

# A Reply to Pierre

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Legal scholarship, Pierre Schlag tells us, is dead. *Live* scholarship, by contrast to the stuff we produce, aims for truths that are both important and hard to uncover—the latter is what requires discipline, and the former distinguishes scholarship from ordinary observation. The “life” in lively scholarship lies partly in the quest but also in the substantial payoff: growth, when we have been convinced of something important and previously unknown; change, when we see the world differently because of it; restoration, when old truths are revalidated; breath itself, when new insights pry open up those proverbial doors of perception, and let in the cosmos. Legal scholarship, Pierre charges, has none of this. It is dead, dead, dead.

Dead scholarship, of which legal scholarship is an example, also aims at truth—dead scholarship is scholarship, after all—but the truths are banal. They don’t rejuvenate; they open no pathways. That I live at 101 Ridgewood Road in Baltimore, Maryland or that my dog is outside right now eating grass and making herself sick in the process are both truths about the world but they lead nowhere, they change nothing, and they contain no insight. Everyone who cared to check it out could come by my house and all would agree with these true propositions—but no one would live, change, or grow on the nurturance offered by the insight. They are “spam truths,” and scholarship that is composed of such truths is spam jurisprudence. Thus, as Pierre’s *Spam Jurisprudence* suggests, there are the truths that are so dull that they deaden your senses, and then there are the truths that are the object of live scholarship—just as there’s spam that will fill you up and real nutrition that tastes good, and just as there’s electronic spam on the one hand and “electronic mail that matters” on the other. If our legal scholarship consists of spam truths—even worse if it actually *aims* for spam truth—then it’s dead. It’s missing what gives live scholarship life.

Legal scholarship is dead, then, because it’s spam scholarship. Why? Pierre’s explanation—his autopsy report so to speak—is that legal scholarship made the fatal mistake (way back when) of adopting, basically, the judicial opinion (and the lawyer’s brief) as its essential form.<sup>1</sup> And the judicial opinion, for better or worse, aims quite intentionally for spam. Legal scholarship aims to imitate adjudication. And adjudication aims for spam-like truths. Ergo—legal scholarship does likewise.

Is this right? The first part of Pierre’s argument—that adjudication aims for spam-like truths—is entirely right, I think, and by no means new, although the

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1. 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, 812–13 (2009).

metaphor is, as well as the condemnatory tone. Owen Fiss, for instance, argued thirty years ago that adjudication tries to *avoid* “crises of meaning.”<sup>2</sup> It aims for truths, whether deep or shallow, that are widely accepted rather than contested. Three decades later, Paul Kahn argued in an influential study of legal culture that the judicial opinion quintessentially aims to convince the reader that the resolution of the question before it—any question at all—is squarely determined by a pre-existing rule, that there’s absolutely nothing new or even particularly interesting here.<sup>3</sup> Both of these giant figures of Yale jurisprudence thus explicate, in as neutral terms as they can muster, the essential and epistemological conservatism of adjudicative truths: the judge seeks to convince the reader that the categories she invokes are both pre-existing and pre-determinative of the judicial outcome. More precisely, if more formalistically, we might put the point this way: the judicial opinion that seeks to justify the decision that some *X* is much *like* a *Y*, or that some *X* just plain *is* a *Y*, and therefore should be treated like the entire class of *Y*-and-all-things-*Y*-related, aims for an elaboration of all the ways that this claim—that *X* is already in the class of *Y*-things—is merely an observation about the world, and not a manipulation of *X*s and *Y*s to create a new class that pushes them together by wont of power and will. So, for example, women always have been enough like men to go to VMI, Justice Ruth Bader Ginsburg tells us; it was just erroneous misperception that led us to think otherwise.<sup>4</sup> Gay sex has always been enough like straight sex to render it the heart of intimate and lawful personal relations; it was just lousy vision that led us not to see this, the Court claimed in its “groundbreaking” opinion in *Lawrence*<sup>5</sup>—and so on. Nothing new here, other than a perhaps overdue recognition of pre-existing reality. *X*s have always been *Y*s, even if they’ve never before been treated as such. These judicial statements of social fact aim to be spam-truths: incontestable, not spicy, easily digestible, the sort of truth that “goes down easily.”

Judicial statements of “what the law is,” furthermore, are just as spam-like as judicial statements of social fact. It has *always* been illegal or unconstitutional to discriminate against women, or Asian Americans, or old people, or disabled people, or conservative Republicans, even if we all erroneously thought otherwise. Why? Because it’s illegal (and again always has been) to discriminate against African Americans and the first kind of discrimination is no different

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2. See Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 750–51 (1982).

3. For a sympathetic explication of this point, see PAUL KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 69–70 (1999) (“Law understands the meaning of an event as an instance of a rule that already exists.”).

4. See *United States v. Virginia*, 518 U.S. 515, 531–35 (1996) (“[Gender] classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.” (internal citation omitted)).

5. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (“[T]hose who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment . . . knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”).

from the second. Everyone will or should acknowledge this sameness between the norms “don’t discriminate against African Americans” and “don’t discriminate against women,” once we’ve ironed out a few wrinkly misperceptions. So, the statement that it’s illegal to discriminate (etc.), although it might sound like a novel interpretation of the law and of the world, really just restates what has always been true and obviously so. To make this enterprise as credible as it can be to the largest number of readers, the bulk of the observations must be of the sort that would be ratified by most of us who read newspapers and pay attention to the natural and political world around us—the cohort, in Pierre’s terminology, on the “high normal end” of the proverbial “bell curve.” If that cohort can be convinced that the judge’s observations of social fact and established law are not just true but trivially true (the latter, of course, being the *anathema* of scholarship, not the *goal* of it) then the opinion is all the stronger. The very banality of the judicial premises *strengthens* rather than weakens the judicial order.

Thus, judicial truths about the world have to be spam truths for the enterprise to succeed.<sup>6</sup> This is not because judges are of merely ordinary intelligence (or ordinary tastes). Rather, it’s because their declarations have to be spam if they are going to convince their audience (the high normal end of the bell curve) that they are not making this stuff up as they go. They have to convince us, in other words, that an *X* is *already* a *Y*, and that *Y* has always been illegal, or compensable, or excusable, or whatever, if their claim that *X* should be treated likewise is credible. And, they have to convince us that those two propositions—that *X* is a *Y* and that *Y* is illegal (or compensable, or an excuse, or a harm)—are as plain as the proverbial nose on your face. *Of course* those statements of social fact and legal norm are true, the judge opines. And because they are of course true, the conclusion is a statement of pre-existing law. It is not an exercise of power.

Legal scholarship is dead, Pierre argues, because it imitates this form. Judges, Pierre makes clear, can be forgiven for leaning toward spam. Judges *have to* say “what the law is”—that’s their job. It’s the imperative of role that sets them on the road to spam: saying “what the law is” requires them to make banal utterances that aim to convince the high normal end of the bell curve.

The same cannot be said, though, of mainstream legal scholarship. No role necessity requires of legal scholars the utterance of spam truths, regardless of what might so move judges. Nevertheless, for quite concrete and not particularly obscure reasons, even the history is spam-like—the task mainstream legal scholarship (“MLS”) set on, early in the twentieth century, was to be the handmaiden to the judiciary, and to ask whenever and wherever, about every legal subject imaginable, “what the law is.” As a consequence, Pierre argues, with only a couple of notable exceptions, traditional or mainstream legal

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6. With apologies to Maria Muldaur, “label it garbage, label it art.” See MARIA MULDAUR, *The Work Song*, on MARIA MULDAUR (Reprise/Wea 1993) (1974).

scholarship, for most of the last hundred years and certainly today, is spam. The basically adjudicative question it sets for itself—what is the law of so-and-so—begs for, and in fact requires, spam answers. So, legal scholarship is dead.

Assuming Pierre is right about adjudication, is he right about the legal scholarship that imitates it? I think his account is mostly (but not entirely) right, although I don't think the situation is quite so dire. I also think, though, that he is wrong in the cure he implicitly proposes. Let me briefly explain each of these three points.

I'll start with a relatively small descriptive point I think Pierre has wrong. Pierre has argued elsewhere and repeats the claim here,<sup>7</sup> that mainstream legal scholarship is not only uninteresting, but that it is also inconsequential. Sometimes, maybe most of the time, the aim of legal "scholarship" is not to answer the question "what is the law of so-and-so" in the abstract or for the sheer fun of it, but to answer the question so as to influence judges who may be grappling with the same question, or who may soon do so. But if that's the case, Pierre suggests, it's most assuredly a failure, by its own lights, and regardless of whether or not it "gets the law right." Judges don't even read this stuff anymore. They're certainly not swayed by it.<sup>8</sup> If the point of legal "scholarship" is to be efficacious rather than merely enlightening, the ship is surely sunk. Legal scholarship simply has no effect.

But this isn't completely true, as Pierre himself notes toward the end of his piece. Legal scholarship affects the way law professors think, the way our students think, the way legal bloggers and their readers think, the way the

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7. Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991); see Schlag, *supra* note 1, at 808.

8. I like Pierre's double-entendre spam metaphor very much. Furthermore, our own behavior is proof that he's on to something. When SSRN pops up in the subject line of my emails, I hit delete, without even a glance, and without even thinking twice. Of course that stuff is spam. It would be nice, in fact, if a sensitive spam filter could select and delete these SSRN emails so I wouldn't have to. I'm sure I'm not alone in this. Scholarship is now not just like spam, it *is* spam.

Nevertheless, if we take the "inconsequentiality" part of Pierre's indictment seriously, then the more appropriate, if more grisly, metaphor for legal scholarship, if he's right, might not be spam so much as the proverbial decapitated chicken. Legal scholarship, by Pierre's description, *twitters* in response to stimuli—symposia, colloquia, tenure decisions, downloads, citation counts, footnote numbers, rankings, and CV listings—but, like the chicken running around the barnyard, it has no heart, no head, and no will. No heart, because this is a passionless enterprise. No head for reasons already rehearsed and then some: ideas that truly challenge the high normal end of the bell curve are an anathema to it; quantifiable evaluators such as citation counts and rankings have sucked the life out of it; and lastly, because the electronic means by which we accumulate and rank it—the downloads, the symposia, and so on—force us to produce too much of it, thus drowning out whatever quality there might otherwise have been. It's too fast and too much; it dumbs us down. By "no will," I refer to Pierre's charge that for all its ambition, MLS in fact has no real discernible effect on the desired target. Judges, already in obeisance to the bell curve, don't need law professors also so bound to tell them what the culture has churned out as sufficiently banal to pass for truth to the masses, most of whom, as it turns out, believe in the corporeal existence of both the devil and a place called hell. No head, no heart, and no will—not really alive at all—but like you know who, it runs around responding to stimuli, proving only that it just is.

judges' clerks think, and ultimately the way clients and their lawyers think.<sup>9</sup> And sometimes, Pierre's charge notwithstanding, it affects the way judges think, and occasionally that effect is clearly observable in judicial opinions. From Georgetown faculty's scholarship alone and just over the last few years—and I'm sure the same claim could be made of most law schools—quite conventional legal scholarship has affected the arguments that have convinced the Supreme Court and lower courts on the unconstitutionality of the terms under which detainees are held in Guantánamo, on the constitutionality of the Family and Medical Leave Act, and on the applicability of the Clean Air Act to greenhouse gases. It has affected the content and wording of statutes, including the Americans with Disabilities Act, the Violence Against Women Act, the Family and Medical Leave Act, the proposed Anti-Discrimination Act, and god knows how many others. It has influenced the way the Washington, D.C. courts are configured to deal with domestic violence claims. Contrary to Pierre's charge, mainstream legal scholarship does have an impact on both judicial decisions and substantive law. It doesn't do so routinely. But it does enough of the time to justify the effort, if that is the scholar's goal.

With that qualification, though, I think Pierre's description is right. He is right, I think, that both adjudication and the scholarship that imitates it aim to convince the high normal end of the I.Q. bell curve of the most commonsensical descriptions possible, of the most obvious interpretations of social reality, through use of the most vanilla-like prose they can pen.<sup>10</sup> The legal academy then puts forward propositions of law that likewise aim to convince the inhabitants of the high normal end of the curve of their mundane ordinariness. This whole process leads to a highly desirable stability if we believe legalism's serious devotees, or to a smug satisfaction among the privileged and a sense of inevitability among the underprivileged if we go with its detractors. In either case, though, such a process, with such an aim, most assuredly won't lead to penetrating insights into our social nature, our political possibilities, or the contours of our knowledge.

We therefore might learn from judicial opinions or from scholarship, that all Xs are Ys—that all of us are human and have rights to be treated as such, that all holders in due course of commercial paper take free of all underlying defenses to the transaction and not just to some, that any acorn—not just this one or that one—can be valid consideration, that speech is speech, including hate speech, or that all negligently caused harm, including emotional harm, is compensable. These are truths we won't learn elsewhere. But, we also learn, simultaneously, that in some important sense we've *always known* them even if

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9. See Schlag, *supra* note 1, at 829–30.

10. I call this the “Lake Wobegon effect” in legal education. Everyone engaged in the legal academy—all faculty at all law schools in the country, from top to bottom of the *U.S. News and World Report* rankings and all students likewise—are solidly above average, just as are all the children in Lake Wobegon. Admissions committees and appointments committees labor mightily to draw meaningless distinctions in the native intelligence as well as the abilities of this completely homogenous group.

we didn't *know* we knew them. They are ordinary legal conclusions that follow from ordinary, obvious, even banal truths, the judge or scholar tells us. In point of fact, the judges learned these truths from us—inhabitants of the high normal end of the bell curve. Pierre is right to insist that the legal scholarship that imitates adjudication in this way will have the same dulling modesty. When a scholar urges a judge to extend civil rights, to uphold a contract, to allow a holder to collect on the paper free of the defense of fraud in the underlying transaction, to protect pornographic speech, or to allow the emotionally traumatized victim of someone's negligence to recover even if she hasn't been physically touched, the scholar is merely asking the judge as well as the reader to see some obvious social facts, to make some easy inferences and apply some pre-existing principles—and *not* to create speech, or injuries, or humans, or value, where there weren't any of these things before, and by no means to create law that didn't already exist. Whether the truth of these matters is asserted in adjudication or in the scholarship that aims to sway it, Pierre is completely right that this mode of thought and argument relentlessly aims to solidify the base of our understanding of who and what we are. It aims to make secure, to root, and to cement the basic blocks of pre-existing knowledge. Our legal scholarship might extend, shape, or modify our knowledge of ourselves or our law just a bit. But it won't upend it.

Where Pierre is wrong (or partly wrong), in my view, is in his cure. I want to break his proposed cure into three steps. The first two parts of it are right; the third part, though, is what I want to criticize.

As rehearsed above, Pierre's descriptive claim is basically that mainstream legal scholarship is as dead as it is because it aims to answer the same question that adjudication sets for itself: "what is the law of so-and-so?" That question asks for spam answers, and that's what judges and scholars offer in response. Judges ask this question in their opinions by virtue of their role and by brute necessity. That's what they're paid to do. But whatever might be true of judges, legal scholars, legal critics, legal journalists, jurisprudes, legally trained op-ed writers, law bloggers, legal historians, and so on don't have to ask the question "what is the law of so-and-so." This is the path a certain generation of law professors embarked upon about a hundred years ago. But we don't have to keep mindlessly following their lead. We could change direction. I think the most sensible way to read Pierre's piece is as a plea that MLS'ers—there are now, after all, several *thousand* of us—kindly ask ourselves *other*, and more *interesting*, questions than the conversation-stopping, mind-numbing question "what is the law of so-and-so." I think he's right to do so. That's the first step of the argument.

Here's the second step. Of course, Pierre may be saying, there are a number of questions that MLS could ask about law, rather than "what is the law of so-and-so." We could ask, for example, *why* the law of so-and-so is what it is, even if the law of so-and-so can only be described as a range of possibilities on a spectrum. We could ask, why this spectrum for so-and-so rather than that one?

We could ask, for example, not *what is* the “law of accidents” (with all the legal “complexity” and “ambiguity” that question suggests), where the goal is to explain why it is that the law of accidents now and always has had at its core (either) the negligence principle or the strict liability principle. We could ask, rather, how did it come to be that our modes of dealing with accident costs in this country rest on a choice between either having negligent actors and victims of non-negligent actors pay the hospital and doctor bills that accumulate by dint of our enjoyment of dangerous goods, or alternatively, having consumers of the products of those actors pay those bills. We could ask, that is, why the law is the way it is, rather than “what the law is.” We could just posit that the law is somewhere in a range between points on a potential adjudicative spectrum, and then ask of the entire range—why this range? Why not that one? Simply asking *why* the law is the way it is, rather than *what* it is, gets the scholar out of the game of imitating adjudication. The point of the inquiry would be not to state the law. The point would be explain its determinants—economic, cultural, political, historical, and so on.

Pierre doesn’t disagree with that, as far as I can tell. I think that’s the reason for his endorsement of the “law-and . . .” movement.<sup>11</sup> But there is another question that legal scholars, critics, op-ed authors, blog writers, and so on could ask, which Pierre has long wanted to take off the table. I think he’s wrong to do so. Legal scholars could ask, as a central, defining question, not what the law *is*, but rather, what the law should be—what the social world should look like in an ideal world, and how law might contribute to that construction. We could ask the explicitly political and normative question of “what the law should be” *rather than* the adjudicative question of what the law is, and rather than the historical, economic, cultural question of why the law is what it is. For twenty years now (some things never change), Pierre has opposed even asking these “normative” questions, and he repeats his skepticism here. Pierre is against our current scholarly status quo. He’s just as strenuously against “normative scholarship”—or as he more frequently puts it, against “normativity” *in toto*.

Why? What’s wrong with normativity? Pierre has given various answers in his twenty-year critique of normativity, but this new essay suggests yet an additional argument, which I think is wrong and merits a response. One reason for Pierre’s longstanding opposition to normativity, suggested by this essay, might be a suspicion—well-grounded—that the kind of normative questions asked, and certainly the answers given by MLS, will be, or are, or have always been in the past, *imitative* of the sorts of normative questions judges ask when deciding cases. Just as the truths about the world and the statements of law in MLS are basically imitative of judicial declarations of truth and law, so too are the political or moral claims about the way the world should look. And, for the same reasons, the normative questions that judges ask and the answers they give, as well as the empirical and legal questions they ask in the course of

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11. Schlag, *supra* note 1, at 821.

writing judicial opinions, will be—virtually by definition they must be—politically uninteresting, aesthetically unappealing, and intellectually deadening. And scholars imitate judges. So, mainstream *normative* jurisprudence is likewise politically uninteresting, aesthetically unappealing, and so on. As such, the problem with mainstream normative legal scholarship—MNLS—is that the normative questions it asks—what should the law be, what should the world look like, how might law contribute—imitate the normative questions asked by judges. Those latter questions, in turn, will be “truncated,” to use Unger’s term for the same phenomenon,<sup>12</sup> or spam, to revert to Pierre’s. Spam normative questions about what the law and world should look like will invite spam answers.

But if that’s the argument, there’s a pretty obvious problem with it, which Pierre’s essay itself clearly shows. Here’s the problem. Pierre may be right about the nature of normative questions posed and answered by judges. As virtually everyone who’s thought about it agrees, both judges and the scholars that imitate them, when explaining what the law is, have to also explain what the law should be. If we want to explain “the law” of compensation for injuries caused by badly manufactured products, we’re going to have to also say what we think “the law” ought to be, because “what it is” is just not all that clear. So, there’s some “normative” or “political” or “moral” analysis involved in even the most ordinary legal and adjudicative writing. Statements of “what the law is” will indeed include, perforce, a tad of “policy analysis,” a dabbling in costs and benefits, some philosophizing over fundamental values or basic principles, and at least some “weighing” of pros and cons between proffered alternatives. That dabbling will be spam-like, for the same reasons the judge’s various truth claims and statements of what the law is are such. And this is as true of imitative legal scholarship as it is of judicial opinion writing itself. The conclusion thus follows: if legal scholarship is spam, then so is its normative component.

My objection to this Schlagian syllogism is just this: normative legal scholarship does not *have to* be so confined, and if anyone pays attention to Pierre’s essay, it won’t be. It doesn’t have to be *imitative*. It doesn’t have to be adjudication-lite. Legal scholars could ask, and I think should ask, normative questions about what the law should be, *not* so as to get a better grip on what the law *is*, and not so as to better imitate the cost-benefit policy analysis or the fundamental values analysis or the basic principles analysis or the pros-and-cons reasoning that typifies adjudication; not, in brief, so as to better sway the court toward one possible legal result over another. Legal scholars could and I think should be asking what the law should be, and what it should not be; what our social world should look like, and what it should not look like; what of the law we have is an utter disaster, and what of the law we don’t have that we

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12. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 577 (1983) (criticizing the “arbitrary juxtaposition of easy analogy and truncated theorizing that characterizes the most ambitious and coherent examples of legal analysis today”).

perhaps should have. And we could do all of this “normative analysis” not toward the end of figuring out what the law is—that is indeed what truncates or spamifies normative analysis<sup>13</sup>—but solely because these are important questions to ask.

Legal scholars don’t typically ask these questions in this “for their own sake” spirit. That’s not to say we don’t ask normative questions. It is to say, though, that we typically ask normative questions toward the imitative aim of discovering in adjudicative fashion “what the law is”—albeit with a policy-based nudge in one direction or the other. We don’t typically ask these questions either toward the end, simply, of criticism, or toward the end of imaginative reconstruction. Thus, we ask whether the Second Amendment protects the ownership of handguns, and in asking that question, our view of the wisdom of forbidding handguns will enter into the analysis. We don’t ask whether or not the Second Amendment is a good idea, even if it doesn’t protect individual rights to firearms, much less even if it does. We ask whether the Fourteenth Amendment protects abortion or gay marriage, and toward that end, our view of abortion and gay marriage will come into play. We don’t ask whether that amendment or the community it has so often inspired ought to have larger aspirations, or whether the language of the amendment is so cramped it can’t possibly accommodate such aspirations, or whether by so limiting our moral imagination it does more harm than good. We don’t very often do what Pierre apparently regards as so absurd a task that it serves in this piece as a *reductio ad absurdum*, and that is to ask what a decent, humane Constitution would do or be, or whether it’s possible to have one. These questions don’t typically get asked. What does get asked, is whether the Constitution does or doesn’t protect handguns, or abortions, or the right to die, and to answer those questions, we certainly may and perhaps have to nudge it this way or that way by engaging with the normative issue. But that nudging is all in the service of the question of legal fact: what does the Constitution say, what will a court say it says, what will the Supreme Court say it says? We don’t ask what a decent democratic republic ought to be doing to protect citizens against violence, or outside predators, or unwanted pregnancies, or poor health, or an overbearing state. We do, of course, ask whether individuals have or don’t have various “rights” of self-defense, or privacy, or to die. We ask whether the Fourteenth Amendment protects all of these rights. We only rarely ask whether those rights, and the protection granted them by the Fourteenth Amendment, by virtue of the limits they impose on our political imagination, does more legitimating harm than good.

Large, explicitly utopian, non-imitative, and utterly nonadjudicative “normative” questions aren’t central to MLS, and apparently Pierre doesn’t think they ought to be. But why shouldn’t they be? It seems to me that Pierre and all the rest of us who are worried about the state of MLS should be calling for MLS to become *more*, rather than less, “normative.” Who better than MLS’ers to ask

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13. *Id.*

and propose answers to both fundamental and not so fundamental questions about the political value of our laws, legal doctrine, and legal systems? Who better than MLS'ers, to ask not only what our social reality should be, but what aspects of it should be addressed by law, what aspects of it might be best left alone, and what aspects of it ought to be either preserved or scrapped? What social possibilities can we envision for ourselves, the fruition of which might be aided by the creation of new law? Which parts of the Constitution are abysmal, disastrous mistakes? Is all of it?

Again, there are perfectly respectable reasons for judges to not ask these questions. There's no reason, though, for legal scholars—who, whatever their hidden oedipal or elektral dreams, aren't themselves judges—not to do so. There's no reason, in other words, for the “normativity” of our mainstream legal scholarship—our answers to the question “what should the law be, what should the world look like, and how might a decent law contribute to a humane and just society and world”—to be tied to a pale imitation of adjudicative policy analysis, and to the sorts of questions that Schlag rightly complains has characterized our normative MLS to date.

Let me conclude by trying to sharpen just a bit the (limited) basis of my disagreement. The normative part of standard legal analysis is indeed severely circumscribed. The judge or scholar can choose, on moral or political or economic or aesthetic or whatever normative grounds seem appealing, between *this* version of the negligence principle or *that* one, since both are loosely compatible with precedent or statute. And, he or she, whether judge or scholar, might make that choice on moral, principled, or political grounds. But the scholar can ask much more robust moral questions than these. Whatever might be true of the judge, the scholar can ask what the law should be, regarding, say, accident costs, *regardless* of what it now is, and regardless of what any conceivable court might envision it to be. The legal scholar who is not imitative, so to speak, and is not aiming to be imitative, need not ground his or her moral or political thought in pre-existing law. She certainly can—but she need not. Again, she *might* ground it somewhat, totally, or not at all, in the law that is. But she's not role-bound to do so. Unlike the judge, she can put the law we have in its place. She might criticize a case, a doctrine, a body of law, or a legal system, on the basis of past judicial decisions, or the law we have, or comparative materials from elsewhere, or a hypothesized social contract, or a cost-benefit analysis, or a utopian imagining of a socialist state, or Aristotle's politics, or a dream she had, or a hallucinogenic imagining, or an intuitive moral sense of what justice requires, or on Kant's or Locke's or Mill's or Rawls's public philosophy. When she does these things, she is not asking “what the law ought to be” as between alternatives posed by precedent. She is not asking the normative question *so as to* answer the legal. She is asking the normative question—hence the political question—so to speak, for its own sake.

Is this something that legal scholars ought to be doing? Or, should this work be assigned elsewhere—to political theorists, maybe, or moral philosophers, or

voters, or poets, or citizens, or legislators, or policy analysts in think tanks, or homeless people, or felons, or people who live in the suburbs, or undocumented workers? I just don't see any reason for legal scholars *not* to do this, and for just that reason, I don't see any reason for Pierre's blanket condemnation of "normativity" in legal scholarship—particularly since we've never tried it in any meaningful, non-imitative way. Why not try it? Legal knowledge might profitably inform utopian, political, moral, and social inquiry. It is different, somewhat, for a legal scholar who knows a little something about law to form a judgment about what an idealized First Amendment or Securities Law would look like, than for a random writer on the blogosphere. Lawyers—all lawyers—do bring some knowledge of law, some appreciation of process, some tolerance for dissenting views, passing familiarity with legal history, and at least a bit of an acquaintance with the lives of ordinary people to the task of figuring out what the law ought to be. Legal scholars might bring all of this and a good deal more.

Might. Beyond that, I think, nothing can now be said about what non-imitative normative legal scholarship—by which I mean, scholarship that asks what the law should be, and does so not toward the end of answering the judicial question what the law is, but rather, the purely political (or moral, or normative) question "what the law should be"—could or would be, because we haven't produced all that much of it. What would inform it? It could be informed by the cultural canon, low-brow, mid-brow, or high-brow, it could be informed by economics or sociology, it could be informed by moral philosophy, it could be informed by our classical liberal political theorists from Hobbes to Rawls, it could be informed by our own political commitments or the platforms of our favorite political parties, it could be informed by gut instinct, it could be informed by the wisdom or wisecracks of Bob Dylan or Ayn Rand or Bruce Springsteen, and so on. Label it garbage, label it art. It could be more or less interdisciplinary, more or less disciplined. It could over time develop guidelines and criteria of quality. But the one thing it need *never* be is an imitation, pale or otherwise, of how a hypothetical judge in some hypothetical "case" would answer the question "what is the law of so-and-so," where the question has been artfully posed so as to isolate and hence limit some discrete legal issue, consciously worded in such a way as to leave intact the entire legal apparatus and legal past within which the issue arises. It would never aim for spam truths. With due apologies to Ronnie Dworkin,<sup>14</sup> that just would not be its point.

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14. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).