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FURTHER REFLECTIONS ON POST-REALIST LEGAL SCHOLARSHIP AND TEACHING: A BRIEF RESPONSE TO PROFESSOR SCORDATO

Gregory Scott Crespi*

In Volume 48 of the *Santa Clara Law Review*, Professor Marin Roger Scordato reflected on how law professors who embrace the instrumental view of law, which is now dominant in academic circles, should properly discharge their duties.[1] Scordato's lengthy article is interesting and insightful. He provides one of the better recent discussions of the transition of the legal academy from the early twentieth century era, when it was dominated by a formalist, doctrinal jurisprudential approach, to the modern widespread embrace of an instrumental perspective. His discussion makes clear that law is no longer regarded by academics as a logically consistent body of rules that reflects an objective reality, but instead is now widely viewed as an inherently political and "value-laden" means of accomplishing contested social objectives, whose operation is to be judged more by its results than by its logical consistency.[2] He also contributes a

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1. Marin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, 48 SANTA CLARA L. REV. 353 (2008). "Certainly by the decade of the 1990s, law schools were overwhelmingly instrumentalist in their understanding and presentation of the law. . . . [W]e were pretty much all realists [by then]." *Id.* at 365.

2. *See id.* at 359–67. Scordato in this article characterizes "formalist" jurisprudence as a purportedly objective and mechanistic method of legal analysis that focuses heavily on the language of judicial precedent, and which attempts to derive general principles from prior judicial decisions in an objective fashion and then apply those principles consistently in a logically deductive manner to resolve new problems. *Id.* at 355. A judge engaged in formalist jurisprudence would properly regard himself as merely a "detached analytical technician" who was not imposing his own value choices when deciding cases. *Id.* at 361–62. "Instrumentalist" jurisprudence, in sharp contrast, is described by Scordato as a mode of analysis based on the premise that legal language is

thoughtful discussion of the problems that this change presents for normative legal scholarship, given that this necessarily broadens the scope of scholarly analysis beyond the logic and coherence of legal doctrines to also include investigation of the consequences of laws for the regulated community.[3] He convincingly explains that legal scholars must now have both considerable interdisciplinary expertise and an ability to engage in sophisticated quantitative empirical research that extends well beyond the law library to properly conduct such instrumental analyses, and how this broader focus sharply undercuts their ability to assert any special authority with regard to the normative issues addressed in their work.[4]

Scordato's article focuses primarily on the question of how law professors who embrace instrumentalism should conduct legal scholarship.[5] But he also offers some related suggestions regarding how those professors should discharge their teaching obligations and their obligations to be of service to judges and to the practicing legal community. Much of his analysis is thoughtful and relatively

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"rarely self-defining," and that "value-laden choices cannot be avoided in the process of interpreting and applying legal standards." *Id.* at 354. The focus of instrumentalist jurisprudence is instead to identify and examine the social purposes underlying legal doctrines, and then evaluate the effectiveness of legal rules in achieving those purposes. *Id.* at 355. The goal in legal development and reform, from an instrumentalist perspective, is thus not to bring the law into closer harmony with some pre-existing, abstract ideal, but instead to more effectively respond to new social challenges. *Id.* at 361–62.

Scordato does not draw a sharp distinction in his article between "instrumentalist" jurisprudence and "realist" or "post-realist" jurisprudence, and I will use the terms "instrumentalist" and "instrumentalism" broadly throughout this essay to describe any conception of law that incorporates the core position taken by the legal realists that legal reasoning is logically indeterminate and is inherently a value-laden enterprise. In an earlier 2007 article, Scordato provided additional insights regarding his views of the nature of instrumentalism in a piece that focused on the issues raised by the 1976 California Supreme Court case, *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976). *See* Marin Roger Scordato, *Post-Realist Blues: Formalism, Instrumentalism, and the Hybrid Nature of Common Law Jurisprudence*, 7 NEV. L.J. 263 (2007).

3. *See* Scordato, *supra* note 1, at 404–29.

4. "[I]t may not yet be widely acknowledged, but the shift from formalism to instrumentalism inevitably results in a profound contraction in the expertise, and thus the authority, that legal scholars bring to normative legal scholarship." *Id.* at 437. *See generally id.* at 404–29.

5. "It is the purpose of this article to consider some of the consequences for legal scholarship of this shift from formalism to instrumentalism." *Id.* at 360.

uncontroversial in its conclusions. In the interest of brevity, I will focus in this short response article only upon a few of his recommendations that I found to be somewhat problematic.

Scordato does an excellent job of describing the tensions that exist today for those law professors who embrace the instrumentalist perspective when the everyday world of legal discourse outside of the academy is still largely dominated by formalist rhetoric.[6] However, some of the recommendations that he offers to professors, in an attempt to help them resolve these tensions in their scholarship and teaching, do not withstand scrutiny, and his otherwise impressive work merits a brief response pointing out these shortcomings.

The basic difficulty that I have with Scordato's analysis that underlies all of my criticisms is that while he recognizes that law professors serve several different functions—engaging in legal scholarship, teaching law students, and providing useful service to the bar—he tends to blur critical distinctions between these functions. As a consequence, he offers recommendations regarding the conduct of both scholarship and teaching that inappropriately subject those activities to evaluative criteria and limitations that are only properly applicable to the bar service function.

I will proceed by first briefly discussing and criticizing a few of Scordato's recommendations regarding the conduct of legal scholarship.[7] I will then briefly express my disagreement with his recommendations regarding how law professors who embrace instrumentalism should proceed in their teaching.[8] Finally, I will offer a summary conclusion of my critique.[9]

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6. *See id.* at 369–72.

7. *See infra* Part I.

8. *See infra* Part II.

9. *See infra* Part III. I do not have the space in this brief essay to discuss the work of any of the numerous other scholars who have over the years addressed one or more of these issues, but I will provide a few references to some of the more important recent contributions that have been made in this regard. Scordato, in his article, provides references to the work of a large number of the more prominent early legal realist writers who have addressed these issues from the mid-1920s on, and to some more recent writers. *Id.* at 375 n.95.

I. SCORDATO'S RECOMMENDATIONS REGARDING LEGAL SCHOLARSHIP

Scordato sets forth a useful three-part taxonomy of legal scholarship that I will also utilize in this response. He first characterizes as "first-order, or primary, descriptive scholarship" those efforts that have only the modest objective of uncritically reporting on and summarizing appellate court cases, statutes, and regulations.[10] He later defines as "second-order descriptive scholarship" those more ambitious efforts that go beyond such narrowly descriptive work and also attempt to identify the underlying factors that give rise to legal doctrines and determine their practical effects.[11] Finally, he classifies scholarship that attempts to evaluate legal doctrines and procedures as "normative legal scholarship."[12]

Scordato notes that the move from formalism to instrumentalism in the legal academy has not significantly affected the nature of first-order descriptive scholarship, although it has led to a radical devaluing of such efforts as superficial by academics who now largely embrace instrumentalism.[13] But when second-order descriptive scholarship is conducted by scholars who embrace the instrumentalist perspective, the work may well be carried out in a different fashion than when conducted by formalists. Such scholarship may culminate in descriptions and conclusions that are premised on instrumental rather than formalist reasoning. If so, those conclusions will usually be more critical of the coherence and consequences of prevailing legal doctrines, and of prominent legal actors who invoke those doctrines as justifications for their actions, than would the conclusions that would result from a more formalist approach to the subjects of inquiry. But as Scordato correctly notes, despite the triumph of instrumentalism in the legal academy, the overwhelming majority of legal opinions and

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10. *Id.* at 372.

11. "[S]econd-order descriptive legal scholarship. . . . seeks to accurately describe what it is that is motivating the choice of legal doctrine without the uncritical reliance on the published words of the decision makers, and without necessarily accepting that the motivating factors are tied to the furtherance of . . . the public good." Scordato, *supra* note 1, at 381.

12. *Id.* at 404.

13. *Id.* at 372–74.

pronouncements of political actors at the highest levels of government continue to be expressed in traditional formalist terms.[14]

Instrumentalist law professors are therefore presented with a conundrum regarding how they should conduct their scholarship. Given the persistence of what they regard as misleading formalist rhetoric in the pronouncements of the larger legal and political community, what kind of second-order descriptive scholarship should they seek to produce? My response is that second-order descriptive efforts should, to the extent possible, proceed in the normal fashion of scientific inquiry where the ultimate goal is to produce disinterested, objective, comprehensive, and accurate descriptions of reality that lend themselves to empirical testing and falsification, without regard to how those efforts might be received by the current legal authorities. A legal scholar, whether of a formalist or an instrumentalist bent, should ideally commence her research by positing a tentative explanatory hypothesis that reflects her best understanding at the outset of whatever matter she is studying, and then she should be open to changing her mind, perhaps fundamentally, should the evidence that she obtains through her research warrant this outcome. One who embraces instrumentalism should therefore start from instrumentalist premises, but these premises should be taken only as tentative working hypotheses to be critically examined and modified as necessary in light of the data, and not be regarded as unquestioned articles of faith that her research must necessarily affirm.

Scordato has a rather different view of the proper objectives and orientation of this kind of scholarly work. He argues that second-order descriptive legal scholarship should

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14. "[P]olitical actors at the highest levels of government continue to espouse the most deterministic version of formalism." *Id.* at 366. "Despite the realist revolution and its full acceptance by most law professors, the overwhelming majority of published trial court memoranda and appellate court opinions in this country continue to present themselves in traditional formalist terms." *Id.* at 370. It is not entirely clear what accounts for this persistence in the use of formalist rhetoric by political actors and judges long after it has been discredited among legal academics. Scordato opines that political actors and judges may be quite aware of the shortcomings of formalist modes of analysis, yet may be concerned that the public will accord less respect to their pronouncements, and perhaps even question and challenge their legitimacy, if they candidly and explicitly accept the instrumentalist paradigm. *Id.* at 371.

not seek to achieve the kind of objective, accurate, and falsifiable descriptions of the world that might be sought by, for example, physicists and chemists.[15] It should instead embed any research findings within the framework of rather Panglossian underlying assumptions that "[e]xisting law is largely coherent and rational; on the whole, it seeks to further important social values; those who administer the law and make critical decisions are, overwhelmingly, striving to be fair and impartial and are competent at performing the function."[16]

Scordato does not go so far as to claim that these optimistic assumptions of a coherent and competently and benevolently administered legal system are descriptively accurate. He argues, however, that scholarly efforts to describe various aspects of the operation of the legal system, even those conducted by instrumentalists who may regard those optimistic assumptions as untenable, should nevertheless take those assumptions as premises not open to question. Scholars should be willing to sacrifice both accuracy and plausibility if necessary to present descriptions and explanations that are in accord with those assumptions.

Justifying such a radical departure from the normal ethic of candid disclosure and commitment to truth and accuracy that guides scientific inquiry in other fields is quite a tall order. Scordato boldly claims that legal scholarship that challenges and contests these optimistic assumptions, "no matter how accurate and true," is "simply not very useful, and it is, as a practical matter, not much valued in our current environment."[17] Such work "risks rejection as being outside the purview of legal scholarship and being unhelpful."[18] Scholars who wish to do research that is practical, useful, and helpful should thus avoid offering fundamental criticisms of the legal system, or of those persons who exercise legal authority, even if those criticisms

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15. "[L]egal scholarship . . . is not seeking the kind of disinterested objective description of reality that one might associate with a nature science like physics or chemistry." *Id.* at 382.

16. *Id.* at 383.

17. Scordato, *supra* note 1, at 383. Legal scholarship that criticizes formalist premises "can expect a rather cool reception in the current environment. Such scholarship . . . simply lacks a receptive audience." *Id.* at 375.

18. *Id.* at 432.

are accurate.[19]

I completely disagree. Descriptively accurate scholarship that departs from these optimistic assumptions set forth by Scordato may not be particularly "useful" or "valuable" to persons in positions of legal authority or influence who might prefer scholarship that depicts them, and the framework of laws that legitimates their power, in a more favorable light. Accurate but critical scholarship indeed "risks rejection" by those persons. But such critical work may be very useful and valuable to society in that it may help reveal the true state of affairs for all to see, and can provide support for those persons who are pursuing worthy legal and institutional reforms. In any event, while the degree of usefulness for existing legal authorities may be one of several appropriate criteria to use for judging the merits of work that is primarily intended to be of service to judges and to the practicing bar, it is not an appropriate criterion for judging the merits of scholarship.

It borders on the outrageous for Scordato to call for scholars to deliberately sacrifice truth and accuracy in their work, if necessary, to avoid reaching results that might lead to criticism of current legal authorities. Legal scholars obviously are tempted to try to enhance the influence of their work by presenting their results within a selective context that is palatable to powerful people.[20] Some observers have critically noted that there are a substantial number of scholars whose work exhibits the earnest and unreflective high-mindedness and optimism encouraged by Scordato,[21]

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19. *See id.*

20. *See, e.g.*, Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2111 (1992) ("[T]he scholars are still walking the tightrope between frankly speaking truth to the powerful and adopting enough of the discourse and conventions of the powerful to have some influence in their world.").

21. Professor Robert Gordon notes:

> [T]he dominant tone of scholarship is one of earnest high-mindedness about the legal system, a sustained and rather mystifying optimism. If anything, in my view, it is all much too soft-edged and sunny, far too sparing of the dark and bitter realities of legal institutions and social worlds in which they work.
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> . . . [But most] scholars continue to assume that the managers of the legal system want the system to work justly and efficiently and to serve its best purposes; and that when deficiencies are pointed out, and rational arguments made for amendment, concerned lawyers will

perhaps in some instances in an attempt to curry favor with legal elites. But an instrumentalist scholar whose research findings question the validity of those optimistic assumptions has, in my opinion, violated a fundamental canon of scholarship if she then alters or selectively presents her results in order to affirm the validity of those assumptions in an attempt to enhance the "usefulness" and "value" of her work to existing legal authorities.

At another point in his article, Scordato retreats somewhat from this rather extreme stance to take a more moderate position. He recognizes that persons who engage in second-order descriptive scholarship might reasonably choose to depart, to some extent, from those optimistic assumptions of a coherent and benevolently administered legal system so as to better "satisfy the intellectual demands of realism,"[22] i.e., address the criticisms of many instrumentalists who fundamentally disagree with Scordato and prefer truth and accuracy over commitment to such assumptions. He concedes that scholars might properly depart from those optimistic assumptions, and accept instead as the underlying organizing premise for their work one or more of several various alternative assumptions, again without regard for their descriptive accuracy, so long as those alternative assumptions still reflect "a wholehearted embrace of the ultimate rationality, coherence and purposefulness of the law."[23]

Examples of such alternative assumptions would be that the legal system is effectively configured so as to achieve some overarching normative goal or goals, such as "[economic] efficiency, economic productivity, deterrence, compensation, risk spreading, [or] beneficial reliance."[24] The proper focus of descriptive legal scholarship would then be to explain legal doctrines by showing, in a quasi-formalist manner, how those doctrines are logically entailed by and deductively consistent with those posited objectives.[25] According to Scordato, such

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> respond with dialogue and collaborate in the reform effort, if necessary even against their own and their clients' immediate interests.

Id. at 2105, 2112.

22. *See* Scordato, *supra* note 1, at 383, 386.

23. *Id.* at 387.

24. *Id.*

25. *See id.* ("In this way, legal scholarship of this sort enjoys the satisfying appearance of objectivity and logical inevitability that was thought to be the hallmark of formalism in its heyday while still appearing to be consistent with

work that characterizes the legal system as a coherent framework for achieving certain desirable ends "is likely to enjoy a far more welcoming reception among the larger legal community" than would more critical work that called attention to the indeterminacy and inconsistency of the law and its manipulation by those in positions of authority to reach unjust results.[26]

Just how is this new position an improvement over Scordato's initial stance, given that it similarly calls for the sacrifice of truth and accuracy when necessary to conform one's findings to whatever premises of coherence, rationality, and purposefulness one has chosen to initially embrace? Let me quote Scordato on this point: "In this way, legal scholarship of this sort enjoys the satisfying appearance of objectivity and logical inevitability that was thought to be the hallmark of formalism in its heyday while still appearing to be consistent with post-realist perspectives."[27]

There you have it. The proper goal of second-order descriptive legal scholarship is to give an "appearance" of the objectivity and logical inevitability of the subject doctrines, even if this is not a particularly accurate depiction of their nature, while also "appearing" to be consistent with the instrumental perspective by utilizing one or more common instrumentalist analytical concepts as the organizing premises, even though one is now using those concepts as non-falsifiable articles of faith rather than as tentative working hypotheses. But work done in this manner, which rules out of bounds at the outset any critical examination of its initial organizing premises, regardless of the findings of the research, and which then alters or selectively presents its findings so as to render them congenial to those with a particular ideological orientation, is not worthy of being regarded as scholarship.

Scordato recognizes the need to address the yawning gap that exists between either of his suggestions and the far more demanding standards of conventional scientific inquiry as to the falsifiability of premises and conclusions.[28] He offers, as a final defense of his position, the argument that descriptive

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post-realist perspectives.").

26. *Id.* at 432.

27. *Id.* at 387.

28. *See* Scordato, *supra* note 1, at 388.

legal scholarship is, by its nature, not something that should be judged by the objective standards of scientific inquiry that are applied in other academic disciplines.[29] Why not? Because descriptive accounts of the nature and underlying causes of a legal doctrine are, in his view, not like a typical scientific hypothesis because "[t]here is not really an expectation that further research and discovery will result in the refinement of a unified set of principles that can fully account for all of the law."[30] Legal scholarship is thus "not like descriptive efforts in the natural sciences, where the basic measure of success is the degree to which the explanation accounts for observable features and predicts future action."[31] The nature of descriptive legal scholarship is that it cannot "offer an account of the object of study that is, in a traditional sense, either verifiable or definitively refutable."[32]

It is not simply that Scordato believes that legal scholarship is unlikely to ever reach the level of comprehensiveness and accuracy often achieved by the natural sciences. Descriptive legal scholarship, in his view, is qualitatively different from scientific inquiry; it is more akin to literary criticism in that any failure to fully explain the subject under investigation, or failure to provide empirically falsifiable predictions, is "more or less irrelevant."[33] The quality and value of legal scholarship should be judged not by scientific standards,[34] but by the "consensus of opinion in the relevant community. . . . the degree to which it is considered interesting and insightful—values that are both highly contingent and perspective dependent. . . . Much of the basis for the evaluation of such work will necessarily be aesthetic."[35]

If I understand Scordato correctly, he is recommending the use of a novel evaluative standard under which descriptive legal scholarship that may be good science, in that

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29. *See id.* at 388–94.
30. *Id.* at 390.
31. *Id.* at 391.
32. *Id.* at 433.
33. *Id.* at 393.
34. "[B]road vistas of accurate description of the making of law and its implementation are simply of little value within the realm of legal scholarship. . . ." Scordato, *supra* note 1, at 383.
35. *Id.* at 393–94.

it is comprehensive, accurate, and advances interesting and falsifiable predictions, but which reaches conclusions that are critical of the coherence of legal doctrines or of the motives or competence of current legal authorities, and is consequently probably "uninteresting" and "unaesthetic" to most of those criticized persons, is nevertheless therefore poor scholarship. In contrast, descriptive legal scholarship that legitimates and rationalizes existing law is "more valuable . . . than more critical work, irrespective of the likely underlying accuracy of the description."[36] Such work, even if inaccurate, is likely to be more interesting and aesthetically pleasing to legal authorities, and, by this standard, is therefore good scholarship. Unlike normal scientific research, the quality of legal scholarship is ultimately a matter of taste—a matter of opinion on the part of legal elites.

No way! I disagree strongly with Scordato's departure from normal scientific criteria and his embrace of this alternative "aesthetic" standard of evaluation of legal scholarship, and I also do not believe that other instrumental legal scholars will find Scordato's arguments persuasive. Descriptive legal scholarship should be judged by the same scientific criteria that are applied in other fields of social inquiry. Scordato is doubtless correct in his factual claim that most current legal scholarship proceeds on the basis of some very optimistic assumptions regarding the coherence of the legal system and the competence and benevolence of legal authorities, rather than on the basis of a much more tentative and provisional embrace of more accurate, and revealing, instrumentalist premises.[37] This does not, however, justify his endorsement of this deceptive practice.

My rather harsh criticisms of Scordato's view of how legal scholarship should be conducted by instrumentalist professors may, be somewhat unfair, or at least overstated. It may be that the root of our disagreement is nothing more than terminological; we may simply be using the word "scholarship" in fundamentally different ways. He implicitly treats legal scholarship as being a subordinate part

36. *Id.* at 397.

37. *See id.* at 385–86 (discussing the scholarly focus on "various theories of statutory interpretation" as opposed to "sophisticated lobbyists, special interests, [and] logrolling or earmarking"); *see also* Gordon, *supra* note 20, at 2105, 2012.

of a larger service function for the practicing bar that should be oriented towards providing judges and lawyers with immediately useful materials for rationalizing and manipulating existing legal doctrines.[38] To Scordato, scholarship that is successful in meeting this goal is valuable, otherwise it should be regarded as poor scholarship.[39] I regard legal scholarship quite differently. To me it is an activity that should be oriented towards providing disinterested scientific discoveries and fruitful and falsifiable explanations and predictions, and should be judged on that basis independently of whether it also serves such a narrowly defined bar service function.

I recognize that academic writers, even instrumentalists, can and should provide a useful service function for the judiciary and practicing bar by helping them better understand and rhetorically manipulate conventional legal doctrines and formalist modes of analysis. This service function parallels the way that practicing lawyers provide an appropriate service for their clients through submitting advocacy briefs on their behalf in various fora using whatever modes of expression will be most effective in helping their clients achieve their objectives. I readily concede that there is value to work done by law professors along the lines recommended by Scordato that is intended primarily to be of immediate practical use to judges and practicing lawyers whose legal roles essentially require them to use formalist doctrinal rhetoric. But I object to his referring to such work that is intended to discharge this bar service function, and moreover a service function that is defined by Scordato in very narrow terms, as "scholarship."

Scordato's basic premise is that descriptive legal scholarship should be conducted and presented so as to be as "valuable" as possible to judges, practicing lawyers, and law students, as opposed to scholars simply following the usual truth-seeking criteria that guide scientific inquiry and letting the chips fall where they may. This narrow practitioner-oriented instrumentalism strikes me as a rather dubious position for a scholar to take, and one that badly undercuts the central scholarly imperative of the search for objective

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38. Scordato, *supra* note 1, at 386–87.
39. *Id.* at 387–87, 394–95.

truth. Scholars bear a special responsibility to think long and hard before they sacrifice candor and accuracy in their work in order to further other social objectives, however worthy those other objectives may be.

Even if one accepts Scordato's dubious position as to the proper objective of descriptive legal scholarship, one can still question his oft-repeated claims that the value of such scholarship for legal actors is much greater if it is framed primarily to help them rationalize and manipulate existing legal doctrines, rather than to illuminate flawed reasoning or extra-judicial influences on the law, and that this is the case regardless of whether one account or the other is more convincing or accurate.[40] He may well be correct as to how law students and established legal actors in prominent positions themselves judge the relative usefulness of different kinds of descriptive scholarship for their own particular purposes. But scholars have their own unique perspectives and responsibilities. They should make their own assessment of whether work that serves primarily to legitimate current legal doctrines, and help legal actors better manipulate those doctrines, is of greater value to those legal actors than would be more accurate and truthful descriptions that might help them better understand the problems of the world that we live in, and better address the shortcomings of our legal order in helping to resolve those problems. Scholars should, of course, also consider the importance of accurate and critical descriptive scholarship for that subset of legal actors who may oppose some aspects of the existing legal order, and who would find such critical scholarship to be helpful assistance for obtaining the needed institutional reforms. Even if one accepts Scordato's instrumentalist premise as to the proper objective of descriptive scholarship, I do not believe that his conclusions follow as to the necessary superiority of legitimizing, rationalizing scholarship over more accurate and critical work. Other prominent legal scholars disagree with him as well in this regard.[41]

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40. "[D]escriptive legal scholarship that produces the consequence of legitimizing and rationalizing existing law is considered more valuable, and is thus likely to garner greater prestige, than more critical work, irrespective of the underlying accuracy of the description." *Id.* at 397.

41. One prominent scholar who has also taken a position opposite to that of Scordato is Professor Gordon. His stance is perhaps best articulated in a piece

II. SCORDATO'S RECOMMENDATIONS REGARDING TEACHING

Let me now turn briefly to Scordato's recommendations

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written in 1992 in response to a now-famous article by Judge Harry Edwards that was critical of legal academics for a number of reasons. *See* Gordon, *supra* note 20 (citing Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992)). Judge Edwards had argued, in a manner that closely parallels Scordato's later recommendations, that law professors were producing too much theoretical, critical scholarship that was of little if any practical assistance to courts and practitioners who were limited to using "authoritative legal materials," i.e., current legal doctrines and formalist modes of analysis, in their work. Edwards, *supra* note 41, at 47. Gordon's response essay, as does Scordato's article, focused primarily upon articulating what the author regards as the proper scholarly role of law professors, and the following quote from that article effectively conveys the essence of Gordon's position:

> [A] radical critique of existing law is not invalid because it is radical, so long as it is true. If the legal system or aspects of it are in fact fundamentally flawed, the exposure of those laws is a signal public service . . . .
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> . . . [J]ust because judges and advocates are compelled by their roles to accept this fiction [of the validity of formalist jurisprudence], I do not see why scholars should be . . . .
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> . . . Judge Edwards' view of the "practical" would seem to restrict scholars to recommending only those changes that current decisionmakers would be likely to accept in the language that those decisionmakers like to use. Most scholars—in my view unfortunately—already accept these restrictions. But legal scholars have never tied themselves down to immediately realizable reforms, and they should not start now. . . . In many instances the audience [for legal scholarship] is not current officialdom at all, but social movements and public-interest groups who are trying to change the political agenda. For such movements, scholarship that documents the flaws in existing [legal] systems can be a very practical instrument indeed.

Gordon, *supra* note 20, at 2089–90. This quote by Gordon emphasizes his view that instrumental legal scholarship very much has a "practical" aspect to it, and is thus of service to the bar if both such service and the extent of the "bar" are broadly understood. My view expressed above in the main text is somewhat different; I believe that descriptive legal scholarship should first and foremost proceed in accordance with normal principles of scientific inquiry, without regard to its practicality. But even if one were to accept Scordato's dubious premise that legal scholarship should be shaped to better meet the "practical" demands of judges, practitioners and others, I think that Gordon effectively defends the social practicality of instrumental analyses that depart from Scordato's recommended commitment to optimistic premises.

Another prominent legal scholar who has recently taken a similar position in support of accurate and truthful descriptive scholarship is Erwin Chemerinsky. *See* Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1081 (2006) ("[W]e should abandon the misleading rhetoric of discretion-free judging and talk about judging as it actually occurs.").

regarding how law professors should conduct their classes. Most law students hope to later engage in legal practice, and there is no question that one of the obligations of a law professor is to help them to learn how to operate effectively in the current legal environment. In Scordato's view, this obligation requires law professors to help their "students to become conversant with the conventional wisdom and the body of generally accepted principles and arguments currently at play," even if "the professor is personally convinced that much of it serves as a kind of legitimating myth."[42]

This is a relatively uncontroversial position when stated at this high level of generality. Law students obviously need to develop an understanding of and facility working with the formally prevailing legal doctrines in order to become competent lawyers, regardless of the degree of coherence or plausibility of those doctrines. Those students often make great financial and other sacrifices to pursue their studies, and they have the right to rely upon the faculty members, that their tuitions largely support, for guidance and assistance in their efforts to master their craft. But any professor who embraces the instrumentalist perspective recognizes that even an encyclopedic knowledge of legal doctrine and a complete mastery of formalist legal reasoning techniques are not alone sufficient skills. A good lawyer also needs to be able to go beyond formalist rhetoric to recognize and address, in some fashion, the true underlying grounds of legal decisions, and to be able to evaluate the operation of existing or proposed legal rules in their actual social contexts.

The difficult issue for a professor who embraces instrumentalism is the proper balance that she should strike between helping students learn the conventional legal doctrines and develop facility with standard formalist judicial reasoning, as compared to helping them to see the limitations of such conventional rhetoric and develop an aptitude for recognizing and effectively addressing the true sources of judicial, legislative, and administrative decisions. There is a trade-off here that simply cannot be avoided because there is only so much class and study time available, and some worthy pedagogical objectives must inevitably be

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42. Scordato, *supra* note 1, at 378–79.

subordinated to others. Just how important for the students' professional future is developing their knowledge of doctrine and their facility with formalist modes of reasoning, when these goals can only be accomplished at the cost of less adequately preparing them to identify, and effectively address what an instrumentalist professor would regard as the true underlying grounds of legal decisions?

Scordato comes down rather forcefully on the side of giving relatively greater emphasis to the coverage of doctrine and formalist analysis, and recommends that the instrumentalist critique of this material that is provided be limited to just a few illustrative examples.[43] Now, this would not be a surprising position for someone to take who had serious reservations about the accuracy or ethical underpinnings of the instrumentalist conception of law.[44] Scordato, however, is by no means a critic of instrumentalism as an approach to understanding law,[45] although as discussed above he favors the use of formalist, or quasi-formalist,

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43. Scordato states:

> [W]hile a law professor would certainly want to expose her students to the realist perspective and to illustrate it on one or two actual cases, it is simply not . . . a very effective presentation to students learning a legal subject for the first time to continue time after time to subject the appellate cases in the casebook to one variation or another of the standard realist critique.
>
> Once the point is made and illustrated a time or two that courts are frequently disingenuous in the deterministic manner in which they explicitly justify their holdings, there is not much more to say.

Id. at 377 (footnote omitted).

44. For example, see the well-known and harsh critiques made of law professors who embrace an instrumentalist orientation by Dean Paul Carrington and Judge Harry Edwards. *See* Paul D. Carrington, *Of Law and the River*, 34 J.L. & EDUC. 222, 227 (1984) ("The professionalism and intellectual courage of lawyers does not require rejection of Legal Realism . . . . What it cannot abide is the embrace of nihilism. . . . Teaching cynicism may, and perhaps probably does, result in the learning of the skills of corruption: bribery and intimidation."); Edwards, *supra* note 41. *See also* Gordon, *supra* note 20, at 2078 (finding Judge Edwards' position in the above-cited article "depends on a conception of the judge as primarily a law-declarer and only marginally and incrementally a policymaker," and Judge Edwards believes that "the main business of scholars should be to help judges, and lawyers arguing before them, to 'find' the existing law—all presented in the conventional form of judicial-doctrine discourse").

45. "It was very satisfying [for Scordato as a young law professor] to guide students away from the innocent faith in an objective, mechanistic notion of law and to help them develop an ability to identify plausible policy concerns and to use them to craft persuasive legal arguments." Scordato, *supra* note 1, at 355.

premises in second-order descriptive scholarship, even by instrumentalist scholars who find such premises to be fundamentally flawed, so as to render that work more "valuable" to law students and to the established legal community. In any event, he clearly recognizes that instrumentalism is now the overwhelmingly dominant orientation in legal academia. His recommendations regarding scholarship and teaching are primarily directed towards those many academics who wholeheartedly embrace instrumentalism, rather than to those persons that may harbor some reservations about that approach.

In Scordato's view, the professional education context in which law teaching takes place "more or less compels" even a professor who embraces instrumentalism to present legal doctrines as essentially "coherent, rational and largely aligned with the conventionally understood public good," and to "abandon the more cynical or radical aspects of her understanding" in an effort to help the students learn to work effectively within the current legal environment.[46] This position closely parallels his recommendation that the second-order descriptive scholarship that academics produce should reflect the same optimistic premises of coherence, competence, and benevolence. He notes at several points in his article that there is enormous pressure placed on law professors, not only by the professional legal community, but also by law students, to focus their pedagogical efforts primarily on helping their students master doctrine and formalist analysis rather than criticizing them.[47]

46. *Id.* at 380.

47. "[P]olitical actors at the highest level of government continue to espouse the most deterministic version of formalism." *Id.* at 366. "[T]he overwhelming majority of published trial court memoranda and appellate court opinions in this country continue to present themselves in traditional formalist terms. *Id.* at 370. "[Judges] may be justifiably concerned that an explicitly instrumentalist presentation of their analysis and conclusions would risk a lessening in the respect granted to their decisions . . . ." *Id.* at 371. "[A] law professor faces very real pressure to maintain and to reinforce a legitimizing attitude towards the law." *Id.* at 376. "[E]normous implicit pressure exists to present the substance of legal doctrine to students, especially in core law school courses, from a largely formalist perspective." *Id.* at 377. Professors work in a context that "more or less compels them to present the procedures and the doctrine as coherent, rational and largely aligned with the conventionally understood public good." *Id.* at 380.

Scordato has apparently been thinking about the tensions between the instrumentalism that dominates the legal academy and the formalist rhetoric

Instrumental explanations of law, "even if entirely realistic and accurate," are, in Scordato's view, "simply not particularly relevant to, nor useful in, the practice of law,"[48] and are "hardly an uplifting intellectual experience for students."[49]

As support for this argument, Scordato provides an extended discussion of a hypothetical tax law provision that he posits was adopted only because of special interest pressures, and he concludes that even a completely accurate instrumental explanation of this provision "would be of very little sustained usefulness to . . . a law student."[50] He similarly argues that a corporate law scholar who was convinced of the accuracy of an instrumentalist explanation of current corporate law rules of the nature of their being completely subservient to corporate management interests should "introduce this idea" to their students, but that it would be "tedious" and "ineffective" for that professor to base his presentations exclusively on that perspective.[51]

Once again, I strongly disagree. Just because law students, practitioners, judges, and other existing legal authorities might prefer that law professors focus primarily upon conventional doctrines and formalist analytical methods, and soft-pedal their more critical instrumentalist insights,[52] this does not mean that professors who are not under the same constraints[53] should acquiesce to these

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that dominates in the larger legal culture for a number of years. *See generally* Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367 (1990) (explaining, at an earlier time, his views regarding the way that law courses should be taught, given this tension).

48. Scordato, *supra* note 1, at 381.

49. *Id.* at 378.

50. *Id.* at 382.

51. *Id.* at 378.

52. Scordato states:

> [J]udges issuing binding and authoritative judgments in actual cases face powerful practical incentives to present their decisions in largely formalist terms. . . . [T]hey may fear that an explicit and widespread embrace by the courts of the instrumentalist paradigm would eventually result in a serious questioning of, and ultimate challenge to, the legitimacy of their authority.

Id. at 371 (footnotes omitted). He also notes: "[M]any students still come into first-year law school courses harboring expectations about the determinacy and the mechanistic nature of legal rules." *Id.* at 365. "[P]olitical actors at the highest levels of government continue to espouse the most deterministic version of formalism." *Id.* at 366.

53. "[L]aw professors . . . face no such practical impediments [as do judges]

wishes. A law professor who embraces instrumentalism should devote substantial efforts to helping students master the ability to critique a broad range of legal doctrines and formalist reasoning techniques from an instrumentalist perspective, even if these efforts necessitate her curtailing, to some significant extent, the basic explication of those doctrines and modes of reasoning.

Scordato has again conflated two distinct professorial functions. He has blurred the distinction between the teaching and the service to the bar roles of legal academics, and then has subordinated the professorial obligation to help law students develop the most accurate understanding possible of the legal system to the service function of providing these soon-to-be members of the bar with the particular knowledge and skills that will be of most immediate usefulness to them in the everyday legal contexts where formalist doctrines are still accorded respect. Such subordination does not strike the proper classroom balance favored by most instrumentalist professors; far less coverage of doctrine and formalist analysis, and far more emphasis on fundamental, instrumentalist critiques of the legal system.

CONCLUSION

Law professors today face some significant intellectual problems. They now overwhelmingly embrace an instrumentalist conception of law as an inherently political and value-laden means of accomplishing contested social objectives, and generally believe that the legal system should be judged more by its results than by its coherence or logical consistency. But outside of the legal academy, the large majority of legal opinions and pronouncements of political actors at the highest levels of government continue to be expressed in traditional, formalist terms that suggest that the legal system is a logically consistent body of rules that reflects an underlying objective reality. How are instrumental law professors to properly discharge their scholarship, teaching, and service to the legal profession obligations, given this sharp tension between their personal beliefs and the public rhetoric—if not necessarily the true

to embracing the greater accuracy of the realist account and the instrumentalist paradigm that flows from it . . . ." *Id.* at 371.

beliefs—of leading legal authorities and practitioners? And how can they develop the considerable interdisciplinary expertise and quantitative empirical analysis skills that are clearly necessary if they are to be able to carry out normative analyses that will merit the respect of scholars in those various disciplines?

Professor Marin Scordato has done an excellent job describing the evolution and nature of these problems, and in emphasizing their importance for law professors. However, I take strong issue with some of his recommendations as to how this tension between a commitment to instrumentalism and the larger universe of formalist legal discourse should be resolved. His basic problem is that he blurs the distinct scholarship, teaching, and service to the bar aspects of the law professor role, and then subjects the scholarship and teaching aspects of that role to evaluative criteria and limitations that are appropriate only for the bar service function, and, for that matter, appropriate only if that bar service function is rather narrowly defined so as to be limited to work that is of immediate usefulness to judges and practitioners in every day legal contexts.

With regard to what Scordato refers to as "second-order descriptive scholarship"—scholarship that goes beyond narrow summary and description and attempts to identify the underlying factors that give rise to legal doctrines and determine their practical effects—I disagree strongly with his conclusions regarding how it should be conducted. For the reasons that I have given, I am of the view that such efforts should be undertaken in accordance with the normal scientific goal of reaching objective, disinterested, accurate, and fruitful falsifiable explanations and predictions. If the research that is done in this fashion leads to critical conclusions that call into question the operation of the legal system, and undercut the authority of some prominent legal actors, then so be it. I reject Scordato's suggestions that such scholarship can only be meaningfully assessed by aesthetic standards applied by legal elites rather than by normal scientific criteria, and that scholarship should be premised on and ultimately be supportive of the assumption that the legal system is coherent and competently and benevolently managed, or at least on the assumption that the legal system is rational and coherent in achieving some worthy overriding

social objective. Those assumptions may be the prevailing working assumptions among the leading members of the legal community outside of academia, but those assumptions should not be allowed to impede scholarly efforts that may illuminate their shortcomings.

With regard to teaching law students, Scordato recommends that even those professors who wholeheartedly embrace instrumentalism should, nevertheless, devote the bulk of their instructional efforts to covering conventional doctrines and formalist analytical methods, and should devote only a small amount of time and effort to exposing their students to a few illustrative examples of instrumentalist critiques of this material. For reasons discussed above, I disagree, and recommend that instrumentalist law professors should try to strike a balance in their classes that gives far greater relative emphasis to instrumentalist critiques, as compared to conventional doctrines and formalist analysis, than Scordato recommends.

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