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How to Fix Legal Scholarmush

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How to Fix Legal Scholarmush

ADAM J. KOLBER*

Legal scholars often fail to distinguish descriptive claims about what the law is from normative claims about what it ought to be. The distinction couldn't be more important, yet scholars frequently mix it up, leading them to mistake legal authority for moral authority, treat current law as a justification for itself, and generally use rhetorical strategies more appropriate for legal practice than scholarship. As a result, scholars sometimes talk past each other, generating not scholarship but "scholarmush."

In recent years, legal scholarship has been criticized as too theoretical. When it comes to normative scholarship, however, the criticism is off the mark. We need more careful attention to theory, otherwise we're left with what we have too much of now: claims with no solid normative grounding that amount to little more than opinions. We have no shortage of opinions, and simply producing more opinions will not make scholarship more practical.

Of course, centuries-old disputes in jurisprudence have struggled to untangle the precise relationship between law and morality, but my message is simple: scholars must be more clear, transparent, and rigorous about which of their claims are descriptive and which are normative (and what sort of normativity is at issue). By being more precise, we can hope to stop talking past each other and develop more objective criteria for evaluating both scholarship and public policy more generally.

* Professor of Law, Brooklyn Law School. For helpful comments, I thank Larry Alexander, Will Baude, Christopher Beauchamp, Stephanos Bibas, Darryl Brown, Alafair Burke, Cynthia Godsoe, Anders Kaye, Orin Kerr, Brian Lee, Jeff Lipshaw, John Mikhail, Sabeel Rahman, Re'em Seger, John Stinneford, and Jonathan Witmer-Rich, as well as participants at workshops and conferences at Brooklyn Law School, Cardozo Law School, and the University of Edinburgh Law School. This project was generously supported by a research stipend from Brooklyn Law School and a visiting fellowship at NYU School of Law's Center for Research in Crime and Justice.

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INTRODUCTION

There is a vast conceptual difference between descriptive and normative claims about the law. Under a common view, descriptive claims about what the law *is* rely on legal sources such as cases, statutes, and regulations, and perhaps reasonable predictions about how judges and others will behave in the future. By contrast, normative claims about what we morally ought to do depend on more than just descriptive facts. They depend on values that cannot be deduced merely by empirical investigation. As a descriptive matter, a jurisdiction may criminalize insider trading, but that tells us little, if anything, about whether the conduct *ought* to be criminalized.¹ Many laws have been morally atrocious, including statutes and decisions institutionalizing slavery, limiting women's property rights, prohibiting interracial marriage, and so on.

Yet the difference between the descriptive and the normative is frequently blurred or ignored by legal scholars. One scholar might say that a judge "should" deem the defendant's conduct insider trading, while another might say that a judge "should not." Though their views appear oppositional, they may agree on substance if one refers to a legal "should" (meant as an expression of the positive state of the law) and the other to a moral "should" (meant to be independent of the positive state of the law). Conversely, scholars may express agreement but actually hold antithetical views. We are left not with productive scholarly exchange but with scholarmush—a tangled combination of claims rooted partly in law and partly in morality that are partly dependent on facts and partly dependent on values. It's time to untangle the scholarmush.

Sometimes confusion arises not from the author but from misinterpretations of the author's claims. For example, in 2010, Jason Mazzone wrote an op-ed in the *New York Times* containing descriptive claims (both historical and predictive) about a major then-upcoming Commerce Clause case in the Supreme Court.² Afterward, according to Mazzone:

[a]lmost without exception, the [law] professors who contacted me (or who wrote responses in other settings) expressed bewilderment, disappointment, even anger that in my op-ed I had "endorsed" the Commerce Clause challenge the plaintiffs were making to the individual mandate. I had, of course, done no such thing. All the op-ed did was explain why I thought the plaintiffs' Commerce Clause arguments would have greater traction than other commentators were predicting and that a success for the government at the Supreme Court was far from certain.³

1. Cf. Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 860 (1983) ("For purposes of analyzing whether insider trading is beneficial or detrimental, nothing turns on whether a particular trade is illegal.")

2. Jason Mazzone, *Can Congress Force You to Be Healthy?*, N.Y. TIMES (Dec. 16, 2010), <https://www.nytimes.com/2010/12/17/opinion/17mazzone.html> [<https://perma.cc/ZR3J-E365>].

3. Jason Mazzone, *Obamacare and Problems of Legal Scholarship*, 2014 U. ILL. L. REV. 1265, 1269 (2014).

Perhaps the law professors Mazzone described confused descriptive and normative claims. Or perhaps they read the choice to defend a particular predictive claim as advocacy of a corresponding normative claim.⁴ Either way, as Mazzone tells the story, the scholarly community unnecessarily bogged itself down by misconstruing a brief op-ed. I will give several examples of claims in much longer, more detailed scholarship where similar misconstruals could easily occur. All of the examples come from excellent scholars writing in venues with more space to explain the normativity of their claims.

Legal scholarship has been accused of being too theoretical.⁵ And there are, indeed, important questions about how much legal scholarship we should have and how much of it should be normative. But to the extent scholars write normative scholarship, the too-much-theory criticism is off the mark. We need *more and better* theory, otherwise we're left with what we have now: normative claims with no solid theoretical grounding that may amount to little more than opinions. We have no shortage of those, and nothing could be less practical when searching for sound scholarly advice. Of course, centuries-old disputes in jurisprudence have struggled to untangle the relationship between law and morality, but my thesis is simple: scholars must be more clear, transparent, and rigorous about the extent to which their claims are descriptive as opposed to normative (and what sort of normativity is at issue).⁶

4. Perhaps the tone of some of Mazzone's sentences led some to think he endorsed his prediction. It is risky, however, to focus on tone rather than affirmative assertions.

5. Chief Justice John Roberts caused quite a stir, for example, when he said:

Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.

Debra Cassens Weiss, *Law Prof Responds After Chief Justice Roberts Disses Legal Scholarship*, ABA JOURNAL (July 7, 2011, 10:28 AM), http://www.abajournal.com/news/article/law_prof_responds_after_chief_justice_roberts_disses_legal_scholarship/ [<https://perma.cc/7UCP-2NH4>]; cf. Press Release, University of New Hampshire, *Scalia's Critique of Legal Education Echoes UNH Law's Practice-Ready Philosophy* (Mar. 25, 2013), <https://law.unh.edu/news/2013/03/scalia%E2%80%99s-critique-legal-education-echoes-unh-law%E2%80%99s-practice-ready-philosophy> [<https://perma.cc/5QNA-9VFP>] (reporting Justice Antonin Scalia's lament that legal scholarship has become increasingly esoteric and his belief that "[t]here's not much more legal scholarship to be done"). Few complain that literary criticism produces insufficient practical advice for novelists, though literary criticism and legal scholarship are disanalogous in many ways.

6. By "clear" scholarship, I mean that it should be as simple to understand as is reasonably possible. "Transparent" scholarship is straightforward as to the claims it makes and upfront about conflicts of interest that might cloud factual assertions. "Rigor" is a shorthand term for qualities such as consistency, precision, comprehensiveness, and being well-supported by facts and arguments. While I repeat these three scholarly qualities frequently, by no means do I denigrate other important scholarly virtues such as originality, elegance, and eloquence. Of course, all of these qualities can present tradeoffs among each other.

I. DESCRIPTION VERSUS MORAL NORMATIVITY

Before turning to the distinction between descriptive and normative claims, we must first know what a piece of scholarship is *claiming* at all.

A. Clear, Consistent Thesis

Most scholarship requires a clearly stated thesis that summarizes the scholar's central claim. The thesis may also contain subclaims, each of which contains more subclaims. But the overarching thesis sets up the author's argumentative goal and gives us a hurdle by which to judge its success. Given that law review articles often exceed 25,000 words and that scholars read hundreds of them, a good thesis increases the chances of making a memorable contribution to the literature. It also adds accountability, making it harder to weasel out of opposing arguments by subtly shifting one's claims.

Too often, legal scholars seem happy simply to stew in topics they find interesting. They enjoy learning about new cases, reminding themselves about old ones, and playing around in the relevant issues. They treat an article's thesis as an afterthought. I've often heard scholars fret about the most inconsequential details of their papers while their theses languish in obscurity. Yet qualities like clarity and rigor are not optional; they're prerequisites of good scholarship.

Faculty frequently workshop papers that lack clear theses. The first question to such speakers should simply be "what is your thesis?" Without a clearly stated thesis, it's almost impossible to have a meaningful discussion. We cannot evaluate how well scholars achieved the aims they set for themselves without knowing what those aims were.

Legal scholars frequently misjudge the quality of a piece of scholarship by focusing on whether they agree with its thesis. Agreement is largely irrelevant. We should focus on the rigor of a thesis,⁷ as well as the quality of the ideas and arguments that support it. And just as sports like diving have a difficulty component, so do theses. The more ambitious, difficult, and unlikely a thesis is, often the more impressive is the progress made to establish it. So, a somewhat weaker argument for a grand unifying theory could be more impressive than a careful, meticulous defense of an uninteresting or unoriginal point. Indeed, the paper that tries but fails to establish a grand claim may still make an important scholarly contribution by advancing the literature. Perhaps the next paper will fill in the gaps. But asking whether you agree with a thesis is a recipe for allowing idiosyncratic biases to infect assessments of quality.

The quality of a piece of scholarship can be evaluated from a perspective that is either internal or external to its thesis. From an internal perspective, we ask whether

7. Soft theses about how one set of ideas "illuminates" another tend to be ambiguous and unfalsifiable. Almost any argument can illuminate another. For example, my student note argues that a rather radical idea is "at least worthy of further consideration." Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 167 (2001). It is not the worst claim of all time and may have been warranted given the unusual subject matter, especially at the time it was written. But the thesis would have been stronger had it been bolder and more easily subject to falsification.

the arguments in support of a thesis are consistent, plausible, and well supported. This analysis should be relatively objective, and because of that, the internal consistency of a thesis is one of the more reliable tests of quality.

We can also evaluate scholarship from an external perspective: independent of the particular arguments made in the piece to defend it, is the thesis itself ambitious, interesting, and original? Similarly, some might ask how useful or practical a thesis is in addressing real-world problems. Both internal and external analyses are important, but external analysis is often less objective. Whether scholarship is interesting, for example, is probably more subjective than whether it is logically consistent.

Legal scholars frequently underemphasize how well defended a thesis is (the internal perspective) and overemphasize the choice of a thesis (the external perspective). For example, scholars writing tenure letters will often summarize an article and then meekly complain that “there are several topics I wish the author had addressed.” Doing so often skips the most important question. Namely, how clear and well defended was the central argument of the paper? Reviewers often fail to state whether alleged omissions are problematic because inclusion is needed to defend the thesis or because the reviewer has different interests than those of the author. The first concern is of monumental importance: ignoring issues fundamental to a thesis can be tantamount to failure. But if an author and a reviewer merely share different interests, it may be of no consequence at all.

In any event, because quality largely depends on how well scholarly writing achieves the aims it sets for itself, it needs a consistent, well-formed statement of those aims in the form of a thesis. A good thesis makes scholarship more clear, consistent, and rigorous. It can also make a piece more memorable and more likely to contribute to the literature.

B. Descriptive Versus Normative Claims

Armed with a clearly articulated thesis, we can more carefully examine the nature of the claim made in the thesis (and in the other arguments that support it). Descriptive claims address the way the world is, was, or will be. They concern features of the world that are, in principle, open to empirical observation—for example, “The envelope was postmarked January 16, 2016,” or “The number of people incarcerated in the United States has increased this year.”

Historical and predictive claims are kinds of descriptive claims as well. Historical claims attempt to describe the way the world was—“Ada Lovelace was a mathematician”—while predictive claims attempt to describe the way the world will be—“It will rain on Sunday.” Even a false descriptive claim, “Medford is the capital of Massachusetts,” is still a descriptive claim. It seeks to describe facts about the world but fails in the process. In legal contexts, a claim that the Second Circuit reversed such-and-such decision would be historical, while a claim that the Second Circuit will reverse such-and-such decision would be predictive. But they are both descriptive claims. All of these claims speak to how the world is, was, or will be, while saying nothing about how it ought to be.

Normative claims, by contrast, speak to how the world ought to be. They typically prescribe behavior or behavioral prohibitions. One might assert that “you should be kind to strangers” or that “you shouldn’t kick a sleeping dog.” In legal contexts, a

scholar might argue that “statutes prohibiting assisted suicide should be repealed.” These claims often contain words like “should” or “ought” that make or imply claims about what is morally good or bad. When legal scholars refer to “policy” arguments, I believe they are generally referring to what I call “moral” arguments.

The line between descriptive and normative claims can sometimes be difficult to draw.⁸ If someone reports seeing a parent “cruelly” hit a child, the statement seems descriptive in some respects. It reports what the person observed. But it likely also contains a normative evaluation that the hitting was morally inappropriate. Similarly, our best scientific descriptions of the empirical world are not value-free. The way we observe the world is influenced by the theories we construct, and those theories depend on certain value judgments.⁹ The key for legal scholars is to be as clear as necessary given the context. If we mostly agree on what we mean by “cruelly,” then not a lot of explication is necessary. But if there is a risk of confusion, more explicit discussion along the descriptive/normative divide is helpful.

Unless otherwise noted, when I speak of normativity, I refer to moral normativity. By contrast, people sometimes speak of norms of fashion, humor, or good manners. Whatever such norms refer to, they do not refer to the sort of thing that, for example, makes you a morally good or bad person or gives you serious obligations to conform. I suspect that the vast majority of “normative” legal scholarship is intended to be *morally* normative, or at least has morally normative components. (In Section II.B.4, I discuss the important difference between legal and moral normativity.)

C. Why the Distinction Is So Important

The distinction between descriptive and normative claims is so important because they make very different kinds of assertions about the world that must be tested in very different ways. If we disagree about a descriptive claim, we can usually go out into the world, examine the pertinent facts, and try to figure out the truth. If you disagree with my descriptive claim that “Hardy Taylor plays for the Giants,” we can likely settle the matter by watching Giants games or checking on the internet. Even predictive claims can be judged more or less plausible based on empirical evidence. Facts about the world today can make predictions more or less likely to come true.

Empirical investigation certainly won’t resolve all factual disputes. Relevant facts may be unavailable. Or a claim might be ambiguous if, for example, I use “Giants” to refer to a baseball team while you use it to refer to a football team. But at least when clearly stated descriptive claims are in dispute, we can often resolve them by empirical investigation.

If, on the other hand, I assert that “hunting animals purely for leisure is unethical, and people should stop doing it,” I am making a morally normative claim about how the world ought to be. Assessing the claim is rather complicated. Unlike descriptive arguments addressed to matters of fact, normative arguments typically have both fact and value components. The argument that we shouldn’t hunt purely for leisure might depend on matters of fact, such as the amount of physical and emotional pain animals

8. See, e.g., HILARY PUTNAM, *The Entanglement of Fact and Value, in THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* 28, 45 (2002).

9. See, e.g., *id.* at 30–31.

typically experience when hunted or the number of animals hunted for leisure annually relative to their population sizes. But it will also depend on matters of value, including our moral obligations, if any, to animals or to reduce unnecessary pain in general. These issues of moral value cannot be resolved by appeal to easily observed facts.¹⁰

Precisely what we are doing when we debate values is complicated and defies shorthand description. Scholars must be clear, though, about when their claims are descriptive and when they are normative. We may agree about certain facts and certain values, but if we don't know precisely what claims are being made and the extent to which they depend on disputed facts or values, we are unlikely to resolve disagreements.

1. Example: Waldron Clouds Normativity of His Thesis

Scholars often confuse descriptive and normative claims simply because they are insufficiently attuned to the differences. The problem, then, has a straightforward solution: don't confuse them. Sometimes, however, scholars quite attuned to the differences simply spell out their views in ways that are somewhat opaque as to their normativity.

For example, in a paper supporting the rationale for the separation of powers doctrine, Jeremy Waldron notes that the "separation of powers" is never explicitly mentioned in the United States Constitution.¹¹ Nevertheless, he writes, "[s]ometimes standards of political evaluation are compelling for us, even when the compulsion is not legal."¹² Are they compelling, though, as a descriptive matter of human psychology? Is he merely saying that we tend to believe in the separation of powers principle? He describes the principle as a "touchstone[] of institutional legitimacy,"¹³

10. A statement that appears descriptive at first glance may nevertheless contain or imply moral assertions as well. Suppose I say, "I've told you many times not to be so mean to your mother." On the surface, I'm making a descriptive claim about what I have said in the past. Empirical data from an eyewitness, for example, might confirm it. The thrust of the statement, however, is likely directed at a normative claim. It implies that you should behave in a manner that is less mean to your mother. The truth of that claim cannot be resolved by empirical investigation alone.

The statement also strongly implies a claim about prior conduct, namely, that you have been repeatedly mean to your mother. This claim has both descriptive and normative components. It probably makes the descriptive claim that you have engaged in bad behaviors in the past, as well as the normative claim that, whatever those behaviors were, they can be described as "mean." Either of these implied claims could be in dispute. We might agree about certain empirical facts (that you repeatedly called your mother a "shrew") but disagree about the implied normative claim (that your use of the term "shrew" was inappropriate under the circumstances). Alternatively, we might agree about the implied normative claim (for example, we agree it is always mean to call one's mother a shrew) but disagree about the implied descriptive claim that you have ever done such a thing.

11. See Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 436 (2013).

12. *Id.* at 438.

13. *Id.*

but does he mean that in fact we treat it as a touchstone or that we ought to treat it as a touchstone?

At one point, Waldron indirectly suggests that the separation of powers principle does have moral force:

By saying we should treat the separation of powers principle as an important political principle, albeit a non-legal one, I do not mean to say that it has merely “moral” force, as though it were just something a particular theorist dreamed up and now wants the rest of us to watch him apply. The principle of separation of powers has a powerful place in the tradition of political thought long accepted as canonical among us.¹⁴

But if Waldron thinks the separation of powers principle has at least some moral force, why does he support the claim by appealing to the *fact* that the principle is part of the constitutional tradition we find canonical? (I see why a *legal* principle of separation of powers might gain *legal* force by its association with a canonical tradition, but Waldron explicitly speaks of the principle as being *nonlegal*.) Facts about the acceptance of various moral arguments are not pertinent to the strength of those moral arguments (except perhaps in very indirect ways). As David Hume famously argued, you cannot derive an “ought” from an “is.”¹⁵ My view of the immorality of Nazi medical experimentation is not weakened by the number of Nazis who approved of it.

As one of our most distinguished legal philosophers, Waldron is surely attuned to the normativity of his claims, making his somewhat obtuse discussion of the normativity of the separation of powers principle more noteworthy. This is especially so in the context of his thesis, as he argues that the separation of powers principle has a distinctive feature. Namely, separating powers leads state actors to more carefully *articulate* rules in advance and to “*govern[] through successive phases of governance each of which maintains its own integrity.*”¹⁶ So what Waldron takes to

14. *Id.* at 437.

15.

I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprized to find, that instead of the usual copulations of the propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. . . . For as this *ought*, or *ought not*, expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the [common] systems of morality

David Hume, *A Treatise of Human Nature*. in CLASSICS OF MORAL AND POLITICAL THEORY 829 (Michael L. Morgan ed., 2d ed. 1996) (emphasis in original).

16. Waldron, *supra* note 11, at 467 (emphasis in original).

be most distinctive and important about the separation of powers is that it encourages articulation, a view he takes to be a novel rationale for the separation of powers. But if what's most important about the separation of powers comes from a novel explanation, then it is less clear why *traditional* constitutional practices bear so heavily on the separation of powers when they failed to (at least explicitly) recognize what Waldron takes to be its most important rationale.

Notice, of course, that there are many interesting questions associated with the separation of powers principle—some principally factual, some deeply value laden.¹⁷ Waldron isn't trying to answer all such questions. He gets to pick his thesis, and his goals are more modest. But he does spend the better part of his article supporting the separation of powers doctrine without making clear how deeply rooted the doctrine is in *moral* considerations as opposed to just our *traditional* constitutional practices. Maybe he thinks political principles have normative force separate and apart from moral considerations, but again, it would help to be more explicit about it.¹⁸ Are we, for example, blameworthy when we fail to instantiate politically normative principles?

In the end, I'm not sure precisely what portion of Waldron's claims can be tested empirically (by, for example, going out and examining the behavior of actual political entities that articulate governance and seeing how they perform) and what portion of his claims are value laden (such that we must debate underlying issues of value). True, legal scholars rarely say much to distinguish these components. But if we're going to carefully debate and hope to resolve disputes, we have no choice but to wade into these difficult waters.

II. MORAL NORMATIVITY IN LEGAL CONTEXTS

The distinction between description and moral normativity stays essentially the same when we move into a legal context. We can either *describe* law or make *morally normative* claims about what the law should be. While description is the bread and butter of lawyers and moral normativity is the bread and butter of legal scholars, both professions engage in both tasks.

17. For example, do we have moral obligations to support the separation of powers principle? If we do, how strong are those obligations? What are the costs of separating powers, and how do they compare to the benefits? If separating powers is a good thing, why merely separate legislative, executive, and judicial functions, when we could subdivide these further? When deciding on further subdivisions, what are the pertinent considerations? And if we know what those considerations are, then what do we gain by referring to the "separation of powers principle"? Given its amorphous nature, could we simply focus on structuring government institutions in ways that capture the underlying benefits we care about without explicit reference to the separation of powers?

18. While this Article was in the law review editing process, Waldron released a draft paper that suggests he is focusing on political normativity. Jeremy Waldron, *Non-Normative Principles* 23 (N.Y.U. Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 19-36, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3400296 [<https://perma.cc/856P-S65J>] ("The separation of powers is definitely a political principle and no account of our constitutional tradition would be good without it."); *cf. id.* at 27 (recognizing debate as to the continuity between "the politically normative character of a principle like separation of powers and its legally normative character").

Matters get trickier when claims blend descriptive and normative elements in nontransparent ways. They can also be tricky when scholars make claims intended to be legally normative but not morally normative. My goal is not to delineate precise distinctions between these different sorts of claims but to encourage authors to be more explicit about the kinds of claims they seek to make.

A. Descriptive Legal Claims

If I say, “This jurisdiction requires commercial hair stylists to have professional licenses,” I’m making a descriptive claim about the law. We could test my assertion by, for example, consulting statutes, cases, and regulations in the pertinent jurisdiction. We could also interview spectators present in the legislative body when a pertinent statute was passed. But whether I love or hate the licensing regime, my statement concerns matters of fact, not of value.¹⁹

Practicing attorneys often make descriptive claims to clients such as, “The statute says W,” or “The Sixth Circuit has held X.” Since interesting legal claims are often indeterminate to varying degrees, many statements about the law are best framed in probabilistic terms, “The law is probably Y,” or in predictive terms, “The judge will likely hold Z.”²⁰ Probabilistic and predictive information is precisely what clients tend to seek from attorneys. They want to know what the law *is* or *is likely to be*. Sometimes, clients may want to know what sort of law is in their best interests. But rarely do paying clients ask which laws are best from a moral perspective, and if they do, they’re seeking more than just legal advice; they’re seeking moral advice.²¹

In legal briefs, attorneys often make confident assertions about hazy legal issues. They might say, “This agreement is clearly binding,” when any good lawyer would only truly believe that a court *might* find it binding. Lawyers regularly blend normative and descriptive claims when they think doing so will benefit their clients. They frequently speak of what the law *is* for rhetorical effect, believing that judges and opposing counsel will find such talk more persuasive.

To the extent that claims about what the law *should* be are disguised as descriptive legal claims, lawyers are being, in some respects, insincere. The insincerity need not trouble us because we all know the context of these assertions. While rules of professional responsibility limit lawyers’ abilities to make false statements about the law,²² within certain boundaries, lawyerly assertions about what the law *is* are really assertions about what their clients think it should be or would like it to be.

19. As noted, the fact-value distinction is not entirely precise. Some facts are value laden and, perhaps, some value propositions are matters of fact. I believe, however, that the distinction is sufficiently clear for present purposes. In some contexts, authors may need to be even more precise if there is a genuine risk of ambiguity.

20. Oliver Wendell Holmes famously stated that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law.” Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897).

21. Lawyers are certainly permitted to address nonlegal matters. MODEL RULES OF PROFESSIONAL CONDUCT r. 2.1 (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).

22. *Id.* r. 3.3 (“A lawyer shall not knowingly . . . make a false statement of fact or law to

Judges use similar tactics.²³ They often refer to what the law *is* as though prior cases make current law quite clear. But often, prior law does not make a case at bar clear, and judges know it. They speak insincerely of what the law *is* to get the same rhetorical benefit that lawyers seek. They proclaim their decisions not only correct but obviously so.

Importantly, however, judicial claims about the content of the law differ from those made by attorneys. In the context of a judicial opinion, a judge's assertion about the law can actually *make it so*. When a judge writes, "It is hereby decided that the agreement is legally binding," the writing not only makes an assertion but also has legal force. Attorneys obviously lack the same power. Still, judicial opinions are insincere or at least unclear to the extent they describe the state of the law as more determinate than it actually is.

When law students ask professors what the law is, they are typically seeking descriptive information. They more often want to know what the law is than what the professor thinks it ought to be. But students occasionally ask both kinds of questions, so the distinction should be made clear.

1. Example: Kadish et al. on Obligations to Retreat

A leading criminal law casebook asks students to imagine a homeowner who invites a friend over for food and drink. At some point, the friend grabs a knife and threatens imminently to stab the homeowner—conditions under which the homeowner would ordinarily have a legal right to use deadly self-defense. The question is whether the homeowner may use deadly self-defense if she is able to escape from her attacker in complete safety by, say, walking out the door and driving away.²⁴ The casebook authors write: "Only a few states would require the homeowner to retreat in this situation; the great majority permit the homeowner to kill in self-defense. Do you agree?"²⁵

Taken too literally, the authors seem to be asking students about a factual matter. Namely, do students agree with the authors' assertion that most jurisdictions would not require retreat under these circumstances? But the authors almost certainly intended to ask the more interesting question: Should homeowners be required to retreat when attacked by invited guests? And that, of course, is a moral question that descriptive claims about the law cannot resolve for us. We know what the authors meant, but they missed an opportunity to help students clearly distinguish legal issues that are purely descriptive from those that are more value laden.

2. Example: Kolber Mashes Together Distinct Concepts of Informed Consent

Let me give an example from another scholar who is usually quite careful to distinguish moral principles and legal doctrine: me. In this excerpt, I should have

a tribunal . . .").

23. *See infra* Section IV.A.

24. SANFORD H. KADISH, STEPHEN J. SCHULHOFER, CAROL S. STEIKER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES* 867 (9th ed. 2012).

25. *Id.*

drawn a clearer distinction between the legal doctrine of informed consent and the moral principle underlying it:

Over the last fifty years or so, lawyers and bioethicists have increasingly emphasized the obligation of healthcare practitioners to respect the autonomous decisions of competent patients by obtaining their informed consent prior to treatment. Informed consent is said to be “perhaps the oldest and most basic legal implementation of bioethical principles.” According to the doctrine of informed consent, practitioners are required to make certain disclosures to patients prior to beginning medical procedures and to obtain the patient’s permission to proceed.²⁶

I don’t think anything I said here was false. But it’s not as clear as it could have been. There is not one “doctrine of informed consent” but at least two: a legal doctrine (with many variations) that can be enforced in court, and a moral version (with many variations) that is intended to guide behavior but has no independent legal force.

The difference between the two versions of informed consent can be critically important. Consider, for example, that the legal doctrine of informed consent focuses on information a doctor must disclose. So long as the information is disclosed, doctors have limited, if any, legal obligations to ensure that the information was actually understood.²⁷ But from a moral perspective, such an approach may seem suspect. We don’t much promote autonomous patient decision-making by revealing information to patients that they do not or cannot understand. Given that there is both a moral and a legal doctrine of informed consent, speaking about them as one and the same conceals important differences.

B. Morally Normative Legal Claims

In the prior Section, I noted that claims about what the law *is* often merely describe the state of the law. A lawyer might confidently assert that some jurisdiction recognizes comparative rather than contributory negligence. As a statement about what is the case, it expresses nothing about which form of liability is preferable. Other times, we speak about how the law should be in morally normative terms.

1. Moral Normativity in Legal Contexts

If I say, “This jurisdiction *should* not require hairstylists to have licenses,” I am likely making a moral claim about how we ought to live our lives if, depending on

26. Adam J. Kolber, *A Limited Defense of Clinical Placebo Deception*, 26 YALE L. & POL’Y. REV. 75, 93 (2008) (footnotes omitted) (quoting Carl E. Schneider, *After Autonomy*, 41 WAKE FOREST L. REV. 411, 417 (2006)).

27. *Canterbury v. Spence*, 464 F.2d 772, 780 n.15 (D.C. Cir. 1972) (“In duty-to-disclose cases, the focus of attention is more properly upon the nature and content of the physician’s divulgence than the patient’s understanding or consent. . . . As we later emphasize, the physician discharges the duty when he makes a reasonable effort to convey sufficient information although the patient, without fault of the physician, may not fully grasp it.”).

one's preferred formulation, we want to do what is morally required or permissible or maximizes well-being or some such. This moral claim happens to be situated in a legal context, but it is a moral claim nonetheless.²⁸ I might concede that statutes and court decisions make it crystal clear that hairstylists need licenses. Still, I could argue that the law should change or that you should vote against licenses in a referendum. Generally speaking, no law dictates how you should vote on a referendum or how legislators should vote on legislation.

Most legal scholarship today seems to make morally normative claims.²⁹ For clarity, scholars should speak of what the law *is* or *is likely to be* when making descriptive claims and speak of what the law *should* be when making normative claims. We need not rely solely on a few magic words to draw the necessary distinction, however. A recent scholarly conference, for example, asks whether "today's First Amendment over-protect[s] the speech of bullies, bigots, and businesses."³⁰ Since, as a matter of description, the First Amendment always protects precisely what it protects, we know the organizers, by asking about "over protection," are presenting a normative question of some sort. When in doubt, however, authors should make sure that their meaning is clear.

2. Interstitial Moral Considerations

Moral normativity can be tricky in legal contexts because it comes up in at least two different places. First, moral issues can be internal to the law: a body of law might be indeterminate to varying degrees and, one might think, *the law itself* calls upon judges, prosecutors, and other legal actors to fill in the blanks using moral reasoning. For better or worse, this gap-filling role is frequently associated with common law reasoning and with constitutional law. We can describe the analysis as raising "interstitial moral considerations" when the law itself dictates gap-filling by reference to morality.

The law often limits the scope of interstitial moral considerations. It might say or imply that only certain moral considerations are permissible, such as those consistent with American constitutional values. In such cases, it can be difficult to untangle the extent to which judges are called upon to exercise their own moral discretion and the extent to which they are supposed to apply values assigned by law. For example, a statute may grant a judge the option to sentence some particular defendant to either

28. Now instead of saying that this jurisdiction should not require licenses, I could make the slightly different claim that this jurisdiction should *stop* requiring hair stylists to have licenses. Then, I would be making both a descriptive and a normative claim. On the descriptive side, I would be asserting that this jurisdiction *does* require licenses as a matter of law. After all, you cannot stop requiring licenses if you're not currently requiring them. But I would also be making the morally normative claim that current practice should change. So, whether this jurisdiction should stop requiring licenses has both descriptive and normative components.

29. Cf. Steven J. Burton, *Normative Legal Theories: The Case for Pluralism and Balancing*, 98 IOWA L. REV. 535, 537 (2013) (stating that normative legal theories "currently dominate the leading legal scholarship").

30. See Derek Bambauer, *Is Free Speech for Assholes?*, INFO/LAW (Jan. 30, 2016), <http://blogs.harvard.edu/infolaw/2016/01/30/is-free-speech-for-assholes/> [https://perma.cc/6HTY-XTNY].

probation or zero to ten years in prison. Assume the judge believes the offender morally deserves only probation but, because another statute requires certain retributive considerations to be taken into account, the judge believes that any sentence less than four years is *legally impermissible*. In that case, sentencing the offender to four years in prison might be the best option given the *legal* constraints on the judge's choice. But it is difficult to pinpoint exactly where the law stops and judicial moral discretion begins.

3. Unfettered Moral Considerations

By contrast, even after a judge has exhausted all pertinent sources of law, including any interstitial moral discretion the law grants, the judge must still make a moral decision as to how to behave. A judge deciding a decade ago whether there is a constitutional right to same-sex marriage would consider pertinent constitutional provisions and case precedents, along with whatever interstitial moral discretion they afford, and reach a legal conclusion. Such conclusions do not necessarily end decisions about what judges morally ought to do, for we can still ask whether judges should decide only in accordance with their best interpretations of the law.³¹ That is a moral question the law cannot answer.

Even if some source of law emphasized that judges should not consider their own moral values, sources of law cannot possibly eliminate the moral question of whether a judge should act in accordance with the law. Moreover, unfettered moral considerations apply not only in important civil rights cases or when the republic itself is in jeopardy. They potentially arise in every single case from administrative law to zoological law. You may believe that, ordinarily, judges should act in accordance with law because doing so is the most *moral* option, and that may well be true. But that is a controversial moral claim that must be defended.

Some claims are ambiguous as to whether they incorporate interstitial or unfettered moral considerations or both. The difference can be important, however. Consider again the judge who believes the offender she is sentencing morally ought to receive only probation. The pertinent statute, let us assume, provides for an unreviewable sentence from probation to ten years in prison, but the judge believes the law requires consideration of retributive factors that dictate a sentence of at least four years in prison.

Two scholars might agree with the judge's legal interpretation but appear to give different advice. One might say the judge "should" give a four-year sentence, while the other might say the judge "should" give the offender probation. Yet, there may be no substantive disagreement if the first scholar refers to a legal determination that includes interstitial moral decision-making while the second refers to an overall choice that incorporates unfettered moral considerations.

How judges ought to use their interstitial or unfettered moral discretion will often depends on truths about the nature of morality. We needn't rely on such truths,

31. Emad Atiq goes further than most, arguing that "judges are not *legally* obliged to follow preexisting law in hard cases, and, moreover, that they are not so obliged from any other normative perspective (say, that of morality)." Emad H. Atiq, *Legal Obligation & Its Limits*, 38 L. & PHIL. 109, 112 (2019) (emphasis added).

however, when making descriptive claims. If you ask what the law *is* on some matter, I will consider precedent and how real-world judges are likely to utilize whatever discretion they are given. The positive state of the law does not depend on the truth of moral claims. Judges' *perceptions* of morality may well be relevant to descriptive statements about the law, but judges' perceptions of morality are largely irrelevant to the truth of moral claims unless you believe that judges are especially likely (or unlikely) to be right.

4. Prudential Normativity and Pure Legal Normativity

Earlier, I used the sentence "This jurisdiction *should* not require hairstylists to have licenses" as an example of a moral claim. But the speaker might have had a different kind of normativity in mind. A lawyer advising an industry association might say, "This jurisdiction *should* not require hair stylists to have licenses," because that would fail to maximize the profits of the association's members. The lawyer could mean "should" in a prudential, self-interested, nonmoral sense. But that is not the kind of normative inquiry in which most scholars are engaged; if you are referring to prudential self-interest, you should make that explicit.

Rather than speaking of prudential normativity, one can speak of a very pure form of *legal* normativity: "This jurisdiction *should not* require hair stylists to have licenses because a licensing requirement would violate the jurisdiction's constitution." The scholar need not be endorsing the constitutional provision. She is merely stating that, according to the law itself, the jurisdiction should drop the licensing requirement. Thus, she may be speaking of legal normativity, where the "should" in her statement refers not to a moral ought but to the more pedestrian ought that characterizes what the law tells us to do.

We can speak in a similar way about norms of etiquette. In some locales, forks go on the left side of a place setting as a matter of good manners. But this rule of etiquette is not a matter of morality. You are not a morally bad person for breaching a rule of etiquette. Similarly, you are not a morally bad person simply because you breach a legal rule. To reach that conclusion, we would need some further claim about the harms of the particular law broken or a defense of a debatable general claim that all lawbreaking is immoral. Unless conjoined with other claims, legal normativity yields no overall conclusion as to how you ought to behave.

We can now inventory several claims we have so far seen. Imagine a close case as to whether the Fourth Amendment precludes admission of inculpatory evidence of a serious crime.³² I could make the pure descriptive claim that the court will allow admission. This could be a prediction with no implication as to the merits of what the court is likely to do. Alternatively, I could make a pure legally normative claim about what I think principles of law themselves require: "Though it is a close case, the weight of precedent shows that the evidence should be excluded." Yet consistent with the preceding, I could claim that, despite the weight of the precedent and *all*

32. See *United States v. Calandra*, 414 U.S. 338, 347 (1974) ("Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure."); see also Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987).

pertinent sources of law, I think the judge “should” refuse to apply the exclusionary rule as a matter of her all-things-considered moral obligation. I might reach that view because I believe the Fourth Amendment exclusionary rule is a travesty of justice, and we have a moral obligation to subvert it. None of these statements necessarily contradict the others. So, if you don’t distinguish them, we often won’t know what you’re talking about.

Some legal scholarship only makes descriptive legal claims.³³ So limited, there is no risk of illicitly mixing the descriptive and the normative. And some legal scholarship may use legally normative claims in ways that are meant to be interchangeable with descriptive legal claims. That is, authors may speak of what judges should do, meaning merely that the law requires such-and-such result. Again, it is important to help readers understand your meaning, as legally normative language can add much confusion if your reader incorrectly assumes you are making all-things-considered moral claims.

When scholars speak of “normative” legal scholarship, I think they usually mean *morally* normative scholarship *about* the law. The traditional jargon in legal scholarship distinguishes between doctrinal work (which focuses on the current state of the law and maybe tries to identify some noteworthy patterns or principles underlying it) and normative scholarship. Since pure legally normative claims are often close cousins of descriptive legal claims, I imagine most people would describe such scholarship as “doctrinal” and reserve the term “normative” for morally normative claims. If there is any doubt, though, about the nature of one’s normative claims, it helps to be specific.

C. Natural Law Approaches

To be sure, there is much debate about exactly what law is and how it relates to morality. Under some views, the relationship between the descriptive and the normative is more complicated than I have so far presented it. Natural law proponents, for example, “hold that because law purports to guide action and impose obligations, the validity of any proposition as law depends on its conformity to moral standards.”³⁴ If they believe that valid *law* must correspond with moral values fixed outside the law, then it seems they cannot speak of what the law *is* without reference to what it morally *ought* to be. A natural lawyer might say, “Though the Constitution is currently interpreted to provide a legal right to abortion, such rights are contrary to morality and are, therefore, not valid law.” By saying that alleged legal rights “are” not valid, the natural lawyer sounds like she is making a descriptive claim. But she is actually making a claim that goes beyond the descriptive. She is saying something like: civil law purports to offer a right that contravenes the natural moral order, and that is bad or ineffectual.

Personally, I am not attracted to the natural law approach. I incline toward some version of legal positivism that “hold[s] that the status of a norm as law depends on

33. For example, in Adam J. Kolber, *Two Views of First Amendment Thought Privacy*, 18 J. CONST. L. 1381 (2016), I emphasize that I only make a predictive claim: “I predict that at least a significant minority of judges would deem a card counting prohibition unconstitutional . . .” *Id.* at 4.

34. LARRY ALEXANDER & EMILY SHERWIN, *DEMISTIFYING LEGAL REASONING* 24 (2008).

social facts and, in particular, on the fact that the norm was posited by a source generally recognized as a lawmaking authority.”³⁵ Indeed, most legal scholars who opine on the matter seem to be legal positivists of one sort or another.³⁶ But I am not opening up a huge jurisprudential debate. My argument is for clarity. Suppose you seek advice as to whether an abortion is legal under your circumstances. You do not want your natural law attorney to simply say that all abortions are unlawful, full stop. At a minimum, you want your attorney to note that civil law does provide something at least called a legal right to abortion and that, in ordinary situations, you will not be prosecuted for having a previability abortion.³⁷

In other words, regardless of whatever natural *lawyers* call law, we want them to clearly break down their views into descriptive and normative parts. I make the same request of natural law *scholars*. When speaking of what the law *is*, they will generally be understood as making descriptive claims that do not depend on the truth of moral propositions. If they mean otherwise, they should make it clear somewhere in their scholarship.

I understand the temptation to say that laws that violate our moral preferences are not law. Indeed, legal scholars are frequently seduced into believing that the law is precisely what they would like it to be. But nothing could be less scholarly. If you want to sway our views based on value claims, be clear that you are doing so as part of a rigorous argument to that effect. To the extent that your *undefended* moral views influence your academic interpretation of what the law *is*, you should seek to minimize your biases or at least be as transparent about them as possible.

1. Dworkinian Blending of Law and Morality

Ronald Dworkin famously defended an antipositivist view, sometimes considered a natural law view, that he called “law as integrity.”³⁸ He claimed that law is best understood as a process of interpretive construction under which judges should assume “that the law is structured by a coherent set of principles about justice and fairness and procedural due process.”³⁹ The law has integrity, according to Dworkin,

35. *Id.*

36. According to Robin West, legal positivism is “once again the reigning philosophical and jurisprudential framework of the legal academy.” Robin West, *Normative Jurisprudence*, in *ON PHILOSOPHY IN AMERICAN LAW* 55, 58 (Francis J. Mootz III ed., 2009).

37. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). Notice that there may be few, if any, practical differences between a natural lawyer and a positivist lawyer. A natural lawyer might say abortion protections are not law even though civil authorities recognize those protections as law. A positivist lawyer with similar inclinations might say that abortion protections are indeed part of the law but ought not to be. The differences between these jurisprudential stances may be largely terminological. Though they may apply the term “law” somewhat differently, it’s not clear that the difference otherwise affects their behavior. See generally David Enoch, *Is General Jurisprudence Interesting?*, in *DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE* 65 (David Plunkett, Scott J. Shapiro & Kevin Toh eds., 2019); Dan Priel, *Is There One Right Answer to the Question of the Nature of Law?*, in *PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW* (Wil Waluchow & Stefan Sciaraffa eds., 2013).

38. RONALD DWORKIN, *LAW’S EMPIRE* 225 (1986).

39. *Id.* at 225, 243.

when we are faithful to the principles underlying precedent while, at the same time, interpreting the law as best we can from the perspective of political morality. Dworkin's view could be considered a natural law view in that the actual content of the law depends on truths about justice and fairness as opposed to just people's perceptions of these moral concepts.

On Dworkin's view, judges should decide cases according to principles that best fit prior precedent and justify the law. Accurate statements of law, according to Dworkin, depend on both prior precedent and moral considerations.⁴⁰ If the very nature of law depends on facts about the content of the law along with normative claims about morality, some Dworkinians might challenge my emphasis on teasing apart what the law is from what it should be.

This objection fails.⁴¹ Assume first that our goal is to describe or predict judicial behavior, and let us assume that judges actually use the approach Dworkin recommends. In that case, our predictions still do not depend on the truth of moral assertions. They depend on empirical facts about how judges understand both precedent and their moral obligations. Dworkinians who seek to describe past decisions or predict future decisions, like others making descriptive claims, must focus on issues of fact, not value. We cannot infer judicial behavior from claims about how judges *ought to behave*.

By contrast, when Dworkinians consider how judges *ought to* behave, I offer similar advice as I give to more generic natural law views: be as clear and precise as possible. For example, Dworkin requires a threshold fit between a proposed legal principle and prior cases. Such judgments of fit may involve some claims about fact and some about value. The total body of binding precedential cases concerns matters of fact, but the judgment of fit may involve a complicated combination of fact and value claims. Since each of these kinds of claims is evaluated differently and depends on different evidence, scholars should try to break them down into their component parts as much as possible.

After a judgment of fit has been made, Dworkinians will try to identify a principle that puts the law in the best light from a moral perspective. Judges should consider what decisions "give voice as well as effect to convictions about morality that are widespread through the community."⁴² Part of what judges should consider are empirical facts—the values of a community and how decisions will be perceived in

40. When a judge identifies a principle in the law:

[H]e reports not a simple-minded claim about the motives of past statesmen, a claim a wise cynic can easily refute, but an interpretive proposal: that the principle both fits and justifies some complex part of legal practice, that it provides an attractive way to see, in the structure of that practice, the consistency of principle integrity requires. Law's optimism is in that way conceptual; claims of law are endemically constructive, just in virtue of the kind of claims they are.

Id. at 228.

41. For some criticism of Dworkin's view, see Larry Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, 6 L. & PHIL. 419 (1987); John Finnis, *On Reason and Authority in Law's Empire*, 6 L. & PHIL. 357 (1987); Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165 (2004).

42. DWORKIN, *supra* note 38, at 248.

light of those values. And part of what they are to consider, Dworkin tells us, are their “more substantive political convictions about the relative moral value of [different] interpretations.”⁴³ So even when following Dworkin’s recommended approach, some parts of the analysis are principally empirical and some principally value oriented. Either way, we all benefit when the analysis is broken down into descriptive and normative parts.

D. Challenges to the Fact-Value Distinction and to Moral Normativity Itself

I argue that scholars should better distinguish the descriptive and normative parts of their arguments. But what if there’s really no good distinction between the two? More broadly, what if there’s no such thing as moral normativity?

Joshua Kleinfeld takes such considerations to show that the fact-value distinction is not a sharp one. He bemoans “the rigidity with which contemporary academic legal culture invokes the fact-value distinction”⁴⁴ and believes it quite fine to offer arguments that blend the descriptive and the normative. It’s not the case, he argues, that “every well-formed claim in the world could be set straightforwardly on one side of the ledger or the other like so many zeroes and ones.”⁴⁵ Indeed, he finds it ironic that law professors insist on a fact-value distinction but then regularly fail to honor it:

Is the corrective justice view of tort law, which holds that the doctrinal structure of tort law reflects ideals of corrective justice, normative or descriptive? Well, both; it is a sort of idealizing interpretation. What about the economic view that regards tort law as an instrument for efficient resource allocation? Again, the view is at once normative and descriptive: it is an interpretation of the existing legal system with critical force to the extent the system diverges from it. What about a view of contract law as the legal effectuation of promise-keeping values? The interpenetration of normative and descriptive ideas in that view is impossible to unravel — either in principle (because the two categories are not truly separate) or in practice (because the two categories get so entwined in the course of argument) or both. When a lawyer argues that the Establishment Clause prohibits school-sponsored prayer in public schools, is that a descriptive claim about what the Constitution does mean or a normative one about what it *should* mean? What about when a lawyer argues that a contract’s reference to “reasonable efforts” means whatever efforts are standard in the industry rather than all cost-justified efforts? Entanglement is a normal feature of human understanding in general, but it is, if anything, particularly pronounced in law. Law is interpretive, and interpretive enterprises exhibit entanglement in extreme form.⁴⁶

43. *Id.*

44. Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1534 (2016).

45. *Id.*

46. *Id.* at 1535–36 (footnotes omitted).

I have three responses. First, even if there are borderline claims that blur facts and values, they do not defeat the distinction altogether. Many statements, and I've given several examples, appear to fall quite squarely on one side or the other. Many others, even if initially ambiguous, can be clarified or broken down into easily distinguished components. The person who reports seeing a parent hit a child "cruelly" can likely describe what she observed in factual terms (for example, the parent hit the child three times across the face) and separately describe her moral evaluation (for example, it grossly exceeded the bounds of appropriate parental discipline). Indeed, when confronted by sometimes vague distinctions, it becomes especially important to be clear and precise about their contours.

We face a similar challenge when distinguishing statements of fact not from morally normative statements but from prudentially normative statements. Surely one could make arguments similar to Kleinfeld's: can we really draw a bright line between our observations of events and our own self-serving biases and best interests? Aren't claims about how things *are* often entangled with views about how we would personally *like them to be*? As a matter of human psychology, we may indeed entangle beliefs about facts and beliefs about our best interests. Still, the standard scholarly response is to do what we can to loosen the entanglement or at least disclose matters that interfere with the clarity and objectivity of scholarly claims. In other words, entanglement risks are real; the solution is to disentangle all the more vigorously.

An examination of Kleinfeld's legal examples reinforces my claims that legal scholars are too ambiguous. If a scholar states that "tort law in X jurisdiction follows principles of corrective justice," we should expect the scholar to explain whether she is simply describing current doctrine, asserting what doctrine ought to do, or making both claims. There are some rather easy test questions to ask, for example: "If the jurisdiction made major statutory changes that explicitly make economic efficiency the goal of tort law, would you still claim that tort law in this jurisdiction follows principles of corrective justice?"

Kleinfeld also claims that it is "impossible to unravel" the descriptive and normative components of the view that contracts effectuate promise-keeping values.⁴⁷ In fact, we can simply ask scholars what they mean and they can usually explain. Or consider his rhetorical question, "What about when a lawyer argues that a contract's reference to 'reasonable efforts' means whatever efforts are standard in the industry rather than all cost-justified efforts?" This is precisely the sort of question where the distinction between facts and values is easy to make: are we supposed to resolve what "reasonable efforts" are by observing what people actually do in some industry or are we supposed to include value considerations in determining what is cost justified? None of these issues seem impossible to unravel. Sure, there may be ambiguities at the margins. Indeed, we always have some uncertainty when interpreting what others mean. But the solution is to make our claims clearer, not to give up on precision.

Second, if it turns out that the fact-value distinction isn't just a little vague but is fundamentally incoherent, then all of normative scholarship is in jeopardy. If people believe that there is no general distinction between descriptive and normative claims,

47. *Id.* at 1536.

then what do they mean when they tell us we ought to do something? There surely are deep and important questions about what this whole “morality” thing is and whether we can make sense of it. But once you’ve gone down the road of writing morally normative scholarship, you will generally be interpreted as accepting the existence of moral normativity. Put differently, if you are making morally normative claims while denying the fact-value distinction, tell us why your claims should be treated as anything more than glowing pixels or toner on paper that have no purchase on how we ought to behave. Radical denials of the fact-value distinction, even if true, are beyond the scope of this Article on *morally normative* scholarship because they preclude moral normativity.

Third, while I’ve dipped a toe into the debate about the fact-value distinction, my overarching claim aims to be largely agnostic about substantive debates in law and philosophy. What matters is not so much whether there is a good distinction between descriptive and normative claims but rather how we are to understand the claims that scholars actually make. In our efforts to interpret scholarship, we must recognize that scholars sometimes intend to make factual assertions, sometimes intend to make value assertions, and sometimes simply write ambiguously because they aren’t carefully attending to the differences. We can, however, seek to clarify what scholars *mean*, even if we are all mistaken in believing that there is a fact-value distinction. If a scholar writes about unicorns, we can still query their *beliefs* about unicorns. Failing to do so would fail to understand their meaning.

Returning to the real world, when scholars say that the failure to obtain affirmative consent to sex constitutes rape, they may mean that a judge *will* find that to be the case or that a judge *should* find that to be the case. Even those who doubt the existence of moral normativity can still admit that scholars *mean* different things when they speak normatively as opposed to descriptively. If we aim to understand each other, we ought to bring such meanings to the surface no matter what we ultimately take to be true.

Kleinfeld and I agree on several points. We both believe there is a fact-value distinction and that it addresses something important,⁴⁸ though we likely disagree over just how fuzzy the distinction is. We also agree that scholars regularly mush together claims about facts and values. Kleinfeld believes that legal scholars rigidly insist on a fact-value distinction that they regularly refuse to honor, while I believe that legal scholars neither insist on the distinction nor honor it.

Our central difference, though, is about how scholars ought to behave in light of the imperfection of the fact-value distinction. Kleinfeld seems quite comfortable with the ambiguity, while I argue that even if there are tough cases along the fact-value continuum, scholars should be as clear as reasonably possible about their meaning. And I hope to show in the next Part that there can be real benefits when scholars make their claims more precise.

48. *Id.* at 1536 (footnote omitted) (“My point is not that the normative/descriptive distinction is altogether confused or meaningless (though some distinguished philosophers think it is). I actually think the distinction gets at something important and there are deep reasons why contemporary intellectual culture is fixated on it. My point is that the nature and scope of the distinction is much more disputed and complex than one would think from the way it is often treated in the legal academy.”).

III. THE BENEFITS OF CLARITY

In this Part, I explain the importance of distinguishing descriptive and normative claims and give examples of some of the ways scholars fail to clearly draw the distinction.

A. Opportunities for Confusion

To see why legal scholars should be explicit about the normativity of their claims, notice some of the many ways two scholars who mush together their views of law and morality might inadvertently talk past each other: (1) they might have a factual disagreement about sources of law (for example, there might be precedents that one scholar is considering but not the other); (2) they might agree about the relevant sources of law but disagree about how judges are likely to interpret them; and (3) they might agree about both the pertinent sources of law and how judges are likely to interpret them but disagree about the best way to proceed from an overall moral perspective (because they disagree about facts, values, or both).

Assume, for example, that a judge must give primary custody of a divorcing couple's seven-year-old son to one of two parents who live several hours drive from each other. As a legal matter, the case turns on the "best interests" of the child, and we will assume those interests are in equipoise, given available evidence, with two possible exceptions. Professor A says that primary custody of the child "should" go to the father because the child has more friends who live near the father than the mother. Professor B says that primary custody "should" go to the mother because, even though there's no evidence in the record to prove it in this particular case, she believes mothers are generally better nurturers than fathers, and this consideration dominates the issue of how many existing friendships a seven-year-old child has.

It seems like A and B disagree about what "should" happen. But consider several ways in which their disagreement might just be terminological: First, A may speak of legal normativity while B may speak of moral normativity. When A says custody should go to the father, she may be making a descriptive legal claim, "the law requires giving custody to the father," conjoined with the view that legal actors "should" reach the correct legal result. She might immediately agree that the world would be a morally better place if the mother had custody and that, if she were the judge, law be damned, she'd give custody to the mother. But when she speaks of "should," she is focusing on positive law, not her views of morality. Hence, A and B may agree on substance but merely speak of different kinds of normativity.

Alternatively, A and B might disagree about whether the law exhausts answers to moral questions in legal contexts. A might believe that, in the context of legal questions, judges morally ought to decide only in accordance with the law. For A, moral oughts in legal contexts are resolved entirely by considering legal oughts, while B believes that the law provides an important starting point but that it's not the last word on what judges morally ought to do. B might believe that judges should sometimes opt for solutions that mesh poorly with the law when they lead to better overall results from a moral perspective. In order for A and B to resolve their conflict, they need to resolve a deep moral question. Arguing about child custody alone may never address their substantive disagreement.

Nevertheless, we might see several law review articles in which A and B argue over contract, tort, and criminal law where the issue that really divides them concerns a rather fundamental theoretical issue that they never actually discuss. Sometimes, domain-specific conflicts *can* help us understand broad theoretical debates, but sometimes they just divert us from more fundamental issues that must be addressed head on in order to make progress. Legal scholars often make their claims too unclear to know precisely where disputes ultimately lie.

In the next three Sections, I give examples of how closer attention to the difference between descriptive and normative claims can improve legal scholarship.

B. Skepticism About Moral Authority

The pronouncements of judges, legislators, founders of the Constitution, and so on are not morally authoritative. You cannot say, because so-and-so says that X is immoral, X is immoral. There is no general agreement about who constitutes a moral authority and whether moral authority even exists. You could say, "This person says X is immoral, and assuming this person is a moral authority, X is immoral." But now you've assumed an essential part of your argument. This is an important point because legal scholars frequently cite legal authorities to bolster claims about morality.

Legal sources *can* buttress moral arguments when the legal source provides substantive reasons that you merely relay to the reader. For example, you can cite a court opinion for a point of fact, though there will often be more direct sources for such information. Similarly, judges may offer a cogent argument about some moral matter. You can cite the argument so long as you are relying on the persuasive force of the argument and not the identity of the person who made it. You can cite fortune cookies and *Bazooka Joe* comics in the same way. Whatever authority a judge or other legal source has, it is not moral authority.

Matters get more complicated when a law references what sounds like a general moral standard. For example, a law might speak of "just compensation" without defining it. Do such laws directly incorporate a moral standard? If so, are judicial proclamations about that standard legally binding?

Judicial proclamations about that standard can be *legally* binding; but they're still not morally binding. When the law speaks of just compensation, it's not referring to justice in the sense that matters for morality. It's referring to a legal notion. One way we know this is that subsequent courts can modify the meaning of "just." They can say things like, "For purposes of determining just compensation in such and such context, we consider the following four factors." Or, "After the Supreme Court's holding in such and such, we no longer consider that fourth factor in assessing just compensation." Courts can alter the legal meaning of terms like "just compensation," but they cannot alter what sort of compensation truly is just. Legal sources can tell us to count someone as three-fifths of a person for voting purposes, but they cannot alter the actual moral value of a person by judicial decree. The 1897 sitting of the Indiana General Assembly nearly passed a bill that would have set the value of pi at

3.2.⁴⁹ Needless to say, had the bill been enacted, it would not have actually changed the value of pi. You can no sooner legislate truths of morality than truths of mathematics.

1. Example: Godsoe Insufficiently Clear as to Kind of Authority

In a 2015 law review article, Cynthia Godsoe argues that juveniles should not be prosecuted for prostitution.⁵⁰ By arguing for the decriminalization of juvenile prostitution, she makes a moral claim in a legal context. As part of her argument, she claims that “[r]etributive rationales do not justify sanctioning prostituted girls as they are minors [and] are not deserving of punishment.”⁵¹ To support her claim that they do not deserve punishment, she quotes U.S. Supreme Court Justice Elena Kagan:

As Justice Kagan concluded in *Miller v. Alabama*: “Because ‘[t]he heart of the retribution rationale’ relates to an offender’s blameworthiness, ‘the case for retribution is not as strong with a minor as with an adult.’” This lower culpability should apply to minors prosecuted for prostitution, particularly those at the younger end of adolescence.⁵²

The appropriateness of the Kagan quote depends on precisely what Godsoe has in mind. If the quote were particularly eloquent or insightful as to a matter of morality, there would be no harm in citing it. To me, though, Kagan merely makes a bald assertion about a relatively uncontroversial moral claim. This raises the possibility that Godsoe quoted Kagan as an authority about a moral claim. Such a use would be suspect, as judges and justices are not moral authorities. Nevertheless, legal scholars frequently treat them as such. They do so, in part, because lawyers do. Lawyers cite legal authority for moral claims, and judges seem fine with it. For the reasons I discussed earlier, however, scholars are held to a higher standard.

Maybe I’m wrong about the nature of moral authority. But at least recognize the need to argue for your view. So, for example, if you think you have identified someone who is an actual moral authority and can somehow provide evidence to support it, by all means, do so. But you cannot surreptitiously assume that someone

49. H.R. 246, 1897 Gen. Assemb. (Ind. 1897), [http://www.agecon.purdue.edu/crd/Local gov/Second%20Level%20pages/indiana_pi_bill.htm](http://www.agecon.purdue.edu/crd/Local%20gov/Second%20Level%20pages/indiana_pi_bill.htm) [https://perma.cc/TM5U-J8W7] (asserting erroneously the “important fact [] that the ratio of the diameter and the circumference [of a circle] is as five-fourths to four”); see PETR BECKMANN, A HISTORY OF PI 174–77 (5th ed. 1982).

50. Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313 (2015).

51. *Id.* at 1345.

52. *Id.* at 1345 (quoting *Miller v. Alabama*, 567 U.S. 460 (2012)). Notice that Godsoe’s claim morphs a bit. At first, we’re expecting an argument that prostituted girls “are not deserving of punishment,” but the Kagan quote endorses only the weaker claim that minors are less blameworthy than adults. Kagan leaves open the possibility that minors are, indeed, deserving of some punishment. *But cf.* Gideon Yaffe, THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY 10 (2018) (arguing that children should be punished less than adults for identical crimes not because they are necessarily less culpable but because “we have constructed our institutions in such a way as to weaken the legal reasons that they have to refrain from crime”).

is a moral authority and expect careful scholars to go along. And if you succeed in identifying genuine moral authority, your proof will be far more important than whatever else you're writing about.

Alternatively, Godsoe could be citing Kagan's view of the *legal* notion of blameworthiness. Words like "retribution" and "blameworthiness" sometimes factor into the legal analysis of sentencing in much the way I suggested "just compensation" could be given special legal meaning. That may be what Godsoe has in mind here, though I see no indication of it in her article. But if she is referring to the legal conception of blameworthiness, the passage would be clearer if she noted that explicitly.

C. Tradition and Legal Evolution as Alleged Sources of Moral Authority

As noted, prior laws have institutionalized slavery, treated women as property, and prohibited adults who love each other from getting married. The mere fact that something is made legal (or illegal) does not imply the value judgment that it ought to be. We needn't rely on the worst of the worst laws to make the point: Several decades ago, most U.S. jurisdictions followed a principle of contributory negligence.⁵³ Does that mean that contributory negligence was morally desirable? Not necessarily. Since then, jurisdictions have overwhelmingly switched to some form of comparative negligence.⁵⁴ Does that show that comparative negligence is morally preferable? Not necessarily. These are just facts about decisions made by courts and legislators. Courts and legislators are fallible. A moral argument about contributory and comparative negligence must appeal to something that matters from a moral perspective, for example, which regime better promotes corrective justice or maximizes societal well-being.

The fact that something is the law may well give us *some reason* for it to remain law. Reliance has moral value. In his defense of tradition, Edmund Burke famously "oppose[d] theories and abstractions, developed by individual minds, to traditions, built up by many minds over long periods."⁵⁵ About the French Revolution, Burke warned:

The science of government being therefore so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree, for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes.⁵⁶

53. See RESTATEMENT (FIRST) OF TORTS § 467 (AM. LAW. INST. 1934).

54. See 57B AM. JUR. 2D NEGLIGENCE § 801 (2004).

55. Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 369 (2006).

56. Edmund Burke, *Reflections on the Revolution in France*, in THE PORTABLE EDMUND BURKE 451 (Isaac Kramnick ed., 1999).

In other words, Burke worried about changing established forms of government. We may be unable to fully appreciate the evolved stability or harmony of social and political arrangements, so changes to the status quo risk making things worse.

Importantly, though, we must distinguish the fact and value components of arguments for traditional practices. One might be persuaded by the Burkean position as it pertains to matters of fact: Maybe we systematically underestimate the risks of social change. Maybe we are bad at designing new arrangements because we cannot appreciate how and why various constituencies settled on the old ones. None of these Burkean strands requires treating traditional rules as sources of authority on moral values. By contrast, we should be skeptical of claims that adopt what Cass Sunstein calls the “implausibly mystical” view that tradition has moral “authority over the present.”⁵⁷

Some theorists echo a slightly different view that the existing state of the law has normative authority because the law tends to evolve in ways that make it better over time.⁵⁸ During the evolution of the common law, they might say, judicial decisions that were especially unpopular or economically inefficient were more likely to be challenged, so that, as a matter of probability, the common law tends to improve its outcomes from a moral perspective.⁵⁹

We should not accept such claims too quickly. First, it’s hard to know where one is in the course of history. Presumably, before most jurisdictions switched to comparative negligence, those who supported the normative value of the common law would have opposed the change on the ground that the common law evolved a system of contributory negligence. Indeed, a view that favors tradition may slow down the very evolution it celebrates. Second, even proponents would likely admit, the approach sometimes leads to the wrong results. For example, many of the laws restricting the property rights of women emerged from the common law.⁶⁰ How can

57. Sunstein, *supra* note 55, at 407.

58. See, e.g., Adrian Vermeule, *Connecting Positive and Normative Legal Theory*, 10 J. CONST. L. 387, 391 (2008) (noting the view); cf. Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1251–52 (2015) (explaining how “the common law’s normative goals can change over time” while doctrine retains a static “jural” meaning, in order to “contribute[] to the ‘growth,’ ‘evolution,’ and flexibility of the common law over time”).

59. See, e.g., George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 53 (1977).

60. *Thompson v. Thompson*, 218 U.S. 611, 614–15 (1910) (emphasis added) (“At the common law the husband and wife were regarded as one. The legal existence of the wife during coverture was merged in that of the husband; and, generally speaking, the wife was incapable of making contracts, of acquiring property or disposing of the same without her husband’s consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other. In pursuance of a more liberal policy in favor of the wife, statutes have been passed in many of the States looking to the relief of a married woman from the disabilities imposed upon her as a feme covert by the common law. Under these laws she has been empowered to control and dispose of her own property free from the constraint of the husband, in many instances to carry on trade and business, and to deal with third persons as though she were a single woman. The wife has further been enabled by the passage of such statutes to sue for trespass upon her rights in property, and to protect the

we know when we're dealing with the good kind of legal evolution? Third, we can question whether the moral improvement that purportedly underlies legal evolution, often framed in terms of economic efficiency, constitutes the view of morality that we really care about. For example, the forces shaping the law's evolution may have emerged from unjust preexisting social structures.

But as with most of what I'm saying, you can make your assumptions explicit and proceed accordingly. A scholar could simply assume that tradition is a source of moral norms, cite whatever literature is supposed to support the claim, and get on with it. It's critical, though, to make the assumption explicit to alert readers that they may need to seriously discount the author's conclusions. Moreover, making the assumption explicit helps avoid a common problem in legal literature where scholars criticize one aspect of law by citing another. Such approaches can be puzzling. If one body of law holds substantive moral weight by virtue of its being law, why doesn't the other? Hence, to make morally normative arguments about the law, one must refer not to legal authority but to moral normativity.

1. Example: Burke May Use Law as a Moral Justification for Law

Another Burke, Alafair Burke, has written about Fourth Amendment search and seizure law.⁶¹ As interpreted, the amendment provides that people are not constitutionally protected from police searches of their bodies, cars, or houses when they consent to a search, provided police do not use impermissibly coercive tactics to obtain consent.⁶² Burke argues that the Fourth Amendment should be more demanding than that. She believes that searches should not only require voluntary consent but also “bear a reasonable relationship to the government's need for engaging in” the search.⁶³ And she offers a number of thoughtful policy reasons in defense of the approach she advocates.⁶⁴ So far so good.

Burke also argues that the Supreme “Court has lost sight of the heart of the Fourth Amendment itself.”⁶⁵ In many areas of Fourth Amendment law, we ask whether police conduct was reasonable based on “an express weighing of the governmental

security of her person against the wrongs and assaults of others.”)

61. See Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509 (2015).

62. See *id.* at 512, 514.

63. *Id.* at 562.

64. See, e.g., *id.* at 544–51. There is certainly a risk that police will exploit opportunities to conduct consent searches. Consider the advice of Vernon Riddick, Waterbury, Connecticut police chief, speaking to a primarily African-American church as one news source reported it: “If an officer stops your car, if they ask to search your person or vehicle, if they demand entry into your home, comply and then complain later to the department's internal affairs office and police chief's office if you feel your rights have been violated, Riddick said.” Michael Puffer, *Waterbury Chief: 'Let's Cooperate'*, REPUBLICAN AM. ARCHIVES (July 14, 2016), <https://archives.rep-am.com/2016/07/14/waterbury-chief-lets-cooperate/> [https://perma.cc/7WJM-TGER]; see also Radley Balko, *Refusing a Search Is a Right, Not a Provocation*, WASHINGTON POST (July 19, 2016, 11:40 AM), <https://www.washingtonpost.com/news/the-watch/wp/2016/07/19/refusing-a-search-is-a-right-not-a-provocation/> [https://perma.cc/W54T-TCAM].

65. Burke, *supra* note 61, at 515.

and citizen interests at stake.”⁶⁶ Calling it “macro reasonableness,”⁶⁷ she argues that courts should look to a high-level “balancing [of] the interests of law enforcement against the level of intrusion to the individual.”⁶⁸ According to Burke, this analysis underlies the Fourth Amendment’s *Terry* doctrine that allows police officers to conduct an investigatory stop and search of a person without a warrant and without probable cause when they have “reasonable suspicion” that crime is afoot.⁶⁹ She believes this analysis is at the heart of other Fourth Amendment “doctrinal rules governing special needs searches, roadblocks, administrative searches, community caretaking searches, inventory searches, protective sweeps, searches incident to arrest, and an officer’s directives that drivers or passengers exit a vehicle during a traffic stop.”⁷⁰

But what relevance do Fourth Amendment doctrines unrelated to consent have for the one she is focused on? As a descriptive matter, Burke is under no misimpression that the consent-search doctrine actually requires the reasonableness test she recommends. Indeed, she criticizes the Supreme Court, the highest body authorized to interpret the Fourth Amendment, for *not* using it⁷¹ and cites no lower court authority that does. While she does make occasional reference to the textual protection in the amendment against “‘unreasonable’ searches and seizures,”⁷² she does not appear to make the legal argument that the text itself requires the sort of macro reasonableness analysis she defends.

While I can’t rule out the possibility that Burke is making a legal claim, it seems like she is really making a moral claim, and she does indeed offer several moral arguments in favor of her position. It’s not clear, however, that her moral claim gains anything by discussing positive law. Just because Test A is used a lot by the Supreme Court and Test B is rarely used doesn’t mean that Test A is morally better. Test B is at no disadvantage *from a moral perspective* simply because it contravenes a test that is used more frequently in other domains. Rather, the value of Test B depends on substantive moral arguments. There may be some simplicity or other rule-of-law values promoted by using the same test in lots of contexts. But the more common test does not have substantive moral authority simply because it has been adopted more frequently (absent argument that the Court generally gets moral matters right).

Moral matters must be settled on moral grounds. Burke cannot rely on Supreme Court precedent to establish her moral argument. Given that positive law provides only the weakest support for her descriptive legal claim, she can’t much rely on the current state of the law to get her constitutional view accepted in court. Maybe she included the discussion of other aspects of Fourth Amendment doctrine because some voices in the academy would bemoan a Fourth Amendment paper with no close connection to current Supreme Court doctrine. But whether those voices are right or

66. *Id.*

67. *Id.* at 536. Burke links her distinction to Orin Kerr’s distinction between micro- and macro-scale inquiries. See Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 523 (2007).

68. Burke, *supra* note 61, at 536–37.

69. *Id.* at 537–39.

70. *Id.* at 539–40 (footnotes omitted).

71. *Id.* at 514–15.

72. *E.g., id.* at 514; see also U.S. CONST. amend. IV.

not, Burke's discussion likely only pays lip service to the expectation anyhow. While it's possible that I've missed the true aims of Burke's article, this very risk counsels in favor of being more explicit about how one's doctrinal discussion bears on one's moral or legal claims.

D. Addressing Moral Magnitude

Since moral arguments can rely on neither moral nor legal authority, they must generally rely on a solid moral theory or part of a theory. If you think tort law is justified only to the extent that it promotes corrective justice, you will often reach different conclusions about what we morally ought to do than if you think tort law is justified only to the extent that it promotes economic efficiency. And these views can lead to different conclusions than the view that tort law is justified by both considerations. If you have no normative grounds for evaluating tort law, then it is not obvious how you can construct any normative claim about tort law.

Good scholarship is about more than just expressing a preference or offering a vote: "I think it would be better if we had a no-fault system for automobile accidents." Rather, we want to know what supports your views about no-fault compensation and how the principles underlying your view apply in other contexts where the same issues are at play. If I'm merely seeking an opinion, I can ask my non-scholar Aunt Sally. If I turn to scholarship, I want a carefully reasoned argument of general applicability.

When I say that your argument needs a solid theoretical basis, I mean that you need to spend time *thinking* about theory; what has to go into a paper depends on its thesis. For example, on some tort law issue, your recommendation might increase both corrective justice and economic efficiency relative to the status quo. If you claim that your proposal is better than the status quo, then you may well have satisfied the theoretical concerns of a wide swath of scholars without having to settle any particular theoretical issue.⁷³ Similarly, you could restrict the scope of your thesis: "Assuming a corrective justice theory of tort law," here's what follows. Attending to theory doesn't mean your work must focus on theory; it just means that you've addressed at least as much theory as is required to defend your particular thesis.

73. In prior work, I have argued that, whether one is a consequentialist or a retributivist about punishment, one is obligated to consider the subjective experience of punishment when sentencing. Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009). At a workshop, George Fletcher stated that he was ill-at-ease with my paper because I never took a side as to whether I was a retributivist or a consequentialist. Professor George Fletcher, Remarks at the Columbia Legal Theory Workshop (Sept. 8, 2008). To me, however, it is a virtue of the piece that it is agnostic between these two theories. There is no shortage of papers that pick a punishment theory and deliver a conclusion on the assumption that the theory is correct. Far fewer papers purport to deliver the same general conclusion with respect to either major theory of punishment.

1. Example: Stinneford Needs More Attention to Theory and Moral Magnitude

In “Dividing Crime, Multiplying Punishment,”⁷⁴ John Stinneford argues that jurisdictions have too much power to divide criminal conduct into individual crimes, each of which carries a significant minimum penalty.⁷⁵ He makes both a moral claim and a legal claim. On the moral side, he argues that dividing conduct into lots of little convictions leads to excessive punishment. On the legal side, he argues that the Constitution should be (and used to be) interpreted in a manner that precludes this injustice.

Most of Stinneford’s article is devoted to the legal issue. He argues that “prior to the twentieth century, judges used the Cruel and Unusual Punishments Clause, the Double Jeopardy Clause, and the rule of strict construction of penal statutes to prevent the government from dividing the unit of prosecution in order to impose excessive punishments.”⁷⁶ Stinneford’s thesis appears to be that “[b]y recovering [our former] methodology for addressing prosecutorial efforts to divide crime and multiply punishments, we can ameliorate our current mass incarceration crisis and make the American criminal justice system more just.”⁷⁷ When Stinneford tells us that we should “recover” earlier meanings of constitutional protections against excessive punishment, however, he acknowledges that his favored approach does not reflect current law.⁷⁸ So without claiming the mantle of current law, it seems that Stinneford is arguing for a change in the law—indeed a change in constitutional law—that will presumably have to rely heavily on moral arguments (to amend the Constitution or to interpret it in a manner at odds with current law).

To support his moral claim, Stinneford focuses on the case of Weldon Angelos who sold eight ounces of marijuana to a government informant on three occasions.⁷⁹ On two of those occasions, Angelos had a pistol on him or in his car, though he never held or brandished it.⁸⁰ When he was arrested, police found additional contraband in his home and other locations, including about three pounds of marijuana, over \$18,000 in cash, and several handguns.⁸¹ At trial, Angelos was convicted of distributing marijuana and of three counts of possessing a firearm during a drug transaction.⁸² Given his several convictions, Angelos was sentenced to fifty-five years and one day of incarceration, the minimum legally permissible sentence.⁸³ His sentencing judge stated that:

Mr. Angelos will receive a far longer sentence than those imposed in the federal system for such major crimes as aircraft hijacking, second-degree

74. John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955 (2015).

75. *See, e.g., id.* at 1957.

76. *Id.* at 1958.

77. *Id.* at 1955–56.

78. *Id.* at 1955–56, 1961, 1968, 2010–11.

79. *United States v. Angelos*, 345 F. Supp. 2d 1227, 1231 (D. Utah 2004).

80. *Id.*

81. *Id.*

82. *Id.* at 1232.

83. *Id.* at 1230.

murder, racial beating inflicting life-threatening injuries, kidnapping, and rape. Indeed, Mr. Angelos will receive a far longer sentence than those imposed for three aircraft hijackings, three second-degree murders, three racial beatings inflicting life-threatening injuries, three kidnappings, and three rapes.⁸⁴

Note that the general setup of Stinneford's article should sound familiar. Here's a moral problem, a case that illustrates it, and a legal solution. Thousands of articles use a similar setup.

To make his moral case, Stinneford strongly implies that Angelos's sentence was unjustly excessive. To be sure, the sentence seems awfully long. Still, Stinneford's argument would benefit from a clearer theory as to *why* Angelos's punishment is unjust; as far as I can tell, he never offers one.

Stinneford's views seem most consistent with the retributivist tradition, which focuses on whether an offender's sentence is proportional to his blameworthiness.⁸⁵ But no one has ever given a widely accepted account of how to calculate proportional punishment. I, for one, have argued that the entire notion of proportional punishment doesn't stand up to close scrutiny.⁸⁶ But even if we grant that Angelos's punishment is excessive from a moral perspective (as it seems to be), Stinneford's thesis is supposed to apply not just to Angelos but to many other defendants whose conduct is divided by prosecutors into many pieces. If Stinneford were only worried about Angelos, he could at most show that the President should commute Angelos's sentence. Stinneford, however, seeks to alter our treatment of many offenders.

Stinneford's moral argument is too weak to apply to offenders generally because, like much of legal scholarship, it suffers from what I call the "moral magnitude" problem. Stinneford needs to give us some measure of *how much* injustice he is addressing. It matters for the same basic reason that blocks the inference from adultery's immorality to its criminality. Merely identifying an injustice is insufficient to demonstrate that a major change in law (let alone constitutional interpretation) is warranted.

For example, Stinneford never tells us how often the current system gets what he would deem a just result relative to what he'd deem an unjust result. He never tells us whether or how often the constitutional interpretation he supports would lead to underpunishment or to other changes in the conduct of legislators or prosecutors. Even some retributivists may believe that we should tolerate some punishment inaccuracy if we ordinarily reach the right result. Again, we cannot assess the strength of the injustice absent further argument.

84. *Id.* at 1258.

85. See Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 972 (2000) ("[R]etributive beliefs only require that culpable wrongdoers be given their just deserts by being made to suffer (or to receive a hardship or deprivation)."); cf. MICHAEL MOORE, *PLACING BLAME* 78–79, 88 (1997).

86. Adam J. Kolber, *The Subjectivist Critique of Proportionality*, in *THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW* 571 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019); see also Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141 (2013).

To establish moral magnitude, Stinneford would ideally tell us how much injustice there was in Angelos's sentence, and more importantly, how much injustice occurs annually as a result of piecemeal prosecution. Then, we could try to compare the relative amount of injustice we would expect were the Constitution interpreted in the ways he recommends. Notice that this sort of analysis is frequently absent from legal scholarship. To be sure, it is difficult to conduct. But scholars ought to address it in some way. Perhaps Stinneford could make some simplifying assumptions or estimates. Even if he couldn't, he could surely note that his claim depends on fact and value claims that he doesn't defend in the paper.

Stinneford might believe, along with typical retributivists, that it is *never* acceptable to knowingly overpunish someone.⁸⁷ Such a view might ease his burden of empirical investigation, since the *Angelos* case itself arguably implicates the injustice of knowing overpunishment. But he never makes that claim in the paper, and it's not obvious that we should never knowingly overpunish, especially if doing so would substantially reduce crime. Moreover, a large-scale system of criminal justice will arguably require some instances of knowing overpunishment if it hopes to cabin judicial discretion.

Stinneford's argument is on particularly shaky ground to the extent he is making an argument of constitutional proportions. If his moral argument succeeds, we may well have reason to vote for laws that reduce prosecutors' ability to stack offenses in the way Stinneford bemoans. But Stinneford has to make an argument powerful enough to override our ordinary principles of majority voting. Hence, the magnitude problem is particularly serious here. Without a clear sense of the magnitude of the injustice Stinneford addresses, it's difficult to assess the argument that we need to invoke anti-majoritarian constitutional protections.

None of this is meant to challenge the conclusion that the world would be a much better place with the constitutional protections Stinneford advocates. What I'm challenging are automatic inferences in legal scholarship from the claim that behavior is morally problematic to the conclusion that we *ought* to make it illegal, criminal, or unconstitutional.

Moreover, if Stinneford's moral argument is grounded in retributivism, he should wrestle with the fact that many punishment theorists are consequentialists who focus on deterring crime and incapacitating and rehabilitating offenders.⁸⁸ Stinneford never addresses consequentialist concerns. And while it may seem obvious that Angelos's sentence overdeters or wastes resources, the reality is more complicated. Angelos had the opportunity to plead guilty and receive a recommended sentence of fifteen years.⁸⁹ So at least he was given the option of accepting a less onerous punishment. Under the storybook view of criminal justice, the right to trial should not be undermined by excessive prosecutorial leverage, and the leverage here certainly seems excessive: the government indicated that if Angelos proceeded to trial it would seek a superseding indictment that could have led to a mandatory prison sentence of

87. See, e.g., LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY 6, 102 n.33 (2009).

88. See C.L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 7–8 (1987).

89. *Angelos*, 345 F. Supp. 2d at 1231.

more than one hundred years.⁹⁰ But beyond the bounds of this particular case, it is not immediately obvious what kinds of leverage are excessive, particularly if one holds a consequentialist perspective on prosecutorial discretion.

Consequentialists would also like more empirical information to assess Stinneford's concerns: How does sentence length affect offense rates? How often do firearms lead to violence in drug transactions? How would these numbers likely change under Stinneford's proposal? The list of empirical questions consequentialists care about is enormous but is essentially unaddressed by Stinneford. He could simply assume a retributivist perspective, but if he does, he should be more explicit and recognize that doing so will limit the scope of his conclusions.

Another reason to address the moral magnitude problem is that we live in a world of limited resources. We must often decide not just whether some policy leads to unjust results but how bad the policy is in a world of competing priorities. Are there never cases when prosecutors need to multiply piecemeal punishments in order to punish appropriately? Stinneford doesn't discuss the matter. Might legislators have selected sentences for decades based on courts' current approach to the pertinent constitutional doctrines such that politicians might make sentences more onerous were Stinneford to make constitutional interpretation more defendant friendly? Can we be confident that the change Stinneford seeks won't have any bad or at least unpredictable political responses? We're simply given no analysis one way or the other. Stinneford seeks a major change to several important aspects of constitutional law, and we need some measure of the problem (ideally on the national level) so we know how critical it is to fix.

Of course, it's difficult to find some of the data that could support Stinneford's claim. And not everyone wants to focus their talents on data collection and analysis. Still, more explicitly recognizing argumentative gaps and assumptions helps readers understand an argument's contours, including its weaknesses, and suggests places for further research perhaps by those who specialize in data collection and analysis.

Again, at no time have I disagreed with Stinneford's claim that current prosecutorial charging practices lead to injustice. Indeed, the article makes for a useful example precisely because its underlying moral assumption seems so attractive. But scholars should question their assumptions and be careful not to ease an argumentative burden simply because the argument jibes with their inclinations.

The shortcomings that I've identified should not be pinned on Stinneford. Quite the opposite. They should be pinned on legal scholarship more generally which regularly allows the concerns I've raised to silently slip by. Some of these concerns can be easily addressed: carefully watching the scope of our claims, paying attention to our underlying moral theories. Some cannot: gathering hard-to-obtain data, quantifying matters that are difficult to quantify. But as legal scholars get better at the former, they can more carefully focus attention on the latter and push the boundaries of what legal scholarship is able to accomplish.

90. *Id.* at 1232.

IV. SCHOLARSHIP VERSUS PRACTICE

Part of the reason legal scholars fail to clearly distinguish descriptive and normative claims is that they focus more on the “legal” part of their title than the “scholar” part. Almost all legal scholars trained as lawyers rather than scholars, and they fall back on approaches better suited to the profession they trained for. Nevertheless, scholars must recognize the descriptive-normative distinction if they hope to make clear, theoretically-sound arguments. Arguments that are neither clear nor theoretically sound have limited *practical* value no matter how well attuned they are to real-world legal issues.

A. Why Legal Scholars Mush Their Claims Together

There are several reasons why legal scholars mush their descriptive and normative claims together. First, we do too little to make the distinction clear to law students, so when they become lawyers and ultimately law professors, they haven’t been trained to make the appropriate distinction or to recognize its importance.

Second, it’s very difficult to combine the weight of law-related moral considerations with the weight of moral considerations unrelated to law. So legal scholars throw their hands up and speak about law and morality as though there’s no difference. Though the task is surely difficult, the weight of different kinds of considerations can be at least roughly combined.⁹¹ Legal scholars should rise to the challenge of addressing such tasks rather than simply ignoring them.

A third and particularly noteworthy reason scholars mush together their descriptive and normative claims is that they see judges and lawyers do it all the time. Based on their legal training, scholars think that claims about what the law *is* often sound more persuasive than claims about what the law *ought to be*, and they seek the same rhetorical effect that judges and lawyers seek. Law professors mistakenly believe that scholarly discussions of law are similar to discussions of law in court. They fail to recognize that the job of a scholar is very different than the job of a judge or a lawyer; scholars have more demanding requirements of clarity, transparency, and rigor.

As I’ve mentioned, lawyers are sometimes professionally obligated to be insincere, and many judges, no doubt, are insincere, writing as though the law is perfectly clear even when it was not prior to the judge’s opinion. Surely some judges take their opinions to be sincere. But I hope judges are frequently insincere when they make confident assertions about legitimately disputed issues because the alternative is that they are simply overconfident in their abilities and sorely unable to recognize genuine indeterminacy.

Indeed, it makes national headlines when federal judges are honest enough about their own abilities to admit making a mistake. When Judge Richard Posner expressed regret over a decision he authored in an important voter identification law case that he participated in six years prior, a *New York Times* article stated: “It is the kind of thought that rarely passes the lips of a member of the federal judiciary: I was

91. See Adam J. Kolber, *Line Drawing in the Dark*, 22 THEORETICAL INQUIRIES IN LAW (forthcoming 2021) (on file with the *Indiana Law Journal*).

wrong.”⁹² But, of course, we shouldn’t be surprised when a person who has decided as many cases as Judge Posner has some regrets. What’s a bit more surprising is that a judge (though in this case, as much an academic as a judge) has fessed up to a regret. Interestingly, the particular admission here was rather modest: Posner largely attributed the court’s error to factual information not provided at the time of the decision.⁹³

Judge Nancy Gertner, now retired from the federal bench and affiliated with Harvard Law School,⁹⁴ has provided a glimpse into how judges craft opinions in ways that massage their underlying views. In a 2014 law journal, she wrote about Damien Perry, a convicted drug conspirator she sentenced in 2000.⁹⁵ Perry had a troubled upbringing, and at age sixteen, about five years prior to his sentencing, he and a friend were playing with a gun when it accidentally fired and shot Perry in the head, causing Perry to lose his left eye.⁹⁶ The bullet remained in his head, causing severe headaches, occasional seizures, and considerable psychological trauma.⁹⁷

At his sentencing for drug-related activities, the government recommended 135 to 168 months’ imprisonment,⁹⁸ though Gertner considered his activities comparatively minor and would have liked him to receive only probation.⁹⁹ Sitting at a time when federal sentencing guidelines were understood to be mandatory, Gertner lamented Perry’s treatment under the guidelines.¹⁰⁰ She seemed pleased to find a reason, any reason I think she candidly implies in a law journal, to reduce his sentence.¹⁰¹

Although the Guidelines were mandatory, I worked mightily to interpret them in as humane a way as I could. There was a little used category for “extraordinary physical condition” under the Guidelines that enabled a departure. To protect against reversal, I wrote a lengthy opinion about the category “extraordinary physical condition,” and how it applied to Damien. . . . Guideline-speak obliged me to write about “bullets in the brain,” Damien’s “extraordinary physical circumstances.” I wrote “Damien Perry has a bullet in his brain. The question is whether that is

92. John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES (Oct. 15, 2013), <https://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html> [<https://perma.cc/E42Q-NHY5>].

93. *Id.*; see also Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST (Oct. 26, 1990), <https://www.washingtonpost.com/archive/politics/1990/10/26/powell-regrets-backing-sodomy-law/a1ae2efc-bec6-47ec-bfb6-1c098e610c5b/> [<https://perma.cc/UX3Z-BYRW>] (expressing Justice Powell’s regret that he voted against finding a fundamental constitutional right to same-sex sexual conduct).

94. Nancy Gertner, *How to Talk About Sentencing Policy—and Not Disparity*, 46 LOY. U. CHI. L.J. 313, 313 (2014).

95. *Id.* at 320–26.

96. *Id.* at 321.

97. *Id.*

98. *Id.* at 320–22.

99. *Id.* at 323.

100. *Id.* at 320–26.

101. *Id.*

an extraordinary physical circumstance sufficient to warrant a downward departure. To ask the question, is to answer it.”¹⁰²

I think her description in the law journal reflects a heavily results-oriented approach to sentencing. Her focus is on how to reduce Perry’s sentence much more than it is on the niceties of interpreting the sentencing guidelines. One reason I say this is that, even if the downward departure was correct as a matter of law, it’s no slam dunk. Hence, her judicial opinion seemed to speak hyperbolically when it stated, “To ask the question, is to answer it.”¹⁰³ Indeed, its hyperbolic nature is revealed by the fact that she follows it up with actual legal discussion. But it’s noteworthy that her position is much more open and direct in the law journal than in her judicial opinion.¹⁰⁴ She states quite frankly in the law journal that she would have liked to give Perry only probation, but she “knew that if [she] had departed from the Guidelines to that degree, the First Circuit would have reversed [her] in a nanosecond.”¹⁰⁵

By no means am I here criticizing either Judge Gertner’s judicial opinion or her journal article. I make no claim that judicial opinions *ought* to reflect scholarly values of openness and transparency.¹⁰⁶ Perhaps Gertner should be commended for her heroic handling of Damien Perry’s sentence. Quite possibly, judicial insincerity and overconfidence have positive effects. Perhaps they make laypeople think that they live in an orderly world, increase their satisfaction with the judiciary, and make litigating parties feel like justice was served. Or maybe they have none of those effects. My point is that there is probably quite a bit of judicial insincerity and overconfidence, and even if they have a place in the legal system, they are qualities at odds with good scholarship.

Scholars are supposed to make objective claims, voiced with appropriate caution. Whatever rhetorical benefits scholars hope to gain by treating “ought” assertions as “is” assertions are dramatically outweighed by the concomitant loss of clarity, transparency, and rigor. And relative to most judges, scholars have considerably more control over their time, tasks, and workloads. Judges must often opine on matters about which they lack deep expertise,¹⁰⁷ while scholars should generally avoid doing so. Scholars should take the time to investigate factual, conceptual, and

102. *Id.* at 323 (footnotes omitted).

103. In the opinion itself, though, Judge Gertner wrote, “To ask the question is *almost* to answer it.” *United States v. Lacy*, 99 F. Supp. 2d 108, 118 (D. Mass. 2000) (emphasis added), *aff’d sub nom.* *United States v. Dedrick*, 16 F. App’x 10 (1st Cir. 2001).

104. *Id.* at 114–19. Some facts are pitched slightly differently in the law journal than in the court opinion. In the journal, Judge Gertner states that Perry “and a friend were playing with a gun . . . [and it] accidentally fired.” Gertner, *supra* note 93, at 321. In her legal opinion, by contrast, she writes that “a friend of his was playing with a shotgun and it accidentally discharged.” *Lacy*, 99 F. Supp. 2d at 114. The version in the legal opinion is more likely to create the impression that the friend was responsible for the accident while the version in the journal more readily allows for an interpretation in which Perry is partly culpable for his own injury.

105. Gertner, *supra* note 93, at 323.

106. See Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091 (2010).

107. See Adam J. Kolber, *Supreme Judicial Bullshit*, 50 ARIZ. ST. L.J. 141 (2018).

normative matters so that their scholarship can be open and transparent without feigning overconfidence or mashing together conceptually different claims for rhetorical effect. Legal scholarship should be held to a higher standard of clarity, transparency, and rigor than legal or judicial practice.

B. Judicial Criticism of Theoretical Scholarship

Many have criticized normative legal scholarship for being too theoretical and impractical.¹⁰⁸ In a much-cited law review article, Harry Edwards, a judge on the U.S. Court of Appeals for the D.C. Circuit, argued that law schools emphasize “abstract theory at the expense of practical scholarship and pedagogy”¹⁰⁹ and criticized law schools that “ignore or disparage legal doctrine.”¹¹⁰ More recently, he has written that law reviews have internalized “law schools’ preferences for obscure philosophical and theory-laden material.”¹¹¹

Edwards does recognize “the importance of theory in legal scholarship”¹¹² when it also addresses doctrine:

“Practical” scholarship, as I envision it, is not wholly doctrinal. Rather, in my view, a good “practical” scholar gives due weight to cases, statutes and other authoritative texts, but also employs theory to criticize doctrine, to resolve problems that doctrine leaves open, and to propose changes in the law or in systems of justice. Ideally, the “practical” scholar always integrates theory with doctrine. Moreover, I am not opposed to “impractical” legal scholarship, as long as *law* professors are well suited to produce it (I see no reason why law professors should write mediocre economics, or philosophy, or literary criticism, when arts and sciences professors could be doing a better job), and as long as *other* law professors continue to do “practical” work. In the ideal law faculty, there is a healthy *balance* of theory and doctrine.¹¹³

Edwards and I have much to agree on: law professors should not write scholarship that is either obscure or mediocre; indeed, their writing should be as clear, interesting, and original as is reasonably possible. Neither law schools nor legal scholarship should ignore or disparage legal doctrine; legal doctrine is obviously important not only to the judicial system but also to legal scholarship and a high-quality legal education. (Indeed, one way to reduce scholarmush is to relieve those who prefer to be doctrinal scholars from the perceived obligation to write normative scholarship.)

But Edwards seems unnecessarily skeptical of theoretical scholarship that fails to address cases and statutes. There are universal features of law and morality worthy of study that transcend time and place in ways that cases and statutes do not. I would

108. *See supra* note 5.

109. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

110. *Id.* at 39.

111. Ronald K.L. Collins, *On Legal Scholarship: Questions for Judge Harry T. Edwards*, 65 J. LEGAL EDUC. 637, 645 (2016).

112. Edwards, *supra* note 108, at 35.

113. *Id.* at 35–36.

welcome theoretical insights from centuries-old legal scholars, even if they have no case citations. Let the same be said of our own work centuries from now.

Besides, scholars that are good at advancing theory should do that; those good at applying theory to doctrine should do that; and those good at both should do both. Not everything that's important to say needs to come from the word processor of a single author. We don't decry the split among scientists who focus on theory and those who focus on practical applications. There's a division of skills and labor.

As for Edwards' view that "legal scholars should do a better job in producing scholarship that is of interest and use to wider audiences in society,"¹¹⁴ I have no quarrel with the general point but disagree on the specifics. Often what we need to make practical decisions is *more theory*. The strength of Stinneford's moral claim, for example, might well turn on whether one is a consequentialist, a retributivist, or a combination of both. Each of these possibilities can lead to different policy recommendations. There is often no *practical* way to make decisions without deep theoretical commitments. We must attend to theory in order to be practical.

C. Potential Objections

1. Is This Article Normative Legal Scholarship?

Some readers might wonder whether this very Article observes the distinction between the descriptive and the normative. The answer is that it has no need to. While this piece *discusses* morally normative legal scholarship, it is not itself morally normative legal scholarship. I make no claims about what scholars *morally ought* to do, let alone what they morally ought to do in some legal context.

The form of normativity contained herein is the normativity addressing good scholarship. I argue that, good scholarship should clearly distinguish descriptive and normative claims. But I am not arguing that the failure to do so is *morally wrong*. Maybe it is *morally wrong* to write poor scholarship when doing so wastes valuable resources, but that's a topic for another day. Still, since this Article is a form of scholarship, it is subject to norms of consistency, transparency, rigor, and so on.

2. Why Should You Trust My Scholarly Values?

I could have called this Article, "A Vision of Legal Scholarship." It does, indeed, reflect my vision of the field and not everyone will share it. But the claim is stronger than just that. I have focused on scholarly values that I think almost all scholars already support—values like consistency, transparency, and rigor. So if you already share these values, I hope to have shown that you will better achieve them by clearly distinguishing the descriptive and the normative. As for the small number of scholars who, for some reason, do not prize these values, I hope that I have shown sufficient risk of pointless scholarly debates in a way that will persuade them to adopt these values so we can improve scholarly dialogue and avoid meaningless squabbles.

To be sure, scholarly values must sometimes be traded off against each other. For example, one scholarly value is concision. When we evaluate scholarship, we should

114. Collins, *supra* note 111, at 645.

care about the quality and quantity of interesting ideas per unit time it takes to read it. As a rough approximation, an eighty-page paper should have twice the scholarly value of a forty-page paper.¹¹⁵ So there are tradeoffs among scholarly values, including the values of concision and rigor. Similarly, one might sacrifice transparency for epiphanic impact.¹¹⁶ On rare occasions, scholarship sacrifices transparency to make its point through humor, exaggeration, or eccentricity.¹¹⁷ No one said that scholarship must fit a cookie cutter mold. With several thousand law review articles published each year, we can surely appreciate creative, out-of-the-box approaches among the lot. The requirement to sharply draw the line between facts and values can admit some exceptions, but deviations from good scholarly norms will benefit from deeper care and feeding of the norms themselves.

3. What About Scholar-Advocates and Public Intellectuals?

Many legal scholars write scholarship aimed at nonscholar audiences.¹¹⁸ They might write *amici* for courts, white papers for government bodies, and editorials for the general public. Must these scholars worry about the normative/descriptive distinction? Isn't there a role for the scholar-advocate and the public intellectual to simply reach out to the public?

Advocacy per se is not inconsistent with scholarship. Indeed, all scholars should be advocates of their theses. What matters is the nature of the advocacy. So long as their work reflects values like consistency, transparency, and rigor, scholar-advocates may indeed advocate and produce good scholarship simultaneously. While one cannot accomplish as much in a short newspaper editorial as a long law review article, concision is a scholarly value and, as noted, we can often tolerate less rigor and factual support in a short piece. A short editorial might effectively serve as a kind of abstract for more extended scholarly discussion.

Concerns arise, however, when scholars sacrifice scholarly values as part of their advocacy. If the advocacy is meant to constitute scholarship, they must observe the fact-value distinction. Violating it fails to maximize scholarly value. At the same time, fishing, crocheting, and playing video games also fail to maximize scholarly value. Not everything a good scholar-citizen does needs to be scholarship. It is

115. Law review articles are often impenetrably long. As Scott Shapiro half-jokes, "In the history of scholarship, no reader has ever wanted an article to be longer." Scott Shapiro (@scottjshapiro), TWITTER (Dec. 20, 2019, 5:53 PM), <https://twitter.com/scottjshapiro/status/1208158469234274307> [<https://perma.cc/W77M-R7XM>]. It is frustrating when an eighty-page paper only truly starts defending its thesis on page sixty, and even more frustrating when, after trudging through sixty pages, the arguments supporting the thesis do not warrant the time already invested.

116. See, e.g., Horace Miner, *Body Ritual Among the Nacirema*, 58 AM. ANTHROPOLOGIST 503 (1956).

117. See, e.g., Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012); Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803 (2009).

118. See Susan N. Herman, *Balancing the Five Hundred Hats: On Being a Legal Educator/Scholar/Activist*, 41 TULSA L. REV. 637 (2006).

helpful, though, to alert readers, if it's not already obvious, when an author is striving to maximize scholarly value and when not.

Also, many nonscholars and non-scholarly organizations cozy up to scholars to promote various causes, hoping to gain an air of objectivity and legitimacy in the process.¹¹⁹ This makes the scholar-as-advocate-or-public-intellectual a bit dangerous. It's one thing to give special weight to a scholarly opinion in light of the scholars' factual expertise in some field. But it is quite another to give special value to their opinions when they are not even acting in a true scholarly capacity.

I have heard many scholars present papers in crowded rooms in which they admit withholding or changing arguments contrary to their own preferences out of consideration for various audiences, such as judges or legislators. Doing so isn't necessarily a major scholarly faux pas; it depends on how the changes relate to the author's thesis. But it is sometimes a serious dereliction of scholarly duty, and the fact that scholars so readily admit to sacrificing their scholarly values should give us pause. Trading one scholarly value for another is part of the art of scholarship, but trading a scholarly value for a non-scholarly value, unsurprisingly, reduces total scholarly value.

Importantly, advocacy that is flawed from a scholarly perspective may still make the world a morally better place. By lacking consistency, rigor, and transparency, some scholars may more persuasively convince judges and other legal actors to behave in ways that are morally preferable. If so, these scholars may be not only morally permitted but morally *obligated to ignore* scholarly values. But note that the quality of their scholarship will pay the price if it reflects less consistency, rigor, and transparency than it otherwise would. Egregiously confusing the normative and the descriptive may not make you a bad person, but it might make you a bad scholar.

4. What Is the Weakest Part of This Article?

The most important question you never hear asked at faculty workshops is "What is the weakest part of your draft?" Of those in the room, the speaker will often be the one best positioned to answer. Directly addressing weaknesses promotes a culture in which we are more upfront about claims that need improvement. Much as scientific research strives to identify research limitations, legal scholarship should do the same.

Were I asked about the weakest portion of this Article, I would say that I make many assertions about the kinds of errors legal scholars engage in and only give a small number of suggestive examples. I claim, for example, that Waldron has been cloudy about normativity, Godsoe and Burke about moral and legal authority, and Stinneford about the theory underlying his arguments. I also identified some of my own mistakes and unnecessary ambiguities, and I suspect that the Article could be populated with many more mea culpas. But these are just a few data points. A stronger case could be made with more thorough empirical analysis. For example, one could examine a hundred law review articles and score them along various criteria associated with the fact-value distinction. That would help us better measure

119. See Eric Lipton & Brooke Williams, *How Think Tanks Amplify Corporate America's Influence*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/us/politics/think-tanks-research-and-corporate-lobbying.html> [<https://perma.cc/ZFN7-L8BK>].

scholarly compliance with the distinction. We might also examine, for example, how compliance has changed over time or varies by subject matter.

CONCLUSION

Legal scholars should strive to make precise, insightful claims with rigorous support. They should more clearly explain whether their claims are descriptive or normative and the extent to which their claims depend on matters of fact as opposed to matters of value.

High quality normative arguments are hard to make, but philosophers have been studying them for centuries. Legal scholars can learn from their analytical approach. True, the difficulty of making high-quality moral claims may lead some to question whether morality is up to the task. But if you don't think it's up to the task, then it's hard to know what the endeavor of morally normative scholarship is all about. For if moral claims lack a solid foundation, they are little more than opinions, and what could make normative legal scholarship less practical than that? On a more optimistic note, a focus on rigor can enliven legal scholarship. By being more precise, we can hope to stop talking past each other and develop more objective criteria for evaluating both scholarship and public policy proposals more generally.

Judges and the media sometimes rely on legal scholars for objective analysis of important issues. Scholars can, indeed, develop expertise about current doctrine, judicial decision-making, litigation tactics, and much more. But legal scholars are not moral authorities. Their views on matters of value are only as good as their arguments. When legal scholars more clearly distinguish facts and values, they will better earn the trust of the judiciary and the media, and their pronouncements will warrant the practical import many think they already have.