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>> To the final session of what I think has been a great conference from my perspective. I hope that everyone here has gotten something value out of it. Let me put my glasses on so I can read what I was going to say. So the final panel is called legal scholarship for the next generation. The idea is for it to be something of a capstone session for the entire conference, although the conferences just seem to be of such an interesting sort of organic piece to me that I'm not sure the notion of a capstone session is appropriate for this one, but we'll see what we get. We certainly have a great group of panelists up here. The charge that I gave to them, although that I'm not sure that I -- could have held their feet to the fire or told them that I would hold their fete to the fire in terms of sticking strictly to this charge is as follows -- computer scientist Alan Kay reportedly said, quote the best way to predict the future is to invent it. You can invent or reinvent what legal scholarship would look like a generation from now, what would you invent? So within those relatively broad confines I

expect some interesting discussion from the folks up here on the bench.

What I'm going to do is introduce each of them now. And then I'll just turn it over to them by name one after the other for their presentations and then we'll have time at the end for a little bit Q & A from you. There should -- yeah. There's a mic over there. So we can use that for Q & A and comments at the end. So I'm going to introduce them starting with Professor Bowman down at the end. I'll introduce them in the order in which they're going to be speaking.

Frank Bowman is the Floyd A. Gibson Missouri endowed Professor of Law at the University of Missouri School of Law. Previously he was the M. Dale Palmer Professor of Law at Indiana University School of Law in Indianapolis. Graduated the Colorado College or the Colorado College.

>> The Colorado College.

>> And the higher bread law school. And spent most of his practice career in criminal law most of the prosecution side. He was a trial attorney with the U.S. Department of Justice's criminal division in Washington and a deputy DA for Denver, Colorado. Later he was deputy chief in U.S. attorney's office for the southern district of Florida specializing in complex white collar crimes. He's also worked in private practice. He served as special counsel to the U.S. Sentencing Commission. He has been academic advisor to the Criminal Law Committee of the United States Judicial Conference. He published extensively in the area of criminal law, criminal procedure, sentencing reform and Civil War era legal history in Missouri, if I read your resume correctly. And is won numerous awards

for his teaching and scholarship. Please welcome Professor Bowman. Might as well give him a hand right now.

[Applause]

To my immediate right is Maxwell L. Stearns who is the associate dean for research and faculty development, Professor of Law and Marbury Research Professor at the University of Maryland. Francis King Carey School of Law. Before joining Maryland's faculty, Professor Stearns served on the faculty of the George Mason University School of Law. We will -- keep it as the George Mason University School of Law for present purposes. Practiced law with Palmer & Dodge in Boston and Pepper Hamilton and Sheets in Philadelphia. And for Judge Harrison Winter on the fourth circuit. Professor Stearn's earned his BA summa cum laude from the University of Pennsylvania and his JD from the University of Virginia where he was a member of the Virginia Law Review and the Order of the Coif. He is interdisciplinary scholarship which applies the methodologies of public choice, social choice, game theory and law and economics to problems in public law. He's appeared in many top law reviews and he's the author or coauthor of two course books and one monograph or public choice or social choice theory and law. Please welcome Max Stearns.

[Applause]

Robin West at the other end, to the left, to my far left on the, the bench, is the Frederick J. Haas Professor of Law and Philosophy at Georgetown University Law Center. Before her appointment at Georgetown, she taught here in Baltimore at the University of Maryland School of Law. And at the Cleveland-Marshall College

of Law at Cleveland State University. She earned her bachelor in JD degrees from the University of Maryland and a JSM degree from Stanford. Professor West as published well over 100 law review articles. I think that's right. I actually didn't count them all.

[Laughter]

There are a lot of them. And book chapters in the areas of gender issues and feminist legal theory, constitutional law and theory, jurisprudence, legal philosophy, law and literature -- she's coauthored, or authored or editing a long list of books including recently and apropos of this conference, a book from 2014 entitled "Teaching Law, Justice Politics, and the Demands of Professionalism." In 2015 she was elected to the America Academy of Arts and Sciences, that's very prestigious honor. Many other honors I can go into, but we don't have time, please welcome Professor Robin West.

[Applause]

And that's in fact true of all of our panelists here. Many other things I could say about them.

And finally, to my immediate right is my colleague, Michelle Gilman.

[Laughter]

My left. The right, right.

>> You're right.

>> My other right. Stage right.

Michelle Gilman is the Professor of Law here at the University of Maryland

School of Law. And is director of our Saul Ewing Civil Advocacy Clinic. She is also the codirector of the Center on Femininism here at the law school. Before joining UB's faculty, Professor Gilman was a trial attorney in the civil rights division at the Department of Justice. She's an associate at Arnold & Porter in Washington and a law clerk, not all at once, I hasten that, a law clerk for Judge Kaufman on the U.S. District Court for the District of Maryland. She graduated cum laude from both Duke University and the (low audio) University of Law School where we overlapped. She -- she was -- I was a senior to her, is that the right way to put it? I'm older than she is. And she served on the Law Review there. Professor Gilman's scholarship focuses on issues related to welfare, poverty, economic inequality and social justice. And her articles have been published in the California Law Review, the Vanderbilt Law Review and the Brooklyn Law Review among others. Increasingly, she has a presence on-line I've been following lately. She's involved in numerous groups working on behalf of low income Marylanders and has received awards for her teaching and her public service. Please welcome Professor Michelle Gilman.

[Applause]

Ah, so just a few words about format. Panelists will speak in the order which I just introduced them. Each panelist will have 12 to 15 minutes, I'm going to count on them to try to keep track of their time. If they get way over I'm going to try and, and let them know about that. After the panelists have spoken we'll do, I may ask a question or two as moderator if I have anything intelligent to

say, which -- at this stage in this conference is quite unlikely. And we'll make sure that we have plenty of time for Q & A from all of you.

So let's begin with Professor Frank Bowman.

>> Thank you. Thank you so much C.J. I want to thank (Indiscernible) for having me here and -- conference organizers including Laurie, who I guess left. I particularly want to thank you Dean Gardner, who is an old friend and colleague of mine. Ah -- and -- he is actually sitting out there making me nervous because, you know, he actually knows me too well. Um -- I want to say at the onset that the previous talks I've heard have been terrific. The panelist with whom I'm sharing the dais with are remarkably accomplished and therefore I feel somewhat inadequate. I'm also sort of hopelessly old fashioned as you're going to see. So rather than titling these remarks, legal scholarship of the next generation, by the time I get finished you're going to think this is legal scholarship for the last generation, but two because I am kind of an old fashioned dude.

So first let me tell you a little bit about myself. This is probably a good way to start a talk like this because it enables you to get some sense of my Bayesian priors. Now, that last sentence was really a lot of fun to say, but of course I haven't the foggiest idea what the means. Not only do I not have a clue what my colleagues are talking about when they start going on about Bayesian probability. But as a guy who has to always look up the difference between mean and median, the odds are good that I couldn't figure out if you gave me a month. All of which that I may foreshadow I might ail against the raising impurest trend

in legal scholarship. But you'll see that will be wrong.

Still it is probably a good idea to start out with a few biographical facts because they may help explain my personal set of otherwise unexplainable premises that another famous guy who pops up a lot in legal conversations, but not so much anymore called his "can't helps." Or since I'm a child of the '60s we could just say that knowing something about me helps you figure out where I'm coming from, man.

So in the first place, I come from a small town in Colorado and I went to a small college in Colorado. And then want to law school at Harvard in the late 1970s and so as far as I can tell, the national legal scholarship media hadn't started back then. Or if it had, it hadn't reached Harvard. Our professors were demigods to be sure. Or at least both we and they thought they were. But it wasn't because mostly, because they had written a butt load of Law Review articles. Mostly they seemed awesome at least to us because they had done stuff. Really cool stuff. In the real world.

My torts professor, example, was Milton Katz. Now, I had no idea then and I don't know, if he ever wrote a syllable about torts or any other legal topic, but he was the administrator of the Marshall Plan after the World War II, and I knew that, and that was really cool. And my civil procedure professor was Abe Chaise who fought in World War II and got a bronze star and practiced law and clerked for Felix Frankfort and helped get JFK elected and in the middle of the Cuban Missile Crisis and later advised RFK, McGovern and Jimmy Carter and that was cool.

Another of my first year professors, later my boss at the Justice Department, was Phil Hymen who was on the Watergate special prosecutor's team. And his former boss, Archie Cox was both a demigod and martyr to the young lawyers of my generation. Just sort of levitated around campus, bow tie and all. And my criminal law professor was Alan Dershowitz, then and now, astoundingly self-absorbed and annoying, but still a guy who really did stuff in the world. And to give you an idea of how little legal scholarship of the Law Review matter Cert mattered in that lost universe, my criminal professor graduated from Harvard law school in 1962. Started teaching at Harvard in 1965 can by the time I showed up in the fall of 1976 had written a total of one Law Review article. He has since written a number of books and slew of articles and all of which are breathtakingly learned, and I should tell you he was one of the very best professors and the smartest people I encountered at Harvard and I, idolized that man. But let me repeat his scholarship tally. By 1976, 11 years at Harvard law school, tenured full professorship, one article. Now, I recognized we're talking Harvard here. The capital of inflated self-regard. A place that at least back then hired its own graduates almost exclusively and seemed to have operated on the premise that if you graduate at the top of your class at Harvard then you pretty much passed the only test that mattered. And if they hired you and you wrote their after, well that was just bully. But insisting that you do so was kind of gauche. Of course, I also recognize that my dear old alma mater has changed since then.

But my point is that I want to law school at a time and a place when it we

students sought to emulate our professors it was mostly because of what they did before law school, before they became professors or what they got to do because they were professors. These were people who mattered in the world of affairs. So my first "can't help" is the conviction that law professors should ideally be people who matter in the world of affairs.

Now, the second thing you know about me is that high path to the academy is by present standards somewhat unconventional, you got that, I guess, in the introduction. I did that graduate at the top of my class. I was not on the Law Review or indeed any Law Review. I did not clerk for a federal judge. I wanted to get into the practice of law as fast as I could. So I went to the criminal division of the justice department and over the ensuing 17 years did a bunch of stuff that you've already heard about.

Um, although the years have flown by and I've now been a teacher a little bit longer than I was a practicing lawyer, the truth is I am and will always remain an old lawyer. An old trial lawyer who teaches and write some. Now, this is a biographical fact that leads to two of my other "can't helps." And first during all of my years as a trial and appellate bar I do not consciously recall every having sat down and read a single Law Review article. Or at least never having read one past the first few pages. For the first few years after law school, I blush to admit this, I actually subscribed to the Harvard Law Review. I suppose with the sort of half-baked idea that I would keep myself up to date on the latest current and legal thoughts. The kind of silly pretentious thing you do when you

are young. Sort of buying the complete works of marshal produce in the original French and resolve that you're going to learn the language and work your way through seven volumes of remembrance of things past in your spare time. But I soon got better sense and I stopped the prescription and stopped the back issues and for many years I fought the small wars that make up the life of a trial lawyer in happy ignorance of the flow of the interjectural fashions that for academics become what hums would have called "fighting face." Critical, legal studies, laws, narrative, law, econ, and all that stuff.

So the first lesson that my life as a lawyer taught me when I became a budding academic is that lawyers never read Law Review articles. Now, we academics kid ourselves, kid, kid around about that amongst ourselves. Of course, but we rarely really internalize it. Because to do that would be just too heartbreaking. All that labor. All those damn footnotes. And no readers. Now, maybe some SSR and downloads by our friends, but nobody who practices or judges in the field about which we write actually reads the fruits of our agonizing labor. So let me repeat -- lawyers never read Law Review articles.

What never? Well, hardly ever. Very, very rarely we write something that some real lawyer or judge or legislature or legislative aide will read and can actually use and does which brings me to my second "can't help" which is closely related to the first.

I can't help thinking that the gold standard for legal scholarship is writing that moves lawyers and judges and policymakers operating in the world of affairs.

And that's not that say that other kinds of scholarships shouldn't count, at least among ourselves. But the laws of pragmatic discipline if there's to be scholarship of the law, its highest form should seek and at least sometimes attain pragmatic ends. But if lawyers don't read low review articles then those law articles are unlikely to have any effect on the law which begs the question of why lawyers don't read Law Review articles.

Now there are plenty of reasons. Some of which have been addressed in this conference. And perhaps some innovations that we heard about like casetext will help. But today I want to emphasize one overriding problem which is most Law Review articles are lousy. Or at least do not remotely repay the time it takes to read them. They're either badly written or poorly reasoned or completely impractical, or shamelessly derivative, or essentially trivial, and anyone of the dozen ways just bad. Given the academic ecosystem we inhabit this state of affairs is almost inevitable. First, the real market for Law Review writing is the Law Reviews themselves, not their tiny readership. Seen in this way, the demand for high quality legal scholarship --

[Low audio]

643 student-edited law journals in the United States. Another 150 peer reviewed law journals and another 160 or so refereed journals for a total of 970 possible outlets for American legal scholarship.

Now, assuming for the moment that these journals publish no more than say four issues annually and print no more than four articles by non-students in each

issue, the academic legal publication machine nonetheless requires over 15,000 submissions annually just to fill its pages. There are about 8,000 American law professors and by my calculation about 5,000 of those hold positions in which regularly scholarly writing is expected. If these journals relied exclusively on law professors for copy, of us would have to write three articles per year every year world without end. Of course, we don't turnout that much so the Law Reviews get contributions from judges and lawyers and that's all of the good know note. But even so, the demand for our musings is essentially insatiable.

Second, the kind of writing we value for purposes of tenure and promotion is lengthy, theoretical, and perspective. I mean, God help the young tenure candidates who word is given the fatal label -- merely descriptive. Likewise, our universities want professors with a national representation and indeed that's, that is often a requirement written into the rules for, for promotion, for example, to full professor. It is at my university.

And our young Law Review editors all what the Law Review of old state U to be considered a national Law Review. So they customarily only accept articles on subjects of supposedly national interest. So we all write long theoretical articles that focus disproportionally on Federal Constitutional or statutory law or perhaps had national uniform law regime or perhaps some law and genre which means we have lots and lots of people trying to come up with some new theoretical construct or perspective analysis of a set of topics that occupy as very modest part of the law that's actually practiced. And there aren't remotely enough good

ideas on these topics to warrant even 5,000 full treatment Law Reviews every year, much less the 15 thousands that the journals need.

And even if the universe of good ideas were big enough, which it's not, the number of professors intellectually equipped to articulate them isn't. Although as a class, we law professors are staggeringly bright. We're bright in different ways. In the simple truth is that only a fairly small percentage of us are really gifted at doing the kind of theoretical scholarship that we academics value. But we all -- or at least most of us, are driven by the professional incentives of the discipline to try to write that way.

And there's another problem which is that law -- ah -- the thing about which we're writing is it bottom a pragmatic and not a theoretical discipline? Holmes, I do come back to him don't I? Was absolutely right that the life of the law is experience not logic. And the giants of the law have never been bright young things who like mathematicians or theoretical physicists have all of their grand insights by the time they're 30. Instead our heroes are thinkers to be sure. But thinkers seasoned by professional experience and intellectual combat.

I would contend that even writing about the law meaningfully and certainly writing on the law prescriptively, requires a deep practical understanding of the human and institutional milieu in which law operates. And you simply can't develop that understanding from law school, a year in a judge's chambers and two years drafting memos at Kedwalts or what's this in humongous. But that, of course, is -- the customary resume of the new law professor. And a life devoted

exclusively to teaching legal beginners and trying to spin new legal theories from books and the receding memory of a brief sojourn in the real world does little to improve that situation.

So for all these reasons it is hardly a surprise that so much of the work of young law professors runs the gamut from the mundane to the inconsequential. But because the, the, the demand for Law Review copy is bottomless, it all gets published anyway. And beyond the natural intelligence in an aid industry, and honest desire for self-improvement of maturing law professors themselves, there are precious few formal mechanisms for insuring that immature work gets very much better or at least more attuned to the realities of the real world as time passes.

Now, I don't say that pure academic admissions can never produce widely and influential scholarship. I mean, Akiel Omar matters in the world. I just contend this is a fairly rare occurrence. Which leads me to my next "can't help."

I can't help thinking that one part of the problem with legal scholarship is a problem with law school hiring practices. To improve legal scholarship I think we should focus more, at least, on hiring people with real world experience in a fair degree of it. Now, the current move to -- ah, more experiential learning is probably pushing us that direction anyway.

So I say make a virtue of necessity. Don't merely hire experienced lawyers at a grudging concussion to ABA and market pressure and consign them to sort of permanent untenured peonage. Expect a hearsay that bright people with considerable experience far from being forever ruined for the life of the mind

are better equipped to write scholarship that will matter in the world.

I certainly found that to be so. Once I became a professor I found that I had a large store of things that I knew about. That I had gripes about. I could write about. Reasonably knowledgeable with a sound sense of what the rules were, what the practice was, what the institutional politics were, how things fit together, what might work and what probably wouldn't. So to the extent that we continue to hire a good number of bright young things, those with little practical experience, we should nonetheless create incentives, really meaningful incentives for them to get involved in the world. To come down off the mountaintop and maybe do a stretch helping run the legal clinic. Ah, write some Amika's briefs. Associate with advocacy groups or think tanks. Joint legislative initiatives. ABA task forces. Local bar groups. Use sabbatical leaves to do some real legal work. Encourage them to immerse themselves in the real world and then write about what they find out.

Encourage them to write for the people they worked with and against. Write things that have a real chance of making a change or preserving what's worthy of preservation.

And the final advantage to -- writing -- for the world of law has lived by lawyers, is that it can help solve our quality control problems of which we have lots. But one of them is that a major problem with legal scholarship is the discipline is that it has no characteristic method for determining truth. Some questions about the legal universe are testable as the political affiliations of

judges effect the decisions they render. Does the race of a homicide victim affect the likelihood that the prosecution will seek the death penalty? Empirical research into questions like these not only add new facts the body of knowledge about the law, but empirical conclusions are falsifiable and if your methods are sound and your questions are good, the answers will be useful to both academics and real world lawyers.

Which is why I actually think impaired increased research is party one part of the mix of improved legal scholarship. But it is obviously not the whole answer. Because even if all law professors could learn statistical methods most questions in law as we know are not empirically testable or falsifiable. Most really important legal questions are at bottom normative. Which competing values should prevail? What means of social ordering are preferably. And so forth and so on. And lots of legal questions are only sensibly answerably in terms of imprecise pragmatic assessments of how existing conditions and systems can accommodate desired social ends.

I think law professors should write prospectively, at least some of the time. But how does one assess the relative merits of perspective scholarly composition? I answer and I'm about to finish up here because C.J. is over there looking at his watch, by noting that the characteristic form for resolving legal disputes is direct argument between advocates, followed by some decision. So -- if legal scholarship will by nature often be long form legal argument for some assuredly preferable legal order rule or ordering, I can't help but thinking that legal

scholarship needs a good deal more exposure to the rough and tumble of adversarial processes. To the extent that we speak only to one another, there are few or no forms for this to happen. Scholarly conferences like this are good. Circulation of article drafts sometimes, but the truth is that scrutiny on such occasions is often superficial, and in any case it is far dog gone too polite. Real argument of the sort that ultimately moves the world is vigorous, searching, impolite, merciless. And in the only way to expose one's ideas to that kind of scrutiny is to push them into real world debates. To write from experience and to craft proposals and arguments for real audiences to ensure real scrutiny. If you can get into the fight -- you're cherished theory may get mauled, but it will get heard. It will be improved by your reconsideration after the mauling and your next outing will be better for the experience.

And finally, I would say I guess that law schools perhaps should to some degree change the metric for evaluating scholarship away from where you publish to what affect your work is having. Now, that's a problem, of course, if everybody is writing about Hobby Lobby or BurgerFuel then hardly anybody is having much real individual effect. And so if that's the only metric then nobody gets tenure or promotion. So I would say change the topics a little bit. Go local. Find subfields where you can really do some actual good. Where your voice can be heard. Where you can actually get out and make a difference. So my perception for the future, future of legal scholarship is really retrograde. It's literally back to the future. We should emphasize legal experience more, not less. Rather than

becoming more insalutary and scholarly in the narrow sense, we should embrace the professional, political, pragmatic, human character of law. We should climb into the public arena ourselves and provide meaningful incentives for others to do the same. We should use scholarship as a vehicle to become in our own spheres men and women of consequence in the world of affairs.

[Applause]

>> Thank you -- thank you Professor Bowman. Professor Stearns?

>> Thank you. Thank you, C.J. for organizers this conference and for inviting me to join the impressive group of scholars throughout the entire two-day program and also this impressive group of panelists.

The talk I'm going to give a bit different from the one I originally planned. I've enjoyed the sessions that I was able to attend and I agree with a fair amount of what I heard. And as you'll hear, I also disagree with a fair amount of what I heard.

For example, I appreciated judge Pullard's defense of legal scholarship and even the notion of writing for self, I do question her deposition that legal scholarship is globally about expressing the writer's vision of the good our just society. Indeed, it's not obvious to me that excellent legal scholarship needs to include even a prescriptive element.

It's undoubtedly worthwhile project. But I want to be clear it is not the only project and the only one that's worthwhile. Personally it has never been my project.

Similarly, I appreciate and I even agree with Jack Balkan's observation that the various law ends seem inevitably to become perspective asking the law questions rather than the questions associated with a postasterisk discipline. And despite that, I, I, I agree with it, but and also think that it is possible to resist that, that temptation.

What I'm going to do is make a couple of contrarian points and they'll be contrary perhaps to Professor Bowman's, but also to several other speakers throughout the conference. And I'll start with them now.

One of the major -- two of the major deposits I'm going to make is number one that, as a result of arbitrary rules generated by the Law Reviews, law professors have actually required to write articles that are too short. I know that's surprising, but I'm going to defend that. Number two, that is a result of recent trends, law professors are writing articles that are insufficiently theoretical. Now I realize that's not the position you've been hearing throughout and I promise you it is not an April Fools' joke. I sent entirely believe that law professors are required to write articles that are both two short and insufficiently theoretical.

I could say I was initially hesitant to accept C.J.'s invitation to discuss the next generation of legal scholarship on the grounds that I am decidedly unqualified. The reason I say that is personally, I've read only a slice and to tell you it truth, that's even true within my own field -- or only read of slice of the scholarship in my field. And a small sliver beyond my field or fields in

my capacity both as a faculty member, attending workshops throughout my career, and also in my capacity as associate dean running various workshops.

But I'll add this, I'm fairly confident that I'm not alone, but having been in the business now for 24 years, I have the luxury to admit it. This just -- there's just too much scholarship to keep up. And although some of it, although some of it is terrific. A lot of it frankly, leaves much to be desired.

The greatest challenge for the next generation of legal scholarship is figuring out which is which. And part of my focus is going to be on how to figure that out in the next generation so that we can actually see some progress in the quality of scholarship moving forward.

So why did I accept CJ's invitation in spite of my reservations? First, I have a simple rule, never turndown C.J., that's easy enough. And second, and less importantly, I think my background is just unusual enough that it offers the basis for what I hope will be a worthwhile perspective.

For the many of you who are unfamiliar with it, my scholarship lies at the intersection of two circles that most people and most legal academics probably think actually don't overlap at all. So there's no space there. Those two areas are -- constitutional law and law and economics. That's where I live. Where law and economics overlaps with constitutional law. And to make matters more specific within the latter my narrow field is public choice and to make the circle even smaller I tend to focus within that universe on social choice and game theory. Although I have dabbled in what you might also call interest group theory and to

show just how unusual this is, after the two books that C.J. mentioned that wrote on public choice for law students, I'm now coauthoring a textbook titled "law and economics private and public" with coauthors Todd Zywicki. My former colleague at George Mason Law School that now apparently has a different name and Tom Miceli who is an economist at the University of Connecticut. This project takes me back to my early law and economic roots, but at the same time, I've just completed a major article on the Supreme Court tiers of scrutiny, doctrine something that some folks in the room I know have been working on for a good long time and it is finally found a happy home. And what makes this unusual is that I actually believe this is all part of the same project. My tiers of scrutiny article and my law and economics textbook to me is actually the same project and what that project is, is solving puzzles or at least attempting to do so that traditional legal analysis lacks the tools to explain. That is the project that I personally am committed to. And it can be a hard project because to do it well requires that you understand something from an external discipline well enough to explain it to others so that they can begin to understand how it might, how it might -- enhance their understanding of the law.

In addition, I'm now in my third year as a, as associate dean at the University of Maryland, across town. And in that capacity, I run various workshops including my law school's traditional legal theory workshop and also the junior faculty workshop for which C.J. has been kind enough to agree to assist in allowing his junior faculty regularly to attend one of the many reasons why I would never turn

C.J. down.

When I became associate dean, I was concerned also about attendance at, and frankly, interest in, our traditional legal theory workshops. Some of my colleagues suggested to me that I abandon it in favor of a kind of group up system of workshops driven by subgroups of the faculty interested in particular kinds of speakers. I declined. And I'll explain why in a bit.

Before proceeding I think I need to answer one fundamental question, which is sort of lied at the core of all of these panels and that is -- who are we writing for? What is this whole enterprise about? And how does it relate to my thinking on this?

So do I think we're writing for judges? Do I think that we're writing for self? Do I think we're writing in the sense that it's a public good going back to one of the arguments rejected by Jeff Harrison and Amy Mashburn.

My answer is different from all of that, I think that we write to become better thinkers, to become better analysts, and ultimately to become better law teachers, that's why I think we write. I wrote many of my early articles because I finally persuaded myself that I had figured out something I was struggling to teach. That's the truth. All of my early articles began as a result of my confronting the classroom with fear and dread because there was a doctrine that I couldn't explain and I'm uncomfortable, personally, going into the classroom and throwing my hands up in the air and saying -- my explanation is that it's a mess. I just can't do that in good faith. So I actually struggled hard to come up with a coherent

frame of reference to explain it to my students and having done that I thought -- I'm going to write this up. Maybe others will agree with what I've done. Maybe they won't. But since I've gone through the trouble to figure it out I'm going to write it up. And I'm glad I did.

But I will say this -- I am quite certain today I could not have pulled that off for reasons that I'll explain in a brief moment. Now, I'm going to focus on three limitations on this generation of legal scholarship and I'm going to suggest a few modest approaches that I hope will improve things in the next generation. But I have to add one more point before I do. One of the questions about legal scholarship, if we're going to go through these machinations of how much does an article cost. The Harrison and Mashburn suggestion is $30,000 a pop. There was another article about a year ago suggesting $100,000 a pop. I think that these analyses don't work. I don't get into a detailed explanation as to why. I think the more foundational question is simply this -- if scholarship were not part of the core portfolio of legal academics, would you, would you have the same kind of legal academics or a very different group of legal academics? I for one would do something else. If law school were simply trade school, I wouldn't be teaching law. I am here because I think I have the skill set to explain some difficult things and to bring another bodies of knowledge that others don't bring together and to use that skill set to the benefit of my students. When I writing my concern is my students. It's not that I write it with the intent that they're going to read it, I write it because I think other professors might benefit from what I've

gone through in trying to explain things in teaching.

So what are the problems with the present generation of legal scholarship? The first problem is the 25000-word rule. This is a 2004, 2005 innovation that I personally think has done serious damage to the state of the scholarly enterprise in this generation. When I began writing in 1992, I wrote several articles that so fundamentally violate this norm that even I was surprised when I asked my library liaison to tell me how long my articles were.

First major article -- the misguided renaissance of social choice, 44,000 words. Second major article on standing, my colleagues told me it was too long to be an article so I should split it in two. I split it in two and I placed two separate articles one called standing and social choice historical evidence, 69,000 words. The second standing back from the forest just disability and social choice -- um, I have 68, but I think it was 58,000 words for that one.

I wrote an article on the dormant commerce clause, 58,000 words. The last long article I wrote I cowrote with Michael Brownwitz at George Mason, I'm sorry. He had been at George Mason, but he is now at George Washington called defining dicta. This is the winner -- at 71,000 words.

By the way, I will just mention I was fortunate. All of the articles I just mentioned placed well. These are in places that -- people would be very happy to place articles in these, in these particular journals. These are good journals. Today, none of those journals would read these articles. They just wouldn't. They would just say -- they are too long.

Now, I'll concede that is not a global tragedy that things that I've published would not be seriously entertained today. The world will still turn on its axis even if these particular pieces don't get, didn't get published. And to be fair, I would have written them differently and yes shorter, but the question is -- at what cost? What's lost in the 25000-word rule?

I see three problems with it and I'll start with two and I'll come back to the third. The first problem is I believe that operates to the detriment of rising scholars especially at lesser ranked schools. Two, it disallows the literature review. Those are related in a significant way. Part of the explanation of the prior article length data is that when I began to teach in 1992, junior faculty members established themselves in large part by writing major Law Review articles that began with the detailed literature review. This allowed a thoughtful overview of the state of the literature in the field in which the article was situated. And by reading one or two very, very well-written articles it was possible to gain a -- gain a meaningful grounding in the relevant field of law.

In the -- author was able to sit, carefully situate her article in the literature and them establish her new contribution very carefully, very precisely and without either over or underreaching. No one does any of that anymore as a result of the 25000-word rule.

The third point is instead what faculty authors now do is get right at it. Whatever the point is they want to make -- bang! I'm going to make this point and then I'm going to tell you why it is earth-shattering. But they often do that

without realizing that frankly, it's not earth-shattering, the point that they're making is a point that others have already made using a different vocabulary.

I've read too many articles in recent years that claim to invent something entirely new when in fact the only thing that really -- is new about it is the terminology used to describe an analysis that preceded them that they probably never read. And the difficulty is that second-year law students don't have the skill set that, earn the depth of knowledge to pick up on this and consulting faculty is a bit of a luxury accept for the most elite law journals in the country. So most Law Reviews don't have the capacity to actually get external expertise on the articles that they're reviewing. And the problem feeds on itself as more and more scholars claim to have broken new ground in some fundamental new insight. Others realize that if they say oh, I have a modest contribution that their articles certainly is not going to get read because unless you have actually invented the theory of relativity then you haven't made it to the top of the stack of articles that somebody actually wants to read.

We are rewarding all of the wrong incentives. The second point is about legal scholarship more generally and I refer to this as the methodological problem. Legal scholarship is unlike scholarship in almost any other academic discipline with the possible exception of political science. And the defining characteristic is nondefinition. If you got to a standard law conference, AAALS, law and society, or a standard political science conference, the American Political Science Association, the Midwest Political Science Association -- when you are a

philosophy, anthropologist, evolutionary biologist, sociologist, psychologist, critical theorist, quantitative methods expert. Statistician, historian, historiography, lit person or economist, you can find a home at those conferences because those conferences really are big umbrellas underneath which their documents for all of those disciplines which is to say neither of those disciplines have a unique methodological core.

This is less true, by the way, of all of the other disciplines that I just listed. Right? All of the other disciplines I just listed whether humanities or social sciences and certainly hard sciences -- have a methodological score. Now, this is both a strength and a weakness of legal scholarship. Most academic fields are defined by a core methodological approach, one that takes years of training to acquire and refine. Jack Balkan is absolutely right when he says that a defining characteristic of legal scholars is doctrinal expertise. Absolutely true. Despite that, legal argumentation can only take us so far. Legal scholars have the capacity to acquire more ambitious methodological tools that can be used to unpack the most attractable problems. Those that conventional methods simply cannot adequately address.

Now, doing that requires a depth of understanding of the relevant tools and those tools very often come from outside of law. There are also developed and designed to study problems, the solutions to which form the corpus one those external disciplines. And Jack is right that the law and -- that the law is often focused on different questions, but I think it is also appropriate to pushback.

Too much legal scholarship takes the form of dabbling. It is much like finding your friends on Facebook and sharing their posts and ignoring or criticizing rather than thoughtfully engaging with those with whom you disagree.

I've also learned that pointing out search disagreements is sometimes viewed as an antisocial activity. This is exacerbated by the problem that even at the most elite schools. Third-year law students and second-year law students lack the skill set to sort this all out. And so it remains the task of the legal scholars, not Law Review editors to ensure that if external disciplines are going to advance our understanding of the law, they do so in a way that is method -- that has methodological integrity and therefore actually advances collective understanding.

This problem is exacerbated by the incentives of rising scholars. Young scholars have incentives to place articles, preferably well, and in this can sometimes conflict with the incentive to get things right. That incentive would be stronger if Law Reviews valued deeply thoughtful scholarship that exhibited mastery of an external discipline along with the relevant corpus of legal doctrine. Editors might place a higher value on these goals if they regularly read articles that demonstrate that the author is taken the time to fully grasp and comprehend the -- that -- the -- to comprehend the literature.

It’s harder to fake bad history, bad economics, bad psychology, and the like among those who actually inside the discipline. And, and -- among Law Review editors and to be honest, even among legal scholars, that's less true. Most legal

academics have not gained expertise in the -- in the external discipline that they're claiming to have. For example, take J.K. Keller sex offender recidivism example. In which there is a claim pervasive in the literature there is an 80% recidivism rate. Now, that's just false. Okay. It's a cascade effect rather than a wisdom of crowds. Part of the problem with relying on the wisdom of crowds is you don't know when they are wise or cascading. Smith always finds crowds except when you shouldn't. That's helpful. How do you know when you should and shouldn't? Well, if you actually had an expert in criminology the expert would have read the data and say that's a bogus datum, I know it because I'm an expert in criminology. And that requires expertise and familiarity with an external discipline.

Here's a test -- if you write in an external discipline one -- three questions you might ask yourself -- are you taken seriously by those in that other discipline? That's question one. Would you feel at home attending a conference in that external discipline? Number two. Number three -- would they invite you to review one of their journal submissions? Okay.

I encourage all scholars who do interdisciplinary work to strive to hit the point in which the answer to these three questions is yes. I think that would improve the quality of the scholarship.

Finally, let me close with a comment on -- let me talk briefly about workshops and then I will give me brief prescriptions. I resisted the call to replace the legal theory workshop at Maryland with a series of topical -- oh, I'm past. Okay.

Let me just do this very quickly -- let me just make -- two quick points then.

I was asked to essentially ditch our legal theory workshop for -- ground up subject workshops. I rejected it because I think that the one way we force ourselves outside our comfort zone is to be in workshops in which people are presenting other things to us. I analogize our facilities to article three judges in that regard. We could have all specialty departments in the law school. I think it's a mistake. The other thing that sharpens our analysis and improves our teaching is to find analogies to work that other people are doing based on alternative methodological perspectives and other subject areas. And so I actually -- still fight for attendance, but I think it's a worthwhile fight.

Let me just make one -- modest prescription. I know you can't put the toothpaste back into the tube. We're not going back to a limitless Law Review submission world. But how about a peer review, review journal? How about a journal not like yuck well that says say this is wonderful, but rather a journal that we take the legal Law Reviews that are being published and we actually is an expert to write a 3 to 5000-word critical essay. Critical essay. I want to emphasize the word critical, right, not this is wonderful. This is wonderful, the next one is even more wonderful. No. An actual critical essay that says -- what it does well, where it falls short, and what we might, what might be done to have made it a better project because we can't count on Law Review editors to do that, but we certainly should at least be able to count on our authors and I'll stop there.

[Applause]

>> Thank you, Professor Stearns. Professor West?

>> Thank you. And thank you, C.J. for inviting my participation on this panel, thank you to everyone here for sticking it out.

So a part of the contemporary skepticism about the value of legal education, as you may have heard, and more broadly the value of the legal academy is focused on the perceived lack of value and legal scholarship. Scholarship that, as presently configured is a part of the legal academy's mission and certainly alongside law school graduates, its major product.

Legal scholarship is under attack from both inside and outside critics. The bill of particulars is lengthy and internally contradictory. So let me give a flavor. According to its critics from the bench and the bar, legal scholarship is overly precious. It is excessively theoretical, interdisciplinary, not useful, not grounded in the real world, and therefore, of no value.

On the other hand, according to critics from other parts of the United States, legal scholarship is overly utilitarian, nothing more than blueprints for better mousetrap, insufficiently disciplined and under theorized and therefore of no value to the larger academy. If it doesn't add to historic knowledge of our own history or the workings of the economy or of humanities cannon than it is simply not scholarship, although it may be of course any number of other things.

From within the legal academy itself, the criticisms are somewhat different, but they're likewise contradictory. One group of critics called then the

scholarly purists charged that too much legal scholarship particularly doctrinal scholarship, which is still most legal scholarship, is overly normative, meaning that because it explicitly aims to make the law better it's political posturing under the guides of scholarship its more kin to op-ed writing or political campaigning than to what two scholars are or ought to be engaged in.

To another camp, again, from within the legal academy, much contemporary legal scholarship particularly, but not only worked on by impurests of various stripes, is not truly legal scholarship, because is not sufficiently legal, meaning it has no normative bite, insufficiently normative and there nor not legal scholarship.

So according to one or the other of these various camps of either internal or external critics legal scholarship is overly academic and therefore of no use to legal profession. It may be scholarly, but it's not law. Or legal scholarship is nothing but legal writing in disguise. Elaborated memorative of courts, and legislators or writers but precisely because of that it is therefore not scholarship, of now use to the university or the larger community of seekers of knowledge and truth. And therefore, of no value. And so on.

For every critique in other words, one can find its opposite critique also forcefully voiced. Legal scholarship does not want for critics.

So I won't take on all of these critics although I do hope to do so in a fourth coming book. Here, I want to address only one of these complaints. As often voiced by critics of legal scholarship from within the legal academy often by critics from other parts of the university to whit that legal scholarship is somehow

not true scholarship because it is overly normative. The complaint here is that the goal of much legal scholarship, which I call -- normative scholarship, is to argue for or at least to articulate the way that the law ought to be as well as what the law is. Because it does so it just isn't scholarship. That -- goes the complaint.

Legal scholarship, according to the stranded criticism isn't true scholarship because of the dominance of ought statements, if it aims to make the law better it is premised on explicit or in placed claims about the way the world no less than the law should be and is hence political moral, sentimental, emotional, whatever else it is, it's normative and therefore whatever, whatever it may be op-ed pieces, Sunday sermons, it's not scholarship solely because of the factoring because it is normative. We shouldn't do it.

As Stanley Fish pithily put the point in a book title from a few years ago, we should save the world on our own dime if we're intent on saving the world. We shouldn't aim to do it in the classroom or in scholarship. We should aim for truth, not for social betterment. If he's right then normative legal scholarship, all legal scholarship is of the form the law is X, but it should be Y, whether from the political left, right, or center, whether it is about the Constitution or international human rights law or traffic ordinances. Whether it aims to improve law through doctrine or through statute or through regulation or by working its way pure, whether it is motivated by a sense of justice, esthetics, efficiency or raw self-interest. All of that's not just bad scholarship by virtue of its

normativity, it's not scholarship at all. So that's the complaint I want to address here.

Let me begin my response to this critique by noting the ubiquity or the ordinariness, the normalcy of normative legal scholarship in the legal academy over the past century and a half. What we now call "traditional doctrinal scholarship" such as policy-based scholarship or precedence-based scholarship. The scholarship often derived by critics add extended briefs, but also what I will call big idea pieces such as, for example Benjamin's pioneer work, refractioning tort laws, a law of wrongs. Hanna's work unearthing the public regarding theories of justice in contract law. Larry Kramer's arguments from the beginning of the century, of this century of about and against judicial review and constitutional law. Or the work of a number of legal economics such as Collin and Chevelle that only are tax policies and not legal rules should aim for, for distributive justice. All of that and much else besides, is normative legal scholarship.

It's all about what law ought to be and not only about what law is. It is the bread and butter of legal scholarship. Normative legal scholarship in the last 20 years may have become more exciting, more theoretical, more interdisciplinary, more sophisticated, more philosophical and so on over the -- course of the last couple decades, maybe not -- but it has been the bread and butter of legal scholarship for well over a century and it still is.

If we take the critique of normative legal scholarship onboard we will have to jet us in the bulk of the legal academy scholarly work. Now, critiques of the

normativity of traditional legal scholarship have also been around for a while, but not quite as long a while, maybe the last 30 years or so. You may recall that law professor Perrier Slag from the University of Colorado wrote a trenchant series of articles in the late 1980s attacking normative legal scholarship. Professor Paul Khan from Yale Law School wrote an extended and quite similar one in his book on legal culture from about 15 years ago. Such critiques, though, for various reasons have unquestionably picked up steam over the last five years or so.

So what is the case against it? Well, there are a bunch of complaints wrapped into the bill of particulars, but to focus on just one -- that's captured in Fish's book title I mentioned a moment ago "save the world on your own time." The complaint and brief that's captured by Fish's title and transported into the legal academy is that overtly normative legal scholarship is not scholarship at all. It's politics sloganeering or campaigning. It's not grounded in reason, but rather impassion or sentiment or partisan politics. Legal scholarship needs to be, must be, empirical descriptive dispassionate and reasoned. Arguments about the world of the should or arguments of the form the law should be thus and so -- are on the values side of the fact value divide and for that reason they're political, plain and simply, and as such have no place in true scholarship.

The recent move towards imperialism and legal scholarship is heightened the contours of this complaint and has put pressure not only on normative scholarship, but on other forms of legal scholarship as well including critical scholarship, legal theoretical work, and clinical scholarship. But it has put the most pressure

on traditional normative legal scholarship.

So two practices have arisen within normative legal scholarship that are some ways I think are responsive to this complaint, but they are not direct offense against it. They weren't articulated in this way, but they are responsive to it. One I want to call the quasi DorKinyoun response, this is not terribly creative. And the second the quasi PosNarian response. Named after Dorcon and Pozner both who have written massive amounts of normative legal scholarship, but their types of responses not responses, those two individuals themselves articulated. The DorKinyoun response to the critique of normative scholarship in brief is that statements about the way the law, sorry. Statements about what the law is always rests on claims about what the law should be. Such that even the driest, most purely descriptive of legal claims rest necessarily on claims about the legal out. So -- saying that the consideration doctrine requires an exchange of values is saying something about what contracts should be enforced, etc. If Dorcon is right, then purely descriptive analytical work that purports to do nothing but say what the law is, is normative through and through its turtles all of the way down, legal analysis just is normative, necessarily so if Dorcon's account of legal argumentation is sound.

I have a lot of sympathy for the position. I wish he hadn't tied it so closely to adjudication. But I think that the position is -- is -- is -- probably right about -- the nature of the legal argumentation.

The second defense of normative legal scholarship, the quasi PosNarian

response is to tape or rationalize the normativity of traditional legal scholarship by recharacterization normative claims as cost-benefit analysis. The aim here in part, whether or not to succeed is to basically transform normative claims about what the law should be and to claims of fact. The benefits and the costs of various policies, laws or rules drawn from cases. The result of this PosNarian translation works is that scholarship can be both normative and rational and nonpolitical. Benefits and costs after all are facts of the matter even if we do generally regard benefits as good and cost is bad. We can then make claims about what the law ought to be, while avoiding the claim that we are politicking in the classroom or in the pages of Law Reviews if we stick to our knitting, meaning if we stick to the tabulation of costs and benefits and whatever inferences right be clearly drawn from those tabulations.

Now, I believe that normative legal scholarship, scholarship about what the law should be is important. It’s generous. It's not done anywhere expect in law schools which means that if we lose it, the world loses it. I think it is great social value. It’s often moving. It's even more often consequentially and impactfully influences both our political environment and our history and the world of ideas and the university.

I also believe, though, that normative legal scholarship, scholarship that aims at a coherent explanation of what the laws should be, deserves a much more robust defense than either the DorKinyoun or the PosNarian arguments that I sketched out. Rather normative legal scholarship, I think, can be and sometimes

should be explicitly what both DorKinyoun scholarship and cost-benefit scholarship try to ward off. It should be explicitly, sometimes, utopian, overly political, aspirational, heartfelt, and impassioned. It should also, of course, be humble, as is true of all scholarship. It should be open to objection and informed by our understanding of law and legal institutions and their constraints.

But normative legal scholarship is basically about what justice requires and the degree to which law delivers on what justice requires or the degree to which law should deliver on what justice requires. And if that's right, if normative justice is about what justice requires, then such scholarship is and should be rooted impassion as well as in intellect.

So I will call for short the normative scholarship I'm interested in defending and a passioned normativity. If the charge against normative scholarship is that it is political, ethical, moral, emotional, and passioned, rather than rational reason, intellectual descriptive or empirical, I would suggest that rather than try to limit normativity or our defense to only those forms of it, the DorKinyoun, the PosNarian forms, that seem to be the most rational, we instead, at least, consider embracing the passion or root of justice of our understanding of it and hence of our own normative scholarship. Legal scholarship is and should be about justice requires it therefore must be normative to the degree which I believe is considerably that justice is itself a product of our passion. It must also there authority be impassioned. It is not captured in PosNarian fashion by cost and benefits and it's not captured in DorKinyoun fashion by the institutional decisions

made in the past. By precedent in other words, even as discerned by herculean judges. Nevertheless, there's a problem with both impassioned as well as detached or passionalist forms of normative scholarship as well as with the defense of such scholarship that's entirely different from the Fishian complaint that we are inappropriately and unethically trying to save the world on the law school and hence the law students and hence the taxpayers dime.

When law -- when lawyers, as well as law professors focus on what we might be able to do with law to bring the world into better alignment with, with, with what we think the law ought to be, we sacrifice to some degree or critical voice. Precisely because our sense of the way law ought to be is so heavily influenced is nearly determined by the bulk of the law that is with much of that law that is being given so to speak a critical pass.

So when we do that, when we focus on the normative, when we all become pragmatists now, to paraphrase a paraphrase, and paraphrase, we internalize a huge loss. To correct for that loss, we also, and I mean by we, the legal academy, but also society, we need legal scholarship that has no normative ambition whatsoever. Not so that it will there by better because dispassionately state what the law is and not because it will say something truer because more dispassionate about the economic or political meaning or consequences of law or say something better because we're dispassionate about our legal history or the role of law and political history, all of that it may be true, it's just not my point. We need scholarship that has no normative ambition whatsoever so we can

better understand and so that we can therefore better criticize the world we inhabit.

By focusing on work in the legal academy on normative ambitions by focusing on law as in means to justice, we risk losing to some-d or focus on law as a means of exploitation, legitimation, subordination, and suffering. We lose our focus in other words, on law as a means to end justice and on the role of law and promoting the power rather than the role of law in promoting the common good.

Both rationalists and impassioned normative scholarship. Scholarship that aims to show what the lot ought to be is indeed of defense today against the presumed trigeminy, the positive economic analysis of the law, of descriptive and analytic legal scholarship, of purely historical scholarship of writing and of some, although not all, of interdisciplinary scholarship and I'm happy to fend both impassioned and rationalist normative scholarship against all of those forces, not to display any all of the other forms of scholarship, but to keep all of this work on the stable. But normative scholarship itself is also a threat to something that's even more marginalized by all of those forces and that's critical legal scholarship. Melt both narrowly as it was defined in the '70s and '80s but also more broadly meaning scholarship with no direct normative ambitions whatsoever, but with the age of better understanding our own situation which just might be so steeped in injustice that no legal fix in the world is going to come close to correcting it.

So if we want to understand our current justice, I believe, we need big, large,

ambitious scholarship that's unabashedly critical, unabashedly and even antinormative. We in the legal academy needs to aggressively carve out space for that work because if we don't it will disappear.

If we want to use law to further the ends of justice, I think we need big large ambitious scholarship that is unabashedly normative. We need to aggressively carve out space for that work as well, but make no mistake about it, if we want to understand how law serves the ends of injustice, we need big large ambitious scholarship that is unabashedly nonnormative, nonpragmatic, that does not aim for a legal fix, but aims instead for understanding.

Right now, normative legal scholarship even of the rationalist PosNarian, DorKinyoun variety and certainly of the nonPosNarian and nonDorKinyoun is under quite severe attack, but critical scholarship is in even worse shape. It is so vilified. It has shrunken its scope and its ambition. The legal academy has to its credit a different points over the last century been a welcoming environment for both normative and critical legal scholarship. The legal academy has at various times understood such scholarship as central to its mission and to its distinctive contribution to the world of ideas and politics both. We need to become that institution again. Doing so will not be easy. In fact it will require self-consciously resolute conviction.

>> Thank you, Professor West.

[Applause]

Professor Gilman?

>> Thank you. C.J. So -- the ballpark opens on Monday and in that honor -- we can all take a seventh inning stretch.

[Laughter]

I'm honored --

>> How about a ninth inning stretch.

>> Ninth inning stretch. I'm honored to be the final speaker at our two-day conference and I want to thank you, C.J. for bringing all these voices together. I know that I've learned a lot. You've given me a lot to chew on in the days and weeks to come.

So -- um, this conference is focus on the future of legal scholarship intersects with another major trend happening in legal education and that is the rise in experiential education. And I'm going to talk about this intersection.

So as many of you know, the American Bar Association is now requiring that before students graduate they take six credits of experiential education. And according to the ABA, that is come from clinics, externships, simulations -- and simulations have cheaper, which maybe very tempting to law schools, but there are many reasons why clinics are superior. Okay?

Real life is Messier. Students engage in the work of clients more deeply because they're real consequences. Students learn to exercise judgment in situations of uncertainty. Students get to see and evaluate interlocking systems of oppression and develop their own professional identities. I could go on, but that's not this conference. Okay?

One reason that's less talked about in terms of the value of clinics is the role that they play both in generating meaningful scholarship and also in disseminating scholarship with real world impacts.

So we begin by talking about how clinicians voices may be different. So every year at AAALS conference I do a workshop with Jeff Pokeric, who's a vice provost at Sefest University that some of you may know, and this work shop is for clinicians who are new to scholarship. And when you get these folks in a room what they really want to do is talk about/complain about how to overcome barriers they face to writing namely time. Okay?

Being a clinician is like being the managing partner of a law firm when you have 100% attorney turnover every four months. Okay? It's exhausting. Okay.

[Laughter]

So as much as the clinicians in the room want to convention about this, Jeff and I don't let them. Okay? Instead we ask them at the start to write down three ways in which they may actually have an advantage as scholars over their peers or doctrinal colleagues. So first they're kind of puzzles where do I begin? Okay. They're thinking, how can we, the second class, the marginalized citizens of academia possibly have an advantage over poorly doctrinal professors who have more time and institution of support? But when forced to answer the question, they do begin to get excited and we get a range of responses. But the gist of them is this -- one, they realize clinicians have firsthand knowledge of real world legal problems. They're deeply immersed within legal systems. They can see gaps

in the law through their actual case work. They've a front row seat at observing the unintended consequences of law. And they see various lawyering models and challenges. Okay?

Second, clinicians have passion. Okay? They have a lot of anger about the systems they see that can be channeled into their writing, I think we all know that anger and the associated desire to effectuate change is a great motivator to put pen to pencil.

Okay? Third, clinicians have a lot of experience in writing and often writing under deadlines. Right? They're in charge of writing or at least supervising briefs, pleadings, and motions -- they're writers. Okay?

And finally, one advantage clinicians -- will say that they have is interdisciplinary perspectives because we often work collaboratively with social workers, medical professors, community organizers, business owners, and others. Okay? So at this point in our workshop, clinicians are getting a little bit excited. And motivated. They realize that they do have a unique vantage point as practicing lawyers, teachers, social change activists and participants in and observers of the legal system. Okay?

So let me give you some concrete examples of what this means for legal scholarship from some of my own colleagues here at UB. Here at UB, we are very fortunate as clinicians because we are on a unified tenure track. We have this same resources for research as do the doctrinal faculty. And our clinical supervision loads are adjusted to ensure that we're productive scholars. And

there are other schools represented on the panel today who have similar frameworks for their clinicians to allow them to engage in scholarship.

Okay. So here's my first example. And this comes from my clinical colleague Dan Hatcher. So being in the trenches representing foster children Dan was able to see that State of Maryland was staking the social security benefits due to foster children, appointing itself as their representative payee, and then taking those kids' money to put it in the state's general fund with the justification that it was paying itself back for the cost of taking care of foster children.

Okay. So Dan was able to link this practice not only to other states where it happens around the country, but also to a wide range of other programs in which state and local governments are hiring private contractors to find ways to divert funds that are intended to support vulnerable people and to put them money right into their own coffers.

So Dan wrote a series of law review articles highlighting these practices. He was able to get major media outlets, including the "New York Times" to report on it, he has testified before State and Federal legislators to change the law in this area and he has addressed high-level federal officials within the Social Security Administration. And his book, that traces and extends on these practices called "the poverty industry, the exploitation of America's most vulnerable citizens" is coming out this summer to a bookstore near you and I think really holds the promise to reform some of these practices for the benefit of the poor, the disabled, children, and the elderly. Okay?

It is unlikely that a doctrinal faculty member would uncovered these practices. A legal aide lawyer might see them, but would never have the time or resources or support to ere these practices or the place them within a larger theoretical context, a clinician is uniquely situated to do so.

Now, I'll give you one more example. So being in the trenches of his mediation clinic, my colleague Rob Brovenson observed that mediation legal scholarship was full of very fascinating theories about the appropriateness of mediation, competing models of mediation, the values of mediation -- but he realized that no one was writing about a key feature of mediation, that is what is the role of a lawyer who represents a client in mediation. Right? Not the role of the mediator, the role of the lawyer. Okay? So using narrative theory, Rob explained how to council clients about the mediation alternative in ways that enhance client autonomy and -- his work has been very helpful to hundreds of lawyers like me who are comfortable with and we grew up trained solely within a litigation narrative for dispute resolution and we had no tools or language for helping clients decide whether or not to mediate.

Okay? So here again, as a scholar, Rob saw this gap in the literature, as a practitioner, he saw a gap in conceptions of a lawyer's role in this emerging field. And as a clinical professor here at UB he had the means to fill both of those gaps. Okay.

I could go on all day with examples of scholarship from each of my wonderful colleagues here, but I don't have the time to do that. So -- you might be

thinking -- well, that's wonderful that clinicians are able to shine a light on practices that, that doctrinal faculty don't edge counter and it is wonderful that they can give voice to clients and organizers and legal services lawyers who might not otherwise -- have access, the academic sphere and the legitimacy that it bestows, but what can clinicians do for me as a scholar? Okay. And I argued to the nonclinician legal scholars among us that we can be one of your most valuable resources for making your work matter in the real world. Okay?

So in my own clinical teaching and lawyering, I've been profoundly shaped by the work of other scholars, both clinical and nonclinical. And so here, too, I'm going to give you two examples.

So one example comes from the work of Martha Fineman a feminist legal theorist who many people in this room, I suspect, are familiar with. And at the risk of really oversimplifying her incredible work, well I'm going to do that anyway, but she's argued at heart that because every human being is inevitably dependent at various stages in our lives, right? When we're children, when we're sick, when we're elderly, it makes sense for us to recognize from the outset that society as a whole has a vital role to play in providing assistance to dependent people and in supporting families to do so. Okay? So I would say that's her theory in a nutshell. I hope I'm -- doing it some justice here.

Okay. So how can I disseminate her work through my clinical? So in my clinic we represent many low-income single mothers struggling to balance childcare and work. When they fall off this balance beam they can indeed face a variety of legal

troubles. Consider the mother cutoff from welfare benefits because she was not able to access a childcare voucher due to a state shortage. In our current work first welfare system these are grounds for her welfare to be terminated all together. And these are the type of cases my students will handle. Okay?

Initially, students often mirror society's neoliberal notions of individual responsibility that in turn blame low-income clients for their own condition. Okay? But by exposing students to Martha Fineman's theory of dependency, students gain greater understanding as to the universality of dependency. They can articulate now why society has a shared responsibility to support families that do not conform to the marital household model. In turn, then, students can craft case theories that shift the factfinders focus away from individual blame and into a larger social context. Okay? So theory -- applied to practice -- improving people's lives. Okay?

I'll give you one more example that's been very informative -- influential to me, and that's Kimberle Crenshaw's work on intersectionality. Okay. And I'll say before I get into this, that I teach a-- "regular" feminist legal theory class and when students are exposed to these theories oftentimes they're eyes light up and it’s like you see this shades going up. It can be a very exciting moment for them. Right? But in the clinical when you talk about these theories it goes from beyond being illuminating to actually being transformative. And that's the point here I'm trying to make.

So Kimberle Crenshaw also very simplified here, has explained how different

systems of oppression are interlinked in people's lives. And how law often fails to recognize these intersections. Okay?

Here's an example of how those very powerful insights were used in my clinic to effectuate change. So I was in court one day when I, ah, saw a woman -- being evicted due to domestic violence. Okay? The landlord simply did not want to put up with the noise and the police calls that this woman's abuser was generating. So I was just sitting back in the peanut gallery, not happy to see this, this was happening all the time, there were other people in this state concerned about this pattern happening and we organized together with my students and -- other students at UB and advocates from across the state to draft and introduce legislation that provides legal rights to tenants who are suffering from domestic violence.

And what intersectionality theory was helpful in doing is assisting the students to unpack the different systems of oppression that were putting these women in the position of losing their homes. Right? Gender, class, race, different systems of property ownership. And with these insights, the students were able to see that a one size all, one size fits all legal solution would not work. Okay?

Instead, we could better enhance the autonomy of domestic violence victims by giving them a range of options related to their housing. Such as a defense to a beach of lease case. Or a legal right to have their locks changed. Or a legal right to terminate a lease or a leave with minimum financial penalty. Okay. Why we had to make compromises in the legislative process, that's not

unusual, the bill was ultimately passed with a range of these options to enhance the autonomy of domestic violence victims.

So again, this is where theory -- impacted law through the video clinical students. Okay?

So Robin West has brilliantly asked the academy in some of her writing to picture a world without legal scholarship. Okay? And so I'm going to ask you to consider a world without legal scholarship written by clinicians. Okay? Within clinics, we would have very good skilled, abled teachers who have a message to share with a wider world, but no vehicle or type to share that message. Okay? We would have students with also great legal skills, but less of a theoretical framework to employ them effectively in those cases and for the rest of their careers.

Academia would lose the view from the trenches that clinicians provide. We might never surface important problems that need resolution by creative thinkers. Judges and lawmakers would be deprived of insights from other experts. Our profession indeed, society, would be denied important voices from lawyers whose lives are dedicated to social justice. We would also lose those voices in thinking about the constraints and opportunities of law. Okay?

So if one role of law schools is to inculcate justice, why wouldn't we want to expand the very range of voices whose job it is to teach and deliver justice?]

So -- in conclusion, this new experiential learning requirement is putting

law school -- law schools across the country very much at a crossroads and how they're going to fulfill this mission. Schools, you know, may embrace exponential learning through a live client model or rely wholly on cheaper and less effective simulations. They may choose to grant the clinicians the status and the means to produce scholarship or they may not. And legal scholarship, I argue, should be part of this calculus. Part of this decision-making as schools are at this juncture.

If schools truly care about legal scholarship, they will embrace clinicians within the scholarly fold. Thank you.

[Applause]

>> Thank you. Professor Gilman. Thank you. Panelists. And -- your program says that this panel is finished at 4:45. What that really means is about 4:55. So -- we do have time, I hope, for some comments. Suggestions? Can ideas? Thoughts? Questions from some of you. And if you would like to do that, please come on up to the front. We have a microphone. It's -- it's not going to be recorded. We're going to cut it off. So we're cutting off the recording. We do have a microphone.

[Event concluded]