

## From the Editors

We are pleased to present a provocative issue for your reading pleasure. The issue begins with ten diverse perspectives from a symposium on “The Future of Legal Scholarship.” We are grateful to Robin West who spearheaded the idea for the symposium, to the AALS for its sponsorship, to Dean Jeremy Paul and Professor Margaret Woo and their colleagues who hosted the symposium at Northeastern University School of Law in Spring 2016, and to the distinguished scholars who participated in the symposium and whose papers we are pleased to publish here.

In our regular Articles section, Professor Andrew Kerr advocates the virtues for both reader and author of “Writing the Short Paper”—an article that intersects well with the symposium theme by opening up possibilities for alternative forms and styles for effective legal scholarship.

Addressing the well-being of law students, Professors Jerome Organ, David Jaffe, and Katherine Bender, Ph.D., present “Suffering in Silence,” an article that provides and analyzes the data from a 2014 survey of law students conducted at fifteen schools. The paper documents several possible causes of heightened distress among law students and outlines some of the particular obstacles that deter law students from seeking appropriate help.

In a review essay—“Christopher Columbus Langdell and the Public Law Curriculum”—Professor Peter Strauss presents a masterly and critical account of the development and present state of the teaching materials for Administrative Law courses in most U.S. law schools. In reviewing the leading casebooks, past and present, he particularly faults the authors and editors for excessive attention to the subject of judicial review of regulatory actions and inadequate attention to legislative and internal agency process and norms, or to the skills all contemporary practitioners need for practice before agencies. This essay is key reading for any teacher of Administrative Law and other regulatory subjects.

Finally, we close the issue with Professor Michael Dorf’s review of Judge Richard A. Posner’s recent book, *Divergent Paths: The Academy and the Judiciary* and a Response to the review by Judge Posner. If for no other reason than the contemporary domestic political controversy—and misunderstandings—about the proper role of the judiciary, all law teachers and deans should be interested in and concerned with improving education and training for members of the judiciary. We hope the Review and the Response inspire further deliberation and debate on this important task.

Kate O’Neill  
Kellye Y. Testy



### **The Future of Legal Scholarship Symposium: An Introduction**

The Journal of Legal Education is proud to publish this collection of essays concerning the future of legal scholarship, many of which were presented at a symposium held at Northeastern University School of Law on April 29, 2016. We are particularly grateful to our Editorial Board chair and guest editor Professor Robin West for her leadership in assembling our contributors and for her inspired opening essay reminding readers why legal scholarship, both normative and critical, is important to understanding our current world and to building a better, more just society.

We chose this moment to focus on legal scholarship's future to present multiple perspectives about how research can continue to serve the broader mission of legal education and to respond to recent narrower views of legal scholarship's value. If today's oft-repeated narrative is that legal scholarship is too expensive and increasingly removed from the day-to-day practice of law, we wanted to know how some of today's leading scholars—representing movements ranging from law and literature to empirical legal studies—understand their roles in the contemporary academic landscape.

We understand, as Dean Frank Wu's essay portrays so vividly, that a mismatch between anticipated revenues and ongoing expenses will place enormous pressure on law schools to cut costs over the next several years. This means that every aspect of legal education, including legal scholarship, should be re-examined for its contribution to the overall enterprise. But, the obvious need for change does not lead to the conclusion that legal scholarship can or should be severed from the broader aims of legal education. It's certainly worth asking what effect diminishing research would have on the development of the profession. And the essays within this volume make a powerful case for the proposition that legal scholarship can help students and others understand law's key role in broad social movements such as criminal justice reform (Deborah Tuerkheimer) and engage students in core questions central to professional identity such as the role and nature of law (Michelle Madden Dempsey).

We also applaud calls from all sections of the profession urging law schools to ensure that our graduates emerge ready to confront contemporary challenges. But, as our symposium authors argue convincingly, legal scholarship has a valuable role in building the conceptual apparatus that new lawyers need to serve clients and the broader society. As I tell everyone whom I interview as a possible adjunct professor, I don't want people in front of the classroom whose idea is simply to tell students that "this is how things are done." Because the one certainty about our profession is that however things are done today they will be done differently tomorrow. A world-class legal education must introduce students to the timeless challenges inherent in building and extending the rule of law. Practice-ready graduates are those who can master new conditions and grow with the times. It's easy to ridicule the jargon-ridden

excesses of certain law review articles while conveniently forgetting that law is a creative enterprise in which new solutions enable new collaborations that empower a growing economy and a safer, more secure world. Our profession's leaders should know better. Our authors do, and they highlight how well-respected scholarly approaches such as law and literature (Richard Weisberg) and critical race theory (Adrien Wing) add value to a legal education. Legal scholarship in these genres affords needed perspectives from which to analyze not merely where the law is now but where it must go to live up to our highest ideals.

Our authors too demonstrate the time-honored role of the legal scholar in correcting errors that may infect the law and hinder its sound administration. Error correction sometimes is conceptual, as when authors unravel fundamental confusions that may creep into judicial interpretations of statutes. Professor Benjamin Zipursky makes a compelling case that just such confusion reigned in cases that have shielded from liability website owners who deliberately re-post false and damaging information. He argues convincingly that courts have made a category error in finding that Congress meant to include such re-postings within the statutory protections for internet service providers. Scholars can also correct errors by identifying conceptual or disciplinary silos that plague the profession and can prevent one group of lawyers and scholars, such as those working in administrative law, from drawing on insights from what should be an obviously connected field, such as financial regulation. (Robert B. Ahdieh). Failure to collaborate with colleagues working on similar problems can produce catastrophic results, as the nation saw when lack of communication between different branches of our intelligence agencies hindered our ability to anticipate the terrorist attacks of 9/11.<sup>1</sup> Of course, as Professor Ahdieh points out, academic culture can also push professors into disciplinary silos, but those who successfully traverse traditional pigeonholes can lead the way to more and better collaboration. Error correction can also come from valuable empirical studies that show whether the purposes of particular laws are actually being achieved as the laws are implemented on the ground. Professor Kathryn Zeiler offers extraordinarily helpful comments on how such empirical work can be fostered and improved in contemporary law schools. An independent, critical, and multi-disciplinary professoriate is critical to helping the profession, including the judiciary, legislatures, and agencies, avoid fooling itself into embracing the effectiveness of questionable laws.

Finally, legal scholars are responsible for the introduction of new concepts that have shaped the nation's understanding of justice and improved the lives of countless citizens. The notion of privacy from Warren and Brandeis<sup>2</sup> and the idea of sexual harassment so powerfully advanced by Catherine

1. See generally, GILLIAN TETT, *THE SILO EFFECT: THE PERIL OF EXPERTISE AND THE PROMISE OF BREAKING DOWN BARRIERS* (2015).
2. Louis Brandeis and Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

MacKinnon<sup>3</sup> are familiar examples. Perhaps one day the idea that the health of populations ought to rank alongside other legal norms will come to be understood as such a powerful conceptual innovation. (Wendy Parmet). But the point is that we never know which legal idea will catch on and change lives, just as scientists can never be sure which experiments will bear fruit. The legal scholar who suggests warnings on cigarette packages is as much a cancer fighter as the researcher who pioneers immunotherapy. Who could doubt that our current political system could benefit greatly from the sort of new ideas, such as federalism, the separation of powers and the bill of rights that launched our nation on its current path? In light of these many virtues of legal scholarship, I will continue to do all I can as a law school dean to encourage path-breaking scholarship that has long been the hallmark of the legal academy.

I cannot close, however, without returning to Professor West's marvelous essay and commenting on what strikes me as the greatest obstacle to an academic environment in which normative legal scholarship can flourish. Professor West discusses Stanley Fish's argument that professors depart from their role as experts when they begin engaging in normative argument. Fish argues, in part, that there must be a distinction between acceptable teaching (communicating expertise to students) and unacceptable preaching (trying to sway students to your political views). But Fish's bright line between expert analysis and normative persuasion is most convincing under a world view in which one's normative commitments are more a matter of personal assertion than an effort to forge bonds with one's fellow citizens. The kind of normative argument that dominates most legal scholarship is one that starts with the idea that core values are shared, and expert analysis is needed to determine which courses of action will best promote those values. A loss of faith in the power of shared norms is far more threatening to the legal academy's mission than the individual teacher who misrepresents partisan advocacy as instruction. Most important, the Socratic method at the root of legal pedagogy stems from a form of normative argument based on teasing out the implications of shared premises, an approach that fits within a University classroom in a way that a didactic, value-laden lecture might not. If I value *x* and my students value *y*, then Professor Fish has a case that it might be inappropriate for me to try to convert students to my point of view. But suppose I value *x* and my students also value *x*. Both my students and I may be unsure instead over what laws or forms of government are most likely to produce *x*. Would it be inappropriate for me to lead them in a discussion of how best to reach the values upon which we agree? Or would that be the very best teaching I could do and a spur to conduct research that would inform my ability to lead such discussions expertly?

For me, the question answers itself, but it leads to another. Are we now living in a nation where goals and values are sufficiently shared so that normative scholarship aimed at teasing out where our values lead is a plausible endeavor?

3. CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

As I see it, the attack on legal scholarship for straying from the narrow goal of instructing students in the law rests upon an unstated argument that most people do not share common goals and values. On this view, people who teach in universities should content ourselves with training students to be gladiators in economic competition—not people building a community together.

I am proud indeed that our authors in this volume universally reject this narrow vision. We all know how dysfunctional certain aspects of our government have become and how difficult it is to change minds in order to change laws. And we are familiar with Roberto Unger's adage that absolute powerlessness corrupts absolutely.<sup>4</sup> Perhaps that's why some scholars occasionally despair over our ability to influence key decision makers and may struggle to hold on to the highest standards. After all, what's the point of an exciting new approach to the law if people's willingness to accept it depends mostly on which side they are already on? But in the end the spur to a vital continuation of legal scholarship's traditions is that as Americans we are all in this together. Devoting countless hours and considerable resources to deepening understanding of the law, broadening perspectives, correcting errors, and innovating new concepts can only help us build a better and more just future. Can we all work harder to reduce jargon, reach out to broader audiences, build connections with those in practice, and improve the quality of our journals? Of course we can. But the real effort must be on rebuilding our shared national commitment to a collective future built on justice and mutual understanding. Paradoxically, those of us in the academy most committed to a vibrant scholarly tradition have the greatest obligation to build bridges outside campus walls. For in a robust, vibrant democracy, legal scholarship will always have a home.

Jeremy R. Paul, Guest Editor



### Guest Editors for “The Future of Legal Scholarship”

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4. Memorable quote recalled by the author from course on Jurisprudence taught by Professor Unger at Harvard Law School in January 1980.