, Mr. Dooley.

44. See, e.g., Glenn Omatsu, *Teaching for Social Change: Learning How to Afflict the Comfortable and Comfort the Afflicted*, 32 LOY. L.A. L. REV. 791, 791–92 (1999).

45. I think it is wrong for journalism as well, for that matter, and I did practice briefly in that field, for what it’s worth.

and reliability. If you believe your mission as a scholar requires you to speak truth *only* “to power,” and to ignore important “truths” that might discomfit the powerless or afflicted—if, in short, you believe that your truth-seeking mission as an academic is limited and constrained not by expertise but by political imperatives—you should say so. The reader then knows that she is not getting the full story. She may, indeed, become interested in what you have identified as *omissions* from that story. She may then explore those omissions in her own work. If your work recommends a particular law reform, and is aimed at legislators and their staffers, they will know that they are getting a one-sided treatment of the issue. They too may want to explore the potential implications that you have said explicitly exist but won’t be discussed. At least if she is to be a scholar of integrity, the legal scholar who wants to “comfort the afflicted” must be willing, by being clear about her intentions and how they constrain her work, to undermine her own goal. She may even be required, by pointing candidly to the issues she will *not* talk about and thus piquing the interest of her political opposites, to offer hostages to fortune.

All of the categories of legal academic I have discussed so far are common. But more common still is the scholar-advocate or “public” (the current trendy phrase is “engaged”) legal academic.<sup>46</sup> For our purposes, this passage does a fair job of summarizing this approach to legal scholarship:

[I]t is the *purpose* of the scholarship that is key to engagement. ‘[L]egal scholarship, in whatever form,’ must have as ‘its object influencing the direction of the law—ideally by moving judges, lawyers, legislators, and bureaucrats to rethink or reconsider a particular problem.’ The goal of engaged scholarship is to influence or shape the law itself, rather than comment on its status.<sup>47</sup>

The law reviews overflow with this kind of legal scholarship. Elsewhere in this Symposium, one can find references to recent debates over whether and when legal scholars should write or sign amicus briefs.<sup>48</sup> But virtually every

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46. For a discussion of various definitions and forms of “engaged” legal scholarship and useful citations, see Sonia K. Katyal, *Encouraging Engaged Scholarship: Perspectives From an Associate Dean for Research*, 31 *TOURO L. REV.* 53, 57–58 (2014).

47. David Hricik & Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 *SUFFOLK U. L. REV.* 761, 765 (2005) (second alteration in original) (quoting Ronald J. Krotoszynski, Jr., *Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption*, 77 *TEX. L. REV.* 321, 327 (1999)).

48. *Transcript—Conference on the Ethics of Legal Scholarship*, 101 *MARQ. L. REV.* 1083 (2018); see also, e.g., Richard H. Fallon, Jr., *Scholars’ Briefs and the Vocation of a Law Professor*, 4 *J. LEGAL ANALYSIS* 223, 233 & n.21 (2012) (raising doubts about the practice of filing scholars’

legal academic knows, and quite a few are happy to say, that scholars' amicus briefs are only one part of a larger practice that begins not with arguably extracurricular activity, but with scholarship itself. A recent article in the *Journal of Legal Education* by an openly "engaged" legal scholar counsels: "Do something that matters. Then write about it. Write an amicus brief; turn it into a law review article. Draft legislation; turn it into a law review article."<sup>49</sup> Much of the time, for many current legal scholars, the order is reversed: Write a law review article; *then* turn it into an amicus brief.

Even that is an incomplete description. These scholars go a step further: Their law review articles *are* amicus briefs.<sup>50</sup> They are written with the goal of convincing judges or other decision-makers to reach a particular decision in a specific case or on a specific topic of current legal and political debate. Often, the goal is not so much to reach the judge directly as to reach his or her law clerks: to provide the arguments or rationales (or rationalizations) the clerk might use in drafting the opinion for the judge, and to drape them in the cloak of "authority" by giving the clerk something to cite. Or the goal is a larger strategic one of using scholarship, along with writing and action on other fronts, to move an argument from "off the wall" to "on the wall,"<sup>51</sup> to give it sufficient momentum and plausibility that the argument becomes "in play" in public and legal discussion. A key part of such strategies is using or trading on scholarly authority: "[T]rying, through [one's] own gravitas as a noted constitutional scholar, to convince people that [a relatively novel] argument is not frivolous."<sup>52</sup>

This is not new, to be sure. Pierre Schlag has observed for years that this is the standard format of normative legal scholarship.<sup>53</sup> I do not know if it is even increasingly common. But it is increasingly noteworthy, for two reasons.

amicus briefs); Amanda Frost, *In Defense of Scholars' Briefs: A Response to Richard Fallon*, 16 GREEN BAG 2d 135 (2013) (defending the practice). For a brief but thoughtful discussion of these issues, see Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203, 1264–64 (2015).

49. Nancy D. Polikoff, *How Does a Radical Lesbian Feminist Who Just Knows How to Holler Somehow Become a Noted Legal Scholar?*, 66 J. LEGAL EDUC. 493, 496 (2017).

50. See, e.g., *A Dialogue With Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889, 1906 (2012) (comments of Judge Frank Easterbrook) ("I'm not as enthusiastic about law review articles as Judge Sutton because many law review articles are just amicus briefs published under another name . . .").

51. See, e.g., Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 TULSA L. REV. 553, 567–68 (2003).

52. Josh Blackman, *Back to the Future of Originalism*, 16 CHAP. L. REV. 325, 331 (2013) (discussing the use of "constitutional persuasion on related fronts: legal and populist").

53. See, e.g., Schlag, *Normativity*, *supra* note 39, at 808; Schlag, *Spam Jurisprudence*, *supra* note 40, at 813.

The first can be described in terms of the sociology of the legal academy. Normatively oriented law review articles were the standard form of legal scholarship for decades. Eventually, this model came under pressure as a result of the entry into the field of larger numbers of legal scholars who were not pure doctrinalists with years of legal practice behind them, but were using various tools from other disciplines (in which they often had doctorates) and at least aspiring to a more “scholarly” model of legal academic work. That many scholars have returned, more or less openly or covertly, to a model that is not only normative but fairly openly political or partisan is all the more striking in light of these changes in the population of the legal academy.

The other reason the “disguised amicus brief” model of legal scholarship is so noteworthy today is that it has expanded and metastasized, taking advantage of a variety of social and other media. One need not choose between a law review article and an amicus brief, or limit oneself to just those two forms of legal writing. In fact, doing so is poor strategy. The scholar-advocate or public legal scholar today wages a simultaneous multi-front war. A piece of advocacy or argument will appear in a law review article. The scholar will attempt to advance, normalize, or give momentum to that argument by packaging it online as an op-ed in a major newspaper like *The New York Times*, or a piece in *Slate* or *The Atlantic* or some other watering-hole for the professional-managerial class. He will propagate that piece through Twitter and repackage it as a series of blog posts. He will work with advocacy groups to give it still wider exposure and do their collective best to make it a talking point in public and political debate.<sup>54</sup> He may organize panels and conferences to give further exposure to

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54. Traditionally, those advocacy groups were extramural: Groups like the NAACP Legal Defense Fund or Alliance for Justice were more or less independent groups that resided outside the university walls. Today, many ostensibly academic “centers” within law schools are either explicitly political in their missions or purport to study a particular subject, such as reproductive rights, but seem only to hire fellows and scholars and advance projects that take a specific position on those issues. They are often funded by individuals or groups whose other arms or funding activities are open in pursuing particular goals and outcomes. These centers, and the effects of this sort of funding, have received much less attention than criticisms of corporate-funded legal research. When these broader funding projects are criticized, it is generally politically conservative rather than politically liberal or progressive projects that receive most of the attention and criticism. See, e.g., Deborah L. Rhode, *The Professional Ethics of Professors*, 56 J. LEGAL EDUC. 70, 76 (2006) (discussing Exxon’s funding of scholarly studies on punitive damages); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1891–95 (2008) (describing a “shrill and relentless campaign” against corporate liability, punitive damages, and class actions by “libertarians, economic conservatives, business interests, and the Republican party,” in which “[f]unding gushed from corporations, business associations, wealthy individual donors, and right-wing foundations to support literally dozens of think tanks, litigation centers, and university programs while underwriting a proliferating range of publications, conferences, and



the argument and transform it into a real or seeming movement. And he will certainly also attempt to advance the argument through amicus briefs—either “scholars’ briefs” or briefs written on behalf of some willing group—and “scholars’ letters.”

Like tech company enthusiasts and TED talk gurus, law professors working in this vein effectively embrace the idea that all this work *is essentially the same*, tailored and spread through a variety of “platforms.”<sup>55</sup> It is unsurprising that Erwin Chemerinsky—who can surely be described accurately and fairly as a highly successful multi-platform scholar-activist—could have written, before the full onslaught of social media, that

I find it hard to explain why an amicus brief containing lengthy and original analysis of a legal issue does not count as scholarship, but that same brief repackaged and published as a law review article is deemed scholarship. . . . If writing for judges can count as scholarship, why not an amicus brief directed at a particular court?<sup>56</sup>

Nor is it surprising to read Sonia Katyal, arguing more recently on behalf of “engaged scholarship,” asserting that embracing different approaches to and platforms for one’s work can “maximize the real life impact that legal scholarship can have on current issues.”<sup>57</sup>

I confess that the more of this sort of activity I see—and there is no shortage of it, especially in an age of political polarization, renewed culture wars, and “#resistance”—the more disturbed and dispirited I am by it. Even an institutional pluralist has his can’t-helps, and this sort of multi-platform advocacy-scholarship pushes all my buttons. Much of my reaction has to do with the obviousness of what is going on. When combined with a simultaneous public refusal to *say* what is going on and an unrepentant and incomplete private

individual fellowships and grants”); Martha T. McCluskey, *Thinking With Wolves: Left Legal Theory After the Right’s Rise*, 54 BUFF. L. REV. 1191, 1250 (2007) (describing a “right-wing” strategy in which “wealthy individual and corporate donors have directed funding to legal scholars who deploy Law and Economics arguments against disability rights and benefits”). Academic study and discussion, let alone criticism, of coordination and collaboration between liberal or progressive centers within law schools, advocacy groups outside law schools, and foundations or individuals that fund both, is virtually non-existent and generally comes from conservatives, and is thus more likely to be ignored by those progressives who pay more attention to their allies than their adversaries. Apparently, the behavior itself is uninteresting and unworthy of concern—just the question of which “side” is engaging in it. It deserves much more study and criticism (or defense) than that.

55. See generally Stacey B. Steinberg, #*Advocacy: Social Media Activism’s Power to Transform Law*, 105 KY. L. REV. 413 (2016–2017). Steinberg’s article is about legal and political activism generally, not the use of social media platform by politically active legal academics in particular. *Id.*

56. Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881, 892 (2009).

57. Katyal, *supra* note 46, at 60.

admission that it *is* going on,<sup>58</sup> it both exhibits and evokes a tremendous sense of cynicism about both politics and scholarship.<sup>59</sup> As something of an idealist about both fields of human activity, and especially scholarship, which for me is a vocation, I deplore that cynicism and its effects. And this kind of activity routinely involves actions that, in my view, subtly harm both scholarship and public advocacy, and thus the health of both scholarly and public discourse.

A recent example illustrates what I mean.<sup>60</sup> In a 2017 op-ed in *The New York Times*, Professor Martin Redish argued that President Trump could not, consistent with the constitutional law of due process, properly pardon former sheriff Joe Arpaio.<sup>61</sup> (The president proceeded to do just that almost immediately after the op-ed was published.) In that op-ed, Redish wrote, refreshingly, “I admit that this is a novel theory. There’s no Supreme Court decision, at least that I know of, that deals specifically with the extent to which the president may employ his pardon power in [a way that arguably violates due process principles].”<sup>62</sup> A day later, on *Slate*, my friends and First Amendment colleagues Micah Schwartzman and Nelson Tebbe published a piece titled, “Charlottesville’s Monuments Are Unconstitutional.”<sup>63</sup> A key paragraph in that piece asserted:

58. I say “incomplete” because its practitioners, in conversation, will cheerfully admit to *much* of this, while offering various sincere or cynical defenses (or both). But there are some things they will not admit about it even in private, either to others or, perhaps, to themselves.

59. One example that again increased my capacity for cynicism about legal scholarship, although perhaps I should not have been so naive, came in a scholar’s presentation I heard a while back. The author prefaced his talk by announcing that he had met Justice Anthony Kennedy and thought he was susceptible to persuasion, and had written the piece to flatter Kennedy, to cozen him into believing that he *already*, by virtue of what he had written so far, took a particular position on an issue, and to convince him to take the next step and write that view into law at the next opportunity. It is considered bad form, or unclubbable, to describe such incidents. What happens at a faculty workshop generally stays at a faculty workshop. But I am not terribly worried in this case about the risk of revealing the identity of this scholar. This description, after all, fits scores of articles aimed at Justice Kennedy, who is one of the most flattered judges in the history of the United States Supreme Court.

60. See Paul Horwitz, *The Small and Vast Difference Between Two Op-Eds*, PRAWFSBLAWG (Aug. 25, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/2017/08/the-small-and-vast-difference-between-two-op-eds.html> [<https://perma.cc/A8H3-RRSE>].

61. See Martin H. Redish, *A Pardon for Arpaio Would Put Trump in Unchartered Territory*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/opinion/trump-arpaio-pardon-arizona-sheriff.html> [<http://perma.cc/7YMC-9U4B>].

62. *Id.*

63. Micah Schwartzman & Nelson Tebbe, *Charlottesville’s Monuments Are Unconstitutional*, SLATE (Aug. 25, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/08/charlottesvill\\_s\\_monument\\_s\\_are\\_unconstitutional.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/charlottesvill_s_monument_s_are_unconstitutional.html) [<https://perma.cc/E7W2-ETPK>] (discussing Confederate monuments in Charlottesville). I note the fact of my friendship with both authors, and add that I very much admire

So far, the lawsuit over Charlottesville's monuments has focused on arcane issues of state law. But there are larger constitutional principles at stake—most importantly, that the government is prohibited from conveying messages that denigrate or demean racial or religious minorities. While private citizens may engage in hate speech under existing law, the government may not demean racial or religious minorities without running afoul of the guarantee of equal protection contained in the 14<sup>th</sup> Amendment. Unlike limitations on hate speech, which remain controversial, this rule against racialized government speech should enjoy widespread support.<sup>64</sup>

My problem with this assertion has little or nothing to do with whether I agree or disagree with it as a normative matter. It lies in two confident little words, paraded before an audience of non-specialists and buttressed at the end of the piece by that incantatory author's description, "X is a professor of law." The words are "principles" and "rule." I think it is fair to say, and that many or most First Amendment specialists would agree, that it is unclear whether there *is* such a principle. If there is, it is as or more unclear whether and how that principle would apply in this or any other concrete case.

Similarly, the word "rule," at least in the absence of a prefix like "proposed," carries with it the implication that there clearly *is* such a rule, and that the courts would—or should, if they follow *existing* law or "principles" correctly—agree that it exists and applies in this case. The phrase "rule against racialized government speech"<sup>65</sup> is further reinforced by another rhetorical device of our new-media age: the hyperlink. It sets off the words in bold purple type against the dull black of the rest of the text. It suggests to the reader, who may or may not bother to click through to the link, that this is not just an argument, but a "fact" established by "authority." That "authority" turns out to

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their work and learn from it regularly. I do so as part of the standard, albeit quite sincere, emphasis that the criticism is not personal and should not be taken as such. I am not sure this kind of disclaimer should be necessary, however. My criticism is academic and professional and presented with enough detail and citation for readers to judge its validity for itself. Academics should not hesitate to criticize each other, albeit in academic fashion and for academic reasons. Friendship in the academy does not require some code of *omertá* or polite silence, although at least one editor at a respected university press once suggested to me that law professors are far less likely than academics in other fields to criticize each other's work. Certainly political alliances are irrelevant: whether I agree or disagree with these writers' work on this or other occasions (sometimes yes, sometimes no) should be unimportant. So are questions of prestige, senior or junior status, or the desire not to offend others for fear of blocking one's own professional advancement, although I admit to being as ambitious as the average law professor.

64. *Id.*

65. *Id.*

be an excellent law review article by Tebbe, titled *Government Nonendorsement*, that *argues* for such a rule.<sup>66</sup> The article itself acknowledges a “widespread” “assumption that the government is free to endorse and denigrate secular ideas,” and says the assumption arises “thanks in part to the Supreme Court and in part to scholarship on free speech and religious freedom.”<sup>67</sup> It argues that “that belief is mistaken,” but makes clear that this is a *claim*, not a certainty.<sup>68</sup> Tebbe argues that the rule is supported by and immanent in current caselaw, but acknowledges that “free speech examples [supporting his claim, in court decisions,] are hard[] to find.”<sup>69</sup> And, like any responsible scholar, he anticipates and addresses potential questions and objections, and notes that they include the essential question what limits should apply to such a rule, although—in a way that is common in modern legal scholarship, as I have suggested above—he treats “the question of limits” as “secondary.”<sup>70</sup>

No reader of this law review article would fail to understand that Tebbe is advancing an *argument* here, and that this argument has no privileged status and does not simply describe uncontroversial current law. Only the most subtle and careful reader of Tebbe and Schwartzman’s op-ed, on the other hand, would be able to tell any of this from the op-ed itself.

Writers of op-eds, when pressed on such points, frequently dismiss them with the defense that they only had a limited number of words to work with and couldn’t over-complicate the argument for general readers. Of course, if one can’t convey such caveats in the limited space available, there is always another option: Don’t publish the op-ed. In any event, the defense doesn’t apply here. The authors could easily and economically have substituted words like “argument” or “proposal” for “principle” or “rule.”

Of course, one can dismiss such things as trivialities or accidents, or question how much they matter. But it is their very commonness, their cumulative effect, and the strategic combination of such arguments, with their elisions and simplifications, across a range of media and approaches, that makes these individual instances significant and disturbing. And the very fact that they *are* connected and concerted, and that the advocacy appearing outside the confines of traditional forums such as law reviews and university press books almost always prominently announces and trades on the status and “expert”

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66. Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013).

67. *Id.* at 649–50.

68. *Id.* at 650–51.

69. *Id.* at 652.

70. *Id.* at 653.

authority of the scholar *as* a scholar, makes it hard to dismiss such concerns on the basis that they are really “just” extra-scholarly advocacy or lawyering.

Again, despite my personal distaste for this model of public or “engaged” scholarly activity, I do not argue here for its elimination or its expulsion from the category of “scholarship.” Rather, I ask what the principles of candor and integrity require in such cases. The answers, by this point in my contribution, are not surprising.

The key requirement is that any legal scholar engaging in such activity should *say so*. Having decided to follow this approach, he should be up-front about it. He can announce early in a law review article that the article is part of a larger project of legal advocacy that will include litigation, op-eds, tweets, and other publicity. He can say in work aimed at the general public, as Professor Redish did so admirably, that he is advancing an argument, not making a confident assertion of the law as it stands and as the courts would describe it.<sup>71</sup> He can make clear, in *any* forum, that he is writing to achieve a particular result, not to explore a question disinterestedly. He can either avoid strategic rhetorical choices aimed at enlisting others rather than persuading them through pure intellectual argument, or openly acknowledge these choices for what they are. If his work is part of a larger suite of collaborative advocacy or activism, he can say so. There is nothing wrong with saying, in the acknowledgment or “asterisk” footnote of a law review article, “This article was delivered with funding from [or at a conference hosted and whose expenses were paid for by] the Center for So-and-So, which advocates for [insert issue and outcome here].” The Center for So-and-So might not like it, but that is the Center’s problem, not anyone else’s. He can say, when drafting an amicus brief or scholars’ letter, that the signatories are not all experts on the issue, or that they are experts on, say, constitutional law in general, but not on the particular question before the court. When writing an article that deliberately limits its scope, if the *reason* for limiting the scope of the discussion is that the unaddressed questions might hurt the article’s chances of persuading judges or might give ammunition to his opponents, he can say just that.

As with the other forms of scholarship discussed above, employing candor and integrity in this fashion will have beneficial effects. The most important effect is to send *accurate* signals to readers, enabling them to evaluate the work—whether in a scholarly forum or elsewhere—with adequate knowledge of its goals and limits. An amicus brief written by a group of self-described non-experts will stand or fall on the merits of the arguments (or whatever other determinants go into the judge’s decision), not on any purported expert authority. A reader of an op-ed who is told that the argument being made is an

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71. Redish, *supra* note 62.

argument about what the law *ought* to be, that it is novel, or that few if any courts have accepted such arguments so far, may still agree with the argument, but will not think she is being given incontrovertible facts, or that anyone who disagrees with the argument must be callously and dishonestly ignoring reality. The reader will be aware that she is being *sold* an argument, that this sale is being pursued across multiple “platforms,” and that the goal of this concerted effort is to influence both the courts and the reasonably well-educated laity (and then some, if one includes Twitter), and to use a wide toolkit of rhetorical and other devices to “maximize the real life impact [of such interventions] on current issues.”<sup>72</sup> The reader has nothing to lose but her credulity and innocence.

And the writer? It seems to me he has nothing to lose that he is entitled to complain about losing. A frequent response I have received to objections to lack of candor and integrity in publicly oriented scholarship, and the use of scholarly credentials to buttress arguments aimed at the public, is that no disclosures are required because, in effect, everyone already understands the game. If that is the case, then the kinds of disclosures I recommend can hardly undermine the work. The problem is one of mere redundancy—that such disclosures are unnecessary. Redundancy seems a pretty small price to pay to ensure the integrity of the scholarly enterprise and guard against taking in more naïve or vulnerable non-specialist readers.

The other possibility, of course, is that everyone does *not* already understand the game. Or the problem may be that it is not always clear when a piece of scholarship or some other piece of writing is a disinterested analysis of an issue and when it is part of a larger project of advocacy, and that the scholar-advocate relies on and takes advantage of the boost in authority and persuasiveness that results from that uncertainty. A scholars’ letter, for instance, or an amicus brief signed by scholars in a particular field, relies on the ostensible special expertise that these scholars bring to the question on which they are opining. And that presumption of expertise comes from more traditionalist “academicized” work. If the letter-writers lack expertise on the issue, or are not drawing on that expertise in writing or signing the letter or brief, or do not in fact agree as experts with all of the content of the brief or letter, they are trading on that authority for other ends and with no fair basis for doing so. It is true that if letters or briefs of this sort began with the caveat that they were not prepared by the signers, or involve assertions on matters on which the signers are not experts, or do not necessarily agree, they would be taken much less seriously—if not by judges, who may already not take them

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72. Katyal, *supra* note 46, at 60.

seriously, then by law clerks, journalists, and the public. That would be a good thing.

In short, I do not seek to reject all such work as “non-scholarship” or rule it out of bounds altogether. But it does seem to me that if it were undertaken with candor and integrity—if its producers told its consumers what they were up to and why—the political effectiveness of this kind of work would be significantly undermined. And it is hard for me to see this as anything other than a benefit, both for scholarship and for democratic dialogue.

There is a final sting in the tail of all this. The exercise of reflection on the goals of one’s work, and candor about those goals and how they are directing or limiting one’s work, may lead the scholar to reconsider her vocation. It may, as the current phrase runs these days, require the “engaged” legal scholar to “check her own privilege.” And there is no doubt that a tenure-track or tenured position at an American law school is an enormous privilege. It is not merely a convenient—even luxurious—place from which to do other kinds of work. It provides the luxurious gloss of authority. But it does not do so for purposes of exploiting that authority—even for good ends. To the extent that the engaged scholar writes, among other things, scholarship that meets all the standard ethical and professional criteria for scholarship, then the academic perch is justified. To the extent that her additional, “engaged” work makes explicit its highly partial goals, its interested perspective, the source of its funding, its reliance on rhetorical tools of persuasion rather than meaningful expertise, and so on, at least that work will not trade unfairly on the ostensible authority of the academic office. But if publicly providing this laundry list of caveats and disclosures is the price of undertaking “engaged” articles, blog posts, Twitter feeds, op-eds, amicus briefs, and the like while remaining in the academy, the “engaged” or public scholar may decide that his or her time would be better spent leaving the academy and focusing on such work directly. There are many places to do so: as a public-interest litigator or private lawyer, at a think tank rather than at a university, as an independent public intellectual rather than a tenured academic, as a political candidate or office-holder or government lawyer, and so on. Tenure is not a life sentence, after all. And there are plenty of would-be scholars who would be happy to fill such positions, and either use them for only their original intended use, or make it quite clear when they are doing anything different from that.

There is one more interesting possibility: Scholars who, because of requirements of candor and integrity, are unable to engage in the same kinds of public interventions they engage in today, could write exactly the same things—in *their non-academic capacity*. No rule says that scholars cannot act as politically involved and engaged citizens. A professor at an elite law school who wants to intervene on a public issue, and who is not bringing real expertise

to the question or not using that expertise properly as an academic, can write an op-ed that omits any mention of his or her academic affiliation. Law professors who want to sign amicus briefs on issues on which they have not done the research or to which they bring no real expertise can similarly sign those briefs as interested individuals, again omitting any mention of the universities that employ them. More academics *should* be politically and civically involved and engaged. Many more of them should do so without using their titles or letterheads. If they find that unthinkable, it is possible that it is time for them to reconsider their vocation.

In fact, none of this is truly unthinkable. To take an imperfect example, consider Professor Michelle Alexander. A former litigator and professor at the Stanford and Ohio State law schools,<sup>73</sup> Alexander achieved much broader fame for her book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.<sup>74</sup> In the process of speaking about these issues, Alexander writes, she became convinced that the kinds of issues she was concerned with, and the ways she wanted to address them, did not belong in a law school or in legal academic work.<sup>75</sup> “At its core,” she wrote, “America’s journey from slavery to Jim Crow to mass incarceration raises profound moral and spiritual questions about who we are, individually and collectively, who we aim to become, and what we are willing to do now. I have found that these questions are generally not asked or answered in law schools . . . .”<sup>76</sup>

So she quit. Or, to be more accurate and less dramatic, she moved. Having decided to “shift[] [her] own focus from questions of law to questions of justice,” Alexander decided that a better home for such studies would be a visiting professorship at Union Theological Seminary.<sup>77</sup> That strikes me as showing an extraordinary sense of candor, integrity, and professional responsibility to both callings—her new one and her old one. More legal scholars should emulate her.

73. For Professor Alexander’s professional biography, see *Michelle Alexander*, UNION THEOLOGICAL SEMINARY, <https://utsnyc.edu/faculty/michelle-alexander/> [<https://perma.cc/CBT3-7ZF9>] (last visited May 2, 2018).

74. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

75. Michelle Alexander, FACEBOOK (Sept. 14, 2016), [https://www.facebook.com/permalink.php?story\\_fbid=1090233291064627&id=168304409924191](https://www.facebook.com/permalink.php?story_fbid=1090233291064627&id=168304409924191) [<https://perma.cc/4HL6-6CMV>].

76. *Id.*

77. Alexander C. Kafka, *A Prominent Scholar-Activist Trades Law for the Seminary*, CHRON. OF HIGHER EDUC. (Sept. 22, 2016), <http://www.chronicle.com/article/A-Prominent-Scholar-Activist/237869> [<https://perma.cc/E6W5-9EQ9>].



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