

IN SEARCH OF HELPFUL LEGAL SCHOLARSHIP, PART 1

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Like reform and ambiguity and symmetry and many other things,¹ relevance often is in the eye of the beholder. An occasional reminder of that fact can be therapeutic for scholars who aspire to be read, respected, and perhaps even relied upon. Chief Justice John Roberts might have been trying to provide some of that kind of therapy when he recently said,

Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something. . . .²

He got a chuckle from his audience – participants in the annual conference of the U.S. Court of Appeals for the Fourth Circuit. But not everyone got the joke, or liked it.³ That should come as no surprise. He was tweaking people. Some people – including some law professors who write law review articles – do not like to be tweaked.

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¹ See, e.g., *Christian Legal Soc. v. Martinez*, 130 S.Ct. 2971, 3019 (2010) (Alito, J.); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 572 (2005) (Stevens, J.); *U.S. v. Armstrong*, 517 U.S. 456, 472 (1996) (Breyer, J.).

² *Annual Fourth Circuit Court of Appeals Conference*, C-SPAN, www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appels-Conference/10737422476-1/ at approx. 30:30 (June 25, 2011) (“*Roberts Interview*”); see also *id.* at approx. 46:40.

³ Well, it seemed like a joke, in part because it was a caricature. There is no such article, at least not on Westlaw. See JLR, Westlaw, Feb. 23, 2012 (search for “kant & evidentiary / 10 bulgaria & eighteenth / 10 centur!” returns zero hits).

The joke was delivered in the 31st minute of a 45-minute interview (conducted by Judge J. Harvie Wilkinson) that touched on a variety of controversial topics and systemic shortcomings relating to the Supreme Court and the legal system of which it is a part. Roberts was good-humored but critical of everyone in the system. There's enough blame to go around, and Roberts is aware of that, as he is of the strengths and successes of that same system, and the credit that is due for them. That much is obvious from the interview taken as a whole. He tweaked himself and his colleagues for "grandstanding" and sometimes "not really being fair to the lawyers" at oral argument, but also praised their collaborative deliberation.⁴ He got in a jab at lawyers who complain about a hot bench by pointing out that "very expert counsel" can handle it, but also praised the "extraordinary Supreme Court bar," and then went further to tell a self-deprecating story of one of his own failures as an advocate.⁵ He tweaked his own law clerks for wanting a day off on a federal holiday, but he also praised their industry.⁶ And so on.

Perhaps law professors should not be offended by a tweaking at the hands of the Chief Justice, but should instead feel honored that they are important enough to merit a tweak.

Besides, in the same interview Roberts made it clear that his lack of interest in articles published in law reviews is based on his judgment that they are not useful to him in his role as a working judge, not on any judgment about their quality as scholarship. This is what he said immediately after the Kantian-Bulgarian-evidence joke:

. . . which I am sure was of great interest to the academic that wrote it, but isn't of much help to the bar. Now I hasten to add that I don't think there is anything wrong with that. If the academy wants to deal with the legal issues at a particularly abstract and philosophical level, that's great and that's their business, but they shouldn't expect that it would be of any particular

⁴ Compare, e.g., *id.* at approx. 43:25 & 33:20, with *id.* at approx. 10:00 & 33:05.

⁵ *Id.* at approx. 34:25; *id.* at approx. 35:25; *id.* at approx. 34:40.

⁶ Compare, e.g., *Roberts Interview*, note 2 above, at approx. 22:15, with *id.* at approx. 19:15, 37:25; *id.* at 20:10 (joking about his perpetuation of the vague and high office-hours demands he labored under as a clerk for Judge Henry Friendly).

help or even interest to members of the practicing bar or judges. At the same time, we're not looking for vocational guidance. . . . [B]ut I do think that if the academy is interested in having an influence on the practice of law and the development of law, that they would be wise to sort of stop and think, is this area of research going to be of help to anyone other than other academics. You know, it's their business, but people ask me, what the last law review article I read was, and I have to think very hard before I come up with one.⁷

The Chief Justice knows what he is talking about when it comes to dealing with legal issues at a particularly abstract level. It is a matter that is very close to home. He has found that members of his own Court sometimes deal with legal issues abstractly,⁸ and he has been found by some of them to do the same.⁹ Indeed, in recent years, intra-Court allegations of abstraction have been fairly common.¹⁰ In addition, members of the Court have recently objected to abstract dealings with legal issues by, among others, Congress, the Solicitor General, and the Supreme Court of Georgia.¹¹ On the other hand, sometimes the Court prefers “neat abstract issues of law.”¹²

⁷ *Roberts Interview*, note 2 above, at approx. 30:55.

⁸ See, e.g., *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2721, 2729 (2011).

⁹ See, e.g., *Abbott v. Abbott*, 130 S.Ct. 1983, 2000-01 (2010) (Stevens, J., dissenting, joined by Thomas and Breyer, JJ.).

¹⁰ See, e.g., notes 8 & 9 above; *U.S. v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2338 (2011) (Sotomayor, J., dissenting); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325, 1339 (2011) (Scalia, J., dissenting, joined by Thomas, J.). The Court is aware that inferior courts, too, have discovered abstractions in its work. *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633, 2643 (2009) (“[O]ther courts considering qualified immunity for strip searches have read [*New Jersey v.*] *T.L.O.* as ‘a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other,’ *Jenkins v. Talladega City Bd. of Ed.*, 115 F.3d 821, 828 (CA11 1997) (en banc), which made it impossible ‘to establish clearly the contours of a Fourth Amendment right . . .’”).

¹¹ See, e.g., *James v. U.S.*, 550 U.S. 192, 229-30 (2007) (Scalia, J., dissenting, joined by Stevens and Ginsburg, JJ.); *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577, 2580, 2587 (2010); *Sears v. Upton*, 130 S.Ct. 3259, 3265 (2010) (per curiam).

¹² See, e.g., *Ortiz v. Jordan*, 131 S. Ct. 884, 893 (2011); see also, e.g., *Stanford University v. Roche Molecular Systems, Inc.*, 131 S.Ct. 2188, 2202 (2011) (Breyer, J., dissenting, joined by Ginsburg, J.); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1947 (2009).

It would be easy to say there is enough abstraction to go around at the Supreme Court and everyone is getting a share were it not for the fact that a proper measure of the supply of abstraction depends on the application of a proper definition of abstraction. Alas, the Justices are divided on that question.¹³ Abstraction, it seems, is like relevance: it is in the eye of the beholder. And each member of the Supreme Court witnesses abstraction with different eyes.¹⁴

Perhaps academics should be honored to be accused of dealing with legal issues at a particularly abstract level, just as they should be honored to be tweaked. It puts them in good company. The same could be said of dealing with legal issues at a particularly philosophical level, but digging into that topic here would be piling on.¹⁵

All of which suggests that when Roberts cautioned the academy about dealing with legal issues at a “particularly abstract and philosophical level” he was not decrying everything abstract and philosophical in the work of the academy and the Supreme Court (after all, the latter contains a substantial amount of the former, some of it in opinions signed by the Chief Justice). Instead, he might simply have been adding some vividness to his central, practical concern — that much modern scholarship “isn’t of much help to the bar.”¹⁶

On that reading, Roberts’s real challenge to legal scholars is to be helpful to the bar, including those members of the bar who are also Justices of the Supreme Court.

As with abstraction, so with helpfulness: the Chief Justice knows what he is talking about when it comes to the challenge of producing

¹³ Compare, e.g., *Sears v. Upton*, 130 S.Ct. 3259, 3265 (2010) (per curiam), with *id.* at 3268 (Scalia, J., dissenting, joined by Thomas, J.); compare also *Bilski v. Kappos*, 130 S.Ct. 3218, 3230-31 (2010) (Kennedy, J., for the Court, joined by Roberts, C.J., and Scalia, Thomas, and Alito, JJ.), with *id.* at 3223, 3235-36 (Stevens, J., concurring in the judgment, joined by Ginsburg, Breyer, and Sotomayor, JJ.).

¹⁴ Cf. *Roberts Interview*, note 2 above, at approx. 46:00 (noting, in the context of a discussion of cameras in courtrooms, that he was “sharing my views and not necessarily all the views of my colleagues”).

¹⁵ See, e.g., *Clark v. Arizona*, 548 U.S. 735, 768-69 (2006); *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3096, 3102 (2010) (Stevens, J., dissenting); *Graham v. Florida*, 130 S.Ct. 2011, 2056 (2010) (Thomas, J., dissenting).

¹⁶ *Roberts Interview*, note 2 above, at approx. 30:55.

material helpful to the bar. The bar, after all, is a tough audience. No judge who has presided over the production of opinions like those that make up, for example, the Court's criminal sentencing jurisprudence could come away from the experience without a deep appreciation of how hard it is to provide helpful guidance to the bar about complicated and controversial topics. It is in that spirit that academics should hear and humor the Chief Justice, and respond to his helpfulness challenge. If he and his colleagues can be told – not by academics, but by their own lower-court colleagues – that . . .

Booker could have been the simple, logical extension of the Supreme Court's *Apprendi* jurisprudence. Instead, the Court produced a fractured, 124-page decision with two majority opinions and four dissents.¹⁷

and

You don't need experience in actually sentencing people in order to totally screw up the law of sentencing. It is telling and painfully obvious that not a single Justice ever had to look a federal defendant in the eye while not knowing what law to apply. . . . Footnote 9 in *Blakely* ("The Federal Guidelines are not before us, and we express no opinion on them.") is the biggest practical joke in the history of American law. . . . The "merits" and "remedial" opinions in *Booker* satisfy George Orwell's definition of "Doublethink."¹⁸

. . . then surely scholars can endure a Kantian-Bulgarian-evidence joke told about them by a judge. What would the typical law professor rather be, anyway, Kantian or Orwellian?

So, nobody is perfect, reasonable minds sometimes differ, and we can all learn from each other, making the consideration of diverse views a good idea. Anyone who has taken 45 minutes out of her or his busy schedule to watch all of the Roberts interview at the Fourth Circuit Conference knows Roberts knows that.¹⁹

¹⁷ *U.S. v. Kandirakis*, 441 F.Supp.2d 282, 286 (D. Mass. 2006) (Young, J.).

¹⁸ Richard G. Kopf, *The Top Ten Things I Learned From Apprendi, Blakely, Booker, Rita, Kimbrough, and Gall*, OSJCL AMICI, osjcl.blogspot.com (Jan. 2008).

¹⁹ See, e.g., *Roberts Interview*, note 2 above, at approx. 11:30 (describing the Justices' deliberations in conference).

Secure in the knowledge that both the abstract and the philosophical are safe from rejection by a Supreme Court populated with judges who appreciate some of each, the academy should feel free to invest in producing the best, most helpful abstractions and philosophizations it can. Reassured by the knowledge that the Justices find the achievement of helpfulness to the bar a sometimes difficult task – one in which a bit of help from a scholar or two might be welcome from time to time – the academy should be no less courageous than the Court in striving to be helpful even at the risk of failing.

But how to be academically helpful to the Supreme Court?

Legal scholars should begin by being realistic about two things: credibility and volume.

First, credibility. Briefs signed by people who proclaim their status as scholars and thus implicitly or explicitly claim their arguments merit extra credence because they are scholarly – aka “scholars’ briefs” – will not be viewed that way by a knowledgeable Justice. Recent and widely-discussed articles by Professors Richard Fallon and Amanda Frost make it pretty obvious that “many law professors sign onto scholars’ briefs . . . without any hesitation” even when such briefs: (1) deal with issues on which the professor is an expert, but cite authorities on which he or she is not an expert; or (2) make reasonable scholarly arguments for or against a position, but leave out legitimate contrary scholarly arguments; or (3) rely on precedents the professor thinks are wrong; or (4) use theories of interpretation that the professor would not use in his or her own work.²⁰ In other words, a scholars’ brief tells the Court what outcome the signing scholars desire, but may or may not tell the Court what those scholars know. Such briefs might well be helpful to the Court, but not because they are reliably scholarly. So, scholars’ briefs probably are not the way to present scholars’ scholarship to the Court.

²⁰ Amanda Frost, *In Defense of Scholars’ Briefs* at 2-3, papers.ssrn.com/sol3/papers.cfm?abstract_id=1978337 (describing Richard H. Fallon, Jr., *Scholars’ Briefs and the Vocation of a Law Professor*, papers.ssrn.com/sol3/papers.cfm?abstract_id=1959936). Attention to this phenomenon is not new (see, e.g., David J. Garrow, *A Tale of Two Posners*, 5 GREEN BAG 2D 341 (2002)), but its salience is rising with the rising number of scholars’ briefs. See Fallon at 1.

Second, volume. There are too many law review articles in the same way there are too many petitions for writs of certiorari. Each one may have its own merits, but it is unrealistic to expect any one person to read all of them, or even to skim each one with sufficient attention to determine whether it merits a closer look and then read the ones that do. There were 7,857 (a not atypical number) filings in the Supreme Court during the 2010 Term.²¹ Most Justices spread the burden of reading and analyzing those filings, and making recommendations about what to do with them, over a pool of 30 or so law clerks known as the “cert pool.”²² There was almost certainly an even larger (not atypical) number of law review articles published during the same period. The “Law Journals” website operated by the Washington & Lee University School of Law lists 658 student-edited law journals in the United States. Even if the average journal were to publish just a dozen articles per year, that would still result in more law review articles (7,896) than Supreme Court filings. Add the output of the 338 peer-edited or refereed U.S. journals and the 685 non-U.S. journals listed by Washington & Lee and the total number of articles is, obviously, even higher.²³

Moreover, in the case of law review articles, the high volume of works is compounded by the high volume of words. Supreme Court Rule 33(g) limits a petition for a writ of certiorari to 9,000 words.²⁴ Few law reviews have a word limit so low, and some law reviews with higher word limits do not adhere to those limits. For example, the *Harvard Law Review*, which portrays itself as a leader in the campaign against “the growing length of law review articles,”

strongly prefers articles under 25,000 words in length
The *Review* will not publish articles exceeding 30,000 words –

²¹ 2011 Year-End Report on the Federal Judiciary at 13 (Dec. 31, 2011).

²² Michael F. Sturley, *Cert Pool*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 155 (2d ed. 2005) (Kermit L. Hall, ed.); Tony Mauro, *The Cert Pool*, BLOG OF LEGAL TIMES, legaltimes.typepad.com/blt/2009/09/sotomayor-joins-the-cert-pool.html (Sept. 21, 2009).

²³ *Law Journals: Submissions and Ranking*, lawlib.wlu.edu/LJ/index.aspx.

²⁴ “[T]he Court or a Justice may grant leave to file a document in excess of the word limits, but application for such leave is not favored.” Sup. Ct. R. 33(d).

the equivalent of 60 law review pages – except in extraordinary circumstances.²⁵

But the third and fourth issues of volume 121 of the *Harvard Law Review* contain a two-part article that is 120,026 words long. And that is only mildly anomalous. The first issue contains a 46,473-word article, the second a 35,166-word article, and the eighth a 33,351-worder.²⁶ In other words, four law review articles weighing in at a total of nearly a quarter-million words. Nor is volume 121 unique. The latest – volume 125 – opens with a 41,641-worder in its first issue, and subsequent issues feature articles of 52,572, 32,447, and 60,509 words.²⁷ And the *HLR* is not alone. The latest volume of the *Yale Law Journal*, for example, opens with a 33,692-worder and includes articles of 42,798 and 45,224 words.²⁸

So many thousands of law review articles every year, containing so many, many millions of words. How is anyone supposed to figure out which ones are likely to be helpful to a Justice deliberating over one of the roughly 80 cases that the Court decides annually nowadays?²⁹ Small wonder the Chief Justice throws up his hands, even if he knows there is much good scholarship – some of it helpful – buried here and there in that mountain range of words.

That is one area where the academy certainly can do more to help the Supreme Court. The academy can take Roberts at his word. It can direct his Court's attention to helpful scholarship.

²⁵ *Submissions*, HARV. L. REV., www.harvardlawreview.org/submissions.php.

²⁶ David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb*, 121 HARV. L. REV. 689 & 941 (2008); Martha C. Nussbaum, *Constitutions and Capabilities*, 121 HARV. L. REV. 4 (2007); Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 449 (2007); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008).

²⁷ Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); Rebecca Tushnet, *Worth a Thousand Words*, 125 HARV. L. REV. 683 (2012); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2012).

²⁸ Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2 (2011); Oona Hathaway and Scott J. Shapiro, *Outcasting*, 121 YALE L.J. 252 (2011); Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738 (2012).

²⁹ 2011 Year-End Report on the Federal Judiciary, note 21 above, at 13.

Professor Sherrilyn Ifill has already taken a step in that direction. In a blog post responding to Roberts's Kantian-Bulgarian-evidence joke she stands up for the academy and its output:

[M]ore often than not, published law review articles offer muscular critiques of contemporary legal doctrine, alternative approaches to solving complex legal questions, and reflect a deep concern with the practical effect of legal decisionmaking on how law develops in the courtroom. Such scholarship can assist judges in explaining complex legal doctrine, but also in working through the application of that doctrine

And then, lo and behold, she offers some suggestions!

Take, for example, the work of my colleague Renee Hutchins, . . . *Tied Up in Knotts: GPS Technology and the Fourth Amendment*, . . . [or] Robert Burn[s'] *What Will We Lose if the Trial Vanishes* . . . [o]r Brandon Garrett's . . . *Eyewitness and Exclusion*. . . . Indeed just a month ago, I remarked to a colleague that if Roberts were to read my 2002 article *Do Appearances Matter?: Supreme Court Recusal Practice in Bush v. Gore*, he would find a detailed prescription of how Supreme Court recusal practice should be reformed and codified³⁰

This is a good start, but something more systematic is called for if the Justices are to receive (a) a steady supply of recommendations of legal scholarship likely to be helpful in deciding the unending stream of cases before them, and (b) recommendations that reflect both the diversity of the academy and its collective expertise.

To that end, professors should organize a cert pool of a sort for law review articles.³¹ They have the knowledge: they know scholarship, good and bad. They have the know-how: they know peer review, pure and corrupt. (Peer review of a sort is at the heart of this project.) And they are in position: they have the tenure that frees them to speak truth not only to power, but also to each other.

³⁰ *Sherrilyn Ifill on What the Chief Justice Should Read on Summer Vacation*, CONCURRING OPINIONS, www.concurringopinions.com/archives/2011/07/sherrilyn-ifill-on-what-the-chief-justice-should-read-on-summer-vacation.html (July 1, 2011).

³¹ Limiting this proposal to law review articles is merely a matter of starting small, not a rejection of other forms such as books, blogs, and the like.

But rather than giving the Justices stacks of memos evaluating every single law review article (as the clerks in the cert pool do with petitions in every single case), the professors should take a different kind of case-by-case approach. Every time the Court grants a cert. petition or otherwise agrees to hear a case, they should give the Justices a simple, readably short list of those articles most likely to be helpful in deciding that case. Then the Justices or their minions can read the helpful scholarship themselves. Each list should be in the form of (and filed as) an amicus brief – a truly brief “brief of scholarship” rather than a conventional “scholars’ brief.”

Producing briefs of that sort would be hard. But there are respectable entities that could do it. Two come immediately to mind:

1. The American Association of Law Schools (AALS). It is already “the principle representative of legal education to the federal government.”³² With its heavy faculty involvement and access to law school leadership, it is well-placed to manage what might be a sensitive peer review process for selecting articles to appear in the briefs.

2. *The Journal of Things We Like (Lots)* (JOTWELL). It is already in the business of “identify[ing], celebrat[ing], and discuss[ing] the best new legal scholarship.”³³ By expanding its coverage to include the best old (as well as new) legal scholarship, and occasionally narrowing its focus to the questions presented in a Supreme Court case, it could produce first rate amicus briefs of scholarship.

In Part 2 of this paper I will either celebrate the launch of an amicus briefs of scholarship program by the AALS or JOTWELL or some other worthy entity, or I will outline a plan that might be used by some other fearless and energetic souls.

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In this issue of the *Journal of Law* we present: (1) another set of useful and interesting miscellaneous public documents from *Pub. L. Misc.* editors James Ho and Trevor Morrison; and (2) the inaugural issue of the pleasingly self-explanatory *Journal of Legal Metrics*, edited by Adam Aft, Alex Mitchell, and Craig Rust.

³² *About AALS*, aals.org.

³³ *Mission Statement*, JOTWELL, jotwell.com.