LAW AND
AND
THE METHODOLOGY OF LAW

EDWARD L. RUBIN*

For the last few dark and stormy decades, ever since it irreversibly dismantled its formalist home, legal scholarship has been traipsing from door to door, looking for a methodological refuge. The doors at which it has knocked have included literature, philosophy, economics, political science, and sociology. Most of the residents have turned legal scholarship away with a meager handout and an explanation that they had problems enough of their own. Economics, which suffers few such doubts, invited it in and tried to gobble it up. For the most part, legal scholarship has kept knocking and tried to make the best of what it was given. A few of its members have abandoned the whole process and, out there in the darkness, tried to reconstruct the law’s autonomous home.

This article briefly canvasses the various efforts to link law to other disciplines, a process that has acquired the appropriately indeterminate name of “law and.” It argues that legal scholarship adopts a unique stance toward its subject matter that precludes the direct application of another field’s methodology. But because of its internal features, legal scholarship needs to rely on other methodologies, particularly social science, to provide an understanding of the forces that act upon the legal system and of the impact of legal decisions. The article then considers two interesting arguments that have been recently advanced to restore the autonomy of law—the autopoietic theory of Niklas Luhmann2 and Gunther Teubner,3 and the theory of discursive modalities developed by

* Professor of Law, University of California, Berkeley; B.A., Princeton University, 1969; J.D., Yale University, 1979.


3. GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (Zenon Bankowski ed. Anne Bankowski & Ruth Adler trans., 1993); Gunther Teubner, Evolution of Autopoietic Law in AUTOPOIETIC LAW, supra note 2, at 217.
Philip Bobbitt⁴ and extended by Dennis Patterson.⁵ While these approaches have much to recommend them, they ultimately do not alter the fact that legal scholarship needs social science to prosper, if not to survive.

Part I considers law and—the relationship of law to other academic disciplines. In the process, it identifies the salient features of legal scholarship. Part II then defines the methodology of legal scholarship with greater precision, discusses its particular relationship to social science, and explains why it cannot function as an autonomous discourse.

I. LAW AND

The primary concern of this discussion will be standard legal scholarship. This may be defined as work which frames recommendations, or prescriptions, to legal decision-makers.⁶ In some cases the work critiques an existing judicial decision, statute, regulation, or constitution, and the recommendation is simply that the decision-maker should act differently. Less commonly, it merely offers a recommendation, with no comment about an existing decision. Most often, the work combines a critique of an existing decision with a prescription, whether general or specific, for a different approach. And sometimes it even suggests that the decision-makers are doing exactly the right thing. All this work, however, is characterized by its normative quality and the direct engagement of its recommendations with identifiable legal decision-makers.⁷

To be sure, many other types of work are recognized as legal scholarship—legal history, legal sociology and jurisprudence, for example. The present discussion is thus properly regarded as an analysis

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⁵ DENNIS PATTERSON, LAW AND TRUTH (1996).
⁷ In this article, the term “prescription” is used as a sub-category of “normative”; a prescriptive statement is a normative statement addressed to a specific person or group of persons, like judges, or Americans, or women, as opposed to human beings in general. This terminology is adopted for convenience only, and no part of the argument turns on it.
of the most common, characteristic mode of legal scholarship, rather than of every work that can be included in that category. There are, however, some conceptual as well as statistical reasons for defining standard legal scholarship in the manner proposed. To the extent that legal history or legal sociology are history or sociology about legal topics, their methodology is simply the methodology of those scholarly disciplines. As for jurisprudence, some of it can be treated as a special brand of moral or political philosophy. A good deal of the remainder, including this Symposium, involves an analysis of standard legal scholarship, and thus depends upon an understanding of that category.

There is also a substantial body of work that simply describes the law, without offering prescriptions or relying on a recognized academic methodology. This is distinctively legal, but it is generally not regarded as scholarship. It consists of practitioner manuals, summaries of current developments, and nonanalytic treatises. The sociological fact that this work is not regarded as true scholarship within the legal academy suggests the centrality of prescription as a distinguishing feature of the field, since the subject matter of the two categories is obviously indistinguishable. Treatises, moreover, tend to cross the boundary into scholarship to the precise extent that they criticize the decisions they describe, and thus propose or imply prescriptions for alternative approaches. Some purely descriptive work does qualify as scholarship, however; typically, it is either comparative, or it is so general that it is recognized as jurisprudence. Such work is relatively uncommon, however. Joseph Raz’s work is descriptive jurisprudence but Ronald Dworkin’s is standard legal scholarship; although it is written at a fairly high level of abstraction, its central focus is a prescription to judges about the way to decide legal cases.

This definition of standard legal scholarship provides the basis for the claim that other academic methodologies are only indirectly relevant to law, and cannot aid legal scholarship in its search for a methodological home. The fields that will be discussed are natural science, literary criticism, moral philosophy, and social science. In each case, the standard methodology of the field will be described. One caveat is necessary, however: all of these standard methodologies have recently come under assault from postmodernism, an assault which has been sufficiently effective to make any statement of such standard


methodologies appear naive. Nonetheless, they are the methodologies that the vast majority of scholars actually employ, and the ones that legal scholarship has sought to borrow. There is no point in borrowing a deconstructed methodology.

As for postmodernism itself, it offers many valuable insights, but it is a kind of intellectual blunderbuss. It is easy to trigger, and it hits a few targets now and then, but the difficult task is to identify the precise shape of the various targets and the way they relate to one another—in other words, the standard modalities of academic discourse. The analysis in this article is based on a sociology, not an epistemology, of academic disciplines—the working methodologies that these disciplines employ to generate their content, not the epistemological claims by which they establish the validity of the entire field.

A. Legal Scholarship and Natural Science

Natural science was the ideal to which legal scholarship aspired in its formative and formalist period, and it exercises a continued fascination because it can produce definite results that are generally regarded as persuasive. In all likelihood, the claim that law could be made into a science was always to be understood in a metaphorical sense, but close examination undercuts even the metaphor. The crucial problem is that the discourse of natural science is essentially descriptive rather than prescriptive. It begins from the premise that there is a real world "out there," separate from conscious human control. Prescriptive statements about this world would be meaningless, but descriptions can yield a model of its behavior that possesses a publicly accessible level of coherence. That, at least, is the working premise of academic natural scientists.


12. See Ernest Nagel, The Structure of Science: Problems in the Logic of Scientific Explanation (1961); Karl Popper, The Logic of Scientific Discovery (1959). This view of the working premises of science is shared by its critics. See Martin Heidegger, The Question Concerning Technology, in Basic Writings from Being and Time to the Task of Thinking 319 (David Krell ed., 1976); Edmund Husserl, The Crisis of the European Sciences and Transcendental Phenomenology: An Introduction to Phenomenological Philosophy 3-84 (David Carr trans., 1970). Recent developments in particle physics seem to challenge this view of reality, see Neil Bohr, Atomic Physics and Human Knowledge (1958), but do not alter either the methodology of science or, for present purposes, the more important
It can be challenged on philosophic grounds, but, as a sociological observation about scientists' beliefs, it remains as true today as it was before our epistemological doubts took hold.

Legal scholarship differs from natural science in the prescriptive purpose it adopts. This difference follows, as an almost necessary consequence, from our present vision of the law itself. The scientific aspirations of the formalists were based on the idea that legal principles were "out there," beyond the reach of conscious decision-makers in the same sense as the principles of natural science. As a result, the formalists believed that the task of legal scholarship was to describe those principles, and then construct prescriptions that would be fully dependent on them. But no one really believes this to be true at present, no matter what one's theory of law. Modern legal scholars regard law as the product of conscious decision by public decision-makers, and possibly others. There is thus no fixed reality, but rather an ongoing process by which people in certain positions make decisions; in bald terms, law is created, not discovered. This sentiment has led to prescriptive efforts to improve the quality of those decisions according to the scholar's own views about law or public policy.

Another major contrast between legal and scientific scholarship is that the external information on which natural scientists rely consists of data, whereas the external information for legal scholars consists of events. The distinguishing characteristics of data, as opposed to events, is that they are generated, defined, and given significance by the academic discipline that studies them.13 To begin with, data are a passive subject of research that must be generated by the discipline itself. This is true even of scientific fields that rely heavily on observation, like geology, and it is apparent in more experimental areas. The biologist who investigates the chemical composition of a mackerel's heart by grinding it up and separating its components in a centrifuge is manipulating the external world in a way that implies its passive and dependent quality. The discovery of a new subatomic particle, a new chemical reaction, or a new dinosaur bone may be an occurrence of great importance, but it is the product of scholarly effort, and thus consistent with the vision of external reality as a passive subject for research. Judicial decisions, legislative enactments, and administrative regulations, on the other hand, are neither discovered in law libraries nor unearthed in the field, but generated by

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nonacademic actors. In dealing with this external information, legal scholarship necessarily adopts a reactive approach.\textsuperscript{14}

Secondly, the nature of the discovered phenomenon in science is defined by the discipline, whether this definition consists of determining the discovery itself, like the subatomic particle; the boundaries of the discovery, like the chemical reaction; or the mere fact that it is new, like the dinosaur bone. Events, as opposed to data, come to a scholarly discipline prepackaged, either by their human originator or by a pattern of human observations that is much broader than the one that the discipline establishes.

The third feature that distinguishes data from events is that the significance of the former is determined by scholars. It is the scientist who tells us if the newly-discovered dinosaur bone is just a piece of Cretaceous garbage that some local museum can display to visiting Boy Scout troops, or whether it changes our basic understanding of what dinosaurs were like. The explosion of a volcano may seem like an event, being independently generated and defined by broadly-based, nonscientific opinion, but is only an historic event; whether it has scientific importance will be determined by Professor Magma and his graduate students who go clambering up its sides. There is some element of this process in legal scholarship; an obscure state court decision can be hailed as a triumph of judicial reasoning, or a Supreme Court opinion can be identified as a jurisprudential Armageddon whose implications had escaped the justices at the time when it was handed down. More typically, however, the decision will correctly identify its own importance, and very often it will establish its importance by means of that identification.

A final difference between the law and natural science lies in the noncumulative quality of legal scholarship. It has always been a source of envy to other academic disciplines that science actually progresses, that existing controversies are resolved, and that new insights can be based on those resolutions.\textsuperscript{15} To be sure, Thomas Kuhn's theory of successive scientific revolutions, engendered by changes in the underlying paradigm of scientific understanding, has challenged this vision of cumulation.\textsuperscript{16}


\textsuperscript{15} It was this model of cumulative knowledge, for example, that served as the basis of Comte's effort to create a science of society. See AUGUSTE COMTE, A SYSTEM OF POSITIVE PHILOSOPHY (1875-77).

\textsuperscript{16} THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970). There is much to be said for his theory, particularly because the view of science it attacks is so appealing that it cannot possibly be right. But, as critics have pointed out, Kuhn
Kuhn adds a needed note of nontriumphant realism to the process of discovery, but he does not refute the basic fact that over long periods of time, the area of scientific agreement increases, and the new problems addressed are increasingly sophisticated and complex.

What underlies the cumulation of scientific knowledge is a unified theory of causality. Scientists are not only involved in a descriptive enterprise, but they are in agreement that their enterprise involves an effort to explain the causes of observed phenomena. They further agree about the sorts of statements that will count as explanations. Viewed from this perspective, natural science is not a group of disciplines, but a single discipline with a broad range of topics. The astronomer and the geologist share the same basic methodology, their fields being distinguished primarily by a difference in altitude. They are prevented from switching from one field to another by the amount of information to be learned, but they can readily accept each other’s results and often utilize these results, in a methodologically effortless manner, when their fields overlap.

It is precisely such a theory that legal scholars lack. They lack it because they are not trying to describe the causes of observed phenomena, but to evaluate a series of events, to express values, and to prescribe alternatives. This does not lend itself to the notions of causality that lie at the base of natural science and its cumulative method. It does not, moreover, involve the sort of statements about external reality that can be...
verified or falsified by data, the process through which the cumulation of scientific knowledge is effected.

B. Legal Scholarship and Literary Criticism

Another source of methodological assistance for legal scholarship is literary criticism, in many ways the diametric opposite of natural science. "Law and literature" once referred to compilations of literary works depicting lawyers—an enterprise that any law-trained person would need to be a masochist to undertake—but now constitutes an important theme in modern jurisprudence. At first, the comparison between legal scholarship and literary criticism appears to be a rather close one. Both literary critics and legal scholars can be properly regarded as engaged in a process of interpretation, an effort to discover the meaning of a preexisting text. This interpretive process may attempt to discern the intent of the author, but that is only one approach to legal or literary meaning; there are numerous others, such as assessing the text's effect upon the reader, or its range of possible meanings, or its interaction with a broader set of social attitudes. All these approaches seem common to both legal scholarship and literary criticism, and have produced a body of writing that can be described, in both cases, as largely reactive and largely noncumulative. Their starting points are works that are generated outside the discipline, and whose character and boundaries are defined by their human originators. Their products are noncumulative, although they rely upon a general background of knowledge and sensibility. The task that both groups of scholars set themselves is to evaluate, rather than to explain; they possess no theory of causality and generate no statements that can be verified or falsified by empirical means.

Despite the similarities between literary criticism and legal scholarship, many scholars maintain that the two fields are ineluctably separated by the fact that law involves the deployment of political power, that it exercises direct consequences in our lives that literature lacks.

Passing over, for the moment, this difficult argument, which depends upon some theory about the real nature of both law and literature


themselves, there remains a basic difference in the purpose of these academic fields, a difference in the scholar's stance toward her subject matter. Literary criticism adopts an essentially nonprescriptive stance. The critic does not address the author with instructions on how to create more realistic characters or construct a better plot, the way the legal scholar instructs judges how to interpret precedent, use social policy, and reason through to their conclusions. This difference in purpose stems from the opposing attitude of legal scholars and literary critics toward their subject matter, an opposition that can be captured by the qualities of involvement and respect.

Involvement is a relationship in which the scholar's efforts potentially affect the subject matter. Literary critics are not involved, in this sense of the term, with the texts that they interpret. Many authors of great interest to contemporary critics are well beyond the reach of earthly instruction, and the creation of literary works in general is not regarded as a rational process that can be improved by academic argument. As a result, there is no felt need to address prescriptive arguments to the creators of literary texts, and no strong sense that anything would be achieved by doing so.

For legal scholars, the situation is largely the reverse; they are inevitably and intensely involved with the subject matter of their research. They regard the law as the deliberate action of state decision-makers that can conceivably be affected by the sorts of academic arguments that they articulate. In such circumstances, prescription is a natural, and rather appealing, mode of discourse.

In place of the legal scholar's sense of involvement, the relationship of literary critics toward their subject matter can be characterized as one of respect. Literary critics regard a work as worthy of scholarly attention because they respect it, because they find in it a source of meaning or of inspiration. One need only imagine a scholarly work about a novel that the scholar did not respect—a Gothic romance, for example, whose cover shows a winsome woman in a filmy dress embracing a dark-haired

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20. For a contrasting view, see Sanford Levinson & J.M. Balkin, Law, Music and Other Performing Arts, 139 U. PA. L. REV. 1597 (1991). The authors make a persuasive case for the lessons that other disciplines can teach, but these lessons operate at a very general level; in essence, they convey a postmodern mood. It is not clear that these other disciplines can provide law with a methodology.

21. There are, of course, subjects of legal scholarship where the sense of involvement is lacking, such as the law of Ancient Rome or of modern Saudi Arabia. It is in these situations that legal scholarship loses the prescriptive quality that characterizes its standard version, and becomes more similar to a literary interpretation of texts.

man amid a bed of flowers—to recognize that it would not be a work of literary criticism at all, but something quite different, such as a sociological study of the "Gothic romance phenomenon." Critics, in other words, assume what Martin Buber would call an I-Thou relationship with the work under consideration. In essence, they regard the author as a person of genius perhaps, or talent at least, whose work they are in a position to interpret and evaluate, but not improve.

This is generally not true of legal scholars, who adopt very much of an I-It relationship with the decision or statute they are analyzing. Deep down inside, legal scholars tend to think that they could do a better job than the judge. Thus, their interpretive efforts to determine the meaning of a particular opinion are often preliminary to prescriptive statements that evaluate the desirability of the determined meaning. As Charles Collier suggests, this is fatal to the enterprise of law and literature, which can only be advanced by treating judges as poets, and according them an artificially created intellectual status that the actuality of their work product confounds. For most scholars, the judge is someone whose work should be improved, not plumbed for the deeper meaning that its obscurities or implausibilities reveal. To be sure, there are interpretive elements in most works of standard legal scholarship, but the addition of a prescriptive element, and the effect of this element on the character of the description, distinguishes legal scholarship from literary criticism.

The relationship between the scholar's interpretive and prescriptive efforts will be determined by the level of the decision-maker to whom the article is addressed. If it addresses its prescriptions to the author of one particular decision, treating the rest of the world as a fixed background, it will tend to take a purely interpretive stance toward prior decisions or a controlling statute. The prescriptive question will be how these decisions should be interpreted, and whether the author of the decision in question interpreted prior decisions or statutes correctly. Alternatively, an article may address itself to the entire judiciary. In that case, it will tend to speak prescriptively about all the relevant decisions, but it may treat the statutory provision on which they depend in a purely interpretive way. Not only does legal scholarship contain these additional prescriptive elements, but their inclusion produces a particular kind of engaged, argumentative interpretation which is qualitatively different from most literary criticism. In addition, modern legal articles often rely on underlying social policy considerations. In that case, there will be no purely interpretive discussion, and interpretation will be used only as the basis for prescription.

A somewhat different claim, advanced by James Boyd White,24 Ronald Dworkin,25 and Stanley Fish,26 is that legal scholars and judges comprise a single interpretive community which collectively defines the law. Whatever merits this view has, it does not bring the scholar any closer to the literary critic. Literary critics may well constitute an interpretive community, but that community does not include the author, the creator of the subject matter that the literary critic studies. In fact, the whole point of the modern "interpretive community" approach to literature is that the author's intentions and internal thought processes are opaque, so that critics—and readers—must construct that meaning for themselves. But the idea that judges and legal scholars define the law as an interpretive community necessarily depends upon a close cultural link between them, and on their ability to understand each other. It is precisely this linkage that generates legal scholars' sense of involvement and the corresponding prescriptiveness of their approach.

It might be argued that literary criticism is also prescriptive, if not to the author of the work, then at least to its reader. This is certainly the import of modern hermeneutic theory, which views criticism as a way to aid readers in the construction of meaning, rather than a way of revealing to them real, preexisting meanings.27 But this sort of prescriptiveness would only be analogous to the legal practitioner literature; it addresses the users, however creative their role, not the originators. In fact, the prescriptiveness of legal scholarship distinguishes it rather sharply from literary criticism. The analogy between the two fields is useful for purposes of clarification, but any effort to give it more substantive effect would founder on this prescriptive quality in legal scholarship, and the underlying lack of respect that it implies. There appears to be no reason why legal scholars would grant judges or legislators a donné, why they would presume that apparent mistakes were intended originalities, or why they would treat ambiguity as a virtue that opens up new vistas of meaning or imagination.

The nonprescriptive character of literary criticism tends to dampen its reactivity and noncumulation, thus further distinguishing it from legal scholarship. This decreased reactivity stems from literary criticism's internally-generated standards of significance. It is the critic who decides

24. WHITE, supra note 18.
25. Dworkin, supra note 18.
which works merit attention, not the authors themselves, and not general opinion as embodied in the *New York Times* bestsellers list. These judgments of significance have a cumulative quality: the proper way to interpret a particular work never really becomes settled, but the fact that the work is worth interpreting does become a matter of consensus. To be sure, authors come into favor or fall out of it, and assiduous critics are occasionally able to persuade their colleagues that some acknowledged classic merits the perdition of oblivion, or that some previously unknown novel is a "minor *War and Peace.*" But over the course of time, literary judgments seem to stabilize, and the familiar canon of great literature takes shape.

The adoption of this attitude implies a standard, an aesthetic of some sort, by which the literary work is judged as admirable or great. Judgments of significance are cumulative because this standard functions for critics the way a theory of causality does for scientists; it provides a basis for agreement about the criteria by which scholarly work is to be judged. Of course, the critics have no way of verifying or falsifying their conclusions. The cumulative process they are left with, therefore, depends entirely on consensus of the critics, a democratic principle much weaker than the authoritarianism of empirical results. As stated, this Article's discussion is an effort to characterize the basic practices of various academic disciplines, and thus avoids engaging with postmodernist critiques. The concept of a canon has absorbed so much deconstructive punishment in recent years, however, that the entire concept has contracted a certain air of illegitimacy. But most of this controversy acknowledges the idea that judgments of significance are possible, and only disputes the criteria by which the standard judgments have been formulated.28

It is, once again, the factor of respect that makes literary criticism more cumulative than legal scholarship. Legal scholars write about cases and statutes because external forces, whether the originators of those products or the general opinion of society, have identified them as significant. In fact, they employ no internally-generated standard, and thus have no basis for agreement, or a cumulation based on judgment. To the extent that legal scholars do make independent assessments of significance, it might be suggested—not altogether facetiously—that their standard is more often based upon contempt than admiration. Generally speaking, articles that seize with glee on obscure errors and drag them

into the spotlight of analysis seem more common than those which celebrate some inglorious, if not entirely mute, Milton of the judicial or the legislative art.\textsuperscript{29}

\textbf{C. Legal Scholarship and Moral Philosophy}

Philosophy, and more specifically moral philosophy, serves as another potential source of methodology for legal scholarship. It is a current subject of debate among philosophers whether morality is descriptive. Moral realists assert that a system of morality can be derived from some state of the world external to morality itself, most typically human reason.\textsuperscript{30} Most moral philosophers, on the other hand, take the position that morality is a matter of judgment or choice, so that its statements are normative rather than descriptive.\textsuperscript{31} To the extent that moral philosophy is descriptive, it again differs from law, since realist arguments are even rarer in modern jurisprudence\textsuperscript{32} and are almost absent from any more specific discussions of legal principles. Ronald Dworkin's analysis bears a resemblance to such arguments, but his principles exist within law, as a matter of cultural experience, not in the external, transcendental realm of reason. Moreover—and this is indicative of the stance which legal scholars adopt—he rarely attempts to catalogue the principles that guide the law; most of his writing recommends that

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\item 29. \textit{But cf.} Francis J. Mootz III, \textit{Legal Classics: After Deconstructing the Legal Canon}, 72 N.C. L. REV. 977 (1994). Mootz points to decisions such as Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. Ch. 1854), as constituting a canon of texts that possess "the progenitive force behind a public discourse and continues as the focal point for a shared effort to define social identity." \textit{Id.} at 1035. While certain common law cases that play this role gained their prominence from legal scholarship, most such cases, and usually all constitutional cases, statutory cases, statutes, and regulations have been forced down the canon's throat by their own self-declared significance.
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judges use those principles, or find those principles, in their own decision-making process.\textsuperscript{33}

Most moral philosophers, however, see themselves as engaged in a normative enterprise, as legal scholars do. As such, they are necessarily involved with their subject matter; they assert, and indeed insist, that ethical systems affect human life, and their own efforts are intended to affect the formulation of those systems. Sometimes, their writings are addressed to individuals, and sometimes specifically to public decision-makers, suggesting to them how to think, how to live, and how to act. Philosophers evince no particular respect toward their subject matter, whether that subject matter is the world, the soul, or other philosophers. Their general attitude, instead, is one of critical inquiry, a refusal to take things on faith or to defer to the genius of one’s predecessors.

Many philosophical ideas are quite useful in the normative debates that constitute the essence of standard legal scholarship;\textsuperscript{34} this phenomenon is hardly surprising, since these ideas are general ones, intended to apply to all forms of knowledge and argument. But the particular methodology of moral philosophy cannot be readily assimilated by legal scholarship; while both fields are normative, the type of normativity involved is rather different. To follow Kant’s distinction, most moral philosophy is phrased categorically, rather than contingently\textsuperscript{35}—the question is how one should behave, not how one should behave if one wants to achieve a particular objective. Legal scholarship generally has some contingent objective at its source, some set of accepted purposes on which its prescriptions are based. Standard legal scholarship is hardly concerned with exploring the underlying function or significance of law. The question it addresses usually involves the proper decision to be made within an existing legal framework.\textsuperscript{36}

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\item \textsuperscript{33} See DWORKIN, FREEDOM’S LAW, supra note 9; DWORKIN, LAW’S EMPIRE, supra note 9; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).
\item \textsuperscript{34} Francis J. Mootz III, Law and Philosophy, Philosophy and Law, 26 U. Tol. L. REV. 127 (1994).
\item \textsuperscript{35} IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS (James W. Ellington trans., 3d ed. 1993). Kant, of course, took the position that morality was descriptive of human reason, but see RICHARD ELDRIDGE, ON MORAL PERSONHOOD: PHILOSOPHY, LITERATURE, CRITICISM, AND SELF-UNDERSTANDING (1989), but his distinction is equally applicable to moral theories based on judgment.
\item \textsuperscript{36} One possible exception is legal ethics, where scholars actively debate whether moral philosophy applies, see e.g., DAVID LUBAN, LAWYERS AND JUSTICE (1988); Susan G. Kupfer, Authentic Legal Practices, 10 GEO. J. LEGAL ETHICS 33 (1996); Deborah Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589 (1985); Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 HUM. RTS. 1 (1975), or whether the only significant issues involve specialized professional norms, see, e.g., MONROE FREEDMAN, UNDERSTANDING LAWYER’S ETHICS (1990); Stephen Ellman,
Apart from the different quality of its normative stance, philosophy is distinguished from law by its nonreactive quality; its ability to set its own agenda. Philosophy certainly responds to broad-based changes in the intellectual climate of society, but so does everything else; its focus on the underlying nature and significance of events precludes more direct influence. To an even greater extent than natural science, philosophy generates, defines, and gives significance to any phenomena to which its practitioners respond; in fact, the very subject of philosophy is the process by which ideas are created, defined, and deemed important, in other fields as well as its own. Philosophers are not entirely immune to events, but it is hard to imagine any occurrence that they would regard as rivaling the significance of a newly-published work by another philosopher.

The one trait that moral philosophy does share with legal scholarship is its lack of cumulation. Philosophic problems rarely become settled to the general satisfaction of those active in the field; for every philosopher who sees increasing levels of conceptual sophistication, there is another who thinks things have run pretty much downhill since Aristotle. There are, however, two elements of philosophic discourse that seem to possess cumulative properties. First, important philosophers generate new categories, distinctions, or perspectives which become part of a vocabulary that expands with time. One need not accept Hume's distinction between "is" and "ought," or Kant's definition of the categorical and hypothetical imperatives, but one cannot ignore them in discussing issues to which they apply. Moreover, one need not struggle to articulate those concepts; although they required extensive and inspired argument to establish, they can now be readily invoked, and used as elements in further argument.

Second, there are certain philosophic issues that in fact are settled over time, not because they can be resolved by philosophic argument, but because they pass out of its ambit into other disciplines. This process is more common in other branches of philosophy, an obvious example being Aristotle's Physics, but it appears in moral philosophy as well. Thus social hierarchy, a dominant moral idea in pre-Enlightenment society, was justified by reference to the hierarchical ordering of nature, and divine

Lawyers and Clients, 34 UCLA L. REV. 717 (1987); Stephen L. Pepper, The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities, 1986 AM. B. FOUND. RES. J. 613; William Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083 (1988); David Wilkins, Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers, 45 STAN. L. REV. (1993). This debate, however, highlights the distinction between moral philosophy and legal scholarship, since it is restricted to one set of issues, and is quite distinct from the majority of standard legal scholarship.
purpose was deduced from nature's ordered design. Evolutionary theories pretty much eliminated the first argument, and natural selection got rid of the second, to the continued irritation of the faithful. It is considered impolite to treat philosophy as a precursor of science, but the fact remains that certain philosophic inquiries have been resolved this way. The sense of cumulation, therefore, lies in the ability to eliminate certain questions from an otherwise noncumulative field.

Both these limited means of philosophic cumulation have their parallels in law, but to an even more limited extent. Law certainly develops a specialized vocabulary; the difficulty is that its categories, being set within a reactive discipline, are often generated by events, not by scholars, and can always be abolished by those same events, even if scholars remain attached to them. As for cumulation through exclusion from the field, the law’s reactivity means that this process, although it does occur, is not in the control of legal scholars. External social forces decree that certain subjects, such as theology or the alienation of affections, are to be banished from the law, but these same forces introduce new subjects just as readily. Not only does this fail to reduce the aggregate, but it means that the exclusion process is simply not the product of the scholarship. Any exclusions, therefore, merge into the general pattern of events to which the scholarship reacts, and lose their quality as a cumulative tradition. In short, it may be useful to philosophize about the law, but the method of moral philosophy, whether applied to law or something else, is quite different from the methodology of standard legal scholarship.

D. Legal Scholarship and Social Science

A final source of methodology for legal scholarship, and by far the most commonly invoked, is social science. This particular affinity is not primarily motivated by a sense of envy, as is true of natural science. The present state of social science as an academic discipline is not an enviable one; in fact, the field has itself been prey to considerable academic envy, as its very name suggests. Rather, the instinctive tendency to make comparisons between law and social science stems from the enormous substantive overlap between these disciplines. Anthropologists, in

38. For efforts to reconstruct these notions, to a limited extent, see Teilhard de Chardin, The Phenomenon of Man (Berdard Wall trans., 1959); Lecomte du Nouy, Human Destiny (1947).
analyzing a different culture, often focus on that culture's law as a major object of attention; sociologists frequently concern themselves with criminal behavior, the police, law-related business practices, or even lawyers themselves; political scientists study law-making, law implementation, and judicial dispute resolution; economists are concerned with the transactions that law governs, and the effects of the laws that govern them.

These substantive overlaps are of great importance, but they can obscure the basic comparison at issue here, which is between the methodologies of social science and legal scholarship. The extent to which legal scholars incorporate social science concepts will certainly go far toward determining the nature of the discipline. But nothing can be incorporated, in any coherent fashion, until the methodology for incorporation, and for research in general, is determined.

With respect to prescriptiveness, social science exhibits a considerable range. Sometimes social scientists, consistent with their aspiration to be scientists, take an entirely descriptive stance, treating their subject matter as a fixed phenomenon, "out there" beyond the control of rational decision-makers. Thus, they will write about the psychological condition of various people without taking a position on their relative depravity, or about political behavior of large groups without decrying its disastrous effects. At other times, social scientists assume an interpretive position toward their subject matter, trying to reconstruct its meaning the way literary critics reconstruct a text. This is generally thought to involve participation in the conceptual and normative framework of their subjects—an active understanding of the way the people who are being studied create meaning for themselves. At still other times, however, social scientists frame contingent prescriptions, addressed to particular decision-makers; they recommend monetarist


41. E.g., Zygmunt Bauman, Intimations of Postmodernity (1992); Clifford Geertz, The Interpretation of Cultures (1973); Max Horkheimer, Critical Theory (Matthew J. O'Connell et. al. trans., 1972); Michael Polanyi, Personal Knowledge (1962); Alfred Schutz, Collected Papers; Winch, supra note 39.

policies to the Federal Reserve because they increase wealth, or design some form of oversight for Congress that can control administrative misbehavior. Such prescriptions are contingent because they rely on an underlying objective—that wealth should be increased, or administrative behavior should be subject to control.

Although the complexity of the social science enterprise precludes easy characterization, its dominant approach appears to be descriptive, thus distinguishing it from legal scholarship. Ever since its inception, social science has aspired to describe social phenomena and explain their causes. We have become increasingly dubious about the sanguine expectations of the field's progenitors, but the basic discourse they established continues to the present day. Contemporary doubts about its truth value or its objectivity are often well-founded, but the effectiveness of the critique should not obscure the nature of basic social science methodology. As in natural science, the critique is often expressed at the level of grand theory, while the day-to-day research within the discipline continues largely undisturbed.

The interpretive and contingently prescriptive modes of social science tend to function as modifications of the field's basically descriptive stance, rather than as truly alternative visions. These modifications are partially determined by varying degrees of involvement and respect. Interpretation begins from a position of respect, a belief that human beings should be treated as creators of meaning rather than as agglomerations of measurable characteristics or observable behaviors. From this, it follows that social scientists, who are themselves creators of meaning, must participate in the beliefs of their subjects, and must actively understand how the people they are studying perceive the world. The analogy between understanding social phenomena and interpreting texts is a natural outgrowth of this approach. Interpretivism is certainly a useful counterweight to the reductionist tendencies of microeconomics, behavioral psychology, and statistical sociology, but it could not function without the elaborate, well-established descriptive techniques that typify social science. A literary text that is being interpreted can be located by an assistant librarian, but a social phenomenon or distant culture must be extensively researched. It is essentially a descriptive task to determine how a people construct meaning, and the fact that the social scientists must understand, empathize or even participate in that process in order to describe it does not change the basic purpose of the enterprise.

The prescriptive mode of scholarship in social science, as in law, emerges from a sense of involvement. When the actions of a particular decision-maker affect the scholar's life, and might be affected by the scholar's work, the desire of the scholar to address prescriptions to that decision-maker will be strong. But in social science, these prescriptions are also built upon a descriptive base; it is the ability to describe and
explain social phenomena that gives social scientists their authority. As a result, their prescriptions are often stated as analyses of past events, or as predictions about the future based on extrapolations from a descriptively-understood reality. Thus, the prescriptive mode, like the interpretive one, is a modification of a basically descriptive discipline. Of course, prescriptions inevitably involve normative choices, but what makes such a prescription a work of social science—what places it within the scholarly discourse—is its descriptive basis. Moreover, the field covers many subjects with which scholars are not involved; it is just as concerned with decisions made by long-dead kings affecting long-dead subjects, or the social customs of minute bands of subsistence farmers with no GNP whatsoever, as it is with the political and economic phenomena that affect our lives today. This reflects the basically descriptive style of social science, and in turn supports and validates that style. If legal scholarship resembles social science in its basic tone, it resembles only the prescriptive aspect of that field, rather than its descriptive core.

The reactivity of social science displays a range that is similar to its range of prescriptive attitudes. At one limit, social science can be as nonreactive, or independent, as natural science, treating external phenomena as a body of data to be discovered, defined, and evaluated. This is typical of fields that deal with individual behavior, such as psychology, sociology and microeconomics. As the focus of a discipline moves toward collective behavior, it is likely to become more reactive, allowing external phenomena to assume the character of events. Thus, historians react to social upheavals, political scientists react to elections, and macroeconomists react to depressions. In all these cases, however, the reaction is tempered by an independent research program that can be brought to bear on the event in question. A running commentary on day-to-day, or even year-to-year events, is regarded as the province of journalism, not social science scholarship.

Such reactivity as social science does display, moreover, generally does not affect the entire field. While all these upheavals, elections and depressions are taking place, the exploration of long-past occurrences by historians, the research into ongoing governmental behavior by political scientists, and the model-building by macroeconomists continue to take place. In many cases, moreover, an event that is seemingly external is in fact the product of a process internal to the discipline. The historian's sensational new document is likely to be some moldy set of records that everyone in the office knew was stuffed behind the water heater, but whose significance had gone unrecognized; the archeologist's great find is often some prominent topographic feature, filled with apparent trash, on which the local populace had spent centuries breaking its plows and cutting its feet. In short, although social science varies greatly in its
quality of reactivity, it does not seem to be as reactive as legal scholarship.

The pattern of cumulative knowledge in social science is also complex. The field seems to proceed along parallel paths; one can identify a number of different schools in anthropology, psychology, political science, and virtually any other field, that seem to cumulate knowledge among their own advocates, but not with other members of the discipline.\(^3\) The probable explanation is that each discipline contains several different theories of causality. In other words, while all the natural sciences comprise a single discipline, divided into categories only on the basis of their subject matter, every social science field actually consists of multiple disciplines, which share the same subject matter but employ different modes of explanation. Cumulation does occur, but only within each separate school of thought.

In reality, the situation is not as chaotic as it might seem, because theories of causality that proceed for a while in a single field, only to collide with a rival theory or vanish in the thicket, often reappear somewhere else with new-found energy. Thus, the utilitarian, rational-actor view of human beings not only governs much of economics, but also represents a growing trend in political science and anthropology. Marxist dialectical materialism has similarly expanded beyond its economic origins, appearing in virtually every social science field. Less definitive approaches to human behavior also exhibit the same ubiquity; thus, the analysis of cognitive devices for integrating deeply felt emotional experiences crosses such fields as psychology, political science, sociology, anthropology, and history.

Social science is also cumulative in that it has developed a variety of means for the verification or falsification of its hypotheses: structured observation, statistical survey data, laboratory experiments, simulations, and mathematical models are all employed to garner general acceptance for social science propositions. To be sure, the results obtained have not achieved such acceptance, but the really trenchant criticisms are generally directed toward the underlying theory of causality, rather than the method of verification. While some aspects of history, anthropology, or psychology seem closer to the interpretive mode of literary criticism, most social science traditions have demonstrated an ability to cumulate knowledge that is accepted within that tradition, and that serves as a basis for further research.

For the most part, legal scholarship does not display even the fractured cumulativity of the social sciences. It does not divide into

\(^{43}\) For a description, see SOCIAL THEORY TODAY (Anthony Giddens & Jonathan Turner eds., 1987) (describing ten different approaches).
subdisciplines whose participants are able to agree upon a theory of causality and a method of verification. Rather, it tends to divide among a variety of normative positions that do not bear any obvious relationship to one another. A feature of recent decades—that is, of the "law and" era—is that many of these positions tend to become linked, or hard-wired, into a particular methodology, for no apparent epistemological reason. Thus, political conservatives have become linked to economics; political progressives to deconstruction, or what Pauline Rosenau calls skeptical postmodernism; race or gender-oriented progressives to constructive postmodernism; political moderates to interpretivism or law and literature. With the exception of law and economics, where one can rely on a rather crisply articulated social science methodology, these separate positions generally do not develop cumulative traditions. They have, however, made normative debate among those with differing affiliations more difficult to sustain.

II. THE METHODOLOGY OF LAW

Having thus surveyed legal scholarship's relationship to other disciplines, it is now possible to offer a general characterization of the field. This characterization begins by considering the epistemological status of legal scholarship's distinctively prescriptive stance. The argument, in essence, is that the field is epistemologically coherent because it is a prescriptive practice, not a theoretically-derived category of knowledge. Its distinctiveness as a practice explains why the methodologies of other disciplines cannot be applied in any direct fashion. Additional aspects of the practice, however, specifically its reactivity and involvement, establish a need to seek the aid of other disciplines in characterizing various interactions between law and external phenomena. Not surprisingly, the discipline that holds most promise, given its subject matter, is social science, and current developments in social science seem particularly promising as means of characterizing legally-relevant

phenomena. Thus, law is a distinct academic discipline, but it is not an autonomous one.

A. The Nature of Legal Discourse

The defining feature of standard legal scholarship is its prescriptive voice; as shown in the preceding section, it is this feature that distinguishes it from other academic fields. The most important distinction is between this prescriptive voice and the descriptive voice that characterizes natural and social science. As Max Weber perceived, both are modes of discourse that possess their own intrinsic form of rationality, and can thus support an academic discourse. Prescription and description do not appear to be conceptually coherent categories, however. According to most modern theories of knowledge, there is no such thing as pure description. We cannot achieve unmediated contact with reality, or indeed, even conceive of what such contact would consist of. Rather, all our descriptions are theory-laden; they emerge from a vision of the world in which our norms and our beliefs are deeply embedded.

Applied to legal scholarship, this approach suggests that the prescriptions of legal scholarship could not be articulated without a well-developed vision of the entities to which the prescriptions are addressed. This vision presents the legal scholar with the information that renders her prescriptions meaningful. Thus, the scholar's recommendations, albeit normative, are derived from her vision of reality itself, not from some normative theory that exists apart from that reality. We possess a set of beliefs, beliefs that are a product of our culture and our historical position in that culture. Description and prescription are both based on those

49. MAX WEBER, ECONOMY AND SOCIETY 3-26 (Gunther Roth & Claus Wittich eds., 1978).

50. If one also includes the distinction between prescriptive discourse and the interpretive discourse of literary criticism, the resulting categorization then resembles Habermas' tripartite division of the forms of communicative action. 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, 273-337 (Thomas McCarthy trans., 1983). Habermas attaches considerable significance to these distinctions, but his argument depends upon some complex claims about the nature of speech that are debatable and, for many people, counterintuitive.

beliefs; they derive from a basic world view, a “fore-understanding,” that cannot be placed in either category. The point is not that there is no reality—that is itself an unprovable metaphysical position and one we obviously do not live by—but that the reality that we perceive is a product of interpretation.

But this does not end the matter, nor does it require us to abandon the perception that the distinction between social science and legal scholarship lies in their use of descriptive or prescriptive discourses. To argue that the distinction cannot be maintained because it cannot be justified in theory assumes that epistemological theory is the only possible source of distinctions among academic disciplines. This seems to deny the very insight that leads to the rejection of the epistemological distinction in the first place—that reality is socially constructed. After all, this insight means only that there is no unmediated access to reality, not that social constructions constitute a single, undifferentiated mass. If a society constructs its image of reality, then it is perfectly capable of constructing a distinction between descriptive and prescriptive academic disciplines as one part of that image. Social science is a separate discipline from law because it perceives itself as separate, and that perception is based on its further perception that it is describing reality. Legal scholarship, by its own account, makes no such claim. To the extent that it describes anything, it describes a human artifact, and its main claim is that it can prescribe alternative approaches.

Social science and legal scholarship, therefore, are not epistemologically-derived positions; rather, they are social practices, ways of speaking about things that are important to us. The fact that they emerge from our system of pre-empirical beliefs makes them meaningful, not invalid. In this context, it becomes possible to reconstruct the distinction that epistemology erases. We know, as a matter of our academic discourse, the difference between description and prescription. We can recognize a statement that purports to tell us how judges actually behave, and we can distinguish it from a statement telling judges how they ought to behave. The distinction is entirely meaningful to us, and because of that, it establishes and maintains the boundaries between two disciplines whose subject matter overlaps. That boundary belongs to the realm of attitude, or belief; rather than separating two theoretically distinguishable disciplines, it separates two disciplines that represent different practices of scholarly endeavor.

The socially constructed distinction between social science and law raises a further question, however. Why have we constructed this distinction, and why do we maintain it? One could, following the methodology of social science itself, provide an institutional explanation and speak of scholars' desire to maintain their cushy jobs, or of the legal profession's need to provide cannon fodder for the capitalist artillery. J.M. Balkin offers precisely such an explanation for law's continued resistance to other disciplines and its continuation as an independent field.33 Alternatively, one could follow the methodology of law, and ask whether the distinction ought to be maintained as a matter of public policy. Pierre Schlag adopts this approach, arguing that prescriptive scholarship should be abandoned because it contributes to the maintenance of an oppressive political and social regime.54 The question being asked here, however, is epistemological. Without denying the significance of other explanations, it asks whether there is some additional reason, grounded in the discourse of the disciplines themselves, for the continued distinction between a descriptive and prescriptive approach to government.

In fact, there is such a reason, and it resides in the general structure of an academic discipline. A discipline, as a body of mutually understood intellectual discourse, must involve certain structuring assumptions that define an approach to the world. We think of disciplines in terms of their topics—biologists study living organisms, art historians study paintings, sculpture, and architecture—but reflection indicates that these topics, by themselves, cannot possibly define a field. Every field needs a methodology, and with that methodology comes a basic stance toward its subject matter. The choice between description and prescription is part of that stance.

But this stance does not come unencumbered; in the case of both law and social science, it carries with it major implications about the attitude of these two disciplines toward their common subject matter. Social scientists treat the people they are studying as objects, while legal scholarship treats them as participants, or as a potential audience for their recommendations. Of course, social scientists exhibit a range of attitudes toward their subject matter, and the proper stance is a highly contested issue at the present time. As Weber argued, real understanding of human behavior requires some degree of participation in that behavior by the

54. Schlag, supra note 6. Schlag's analysis is discussed below, at text accompanying notes 60-65.
social scientist. Nonetheless, the point of this participation is to understand the behavior, not to change it, and the aspiration of the social sciences, whatever the level of participation, remains the objective, generalized description of human behavior.

Legal scholarship is distinguished from political science because legal scholarship treats the people it studies as equals, and thus as a proper audience for its prescriptions. The legal scholar is involved with her subject; she speaks directly to that subject, with recommendations about the proper way to make decisions. Of course, she may assert superior knowledge or analytic ability, but she assumes that she is speaking to a person like herself, who can understand and respond to her argument. The aspiration, therefore, is not to be objective, but to be significant and persuasive.

This stance is the source of legal scholarship’s particular methodology. While the distinction between “is” and “ought” may have been dissolved at the epistemological level, it is vitally and frustratingly alive in all our theoretical and practical discourses. We have no methodology to move directly from the discourses we perceive as


56. Given the preceding point about our theory-laden vision of reality, it might seem that the notion of an objective description must be meaningless, but that is not the case. Objectivity, like pure description, can be a characteristic of a scholarly practice, even if it is not possible as an epistemological position. The mere fact that one must make some assumptions to create a discipline, or to think at all, does not mean that there is no difference in making additional assumptions. Assuming that causality operates and asserting that the Democrats are right about employment policy represent two different levels of analysis. The existence of causality is an assumption we all share, and that only becomes an issue in the academic discourse of philosophy. The correctness of the Democrats is very much a matter of current debate within our society. It is meaningful to be objective, or neutral, about such contested issues, even if one must rely on general but contestable assumptions or beliefs to do so.

57. Jules Coleman and Brian Leiter argue that judges are capable of achieving “modest objectivity” and should be evaluated on that basis. Jules L. Coleman & Brian Leiter, Determinacy, Objectivity and Authority, 142 U. PA. L. REV. 549, 620-25 (1993). Modest objectivity is defined as a judgment that the entire community would reach under ideal epistemic conditions. This is somewhat related to Habermas’ position in his recent analysis of law and democracy. Jürgen Habermas, Between Facts and Norms (William Rehg trans., 1996). However, the concept describes the methodology of judicial decision-making, not the methodology of scholarship. Scholars often argue that judicial decisions, although “objective” in the sense described, are wrong according to some other standard. But even if they do not invoke another standard, and instead use the one Coleman and Leiter propose, they are not striving for the kind of objectivity that the judge is striving for. Rather, they are evaluating the judge’s effort to be objective, using criteria that lie outside the judge’s decision-making framework (e.g., is there really a consensus, were the conditions ideal, did the judge get it right?).
descriptive, such as natural or social science, to decisions about the way to organize our society and the kinds of laws we should establish to effect that organization. Nor does it seem likely that we will be able to develop one. There is no scientific fact about human gestation that is likely to resolve the abortion debate one way or another; there is no analysis of human preferences and macroeconomic structure that is likely to determine how redistributive our economic policies should be. For decisions such as these, we will continue to need methodologies, of which legal scholarship forms one part, that channel normative debate. We need to decide what features of external events are relevant, how consistent with each other our responses to them should be, how these responses should be implemented and which of these responses and means of implementation conform to other norms of public governance.

But the stance of legal scholarship as an academic discourse should not be oversimplified. Participation through recommendation is not only an effort to persuade legal decision-makers, but also an effort to achieve understanding, in the precise sense that Weber used this term. By engaging in an ongoing normative debate about particular decisions, legal scholars achieve an understanding of the issues and the decision-making process of a sort that is simply not available to someone who adopts the stance of social science. Political science analysis of judicial decision-making, for example, tends to treat these decisions as a reflection of the judge’s ideological attitude, and to test its conclusions by trying to predict future decisions. But no matter how accurate this analysis may be, it cannot achieve an understanding of the way that judges create, interpret, and deploy legal doctrine. Doctrine is an inherently normative activity, and there are aspects of it that can only be understood by direct involvement in this process. In short, the prescriptive stance of law is not only an effort to influence public decision-makers, but also a mode of understanding, and it should be judged by its insights as well as its influence.

In recent years, several leading legal scholars, while agreeing that legal scholarship is an essentially prescriptive enterprise, have argued that the entire approach is a dead end, and should be reconceived or abandoned. Some of this work has emerged from the critical legal studies movement, but the most thorough-going attack has been Pierre


59. See Brest, supra note 6; Joseph Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1 (1984); Tushnet, supra note 6.
Schlag's, which is based on skeptical postmodernism. Schlag's central point is that the enterprise of prescriptive scholarship is "decomposing" because "neither judges nor any other bureaucratic decision-makers are listening to academic advice that they are not already prepared to receive." The result, in his view, is a self-justifying, ritualized discourse that is bereft of real meaning and makes legal scholars accomplices in the abuses perpetrated by public decision-makers.

The first and most obvious difficulty with this claim is that it rests on the complex and unproven empirical assertion that legal scholarship does not influence legal decision-makers. On its face, it seems implausible to suggest that legal formalism, the legal process school and, more recently, law and economics have had no such effects, and it would be interesting to see precisely how one would overcome this surface implausibility and prove the point. Second, Schlag's argument implies a rather old-fashioned, positivist notion that the only worthwhile or rational arguments (e.g., the only "truths") are descriptive. The reason is that he would be unlikely to hold descriptive arguments to his standard of real world effects; we are interested in learning about the expansion or contraction of the universe because it adds to our understanding, not because there is anything that we can do about it. He insists on holding prescriptive arguments to this standard because he assumes they have no intrinsic value, no role in achieving understanding. But the entire intellectual tradition that has rejected positivism—and that serves as the basis of the postmodernism on which Schlag relies—for the rational argument would seem to make such a claim implausible.


61. Pierre Schlag, Pre-Figuration and Evaluation, 80 Cal. L. Rev. 965, 972 (1992). A secondary criticism of Schlag's position is that the quoted sentence seems to represent an enormous concession. For what does it mean to be "already prepared to receive" a particular piece of advice? That the decision-maker believes in liberal democracy? In that case, Schlag is conceding that scholars can influence virtually any existing American decision-maker. Or does it mean that the decision-maker is in political agreement with the scholar? That is still a major concession; it would allow for the idea that Posner, Easterbrook, and other members of the Chicago School provided political conservatives with a new way of justifying their positions, of thinking through new issues, and of responding to their critics. That makes them less influential than Napoleon, but quite influential nonetheless. Or does the phrase mean that the decision-maker is in exact agreement with the advice before the advice is given? In that case, Schlag is not making a concession, since there is no influence, but his qualification is unnecessary; what would it mean to be "listening" to a written article or book if one already knew and agreed with the work's content? What Schlag really wants to say, it would appear, is that judges and other bureaucratic decision-makers simply never listen—at all—to academic advice, but he could not quite bring himself to make such an implausibly categorical statement.
or aesthetic statements possess truth values of their own. In the case of legal scholarship, value is derived from an ongoing debate about the decisions that judges should reach or the statutes that legislators should enact that improves our understanding of our legal system.

A third difficulty with Schlag's critique is that even he cannot tolerate the nihilism it implies; to escape this, he succumbs to a greater naïveté than the scholars he is criticizing. He gives this naïveté a postmodern patina by being somewhat coy about what legal scholarship should do in place of offering prescriptions. His clearest suggestion is that legal scholars should study existing legal practices to determine their causes and their content. This is certainly unexceptionable, as far as it goes—such inquiries, essentially the sociological study of law, are obviously worthwhile. But the real question is what one should say to scholars who have chosen not to adopt this approach (it is valuable, but so is paleobotany, endocrinology, and various other fields that most legal scholars have chosen not to pursue) and have instead chosen to write standard legal scholarship. The nihilist response, which is "shut up," is not tolerable for Schlag; in its place he seems to imply the truly old-fashioned idea that these scholars should shift to the sociological study of law because this approach will resolve their normative debates, rescuing them from their complicity with an oppressive, morally bankrupt regime and aligning them with the good, the right, and the possibility of human emancipation.

Schlag thus employs, ironically, a legal scholarship-style approach to legal scholarship: he frames a recommendation to other scholars on the basis of normative considerations. These considerations, moreover, are no different in content from the considerations of the legal scholars he


63. Schlag, supra note 6, at 932 ("But what should we do? This question arrives on this scene predictably enough, but really much too late at this point. It's already being done."). For a similar critique of Schlag's approach, see Francis J. Mootz III, The Paranoid Style in Contemporary Legal Scholarship, 31 Hous. L. Rev. 873 (1994).

64. See Schlag, supra note 6, at 916-29. "Yet this marginalization of the social and the historical seems—now that we think about it—clearly wrong. It seems clear that a competent judge (or legal academic) would want to think about the social and historical location of her own thought processes." Id. at 921.

65. Problem, supra note 60, at 1740 ("Rather than contributing to our understanding or to the realization of the good or the right, all this normative argument simply perpetuates a false aesthetic of social life—one that prevents us from even recognizing the sort of bureaucratic practices that constitute and channel our thought and action.").
condemns. Whether our present regime is oppressive, and whether opposition will be more emancipatory than continued participation, is one of the principal issues that is at stake in contemporary legal scholarship. Opinions seem to differ. For present purposes, the main point is that social science—even sophisticated, critical, non-hegemonic social science—cannot resolve this question, or any of the other questions that animate legal scholarship, because the two disciplines proceed from different premises, and adopt different stances toward their subject matter. These stances are concededly socially constructed, but they reflect our society’s entire theory of knowledge and meaning. Nor can Schlag’s criticism be salvaged by jettisoning his prescriptions, and rejecting normative scholarship in its entirety. The urge to address the normative issues involving law is an insistent one; most people would find it frustrating to have no scholarly discourse for confronting matters that are so obviously important to their lives.

B. The Limits of Legal Discourse

The discursive distinction between description and prescription thus divides law from other disciplines, and establishes it as a distinctive academic methodology. It appears, however, to leave legal scholarship in a worse state than before; no one seems very certain what its separate methodology should be, and it appears as if there is even less reason to hope that other fields might be of assistance in this quandary. By casting doubt on the entire “law and” enterprise, moreover, this conclusion seems to run counter to the most powerful and seemingly promising trend in current legal scholarship.

A partial answer to this question is that there is no reason why the prescriptive discourse of legal scholarship cannot draw on other prescriptive fields, particularly political theory and epistemology. The idea that law is an autonomous discourse, a position associated with formalism, and partially revived by legal process, was never so comprehensive that it would preclude arguments based on political theories such as utilitarianism, egalitarianism, or philosophic liberalism. To these can be added the epistemological theories that have become current in recent years, such as pragmatism, hermeneutics, and discourse ethics. These various approaches, which are general enough to be applied in any field, provide the debates in legal scholarship with a depth and

breadth that they would otherwise lack. The epistemological theories represent a particular advance because they add prescriptions based on the possibilities for human understanding to those based on desirable results. In other words, they are process theories, and thus provide the basis for arguments that particular decisions will instantiate values such as human emancipation or the unfolding of our culturally embedded legal principles.

The answer is only partial, however, because these theories, however broadly or abstractly phrased, serve only as particular positions in the ongoing debate, not as a general methodology. More seriously still, the other features of legal scholarship, apart from its prescriptiveness, that emerge from the survey of its relationship to other disciplines suggest that these prescriptive theories leave many questions unaddressed. Legal scholarship, to a much greater extent than natural science, literary criticism, moral philosophy, or social science, is reactive and involved. It is reactive because it responds to external events that are not generated, defined, or given significance by the field itself but by other actors, and it is involved because its prescriptions are addressed to identifiable, external decision-makers.

These intense relationships to external forces suggest that legal scholars need to obtain an understanding of the external events to which they react, and of the effects on such events that their recommendations to legal decision-makers will produce. There is no fully developed theory that addresses this issue, but the traditional answer has been that these understandings can be generated within legal discourse itself. This answer rests on the premise that the events are already characterized in legal terms, and the recommendations will affect decisions that are conceived in those same terms. Thus law is an autonomous discipline; the legal system is closed and self-contained so that it can be fully described by its internally generated discourse. The idea is linked to the further idea that there is a unity of discourse between judges and legal scholars.67 Because of this shared discourse, legal scholars do not need a methodology to characterize external events or to measure the effects of their predictions; all they need to do is to use the discourse of law that they share with judges.

This traditional position is certainly a familiar one, but it has two extremely serious defects. The first is that it cannot possibly apply to any legal decision-maker other than a judge. Legislators and administrators do not speak or think in the closed discourse of legal doctrine. Typically, theirs is a public policy discourse; they are trying to reach decisions that have desirable social consequences, not ones that fit with, or build upon,

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67. Rubin, supra note 6, at 1881-86.
existing legal doctrine. If one were to examine the materials that appear before a judge when making his decision, one would typically see a set of oral arguments and briefs asserting that "every legal precedent supports my client's position; there is not a shred of support for the opponent's argument; to accept this argument would involve a radical alteration of the law." These briefs, again typically, would cite positive law and previous decisions of, in order of preference, the court, other courts in the jurisdiction, and other courts in other jurisdictions. But if one were to examine the materials that appear before a legislator, one would find oral arguments and briefs arguing that "my position will produce the following good results, whereas my opponent's would be a disaster for the nation." One might also see at least some survey data, economic projections, or other social science sources. An examination of the materials that administrators use would reveal oral arguments, briefs, and written comments of a similar nature, and a somewhat larger number of surveys and projections. Clearly, legislators and administrators cannot be treated as participating in a self-contained or autonomous legal discourse.

The solution for many legal scholars—one which is not astonishing only because it has become so familiar—is to limit their audience to judges, and thus preserve their ability to remain within the boundaries of legal discourse. This enables legal scholarship to continue without a means of understanding external events or effects, but it does so at a great and ever-increasing price. Modern law is largely created, interpreted, and applied by legislators and administrators; judges are important, but their relative importance has been steadily declining for at least a century. Of course, legal scholars should study judges, and of course there will be some scholars, given the levels of specialization of modern academics, who will focus exclusively on judicial decision-making. Biologists should study one-celled organisms, and some will devote all their efforts to this topic. But for the entire field of legal scholarship to concern itself exclusively with judges, and ignore all the multi-cellular organisms of our governmental system, is to condemn itself to a severely limited perspective, and ultimately to paleozoic irrelevance.

68. For a fuller discussion of this mode of judicial decision-making, see MALCOLM FEELEY & EDWARD RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (forthcoming 1998).


The second serious defect with the traditional approach of treating law as an autonomous discourse is that it is not even a particularly accurate or useful means of relating to judges. Ever since the Brandeis brief, the judiciary’s need for information that lies outside the boundaries of legal discourse has been well-recognized. The more administrative our legal system becomes, the more relevant such information will be, because an increasing amount of the judge’s efforts will involve interpreting legislative and administrative provisions that were drafted on public policy grounds. One hundred years ago, judges were still the primary creators of the law, and other judges could understand this law within the framework of legal discourse. While judges still create law, legislators and administrators are its primary originators, and a purely legal interpretation will often be an impoverished one. It is possible to construct a theory of interpretation that relies solely on the text of these enactments, as Justice Scalia has, but the result is a profoundly, if intentionally, uncomprehending approach to the material being interpreted. Justice Scalia may assert that he is using a neutral, constitutionally legitimated approach that provides the best interpretation of the text, but he has fooled virtually no one.

Judge Harry Edwards, following a somewhat similar line of reasoning, has launched an attack on what he called “impractical” legal scholarship, particularly as practiced by the “elite” law schools. His main complaint is that so many scholars have moved outside the discourse of legal scholarship that a disjunction between legal scholarship and the legal profession has emerged. But Judge Edwards’ broadside raises more concerns about the quality of his judicial decision-making than about the quality of legal scholarship. A contemporary judge must determine the validity and application of a wide variety of complex statutory schemes, phrased in public policy discourse and drawing on the learning of many nonlegal disciplines. Judge Edwards’ dismissive attitude toward these disciplines indicates a preemptory, unsympathetic approach to our modern legal system that is a truly unfortunate stance for a judge to adopt. His


complaint, as Paul Reingold notes, seems motivated by nostalgia;73 things would be much simpler if the legislature and the executive had simply left the law alone and enabled us to maintain its coherence as an autonomous system. In fact, he wants a complete unity of discourse between scholars and judges. He wants scholars to abandon their efforts to characterize external events in nonlegal terms, even though there is no coherent methodology for doing so within the law itself.

C. The Use of Social Science in Legal Discourse

Combining the separate discourse of legal scholarship, the reactive and involved nature of that discourse, and the recognition that the discourse cannot function autonomously, leads to a fairly obvious conclusion: legal scholarship must rely on other disciplines to characterize external events and effects, although it must continue to develop its own methodology for framing its characteristic prescriptions to legal decision-makers. The separate methodology of law is essential, but it is a relatively thin one because of its reactivity and involvement. Thus the "law and" question is crucial, and the recent efforts of legal scholars in shopping among other disciplines has not been misplaced. What is being sought, however, cannot be a methodology for legal scholarship itself, for no other discipline addresses the same issues and adopts the same stance toward them. Rather, the real promise of the "law and" enterprise is that it can provide the characterization of events and effects that legal scholarship is lacking and can no longer aspire to develop.

The crucial question for interdisciplinary legal scholarship, therefore, becomes the simplest one. Other disciplines should not be canvassed for their methodology, but for their subject matter. The most useful discipline will be the one that addresses the same events to which legal scholars react, and the same effects that their recommendations are intended to achieve. Of course, any explanatory force that such a discipline possesses necessarily depends upon its methodology. But the simple, uninteresting conclusion is that legal scholars are not shopping for a methodology, but for a correspondence in subject matter.

Having said this, it is apparent that the discipline to which legal scholars should turn is social science. While some of the internal discourse in the legal field, particularly the creation and development of legal doctrine, lies beyond the reach of social science, virtually all the external events and effects for legal scholarship are well within its ambit. In particular, political science, economics, and sociology are all directly concerned with the events to which legal scholars react, or the effects

which their recommendations produce. The value of social science is that it enables legal scholarship to develop realistic models of the law's relationship to society in general; it provides a means of understanding an array of forces and effects that are not explicable within the confines of a prescriptive discourse.  

Consider, for example, a typical work of legal scholarship. The Supreme Court has just decided a case interpreting some federal regulatory statute in an unexpected way, and the usual spate of law review articles appears critiquing the decision and recommending an alternative approach. The decision could be analyzed as nothing other than an interpretation of the statutory text, but this would be regarded as a rather retrograde approach these days. Instead, there would be at least some effort to understand the purpose of the statute and the political forces that produced it. This could involve a traditional interest group analysis, or it could employ public choice or positive political theory. In addition, the effects of the Court's decision would need to be considered, and this could involve both political science and economic analysis. All this information would be of great value to the legal scholar in framing a recommendation, although none of it could determine what the recommendation should be. In framing this recommendation, moreover, the effects of the proposal would be a matter of considerable interest, one where political and economic analysis are likely to provide substantial insights. Again, however, the analysis of the results can only provide information; it cannot resolve the underlying question.

This model of law's relationship to social science tracks Weber's model of society in general. Weber distinguished between value rationality (the debate about desirable social norms) and instrumental rationality (the search for the optimal means, as empirically determined) to achieve a predefined end.  

He believed that instrumental rationality should serve the purposes determined by value rationality. Indeed, being instrumental, it must serve some purpose that is defined by another mode

74. This account can be contrasted with Jack Balkin's lively discussion of interdisciplinary studies as colonization. Balkin, supra note 53, adopts the positivist, external stance toward legal scholarship that is typical of traditional social science. This point of view is revealed in the metaphors he employs, such as interdisciplinary studies as colonization, academic methodologies as cultural software, the survival of different methodologies as Darwinian evolution and interdisciplinary scholars as "turncoats and invaders." Id. at 955-56, 960-62. The present article, in contrast, adopts an internal, or phenomenological perspective toward legal scholarship, and tries to understand the meaning of the field, and its interdisciplinary efforts, for those scholars who are involved in it. Balkin's account represents an illuminating, if somewhat traditional, perspective; to the extent that he implies that it is the exclusive account—that legal scholarship has no meaning for its participants—it is highly implausible.

of discourse, and we would be irrational to take it as an end in itself. Weber was concerned that instrumental rationality—the discourse of technology and bureaucracy—would become so dominant a mode of thought that it would preclude or obscure normative inquiry and thus engender this irrationality.\textsuperscript{76} In legal scholarship—not surprisingly, for the subject matter of law and social science overlaps—the relationships are the same. The essence of the field is the structured debate about social norms, or value rationality in Weber's terms. Social science is an instrument that enables law to achieve those purposes that this normative debate defines in the most instrumental or empirically valid manner. As such, it has an extremely valid role to play, but should not—it cannot rationally—be taken to resolve the debate about the proper choice of purpose. Thus, social science plays an essential but subordinate role in legal scholarship.

A considerable body of scholarship linking law and social science now exists, and it has begun to display the cumulative quality to which most academic disciplines aspire. There appear, at this point, to be three principal impediments to further progress. First, a lack of clarity about the methodology of legal scholarship itself sometimes generates the claim that a social science discipline, most commonly economics, can definitely resolve legal issues.\textsuperscript{77} This is distracting, as distracting as claims from within the discourse of legal scholarship that interpretation of a text can produce such a result. The whole point of legal scholarship is to organize and maintain a normative debate. The distinction between descriptive and prescriptive discourse, socially constructed though it may be, is central to the way we think about these matters. Claims that social science can resolve this debate, rather than merely informing it, serve only to induce hostility to the entire law and social science enterprise among those who do not practice it, while leading its practitioners off the path of further insight with beguiling mirages of normative certainty.

The second impediment to further progress is essentially the converse of the first, and results from the fractured cumulativity of social science. Within any given social science field, different theories of causality contend with one another; this produces lines of cumulative research that proceed on parallel paths, or occasionally run headlong into each other, generating a considerable amount of confusion and debris. Confronted with this chaotic prospect, legal scholars have often been tempted to select social science methodologies that seem to support their own normative


position, rather than using social science to clarify the nondoctrinal premises and consequences of that position. Thus, political conservatives have linked themselves to economics, although economics itself can support virtually any position that is currently under discussion by legal scholars. Similarly, political progressives have often embraced postmodernist approaches, although the lessons of postmodernism do not really align with any particular political position either.\(^7\)

The final impediment to the effective use of social science in legal scholarship is more specific, but, until recently, has probably been the most severe. Social science does not seem to provide direct answers to many of the things that legal scholars want to know. Even if one is clear that social science will not resolve a normative debate, and even if one avoids using social science methodologies as an argument in that debate, the relationship of social science to law often seems uncertain. A large part of the reason for this uncertainty lies in what James Coleman calls the macro-micro problem;\(^9\) that is, the problem of developing explanatory accounts that link individual and collective behavior. This is a problem that social science, thus far, has failed to solve, but it is central to the enterprise of legal scholarship. The prescriptive stance of legal scholarship means that it will tend to be addressed to individual decision-makers, or at least structured around the kinds of decisions that individuals make. But virtually all the decisions of legally significant actors occur in an institutional setting—legislatures, government agencies, business firms, or non-commercial private organizations. Individuals acting on their own commit torts and crimes, display deviant behavior, vote, select consumer products, and relate to family members. Social science often studies these behaviors, but these are generally the areas of social science that are most remote from law. Rather, law deals with institutional responses to these behaviors; the individuals whose behavior it addresses are those who frame these responses as part of an organization.

It might appear that there is one vast exception to the principle that legal actors inhabit institutions, that being judges. But, of course, the judiciary is an institution. It possesses collective norms, a hierarchy, an internal structure regulating workload, a boundary controlling information flow, and all the other institutional attributes. It is, however, an institution

\(^7\) See J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 Mich. L. Rev. 1131 (1994). Feldman does not take issue with Balkin on this point, see Feldman, *supra* note 52; his critique is that Balkin tries to derive our sense of justice from transcendent values, rather than recognizing it as a socially constructed value, as postmodernism suggests. As Feldman points out, postmodernism treats all our views about justice in this manner, and thus does not necessarily favor one or the other.

where many individuals have substantial, and often relatively equal, amounts of discretion, like a law firm or a research laboratory. This, combined with the formalist image of an individual judge deriving his decision from an immediate contemplation of legal texts, has tended to obscure the institutional character of the judiciary. As a result, legal scholars have been less assiduous in seeking social science models for judicial behavior. Social science, in its turn, has not offered much help as a result of the macro-micro problem. It can model the behavior of individuals or the behavior of institutions, but when an institution is primarily composed of semi-independent, discretionary decision-makers, only an account which links both levels will provide a satisfactory image of the totality.

One of the more interesting trends in modern social science has been the development of several separate efforts to address Coleman's macro-micro problem. The first is called "new institutionalism" and emerges from the sociological study of institutions. In essence, it steers a middle path between the personalistic approach of human relations theory, where the institution itself tends to disappear, and the impersonal, mechanistic approach of general systems theory, where the people tend to disappear. In doing so, it builds on Herbert Simon's decision theory, which focuses on the institutional position of the decision-maker—her position in the hierarchy, the information she receives, and the tasks she is expected to accomplish. This approach has been extended and deepened through the analysis of institutional norms and systems of meaning carried out by John Meyer, James March, Johan Olsen, Paul DiMaggio and Walter Powell. It has explored the process by which the belief systems of individuals combine and react to create institutional behaviors.

A second development, called new institutional economics, has emerged at roughly the same time through the work of Douglass North and Oliver Williamson. It is, as its name suggests, an economic analysis, but it breaks with the neoclassic approach that generated

81. HERBERT SIMON, ADMINISTRATIVE BEHAVIOR (2d ed. 1961).
standard law and economics by following Simon's idea that people are only boundedly rational; that is, their rationality is limited by the information they receive and their own capacity to process that information. This has been combined with an analysis of norm formation within institutions, and of the transaction costs involved in various institutional arrangements. The goal is to develop a way to explain the behavior of institutions on the basis of the individual's motivational structure.

These efforts promise to provide a social science account of institutional behavior that is particularly useful for legal scholars. In addressing prescriptions to individuals, the most crucial information involves the constraints on that individual's decision-making powers, and the effects that the individual's decision is likely to produce. Of greatest concern, of course, are legal decision-makers—those who create, interpret, and apply legal rules. Since law is both a set of norms and a system of meaning, an account of the decision-maker's relationship to the organization that is phrased in these terms is likely to be particularly useful. None of this will resolve the normative debates that animate legal scholarship. What it might do, however, is to provide a rich empirical context to channel those debates, indicating the range of realistic options and the consequences that will flow from them.

D. The Non-Autonomy of Law

In recent years, two sets of rather interesting, sophisticated arguments have been advanced that, in effect, revive the rather unsophisticated claim that law is an autonomous discourse. The first of these, which may be called the theory of discursive modalities, was developed by Philip Bobbitt in two books about constitutional law, and extended into a general analysis of legal reasoning by Dennis Patterson. As Patterson interprets it, this theory is based upon the epistemology of the later Wittgenstein. The second approach is autopoietic theory, developed by Nicholas Luhmann and Gunther Teubner. It is drawn from continental social theory, specifically the systems theory that Luhmann has developed. Both approaches suggest that legal scholarship possesses its own discourse and cannot profitably

84. Simon, supra note 81, at xxiv.
85. See Rubin, supra note 47, at 1411-24.
86. Philip Bobbitt, Constitutional Fate (1982); Bobbitt, supra note 4.
87. Patterson, supra note 5.
88. Wittgenstein, supra note 62; see also Patterson, supra note 5, at 163-79.
89. See Luhmann, supra note 2; Teubner, supra note 3.
90. For the most recent statement of this theory, see Luhmann, supra note 2.
borrow empirical insights from social science. Considering them will serve to clarify the contrary assertion that this Article advances.

According to Bobbitt, judicial review in constitutional law is a practice, not a theory. It consists of six forms, or modalities, of argument: historical argument, which relies on the intent of the framers; textual argument, which relies on the language of the Constitution itself; structural argument, which relies on the relationships among constitutional provisions; doctrinal argument, which relies on judicial precedent; ethical argument, which relies on those moral commitments of the American ethos that are reflected in the Constitution; and prudential argument, which "seeks to balance the costs and benefits of a particular rule." A proper, or legitimate legal argument is one that uses these modalities. Thus, searching for a theory that would justify judicial review is meaningless because it depends, in Bobbitt's terminology, on a Langdellian belief that legal propositions are statements "about the world," verifiable in the same way as the propositions of natural science. Instead, law is a normative discourse, part of our social construction of reality. Legal arguments are legitimate to the extent that they are properly articulated within this normative discourse; there is no theory behind these arguments that provides their justification. "If we want to understand the ideological and political commitments in law," Bobbitt writes, "we have to study the grammar of law, that system of logical constraints that the practices of legal activities have developed in our particular culture."

Patterson expands this account into a general theory of legal justification, that is, what makes a statement of law true. His answer is that truth in law is determined by the forms of legal argument, not the correspondence between a legal statement and some external justification. Thus, a proposition of constitutional law, such as "anti-abortion laws violate the Bill of Rights," is validated by arguments that employ one of Bobbitt's six modalities. It is not validated by reference to some external justification, not even the positivist justification of enacted law backed by a rule of recognition. As Patterson states, "the positivist conceives of law as a matter of certain (social or institutional) facts, which can then be used in the same manner as scientific propositions (e.g., confirmation). But law is not as the positivist supposes (i.e., akin to science). The truth of a proposition of law is the product of an activity (justification) and is

91. BOBBITT, supra note 4, at 12-13.
92. Id. at 45-57.
93. Id. at 24.
94. See PATTERTON, supra note 5, at 146-79.
This theory of discursive modalities addresses law in general, not legal scholarship, and neither Bobbitt nor Patterson focuses on the use of social science in law. Nonetheless, there is at least a mood, and perhaps an implication, in their work that legal discourse can function autonomously, that is, using arguments that are internal to the legal system. As a corollary, arguments that are not part of that system only become relevant if translated into legal terms.

To a considerable extent, the theory of legal scholarship presented in this Article is in agreement with Bobbitt's and Patterson's approach. Because legal scholarship is prescriptive, because it belongs within the general realm of the normative, it is indeed the case that other methodologies, specifically those designed to describe the physical or social world, cannot resolve the issues that are at stake in legal scholarship. On the other hand, legal scholarship affirmatively needs to use these methodologies to characterize events and measure effects that are external to the legal system. It is in this area that the theory of discursive modalities requires clarification.

Although Bobbitt relies on the social construction of reality to distinguish between legal propositions and empirical statements, his own approach to legal discourse is somewhat positivistic, in the epistemological sense. He approaches legal discourse as an observer, rather than a participant, and asks about its form or structure rather than its meaning. But if one focuses on meaning—that is, what the actors think that they themselves are doing—a discontinuity appears in his list of modalities. Five of the six, namely, the historical, textual, structural, doctrinal, and ethical, are methods of interpreting legal texts, in Bobbitt's case the Constitution. The sixth, prudential, does not involve interpretation of a text, but the consideration of nontextual matters, such as the social costs and benefits of particular decisions. Traditionally,
we think of legislators and administrators as making these kinds of arguments, while we think of judges as interpreting texts. That is wrong, however; legislators and administrators regularly interpret texts, and judges regularly make public policy, that is, reach conclusions on a prudential basis, and not on the basis of a text.* There has, however, been a good deal of discomfort with this judicial function, and a tendency to exclude it from the range of legitimate judicial discourse.

Bobbitt's first five modalities, which are all recognizably ways of interpreting a text, can be accurately described as internal to the legal system; all of them, even the historical modality, are methods that lawyers and law professors have developed and that comprise part of the recognized methodology of legal argument. The sixth modality, however, depends heavily on methodologies external to the law, specifically those of social science. By melding this essentially non-legal mode of discourse into his list of modalities, Bobbitt creates the impression that legal discourse is much more comprehensive than our ordinary understanding would suggest. In fact, this discourse is essentially limited to a particular kind of normative debate linked to a particular kind of textual analysis. It stops short at precisely the point where empirical, or prudential, considerations are perceived as relevant. To incorporate these considerations, traditional legal methodology is not sufficient, and both legal actors and legal scholars must have recourse to social science. This is the source of the discomfort we experience when judges, who are not traditionally regarded as policymakers, use prudential arguments like cost-benefit analysis.

Bobbitt and Patterson also convey the sense that legal discourse is more comprehensive, and more autonomous, than it is generally perceived to be by describing it as a practice. While the characterization itself is a persuasive one, it is important to avoid attributing excessive content or significance to the concept. To say that law or legal scholarship is a practice is to anchor it in intersubjective or cultural conditions, rather than in strong epistemological claims of validity. But this does not determine the content of the discourse or its relationship to other discourses. Such determinations require a separate theory about the way that discourses relate to one another.

grounds. Bobbitt believes that this is inconsistent, in that Bork invoked a second modality, and that Bork's textualism was self-deceptive. BOBBITT, supra note 4, at 83-108. But if Bobbitt's first five modalities are all methods of interpreting a text, while his prudential modality is qualitatively different, then Bork is not being inconsistent. He is choosing a textualist mode of interpretation, but modifying it with non-interpretive, policy-based considerations.

98. See note 58, supra, citing sources; FEELEY & RUBIN, supra note 68.
As a first approximation, we can distinguish among discourses that are closed to unmediated inputs and outputs, discourses that are open to unmediated inputs, discourses that are open to unmediated outputs, and discourses that are open to both unmediated inputs and outputs. To be open to an unmediated input or output means that the validity of some proposition within the discourse is determined by a proposition that lies outside it. If the proposition outside the discourse generates the proposition within it, the proposition outside the discourse is an input; if the proposition outside the discourse is determined by a proposition within the discourse, the proposition outside the discourse is an output.

Mathematics is an example of a truly closed or autonomous discourse. External events do not serve as inputs that determine its developments; information must be mediated or restated in mathematic terms in order to be relevant. Similarly, the application of a mathematical proposition to other fields, though obviously of interest, does not affect the truth of that proposition; the mathematical validity of imaginary numbers, for example, is not affected by their subsequently-discovered use in modeling electro-magnetic fields. Literary criticism, in contrast, is open to inputs, but not outputs; for most branches of criticism non-literary facts about the author’s biography or culture serve as inputs that are relevant to the validity of various propositions. But the usefulness of a literary critic’s argument outside the realm of literature is generally not regarded as affecting its validity. Consequentialist ethics may be thought of as a field open only to outputs.

Legal scholarship, however, has a dual openness, at least with respect to policy issues; social science insights about external events help determine the validity of many propositions, so it is open to inputs, while social science insights about the effects of legal propositions help determine their validity, and represent the field’s openness to outputs. This suggests that Bobbitt’s and Patterson’s categorical statements that legal propositions are only arguments, and not statements about the world, need to be modified, or at least clarified. Because of its dual openness in the policy area, some legal propositions really are statements about the world, even if they also function as legal arguments. Many legal scholars, for example, believe that a legal rule is not valid if it produces

99. This is not true for New Criticism, see, e.g., CLEANTH BROOKS, THE WELL-WROUGHT URN (1947); CLEANTH BROOKS & ROBERT PENN WARREN, UNDERSTANDING POETRY (1938); AUSTIN WARREN, THEORY OF LITERATURE (1949); WILLIAM K. WIMSTATT, THE VERBAL ICON (1954), but it is just this closure that makes New Criticism controversial.

100. Kantian ethics is a closed field, and situational ethics is open to inputs and perhaps outputs. It follows that, if one takes ethics as a whole, it is dually open.
certain nonlegal consequences; for example, general rules about the enforceability of contracts are invalid if they increase inequalities in wealth.

The tendency to treat practices as autonomous, that is, closed to both inputs and outputs, may stem from a mischaracterization of the basic concept. Alasdair MacIntyre, in one of the seminal modern works about the concept of a practice, uses the game of chess as an example of a practice. But chess is an example of one particular type of practice, namely games. While the concept of play in general may be broader, the term “game” generally refers to a type of practice that involves play and that is closed to both inputs and outputs. That is what makes it a game. No external event affects professional baseball in an unmediated way, and more significantly, the results of any baseball game do not have any direct consequences outside the game. But this is not true of other, non-game practices, like law or politics. It is cute to describe national elections as a game, but the election process, like law, possesses a dual openness; it is directly affected by many non-electoral events, and, of course, it has many direct external consequences. In other words, there are different kinds of social practices; the mere fact that something is a practice does not, contrary to MacIntyre, tell us anything about the practice’s relationship to other practices. The language of Bobbitt’s and Patterson’s work seems to imply that social practices are necessarily closed, but their work need not be read this way, and it is preferable not to do so.

A second analysis that suggests the autonomy of law, in this case quite explicitly, is the autopoietic theory of Luhmann and Teubner. While the theory is far too sophisticated to allow for rapid summary, the basic idea is that society in general is a self-regulating system of communication. Certain fields within society can become, in their turn, specialized, self-regulating sub-systems. As Teubner says, these sub-systems “have constituted autonomous units of communication which . . . are self-reproductive. They produce their own elements, structures, processes, and boundaries. They construct their own environment and define their own identity.” Such sub-systems are “operationally closed, but cognitively open to the environment.” This means that the legal system responds to that external phenomena, but not directly;

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102. MacIntyre, After Virtue, supra note 31.
104. Teubner, supra note 3, at 69.
105. Id.
rather it constructs an internal model of these phenomena. External phenomena function as disturbances to the legal system that induce it to develop, or alter, this internal model.

Teubner points out that it is relatively easy to describe conflict resolution, which is closely allied to the judicial interpretation of texts, as an autopoietic system. Legislation presents a more difficult case, but his analysis suggests that economic legislation does not control “the economy;” rather, it controls legal actors whose effect on economic systems is uncertain. Thus, the legal system does not affect the economy directly but “observes itself” making certain changes in response to a disturbance. The effect is an indirect one because law and external phenomena exist on different ontological levels. There is thus a clear connection between this theory and the Bobbitt-Patterson theory of discursive modalities.

Although Luhmann and Teubner sometimes suggest that law is necessarily autopoietic, most of their argument is empirical, not theoretical. They demonstrate convincingly that law, even regulatory law, can be autopoietic, but not that it must be. In fact, law often possesses this quality; legislators rely on testimony, lobbyists’ arguments, and various alternative views, rather than social science data, in drafting a statute, and they look to judicial decisions, rather than systematic evaluations, to gauge the statute’s effects. But this is a defect in the legislative process; it produces bad law. It is also possible for legislators to rely on real data, to evaluate the performance of their enactments, and thus to link the legal system with other modes of social discourse.

Legal scholars, being less constrained than legal actors, can facilitate this process. While they can be part of an autopoietic legal system, they need not be. Instead, they can make direct use of social science to understand the events that affect the legal system and to measure the effects of the legal system on external phenomena. By doing so, they can frame prescriptions that reflect a deeper understanding of the system, and that may be particularly useful to legal actors. Legal scholars would indeed be playing an influential and valuable role if they could penetrate the system’s dysfunctional and somewhat old-fashioned autopoieticism.

The apparent link between autopoieticism and closure comes from attributing too much content or significance to the idea of self-regulating social sub-systems. In a complex, sophisticated society such as ours, these sub-systems can take many forms. If the participants in a system can create a boundary, they can also penetrate that boundary; if they can establish an autonomous discourse, they can also reestablish a discourse.

106. Id. at 70.
107. Id. at 77-97.
that incorporates relevant findings from other fields. The new institutionalism suggests the complexity of social institutions, and the multiplicity of levels on which they operate; new institutional economics suggests that individuals can strategize against constraints, as well as be limited by them. Legal scholars are capable of penetrating the boundaries of legal discourse, and using social science where it offers direct and useful insights for the study of law. They may even be capable of teaching other legal actors how to carry out this process.

III. Conclusion

The purpose of this article is both cautionary and hortatory. It suggests that the “law and” enterprise should be approached with caution. While other fields may produce many beguiling insights, they cannot supply standard legal scholarship with a methodology. The contingently prescriptive stance this scholarship adopts is simply different from the descriptive stance of natural or social science, the interpretive stance of literary criticism, or the categorically prescriptive stance of moral philosophy. Given the methodological quandaries of contemporary legal scholarship, this appears to be bad news.

However, some of legal scholarship’s most serious quandaries do not stem from its prescriptive character, but from its engagement with events and effects that lie outside the field. Here, “law and” can be particularly valuable because other fields provide a way of understanding these events and effects. The most useful fields are the ones whose subject matter overlaps with that of law and legal scholarship—most obviously social sciences such as economics, political science, and sociology. Of course, these fields suffer from their own discontents, and they cannot offer definite solutions to the debates which animate existing legal scholarship. Nonetheless, they have already generated a range of interesting results, and the current directions of these fields offer further possibilities.