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Introduction

This book of essays responds to the intersection of two failures, in the hope that approaches with the promise to address one of these failures may also have promise in addressing the other. The first failure is the dismal inability of American urban policy, over at least the past half century, to significantly improve the lot of the low-income populations that are concentrated in pockets of most American cities. The second failure is the increasingly recognized inability of the American legal academy to find models of legal scholarship that achieve relevance for audiences that can have real impact on real problems.

The failure of much legal scholarship to deliver insights of value to those seeking to confront urban problems certainly does not bear primary responsibility for the continuing problems of the urban cores. Those problems have deep roots, not only in law but also in economics, politics, sociology, and history. Nonetheless, the structures and dynamics of multiple bodies of law are major contributors to our cities' present dysfunction, and are critical tools for any significant reforms. The challenges of the urban core, like many of the challenges confronting contemporary America, involve law as one vital thread in a complex web of forces that together sustain the problems. The challenge of legal scholarship is, in significant measure, the challenge of finding a way to tease out the legal dimensions of these tangled webs and to address those legal dimensions in ways that potentiate change.

What is exciting to us is that we are beginning to see glimmers of hope for legal scholarship with this capacity – often in the form of qualitative research that suggests alternatives to established legal concepts and to familiar legal strategies. Our goal is to showcase some of these examples of engaged and efficacious legal scholarship, both to advance analysis and action that address the challenges of the urban cores and to exemplify the prospects of a newly revitalized legal scholarship.

The hope behind this collection is that some of the promising new scholarship addressing the intractable problems of the urban cores may offer valuable paths forward on both of these problems. In times of paradigm failure, examples of useful

work may provide clues about the elements of an effective new paradigm. In particular, if the question is what kinds of scholarly approaches can restore the practical efficacy of legal scholarship, and can revive the interest of communities beyond the legal academy (and, indeed, the interest of the legal academy itself) in engaging with such scholarship, then where better to look but to scholarly writings that show those capacities? In this chapter, we explicate the two failures that this volume seeks to explore. We begin by examining the current crisis in legal scholarship. We then examine the problems of the urban cores. Our purpose is to provide a context for the scholarly work that follows in the remainder of this book.

THE CHALLENGES FACING LEGAL SCHOLARSHIP

In recent decades, a growing chorus of voices, both inside and outside the legal academy, has expressed concerns about the diminishing relevance of legal scholarship to the interests of judges, policy makers, and practicing lawyers. These concerns have not focused specifically on scholarship relating to the challenges of the urban core, or to any particular field of legal scholarship, but much of the critique is as applicable to this field as to many others. Indeed, in several respects, the gap between legal scholarship and the needs for urban transformation may be a particularly vivid example both of the problem and of the potential for a more productive future.

One influential early statement of the concerns about scholarship's disconnection from the world of practice came from Judge Harry Edwards, a distinguished law professor and jurist on the federal court of appeals for the District of Columbia Circuit, in a 1992 article in the *Michigan Law Review*.¹ Judge Edwards observed that legal scholarship has become increasingly detached from the concerns of judges, legislators, and legal practitioners, because an increasingly academic orientation of law professors had shifted scholarship's focus to "abstract theory" (typified by critical legal theory and law-and-economics) at the expense of "practical" scholarship (characterized by a prescriptive focus on legal doctrine).

This critique of the trajectory and relevance of legal scholarship is widely shared, both inside and outside the legal academy. Supreme Court Chief Justice John Roberts famously observed, "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."² The American Bar Association's MacCrate Commission on Legal Education

¹ Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

² *A Conversation with Chief Justice Roberts* (C-SPAN television broadcast June 25, 2011), www.c-span.org/video/?c4545488/john-roberts.

reported a widespread sense among practicing lawyers that “law professors are more interested in pursuing their own intellectual interests than in helping the legal profession address matters of important current concern.”³ Professor Robin West decries the legal academy’s growing distaste for what she characterizes as “normative” scholarship, which strives to “make the law better” by seeking to “mold, or shape, or reshape, or reform, or radically alter law,” and the academy’s increasing focus on descriptive scholarship that observes the legal system from an external, often empirical, perspective.⁴

Many factors have contributed to the changing relationship – and the changing perceptions of the relationship – between legal scholarship and potential nonacademic audiences. But one important dimension is surely the evolving nature of legal scholarship itself over the past century. In large measure, the critique of legal scholarship’s diminished relevance has focused on the turn away from emphasis on what Robin West refers to as “normative” scholarship, or what Judge Edwards refers to as “practical” scholarship. The suggestion is that legal scholarship in recent decades has become increasingly focused on critical, theoretical, and interdisciplinary perspectives, at the expense of a focus on how the substance of the law, its rules, principles, and doctrines, can be clarified, refined, or reformed to serve recognized societal needs and ends.

One of many possible versions of the story of that evolution goes like this: Once upon a time, perhaps a century ago, legal scholarship was predominantly concerned with the clarification and refinement of legal doctrine, in furtherance of Langdell’s vision of law as science. The work of the scholars involved in the American Law Institute’s Restatement projects and in crafting the grand treatises of that era was paradigmatic. This model of the legal scholar’s role rested on an ideal vision of law as stable, systematic, and apolitical, and a view of scholarship’s goal as moving the body of law toward that ideal state, just as empirical scientists’ task was to move scientific theory ever closer to truth. And, happily, the legal scholar’s task under this vision – clarifying and refining legal doctrine – aligned closely with the concerns of practicing lawyers and judges, and with the scholars’ role as teachers of future practicing lawyers.

But, in the early decades of the twentieth century, this vision of law, and of the role of legal scholarship, came under withering and devastating attack from the legal realists. Reacting to profound economic and social change and the resulting stresses on legal norms and principles, the realists convincingly exposed law to be

³ *Amer. Bar Ass’n Sect. of Legal Educ. & Admission to the Bar, Legal Education and Professional Development – An Educational Continuum* 5 (1992).

⁴ Robin West, *The Contested Value of Normative Legal Scholarship*, 66 *J. LEGAL EDUC.* 6, 7 (2016). West acknowledges, *id.* at 11, the continuing prevalence of normative scholarship in legal journals, but sees it as under attack from a range of perspectives, and argues that these attacks devalue such scholarship and favor other forms that she sees as less valuable in shaping or improving the law.

historically and socially contingent, grounded not on foundational principles but on competing interests, and as inherently political and contested. This transformed understanding of law did not, of course, foreclose legal scholars from a continued focus on the clarification and improvement of legal rules and doctrine, but it stripped such efforts of the veneer of scientific methodology or of progress toward objective truth. Efforts at normative or practical legal scholarship were revealed to be inherently perspectival and political.

What, then, was a legal scholar to do, if she aspired to the norms of objectivity and knowledge advancement that prevail in the academy (and particularly in the social sciences, which are naturally seen as law's nearest academic kin)? Over the ensuing decades, several different paths emerged and assumed prominence in the legal academy, but each of them drew legal scholarship away from its traditional orientation toward doctrinal development, and each of them diminished the direct relevance of legal scholarship to the concerns of practicing lawyers and policy makers.

One path is to reframe the legal scholar's inquiry as an investigation into the actual workings and evolution of law in its practical contexts, drawing on the methods of the empirical social sciences. The law-and-society approach asks not what legal doctrine is or should be, but rather how the law actually plays out in the various social contexts in which it is deployed ("law on the ground" not "law in the books").⁵ The focus is on empirical description of the workings of legal institutions and of the role of lawyers and of various actors' understandings and deployments of legal norms in the actual functioning of the social structures that law purports to govern. Such empirical observations are, of course, highly relevant to the practical choices of practicing lawyers and policy makers, and some of the insights generated by the law-and-society movement have had valuable impacts both on the ways that lawyers understand their work and on efforts to reform the structure of legal institutions.

But, to the extent that these audiences are looking to legal scholarship for insight and guidance about the content of "the law" – about legal rules and principles, about the arguments that lawyers can make before legal tribunals, about the ways that law-makers should frame their pronouncements – this scholarship can seem beside the point, or at best of only indirect relevance. Indeed, it often serves to deepen skepticism about the utility of more traditional doctrinal scholarship, by exposing how modest an impact articulated legal rules and principles have on real-world outcomes.

Another path draws on the tools and methodologies, not of sociology and anthropology, but of economics, and seeks to explicate, analyze, and critique legal rules and practices as elements in a system governed by the laws of economic theory. The

⁵ For a couple of classic statements of the law-and-society approach, see Stewart Macaulay, *The New versus the Old Legal Realism: "Things Ain't What They Used to Be"*, 2005 WIS. L. REV. 365 and Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986).

law-and-economics approach, like the law-and-society approach, aims to understand the law as one functioning part of a larger whole, assessing the extent to which legal rules redress or exacerbate imperfections in the larger system that distort the efficient operations of a market economy, and the ways in which economically rational actors' responses to legal rules affect the practical operation of those rules.⁶ As with law-and-society scholarship, work in the law-and-economics tradition has certainly exerted considerable influence, modeling and legitimating a new set of arguments that have become highly influential in certain judicial and policy contexts.

But, this approach, too, has largely tended to widen the gulf between academic work and practitioner and policy maker concerns. In part, this is the consequence of the increasingly technical and specialized character of the economic analysis deployed particularly by interdisciplinary law-and-economics scholars, accentuated by growing doubts about whether the asserted laws of economic theory accurately depict the ways that actual human agents and institutions behave. And in part, it reflects skepticism about whether the economists' touchstone of market efficiency is the primary normative standard for assessing legal rules and practices, in the face of a range of other compelling norms for assessing societal outcomes. Moreover, as with much of the law-and-society scholarship, significant segments of law-and-economics analysis, particularly those drawing on Coase's theorem or on public choice theory, tend to minimize the utility of legal analysis and argumentation as sources of practical consequences.

A third prominent path builds on the legal realists' critique of the coherence and the objectivity of legal doctrine by deploying the tools of critical theory to more carefully and thoroughly unpack the logical indeterminacy of legal argumentation and the often unarticulated biases and assumptions that shape legal texts and legal doctrine. The many threads of the critical legal studies movement draw on a wide range of interpretive approaches, from Marxism and postmodern deconstructionism to critical race and critical gender theory, to diagnose the societal forces that shape legal discourse. At its core, the critical legal studies approach uses the analytic tools developed by a range of interpretive disciplines to expose the dependence of legal doctrine and argumentation, not on its purported objective rationality, but on powerful, though typically unstated, underlying societal dynamics and power relationships.

Like the law-and-society approach, the critical approach takes an external perspective on legal content; it does not seek to engage in legal argument or exposition, but rather seeks to explicate the law by placing it in its broader societal context. But where the law-and-society approach focuses on the practical consequences of the legal system, the critical approach focuses on explanation of the legal discourse itself. The resulting scholarship, again, may shed valuable light on the functioning

⁶ For the classic statement of the law-and-economics approach, see Richard A. Posner, *Economic Analysis of Law* (9th ed. 2014).

of legal doctrines and processes, but not in ways that connect to the needs and interests of those who actually engage in legal discourse and practice. Instead of suggesting ways to use or improve the law in practice, critical legal studies serve primarily to cast doubts on the utility and the legitimacy of doctrinal analysis and argumentation by revealing that such practices are a mere superstructure serving to mask the real underlying drivers of legal outcomes.

In sum, according to this story of the evolution of contemporary approaches to legal scholarship, each of these dominant methodologies builds on the realists' insights by turning to non-lawyerly paradigms that shed light on the workings of the law by placing legal doctrine and discourse in their broader societal context. Undoubtedly, when well executed, each of these approaches (and a range of other law-and-xxx approaches drawing on other academic disciplines) can offer invaluable insights into the legal system. But they offer little help – or, at best, only very indirect help – to those who are actually seeking to advance and deploy the tools of legal doctrine and discourse to pursue practical outcomes. And, in fact, the more seriously the insights of these post-realist approaches are taken, the more doubt they cast on the practical relevance or utility of legal doctrine or principles or of efforts to elucidate or improve them. Little wonder, then, that practicing lawyers, judges, and policy makers find so little of practical value – and so much to disdain – in these veins of scholarship.

But how accurately does this story describe the actual path of legal scholarship over the past century? Have we really seen a trend away from doctrinal, normative, practical scholarship and its replacement by the various post-realist approaches described previously? Is it this trend that accounts for the widening gulf between legal scholarship and its potential audiences in the world of practice and policy? Preliminary results of an empirical review of prominent legal scholarship suggest that the story mistakes, or at least greatly exaggerates, actual trends, as reflected in the pages of leading law reviews, and instead tend to confirm the observation of several recent commentators that traditional doctrinal scholarship continues to dominate the legal academy.⁷

With the assistance of a team of research assistants, we are surveying the articles published in a dozen prominent student-edited law journals at intervals over the past century, and classifying those articles in categories intended to capture the trends envisioned in the narrative just described. This project is only partially completed, but the sampling reviewed so far strongly suggests that contemporary legal scholarship, at least what is published in leading student-edited journals, is overwhelmingly doctrinal scholarship of a relatively traditional form, and that the frequency of more

⁷ See, e.g., West, *supra* Note 4, at 7; Richard A. Posner, *Symposium: Law, Knowledge, and the Academy: Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1317, and sources cited in n.7 (2002); Robert Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 523–24 (2000); Robert W. Gordon, *Lawyers, Scholars, and the “Middle Ground”*, 91 MICH. L. REV. 2075, 2099–100 (1993).

“external” perspectives on law has not changed markedly over the decades, although the particular styles and methodologies of such scholarship have certainly evolved.

More specifically, we identified ten different categories that characterize various threads of legal scholarship⁸ and asked our research assistants to identify the categories into which articles published in several different year-long windows fell, recognizing that many articles would fall in more than one category. Of the eighty-two articles reviewed to date in the most recent time period (the 2014–15 academic year), the vast majority of the articles fell into either the doctrinal (forty-three) or normative (fifty-eight) category (with many falling into both). Only eight articles of the eighty-two were classified as neither doctrinal nor normative.⁹ Our samples from earlier time periods are not yet as extensive, but the dominance of doctrinal and normative approaches appears relatively constant back to 1914–15.

So, perhaps the problem is not (or is not primarily) that legal scholarship has abandoned the project of examining and attempting to improve legal doctrine, but rather that such doctrinal or normative scholarship, at least in its contemporary forms and in its contemporary contexts, also fails to connect to the needs and interests of practicing lawyers and policy makers. Several factors may contribute to that disconnection.

First, and perhaps foremost, is the fallout from the realists’ recasting of the nature of doctrinal discourse. If statements of legal rules or principles are recognized to be assertions of political preferences, and not descriptions or explications of a system of normative standards subject to validation through an agreed methodology, then the doctrinal pronouncements of legal scholars have no particular authority. They simply express one more opinion about what someone would like the rules to be.

Professor West is surely right that there is no cause for complaint that doctrinal discourse and doctrinal scholarship are inherently normative. After all, the very function of legal rules is to provide a structured framework for governing social interactions that commands broad acceptance due to its grounding in acknowledged norms of justice or fairness or social utility. Legal analysis is, as West says, normative “all the way down.”¹⁰ And, while we can recognize, with Justice Holmes, the possibility of a legal system grounded on nothing more than the dictates of “an emperor with despotic power and a whimsical turn of mind,”¹¹ it is the grounding of legal rules and principles on a normative foundation – and their accessibility to normative critique and evolution – that allows law to serve its crucial legitimating function.

⁸ The ten categories are: Doctrinal, Normative, Historical, Comparative, Law-and-Economics, Law-and-Society, Critical Legal Studies, Law-and-XXX, Empirical/Quantitative, and Case Studies.

⁹ The remaining eight were scattered over the various other categories, with no more than two of them falling in any category.

¹⁰ West, *supra* Note 4, at 14.

¹¹ Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897).

Still, the fact that the mainstream of legal scholarship is inherently normative and therefore contestable, that it focuses not on how things are but on how they ought to be, puts it on a very different footing than the descriptive and empirically testable content of most of the scholarship in medicine or engineering or education or other professional fields. In most other professions, much of the academic work, while not immune to methodological dispute and evolution, provides practitioners with factual information about the world in which they practice, information that helps them to know what results their actions in their practice will produce. So, they turn to scholarly findings because they guide their practice.

If legal scholarship similarly described what the law is, that is, if it described how the legal system would respond to possible behaviors of lawyers and their clients, then practicing lawyers might find such scholarship crucial to their practice. That was at least one face of the classical vision of legal scholarship, the vision put forth by Langdell and persisting into the early twentieth century. But the realist revolution left that vision shattered and discredited. So, post-realist practitioners may occasionally turn to scholarship as a place to find the sources on a particular topic conveniently collected. And litigators may occasionally cite to supportive scholarly writings – at least some of which are recognized to have been written for precisely that purpose – to buttress their arguments. But, in the post-realist world, no practitioner is likely to think of normative scholarship as a source of knowledge, needed for its predictive insights into underlying legal reality.

Other factors also conspire to widen the gap between normative scholarship and the lawyers, policy makers, and others who use and shape law on the ground. For one, normative scholarship is primarily focused on the role that legal rules, principles, and doctrine play in the context of judicial development and application of the law. It is particularly in the context of appellate courts' reasoned elaboration of legal concepts and rules that normative scholarship is most at home, both as elucidation of, or commentary on, what the judges are doing and as intended guidance for their efforts.

In some areas of law, this may be where a good bit of the action is. West's field of constitutional law is perhaps a prime example. But much of the work of practitioners and policy makers, including much of the work of those tackling the challenges of the urban core, is not centered in the appellate courts. Much of it is transactional; much is engaged with regulatory or administrative bodies, not courts; even the portions that do involve litigation are often in settings where no one anticipates that there will ever be a judicial decision, not to mention an appeal. And, to the extent that legal rules are important factors in these settings, they are often very fine-grained rules, resting on technical statutes or regulations or on less formal standards that have become accepted guides to practice. Normative scholarship could, and occasionally does, dive into these quotidian and highly contingent bodies of law, but normative scholarship's norms of reasoned elaboration and of

argument to and from principle are often not a natural fit in these contexts – for either the scholars or the practitioners.

Finally, the forms and norms of legal scholarship are anything but practitioner or policy-maker friendly. To state the obvious, law review articles are very long, and often very slow to get to their points. They often seem to reflect the author's need to tell the entire story about a topic, even if most of it has been told repeatedly by others, before coming to their distinct contribution. And this apparent need is quite understandable. For newer scholars, their primary audience is their future tenure reviewers and the scholarly community in which they are seeking to carve a niche, and their primary guidance about what these audiences expect are the models that they see in leading law reviews. Even post-tenure, for most legal scholars the primary audience remains the fellow scholars within their field, and the primary measures of successful scholarship are a prominent law review placement and frequency of citation by other academic writers. Meanwhile, law review editors (third-year law students) bring little expertise, are in their posts for very short terms (while much of their focus is elsewhere), and are hardly likely to see their role as reforming or transforming the nature of legal scholarship, or to have the authority or skill to do so if so inclined.

For all these reasons, it is entirely unsurprising that the kinds of scholarship that fill the pages of the vast array of law journals and that consume much of the time and energy of law school faculty are rarely read widely by those who use law in practical settings. Although lawyers may be conversant with the types of content and argumentation in the law reviews, they cannot reasonably expect that what they find there will be directly useful in their work, unless their work is in the rarefied context of path-breaking appellate litigation. And, for non-lawyers in policy-making or institution-guiding roles, the approach of typical legal scholarship – from its magisterial tone to its extensive use of footnotes and of the arcana of citation form as parts of the exposition of its arguments – often appears foreign and forbidding. Both the lawyers and the non-lawyers who spend their time dealing with time-sensitive, practical matters are likely to experience their challenges as too urgent – and too fluid – to wait for, or to wade through, the legal scholarship.

We don't pretend to have a firm or simple diagnosis for legal scholarship's disconnection from the world of practice or a confident prescription for bringing the legal academy's rich resources into more effective connection with the real-world problems that so many academics see as their concerns. Our hope for this book is that, by sharing and examining some promising examples of what some scholars are producing, we can derive some insights and test some hypotheses about the challenges and the paths forward.

But first, it may be helpful to focus on the specific challenges in the field of our concern – the role of law in addressing the profound dysfunction in many American urban cores.

LAW, ACTIVISM, AND SCHOLARSHIP IN THE URBAN CORES

Although they remain pressing, the legal and policy challenges presented by American urban poverty are not new. For many decades, urban cores across the country have suffered from deep and persistent concentrations of unemployment, economic underdevelopment, and immobility. The paradigmatic image of these areas has been the densely populated and geographically discrete “inner city,” where access to housing, consumer goods, financial services, health care, schools, public safety, and other basic amenities is lacking. In the vast majority of urban cores, this image has also been distinctly racial. Experts across a range of disciplines have demonstrated that the stunningly high level of segregation in American cities by the middle of the twentieth century contributed to public and private disinvestment in the urban cores, many of which are still disproportionately populated by African-Americans, immigrants, and other communities of color.

Policy and Activism in the Urban Cores: A Very Brief History

This is not to say that the problem of urban poverty has been ignored. From the turn of the twentieth century onward, beginning with Booker T. Washington and W. E. B. DuBois, prominent African American leaders have engaged in active discussions about strategies for addressing urban challenges.¹² These discussions spawned numerous competent and dedicated private organizations, many of them nonprofit, which deployed a broad range of strategies to address urban underdevelopment. The activism and engagement of these organizations produced meaningful change on the ground, and it also eventually spurred governmental engagement.

While the history of policy making in and about the urban core during the last century is complex and varied, it can be described in three main stages. In the first stage, which began during the New Deal, the federal government explicitly recognized the unique concerns of the urban cores. The socialization of loss that occurred after the Great Depression included a core recognition of a basic “right” or “need” to work, and at least an aspiration to achieve for all Americans a basic standard of living. The policies that followed were developed and promulgated in a top-down approach, whereby federal funding and policy making determined ideological principles, programmatic development, and ground-level implementation. In important respects, the New Deal-era efforts paralleled the development of social and economic policy in post-war Europe, although American initiatives were significantly impeded by the willful failure of federal policy to address (and regularly the active contribution by federal agencies to) the problem of segregation. During this stage, state and local agencies eventually began to recognize and attempt to

¹² Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 410–12 (2001).