SCHOLARS AS AMICI

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YOU CAN SAY WHAT YOU WANT on scholarly papers. Are you reporting a consensus? An historical review of what the term has meant over the last 200 years? Are you reporting what some famous or smart person once said? Or are you sending out a prayer, a plea, a hope?

I am hoping. So here's how I define a scholarly paper:

A scholarly paper – in the legal world – is one which provides context and background for trial orders and other judicial opinions. It doesn't matter where it's published. It could itself be a court opinion. It might be on legal issues and often is, but not necessarily, because it might be directed to statistics, DNA, privacy, computers, medicine, or accounting. In any event the paper is directed to judges, and so is of interest to lawyers who want to persuade judges.

It's a broad category.

In this country, court decisions are usually informed only by a few private parties with private interests, but the results are precedential – everyone else has to live with the consequences. Public policy issues which in other governments are relegated to bureaucracies and other (perhaps elected) officials are in the United States given over to courts. Problems arise where judges have broad powers on public issues but are informed only by private parties. Blend in the fact that trial judges (and to a lesser

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extent appellate judges) don't have time to investigate all aspects and ramifications of their decisions, and we have a sometimes toxic brew.

This might bring into question the legitimacy of the courts' decisions. And private parties concerned that courts will import public policy to decide their private dispute may try to opt out of the court system – e.g., for arbitration. But in the United States there's no line between private and public: even contract disputes, where the parties have the broadest range of options to set their own rules, are subject to constraints such as voiding unconscionable provisions.

Scholarly papers, like briefs of amici curiae, ameliorate these problems. They focus on broader issues, likely not briefed by the parties and requiring too much work to figure out in the context of a single case. The papers might address the development of a statute, or the last fifty years of appellate opinions on an issue. This is useful because courts might not have the time to do this themselves, and because scholars think of things that judges don't.

But perhaps more importantly, scholarly papers address areas in which judges have no expertise. Judges are expected to act as a "gatekeeper" in deciding if a putatively scientific opinion goes to the jury, but few judges know much about "statistical significance" (p values) and how this can be easily toyed with. So how to do our job? We decide discovery battles worth millions of dollars in electronic discovery costs: what do we know about technology-assisted review and emerging artificial intelligence search methods? We decide the voluntariness of confessions, whether arbitration and other agreements are coerced, and whether someone really was "on notice" of something; but most judges are not up to date on how the mind processes information, including pervasive cognitive fallacies. And how do statutory regimes designed to protect air, water, and endangered species really work? We need scholars and their papers, and if lawyers know we're reading them, lawyers will read them too.

A last word on academics. You might have thought I'd put papers by and for legal academics as the obvious source of "scholarly" papers. Nope. It's not that I begrudge them their fun (and Roman Law can be a lot of fun[1]). It's that I think the law is, first, for the people in this country, and as

[1] Under Roman law one could challenge the competence of a court of limited jurisdiction only *after* judgment; questions were asked by judges while witnesses were tortured (and

long as I am just hoping, I hope for scholarly papers that help judges and lawyers help the people who pay our salaries.

But this is a big tent: if you want to know what claims are triable to a jury in California, you need to know what the story was in 1850 when the state was born, and for that you'll need to go back further in time. Primary rights, California's weird approach to res judicata and related issues, goes back centuries to pre-colonial days, and knowing that might help apply (or, better, do away with) the doctrine today.[2] And you'll never be as sensitive to the need for the law of trusts without knowing of its fourteenth century origin.[3] These are, for those practical reasons, useful scholarly topics.

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testifying slaves *had* to be tortured); suits could be initiated without stating specific claims; and cases were decided only on stipulated facts (which present-day judges might find pretty attractive). Ryan Patrick Alford, "How Do You Trim the Seamless Web? Considering the Unintended Consequences of Pedagogical Alterations," 77 *U. Cin. L. Rev.* 1273, 1300-1301 (2009). And if you like legal fictions you'll love this: "And so the Roman lawyers developed the protosatirical tool of the 'legal fiction,' fictio iuris, a method by which they would, essentially, preserve the law by changing the facts of the case to meet the letter of the rule. Thus, a child might be treated as an adult or a woman as a man, if, in the view of the judge, that would lead to a proper outcome." Peter Goodrich, "Satirical Legal Studies: From the Legists to the Lizard," 103 *Mich. L. Rev.* 397, 417 (2004) (note omitted).

[2] Curtis E.A. Karnow, "Primary Rights," 28 *So. Cal. Interdisc. L.J.* 45 (2018).

[3] Charles Donahue, Jr., "What Happened in the English Legal System in the Fourteenth Century and Why Would Anyone Want to Know?," 63 *SMU L. Rev.* 949, 966 (2010).