

Archetypal Legal Scholarship: A Field Guide

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It has been my pleasure to be a sounding board and advisor to many people who consider becoming law professors and yet it has not always been easy to introduce people considering their own research projects to reflect on how their ideas connect with the varieties of legal scholarship. One day I decided to write up a “field guide,” meant to be rather like the guides to birds that offer pictures and descriptions to assist the casual or serious birdwatcher. After sharing it and revising it, I have learned that this “guide” now travels underground and electronically, so I thought it time to give it an official publication, and the Journal’s editors kindly agreed. The explosion of interdisciplinary research in law contributes to the variety of legal scholarship. So does the contrast between “inside” and “outside” thinking in law schools where we try both to equip people for practice and effectiveness within existing institutions and for roles as critics, institutional reformers, and scholars who may explain and analyze in terms quite different from those in the minds of actors operating within existing legal systems. So here with an invitation for supplements, critiques, and revisions is my Archetypal Legal Scholarship: A Field Guide.

I. Doctrinal restatement, e.g., Robert Clark, *Corporate Law*,¹ Laurence Tribe, *Constitutional Law*;² Yoram Dinstein, *War, Aggression and Self-Defence*.³

- a. Organize and reorganize case law into coherent elements, categories, and concepts;
- b. Acknowledge distinction between settled and emerging law;
- c. Identify difference between majority and “preferred” or “better” practice—ideally with some explanation for the criteria to be used.

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1. Robert Charles Clark, *Corporate Law* (Aspen Pub. 1986).
2. Laurence H. Tribe, *American Constitutional Law* (Foundation Press, 3d ed. 2000).
3. Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge Univ. Press, 5th ed. 2000).

II. Recasting project, e.g., Charles Reich, “The New Property;”⁴ L.L. Fuller & William R. Perdue, Jr., “Reliance Interest in Property;”⁵ Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy;”⁶ Guido Calabresi & A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral.”⁷

- a. Gather more than one “line” of cases across doctrinal fields, categories, or historical developments, and show why they belong together or expose unjustified discrepancies;
- b. Offer a new framework or paradigm that can recognize past, present and future material.

III. Policy analysis, e.g., Elizabeth Bartholet, *Nobody’s Children: Abuse and Neglect, Foster Drift, and the Alternative of Adoption*⁸; Jeff Sovern, “Opting in, Opting Out, or No Options At All: The Fight for Control of Personal Information;”⁹ Russell Korobkin, “Bounded Rationality and Unconscionability: A Behavioral Approach to Policing Form Contracts.”¹⁰ Roderick Hills, Jr., “Is Federalism Good for Localism? The Localist Case for Federalist Regimes;” William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment*.¹¹

- a. Usual structure: present a problem; canvass alternatives; propose an evaluative scheme or method; recommend preferred solution;
- b. Attribute problem to: distance between goal and implementation; conflict with a powerfully competing goal; the lack of fit between legal rules or practices when compared with changing social, economic, biological or technical circumstances; or mistaken assumptions as demonstrated by historical review, economic model, psychological research or evidence from other fields;
- c. Not a brief: include fair analysis of a range of alternatives and alternative criteria; offer useful analyses even for people who do not agree with the assumptions, methodology, or conclusion.

4. Charles Reich, *The New Property*, 73 *Yale L.J.* 733 (1964).

5. L.L. Fuller & William R. Perdue, Jr., *Reliance Interest in Property*, 46 *Yale L.J.* 52 (1936).

6. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890).

7. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089 (1972).

8. Elizabeth Bartholet, *Nobody’s Children: Abuse and Neglect, Foster Drift, and the Alternative of Adoption* (Beacon Press 2000).

9. Jeff Sovern, *Opting in, Opting Out, or No Options At All: The Fight for Control of Personal Information*, 74 *Wash. L. Rev.* 1033 (1999).

10. Russell Korobkin, *Bounded Rationality and Unconscionability: A Behavioral Approach to Policing Form Contracts*, 70 *U. Chi. L. Rev.* 1203 (2003).

11. William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford Law and Politics, 1st ed. 2004).

IV. Test a proposition about society or the economy or about human beings that is used by lawyers or assumed in legal sources, e.g., Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes*;¹² Robert H. Mnookin and Lewis Kornhauser, “Bargaining in the Shadow of the Law;”¹³ Lucien Bebchuck and Alma Cohen, “The Costs of Entrenched Boards.”¹⁴

- a. Take a widely assumed or commonly known proposition familiar to lawyers or legal theorists;
- b. Undertake an empirical investigation about its validity or summarize and assess empirical work conducted by others or undertake model-building or summarize and apply model(s) developed by others;
- c. Digest the findings for legal audiences.

V. Study, explain, and assess legal institutions, systems, or institutional actors, e.g., Abram Chayes, “The Role of the Judge in Public Law Litigation;”¹⁵ Marc Galanter, “Why the ‘Haves’ Come out Ahead;”¹⁶ Richard Lempert, “A Classic at 25: Reflections of Galanter’s ‘Haves’ Article and Work It Has Inspired;”¹⁷ George L. Priest & Benjamin Klein, “The Selection of Disputes for Litigation;”¹⁸ Judith Resnik, “Managerial Judges;”¹⁹ Patricia Ewick & Susan Silbey, *The Common Place of Law: Stories From Everyday Life*;²⁰ David B. Wilkins & Mitu G. Gulati, “Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms.”²¹

- a. Offer historical, anthropological, sociological or economic analysis of the behavior of legal actors or institutions, often exposing complexity, gaps between theories and practice, dynamics, and layers of meaning

12. Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard Univ. Press 1994).
13. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law*, 88 *Yale L.J.* 950 (1979).
14. Lucien Bebchuck & Alma Cohen, *The Costs of Entrenched Boards*, 78 *J. Financial Economics* 409 (2005).
15. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281 (1976).
16. Marc Galanter, *Why the “Haves” Come out Ahead*, *Wis. L. Rev.* 1974.
17. Richard Lempert, *A Classic at 25: Reflections of Galanter’s “Haves” Article and Work It Has Inspired*, 33 *Law & Society Rev.* 1099 (1999).
18. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. Legal Stud.* 1 (1984).
19. Judith Resnik, *Managerial Judges*, 96 *Harv. L. Rev.* 374 (1982).
20. Patricia Ewick & Susan Silbey, *The Common Place of Law: Stories From Everyday Life* (Univ. of Chicago Press, 1st ed. 1998).
21. David B. Wilkins & Mitu G. Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 *Va. L. Rev.* 1581 (1998).

and effects;

- b. Use empirical or interpretive methods and/or models;
- c. Offer a normative assessment or agenda for further study.

VI. Critical projects, e.g., Duncan Kennedy, “Form and Substance in Private Law Adjudication;”²² Robert Cover, “Supreme Court—1982 Foreword: Nomos and Narrative;”²³ Kimberle Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law;”²⁴ David Shapiro, *Federalism: A Dialogue*.²⁵

- a. Expose unstated assumptions, patterns or results, internally inconsistent structures or other tensions within a body of law or legal practices or institutions;
- b. Highlight the tensions, contradictions or paradoxes behind the surface of law or legal practices; sometimes they are not resolved but instead try to link to larger psychological, social or philosophic difficulties and political or normative efforts.

VII. Comparative and historical inquiries, e.g., Mary Ann Glendon, *Abortion and Divorce in Western Law*;²⁶ Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence*;²⁷ William Forbath, “The Shaping of the American Labor Movement.”²⁸

- a. Offer a rich description of an earlier era or contrasting legal regime;
- b. Satisfy the criteria within the fields of anthropology or history in use of sources, triangulation, and contextualization;
- c. Suggest how this study illuminates differences, choices, or continuities when compared with contemporary domestic practice.

22. Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976).
23. Robert Cover, Supreme Court—1982 Foreword: Nomos and Narrative, 97 Harv. L. Rev. 1 (1984).
24. Kimberle Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331 (1988).
25. David Shapiro, *Federalism: A Dialogue* (Northwestern Univ. Press, 1st ed. 1995).
26. Mary Ann Glendon, *Abortion and Divorce in Western Law* (Harvard Univ. Press 1989).
27. Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Harvard Univ. Press 2009).
28. William Forbath, The Shaping of the American Labor Movement, 102 Harv. L. Rev. 1109 (1989).

VII. Jurisprudence, philosophy of law, and connecting philosophy and law, e.g., Ronald Dworkin, *Law's Empire*;²⁹ Catherine MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence;"³⁰ Richard A. Posner, *The Problematics of Moral and Legal Theory*;³¹ Seanna Shiffrin, "Speech, Death, and Double Effect."³²

- a. Develop or elaborate a theory that tries to explain how all of law or chief portions of it hang together;
- b. Engage with alternative theories;
- c. Demonstrate the contribution this theory makes to a conceptual puzzle or set of doctrinal or practical problems;
- d. Advance view of justice or analysis of what norms law should pursue.

IX. Combinations, e.g., Cass Sunstein, "Interest Groups in American Public Law;"³³ Derrick Bell, Jr., "Brown v. Board of Education and the Interest-Convergence Dilemma;"³⁴ Lani Guinier, "The Triumph of Tokenism;"³⁵ Frank H. Easterbrook & Daniel R. Fischel, "Voting in Corporate Law;"³⁶ Ian Haney Lopez, *White by Law: The Legal Construction of Race*.³⁷

29. Ronald Dworkin, *Law's Empire* (Belknap Press of Harvard Univ. Press 1986).
30. Catherine MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," 8 *Signs* 635 (1983).
31. Richard A. Posner, *The Problematics of Moral and Legal Theory* (Belknap Press of Harvard Univ. Press 2002).
32. Seanna Shiffrin, "Speech, Death, and Double Effect," 78 *NYU Law Review* 1135 (2003).
33. Cass Sunstein, "Interest Groups in American Public Law," 38 *Stan. L. Rev.* 29 (1985).
34. Derrick Bell, Jr., "Brown v. Board of Education and the Interest-Convergence Dilemma," 93 *Harv. L. Rev.* 518 (1980).
35. Lani Guinier, "The Triumph of Tokenism," 89 *Mich. L. Rev.* 1077 (1991).
36. Frank H. Easterbrook & Daniel R. Fischel, "Voting in Corporate Law," 26 *J. L. & Econ.* 395 (1983).
37. Ian Haney Lopez, *White by Law: The Legal Construction of Race* (NYU Press 1996, rev. ed. 2006).