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>> I'm CJ Peters and as 99.9% of you know by now I'm the Associate Dean for Faculty Scholarship here at the University of Baltimore School of Law and I want to welcome you to the second plenary session of the fate of scholarship in America law schools conference. This morning we had a terrific panel discussing legal scholarship and legal education. We had a very interesting and informative, I thought, lunchtime talk by Dean Kellye Testy, and now we proceed to our second panel, Legal Scholarship in the Legal System which is going to be moderated by our own Dean, Ron Weich. And I'm sure that many of the interesting themes that were raised this morning are going to be raised again and I'm sure that we're going to have interesting ideas to talk about with this panel as well. So please let me turn it over to Dean Ron Weich.

>> Thank you CJ, and thank you all for coming back after lunch. We're going to have a lively panel to keep everybody awake after lunch. And in this panel we are shifting gears. In the morning I think we spoke about legal scholarship

and its value in general and its role in legal education. For this panel we're now turning our attention to the impact of legal scholarship, if any, on the legal system, the practice of law, the work of lawyers and judges. And we have a wonderful panel, very well equipped to guide us through this discussion. I'm going to introduce them in a very summary way right now. Each of them will then speak for ten to fifteen minutes. I will follow the lead of Professor Sellers in the first panel and introduce each panelist in greater depth right before they speak then we'll leave plenty of time for questions, discuss among the panelists and participation by the audience. So I'm going to look to my immediate right and continue right on down. We're joined by Professor Amy Mashburn. Again I'll be saying more about her when she talks, but I'll just say she's a professor and the Associate Dean for Academic Affairs at University of Florida's Levin College of Law. To Professor Mashburn's right is Judge David Hamilton of the Seventh Circuit Court of Appeals. To Judge Hamilton's right is Judge Nina Pillard from the District of Columbia Circuit in the United States Court of Appeals. And to Judge Pillard's right is a professor with a more difficult name. Professor Rashmi Dyal Chand and she pardoned me in advance for mispronouncing her name, which I may do at different times during the discussion. In a rough sense, and this is a vast over simplification, but in a rough sense, Judge Hamilton and Professor Mashburn are critics. They have some skepticism about the relevance of legal scholarship or thoughts about how legal scholarship could be more relevant to the practice of law. And in a rough sense, Judge Pillard and Professor Dyal Chand are defenders

of scholarship. I think their views are more nuance than that, but it just explains why the order is going to be first the critics and then the defenders and then interaction. So first we're going to hear from Judge Dave Hamilton. So he gets his full introduction now.

Judge Hamilton, as I said, a member of the Seventh Circle Court of Appeals. He's been in that role since 2009 and before that served as a judge on the United States District Court for the Second District of Indiana and served as Chief Judge of that court. Dave is here for lots of reasons, but among others, he is my law school classmate and moot court partner. Thirty something years ago we sat in front of a panel, the finals argument was before, this is how long ago it was. It was Judge Scalia, who was a judge on the Supreme Court, Judge Arlin Adams from the Third Circuit and Judge John Newman from the Second Circle. And I think we won. Didn't we win? We won.

>> I'll just stay silent.

[Laughter]

>> We're pleased to have Judge Hamilton here and one reason why he's useful for this discussion is that his chambers, his Seventh Circle Chambers are in the Indiana University Law School. So while he's not a tenure track professor, he sees them all of the time and has a sense of what they do and he's very well situated to tell us whether they what they do is relevant to what he does. So Judge Hamilton.

>> Thank you, Ron. Good afternoon everyone and thank you all for the hospitality here and the opportunity to visit you all in Baltimore and to share

some thoughts that I hope will be useful contributions to this conference. I assume it's escaped no one's attention that this conference spans April Fool's Day, and my objective here as the outsider from the academy is to try to avoid playing the fool, I guess. I'd like to start with a true story. As a new district judge years ago I had a case that posed a conflict between rights of one employee under the then new Americans with Disabilities Act and the rights of other workers under the seniority system under the Collective Bargaining Agreement. The question was, who had priority rights to a particularly desirable job and shift at a railroad yard? But obviously the issue was potentially a quite sweeping accordance for employees and employers across the country. My case was literally a case of second impression in the country at that time with this interesting conflict of rights. But it was also presenting an issue that had been quite predictable. Well, I heard oral arguments and my clerk and I realized, okay, this is going to be tough. So we got to work and we discovered three things very quickly about this conflict in statutory rights. First, the statutes were essentially silent on the question that we faced. Second, the legislative history showed that Congress recognized the problem, but the history was inconclusive as to what Congress thought ought to be done about it. And third, there was no controlling case law. So I asked my eager law clerk to look into the law reviews available for advice and after a thorough search he came back and summarized the available articles. One, the statues are silent. Two, the legislative history is inconclusive and three, we'll have to wait and see what the courts do. [Laughter

] This obviously was not helpful. At the time I focused on my disappointment. I soldiered on and wrote an opinion and ultimately it was affirmed and the approach to the problem wound up being accepted around the country but for the legal academy in hindsight, this is always seemed to me like a great missed opportunity. Here was a foreseeable problem, one that had actually been foreseen by Congress and at least some scholars and it offered an opportunity for someone or perhaps several people to do some careful thinking and to argue for a particular solution to this problem. Preferably someone who had A, more expertise than I did in labor and employment law and policy and B, the more time to devote to the process than I did. Instead, what I found were simple descriptions of the problem and punts as far as identifying potential solutions. I would have been very happy in fact I would have been delighted to cite and endorse a Professor Doe or Roe or even if somebody had taken the bull by the horns and offered a collision even if I had disagreed with it, I think it would have made for a better debate as first I and then some other courts began to confront that issue. So that's kind of the, that may give you some perspective of where I'm coming from. I am grateful to be here not as a producer of legal scholarship, but only as a consumer. Unlike my colleagues, Nina Pillard who used to be a professor, I have not done that, although I hang around a lot them these days. And I want, I don't have, I don't have any kind of an ambient view of these problems with the legal academy. I'll just try to offer the perspective that I have as a consumer and I hope to talk today about how my colleagues and I use scholarship. About what is measurable and not

measurable about the impact of that scholarship, but the effects of changing formats on legal scholarship and its use. I'd like to also talk about some more aspirational roles for the work that you do. I am aware at least dimly of the wide range of legal scholarship. I am aware of the popularity these days of empirical studies of almost anything. I'm sure many of them are valuable but I also, when I come across these articles, often conclude that you cannot always count what matters when you're doing empirical studies and that what you count often does not matter. I am aware of the emerging growing dominance of law and in higher faculty more and more with PhDs and introducing more interdisciplinary scholarship. I am aware of quite dimly because I don't have time to deal with it, some of the more highly theoretical work that is being done. And I'm aware of a good amount of doctrinal work ranging from broad surveys and descriptions of the law to narrower focused articles that offer more prescription with respect to doctrine. And I should also say with respect to law and, I don't mean to be critical of it because I would also say that doctrinal critiques and prescriptions from the perspective of law and, for example, combining the lessons of psychology or economics to critique existing doctrine and court practices can be incredibly useful in the work that you do. It is in my view, the doctrinal work critiques and descriptions that is most immediately useful, I think that's been shown and a little bit of empirical work, if I may use that term, that Judge Wood, my colleague has done in a survey of our court's work, because after all, legal doctrine is what we do. It's not enough just to say that what we're doing is contrary to sound

psychological principles or economic principles, we do at least need to tie it in somewhere into the fabric of law and continuity. But in the doctrinal problems that we face I would say most courts feel we're pretty busy. A little secret, when you are first trained as a brand new Federal Judge, the very first lesson in those, the two weeks of classes, is how to complain about your caseload. Okay. [Laughter] So we do that, don't take it all that seriously, but we do generally feel pretty busy and think that professors who may be interested in a particular problem may be subject to a little less time pressure and have more time and all of these eager research assistants to help dig into the problem. And that's helpful but I want to also suggest that there's another way in which this doctrinal can be in critique can be especially helpful and that is those of you in the academy are not tied either to docket pressure or to clients and a need to bill for your time. I know you're accountable to the Dean, but that's over a long term. Maybe there's some time for blind alleys here and there, and I don't want to exaggerate flexibility and leisure time, but I think it would be fair to say you've got more time along those lines and you do not have to be tied to client interests and some of the centers of power and wealth in our culture that have such an impact on the shape of law. In his book "Dreams from My father", now President Obama, recently graduated from law school at the time, was writing about some of his disappointment about his encounters with the legal profession and he said, "The study of law can be disappointing at times. A matter of applying narrow rules and arcane procedure to an uncooperative reality. A sort of glorified accounting that serves to

regulate the affairs of those who have power and that all too often seeks to explain to those who do not the ultimate wisdom and justice of their condition." Now he had a lot more to say that was a little bit more optimistic about legal institutions, but I would say that pushing back against that more disappointing view of legal institutions, those of you in the academy can do a great deal by giving voice to perspectives that don't necessarily have short term pay offs. And you have the ability I think, as much as anybody else in the system, to speak truth to power. And I hope that you all will use that. I'll talk briefly if I could about attempts to measure judicial use of legal scholarship. Of course, not surprisingly that tends to be focused these days on citations to law review articles and judicial opinions. It's easy to do, at least at one level it's eminently countable. And some of the recent findings are that judicial citations to scholarly articles have been increasing. Interestingly, they are found most often in courts that are relatively lighter caseloads. So think about that. That's certainly true on our court which tends to do a lot of it and we have a relatively light caseload on Federal Court of Appeals on a per judge basis. It also turns out that a relatively small cohort of appellate judges is responsible for most citations. Something like 14% of the judges account for about 50% of the citations. I'm in that group. My colleague, Diane Wood, as I mentioned, did an empirical study published about a year in the Yale Law Journal that included a survey of one year's worth of Seventh Circuit Opinions. We had 669 published presidential opinions that year. 76 of them, or 11% included citations to scholarly articles, to about 173 different

citations. Put that up against your Jeffrey Harrison's 8,000 articles a year, and I know we're just one court, but obviously we're not getting to a lot of that material. And about 70% of those citations were to doctrinal articles, either to surveys or to narrower doctrinal issues. What that tells us though is we've got about 90% of our opinions without scholarly citations, but I would urge you not to worry too much about that because a lot of what we do is doctrinal within fairly narrow confines. We don't need to seek out guidance from the academy as we are just working through iterations on particular statutory or common law issues or procedural issues. But when I looked through the list of cases that Wood had collected, what I found was that most of them were in the most important and ambitious cases from our court during that year. We turned to the academy when doctrine and precedent offered the least guidance. Now I should also add that there's another use of legal scholarship that may not be as much fun but that is in the form of treatises and restatements which can be incredibly valuable uses of legal scholarship. I don't know if people get tenure for that kind of work anymore but it is a, it can be very, very valuable there. And I also should say that I try to urge my law clerks to use secondary literature, not only the treatises and restatements in articles to learn the existing lay of the land, but also to explore the secondary literature on the pivotal points of decision, at least where those pivotal points are more doctrinal than factual. And when come up I'm always happy to take a look and cite them to try and explain what we're doing. So why do I cite them? To adapt an old joke that others have adapted to this context,

you can suggest the judges use law reviews the way a drunk use as lamppost, more for support than for illumination. [Laughter] Where I can explain a decision well based on authoritative precedence and primary sources of law, those are the places I'm going to go first in terms of writing. The citations to secondary materials, or at least most of them, can be a signal that you just don't have anything stronger in terms of power and authority and you're out there on a cutting edge. Although it's also true that a citation to scholarly work may be a shortcut for a citing and referring your reader to massive bodies of law which, I hope the professor and his research assistants have read and I have not. But I would suggest when we are using secondary materials, the work of legal scholarship, it is most important when I and the professors are in essence trying to shape the law in a new direction or trying to solve a problem. That's certainly when I need it most. And I should add for what it's worth, when I'm hiring law clerks, I'm looking for law clerks that have shown in their law school and sometimes later years, some experience with that kind of work. It may be their own notes or seminar papers. It may be working with a professor on research projects that have kind of a goal, but somebody who has had both the intellectual ability and the ambition to try to shape the law in some way is somebody that I'm usually interested in hiring. I believe Professor Mashburn is going to be talking about how unreliable, among other things, how unreliable citations counts may be, so I don't want to take away from that, but I do want to illustrate some invisible ways in which legal scholarship can be very important. Again in the toughest cases, where the law

is uncertain, when we face a choice between two evils or between two competing goods, that's where I really welcome the kind of careful, I hope unbiased, or at least transparent thinking from good scholarship. It could be in something as unexciting as how different states manage collection of delinquent property taxes, a topic on which I recently turned to scholarship. It could be something as important as emerging circuit splits in class action law. Another recent topic that I turned to scholarship. Or it could be something as dramatic as the same sex marriage cases about a year and a half ago. When I learned that I would be on the panel when our court would address those issues in 2014 I frankly knew very little about the applicable doctrine of case law. I read a number of opinions to get ready and frankly was pretty disappointed with the way a lot of judicial opinions seem to overlook the hard problems and the implications of various arguments for the next generation of cases. So I turned to scholars. I had law clerks who were very interested in issue. I said, you know, give me twenty articles to take on vacation, busyman's holiday, I know, but I felt to do my job well I needed to do some of that reading. And I found a variety in terms of quality and viewpoints but it turns out that there were some real gems, much better than anything the courts were turning out at that point. And what I learned from that reading profoundly shaped by thinking about that case or those cases, rather, for purposes of oral argument and for conference. Nothing was cited of that in the final opinion by Judge Posner. He did cite one law review article on the same sex marriage opinion. It was Oliver Wendell Holmes Jr.'s article from 1897. [

Laughter] Half of the law could criticize it as depressive in tradition and that came right before a citation to the Book of Leviticus, if you're interested in the subject. But I hope that may help illustrate one way in which scholarship can have a profound impact. I would like to talk briefly about the technical changes that have produced huge shifts in availability and usefulness of legal scholarship over my professional career. We now have massive databases allowing instant searches and rapid sorting. If you compare this to 30 or 35 years ago when Lexus or West Law had their dedicated terminals in the law school library or in the law firm. Very expensive search charges, limited databases, not user friendly interfaces, so it was hard to browse. So the judge who wanted to search the secondary literature needed to send a clerk to rare, good law library to spend a lot of time prowling the shelves and looking in the books. My clerks and I can now sit at our desks of course and replicate those results in seconds and quickly begin sorting through the results. That makes this vast body of material much more accessible to us and I should add, without the filters of the hierarchy, necessarily in terms of who the authors are or where it's published. The hierarchy tends to be, how close is the match to my search terms and that can usually be very helpful. I want to talk in particular about the effects of blogs and SSRN that I think provide important opportunities for scholars and other commentators to be heard in court in a timely way beyond submitting amicus briefs. So instead of writing for a target audience eight to sixteen months from now, you can write tomorrow morning for the blogs and provide immediate distribution of your drafts

through SSRN. And I would suggest, at least if what you're doing it is addressing something that is pending now, it might be a lot more rewarding to get that work out quickly rather than have to revise an article twelve months from now about how the courts have gotten it wrong over the last few months, as they finally encounter this problem. With respect to blogs, I want to note in one rather high profile argument in our court I had asked the question about lines of precedent, but the counsel did not expect and the answer was a complete whiff. Just not satisfactory at all. But a professor who had been following the litigation noticed the question that I had asked and noticed that I really didn't much of an answer and two days later answered it on a high profile blog that I happen to read. So I got my answer or at least an answer two days after the argument and it turned out that that actually did show up in the final opinion coming out of that case. That is that line of precedent, like a citation to the blog. I think the impact was certainly there. And if you want to see immediate impact I would also suggest that you look at litigation involving the contraceptive mandate and the accommodations for religious not for profits. Look at the writing of Professor Marty Lederman on vulcanization blog, which is one of those that I look at regularly. His writing has been powerful, detailed, persuasive and incredibly timely. I don't know if anyone else has noticed Marty's writings on this topic, but he has responded, after the argument, the case was argued before the Supreme Court last week with some somewhat surprising views expressed from the bench, some actual assertions made from the bench. Professor Lederman answered a number of

those questions on vulcanization early in the morning. I don't know if anybody cared or noticed, but he answered it early the morning of the day the justices were going to be talking about those cases in their conference. Now is that going to have a decisive impact? I don't know. And it may be advocacy, see in Marty's case it is advocacy on a particular point of view but it's a rigorous form of advocacy and it's an open market for ideas. And I should add I do not just read lefty blogs [Laughter] when I'm trying to see what's going on in our world. That kind of work takes a substantial investment in time. It requires a reputation for credible, reliable analysis of the issues and the influence may not be visible and linear, but I would suggest that the opportunities to have that kind of impact are available across the spectrum of opinions and philosophies. I would also just like to talk very briefly about the elephant in the room and that is the role of students in legal scholarship. Professor Mashburn's article that I hope she'll talk about some has provided new data that status and hierarchy perceptions matter with respect to law reviews, schools and authors. That's fresh data that reminds us of this elephant in the room. I realize it is a very old elephant. And it's a room that's been around for a while and many of us have become numb or oblivious to its presence. But the role that even very good 2L students play in deciding which articles get published where is from the perspective of anybody outside the academy, unique and bizarre. [Laughter] I know these people are really smart and hardworking. I try to hire them when they finish their law school. And they are, those people are like some of my smartest friends in law school back in 1982

and 1983. But my friends who followed academic careers are now a lot better qualified, I would suggest, to make these judgments about the relative quality and importance of legal scholarship then they were 34 years ago as 2L students at Yale. I recognize there are various local acts of rebellion against this ability of the 2Ls and acts of resistant against it with more and more, at least a little more professor and peer reviewed journals. But I would suggest to you it is not enough and we need a lot more, and even for student edited journals, a lot more guidance from experienced hands would be a very useful thing. I'd like to conclude by going back to the role of critique in dealing with the work of courts and I cannot emphasize this strongly enough. Courts as you know are tied up in debates of our own legitimacy over theories of legal interpretation. We have our textualists, our originalists, our pragmatists, those who are advocates of living Constitutions, those who are advocates of dead Constitution and so on. I will spare you my standard stump speech on that topic, but I would suggest that true scholars understand those kinds of interpretive problems a lot better and have explained them a lot better than I can. But suffice to say, the problems with textualism and originalism cannot be a solved in a way that I find is persuasive and satisfactory. So I am more from an all of the above school of legal interpretation looking for help wherever I can find it. And I count on the legal process, the transparency of a public adversarial process of publicly explained decision based on a publically available record to provide both illumination and legitimacy for what we're doing. What that means to somebody from my point of

view however, is that the legitimacy of our judicial decisions depends a great deal on how persuasive they are in the legal community. First are the judges, but also to the bar and to the legal academy as well as to the general public. The test for us is, have we persuaded our audiences? So what we have is a vital feedback loop between judges and scholars. We need your critiques. It would nice of course if they're fair minded, if they're not too personal when you see room for improvement, but where else are we going to get better guidance about the need for improvement in the work of the courts than from the legal academy that has the time and the talent and the professional skills to evaluate the quality of the work we're doing? So I would urge you to take the opportunities presented to offer those critiques, seize the opportunities to speak truth to power. Again, wouldn't mind if it's at least bulleted, but I'll welcome that. Speak truth to power and push back against the capture of legal institutions by groups and institutions that are particularly well endowed with wealth and power at this point. I look forward to the continuing discussion and thank you for your attention.

[Applause]

>> Thank you Judge Hamilton for that very thoughtful balance presentation, a critical in some ways, supporter in others. I also want to say that when he referred to his smartest friends in law school, I think he was talking about me, but I'm not sure. [Laughter] next we're going to hear from Professor Amy Mashburn who as I said, is a professor at the University of Florida Levin College of Law.

She's the Associate Dean for Academic Affairs and Director of the Lawyer and Professionalism Program at that school. She's been at that school since 1990. Practiced law before that. And she, this is kind of a continuation from this morning because Professor Mashburn is a co author of Professor Hamilton of the article we heard about earlier, "Citations, Justifications and the Troubled State of Legal Scholarship, An Empirical Study" which was published in 2015 in Texas A&M Law Review. Professor Mashburn.

>> I think I'm going to speak from here. I invite you to think about the talk I would have given if I hadn't spent about six hours in Atlanta last night and acquired a cold. But I want to thank you for inviting me and I think that what where will bring will be a true outside perspective, even though I'm a member of the academy, law professors are my tribe. I love them. I love their scholarship, but I come to you today not to praise legal scholarship but to add a critical voice to the mix from within. And I do that in the spirit of finding common ground between our belief in what we do and outsider's perspective that there's a lot of room for improvement. The truth on both sides of this. So I'm going to describe the problem to you with describing a series of disconnects and then what I think is causing this. I do have some proposed solutions, but in the interest of not going too long I can talk about those later if you have questions. And I don't know if I mentioned I have a tremor. I mention it because sometimes people, if I say nothing, they think she's very nervous and they're kind to me. I don't want you to do that. Or they think I'm about to blow because something

is making me really mad. And neither of those things are true. The first disconnect is what I'm going to call the straw man version of the argument which flows partly from the article and beyond and then what we're actually saying. The truth is somewhere in the middle. The straw man version, and I'm doing this out of deep respect, but it's the version that you heard at the lunchtime talk. It's essentially a version that we don't like theory. Not true. I love theory. Legal theory has changed the way I live my life, the analysis and those things, I use them every day. But the argument that it's either other. That we're talking about eliminating legal scholarship or we're talking about adopting incentives would reduce the production of a certain type of scholarship when really what we're trying to do is increase the production of more meaningful scholarship. We're not saying, in fact, quite the opposite, that citations matter to the extent, and more about that in a minute, that others believe they do. And that the lack of citations is in and of itself demonstrative of the lack of influence. We definitely do not say that. Or that legal scholarship should be presumed to be meaningless or without quality or merit. None of those are what we're saying. I think that we as a group have to become more accepting of the process of change. 26 years I've been in legal education. I've been dismayed for example, by the ALS's response to the AVA's efforts to reform legal education and I just, and I feel a little bit of that potential here. That a conference devoted to thinking seriously about the fate of legal scholarship, improving it, could bust out into a celebration of legal scholarship, which we do every day in the academy in many ways. And the

reason why I say that is because I have been meditating a lot on change and how we change, that's partly because an I'm an Associate, a new Associate Dean at an institution where we're trying to really change things. And I've been reading and thinking about theories about how you get groups to change and one of the things that happens is the first response is usually wait, you've got it all wrong. If you really saw us, if you really understood, you wouldn't be asking for us to do things differently. And I guess I just wanted say I really see you, I really value the work, but I'm still asking for some change. The second sort of disconnect is between the reliance and the promotion and it is relentless on what I'll call raw citations counts and the problems that our study found with those counts. And this surprised us, but we to accept that the system we've created with student edited law journals and their incentives to cite the insane fuzzy labyrinth system of citations that forces students to their medal by citing virtually every sentence in a law review article is going to generate a lot of cites. But when we dove into those cites and looked at what they were actually citing for, and I'm sure everybody in the audience has had this experience who is a scholar, you think, oh yea, somebody cited me and you go look at it and say, what are they citing me for that? My co author Jeff Harrison was cited by this reporter, he won't like me saying this, for something that he isn't sure he said, but he'll take it. [Laughter] The problem is when we dove into those cites, not only was that the case, but in fact what the readers liked were the things that the judge was talking about. That's a place where we really bring value, but we don't value it. And

these are descriptive, organizing, template imposing framework framing work that is meaningful, but not necessarily the main point of the article. And that very rarely were articles, did it seem like the siding work was actually influenced by the legal theory that was the main reason why the work was being produced. Not saying it doesn't happen, not saying that our sample was definitive. If you think I'm wrong, go forth and prove me wrong. I'm just telling what we found. The other thing is that our assumption that publication in a law review is recognizing and legitimating quality scholarship, or the articles that ought to be published where they're being published. In fact, the system is really flawed and I want to make it clear to the students in the audience that this is not by any means questioning your role, it's the role we've created for you. But what happens when you have a flood of 8,000 articles a year and harried law editors who have to try and pick from them, they rely on surrogates for quality and those surrogates are things like where the professor graduated from law school, who's in the thank you footnotes. And so what we found were really hard correlations that were status driven. So in fact something that we think is very open and because the likelihood of citation in secondary sources and in judicial opinions was related to the rank of the school where the law review was being published. It means that those decisions have real consequences about whose ideas are getting out there and how. And so our current system is perpetuating stratification and privilege and elitism, and we need to take a look at that. The other sort of dichotomy is on the presumed influence of scholarship on groups other than law professors. We hear this, it's

often the I'll use an example. This is an article that transformed, people will say transformed law, but what it's really transformed is legal scholarship in that area. It has certainly captured other legal scholars and that they have lively debates, I have no doubt. But on a point that important and why it's so important in a moment, we mustn't presume that. We need to know what types of things are styming our ideas from being helpful, where we can be really helpful and what types of things we need to incentivize because we need more of them produced. The reality is, among law professors, we know how we show one another that we are somebody to be reckoned with in the debate. I don't think we ever have to worry about generating enough of that. It's the other types of scholarship that we need to focus on generating. I won't spend any time on this one because I think Professor Harrison talked about this. But our perception of scholarship as a public good and the sort of dubious overinvestment in scholarship, it may be the case that when, from 1972, if you look at the growth in law schools, it's amazing. And every one of those schools, if you look, have sort of adopted the Harvard tenure model and that meant those professors had to generate law review articles that would get them tenure at the university. This is what is the engine that's fueling this. On a more profound level, this is really about, and it is hard to be a law professor today. There's nothing worse, because I teach professional responsibility. I do blogs, the ABA stuff, and to read the type of virtual that is so loosely leveled against law professors, it's unfair and it's distorted. So I don't want to add to that, but there's a truth here that we're

not looking at. It's the disconnect between how we view ourselves. We view ourselves as reformers and agents of change and we do that without any knowledge of whether our impact is really going beyond other law professors. And then to use an analogy from a very bad movie, if you read the way the public views us, it's as if we're in habitants of a village where the norms that govern how life is conducted literally come from another century. And the boundaries of that village are policed by man made monsters. Everything that those of us in this room use to distinguish between what's legitimate and what isn't. And what that does is cut us off from the life giving force that was always the interplay between law and practice. To me it's very sad when people would really question whether that's something we ought to be doing. Of course we should. This notion that things are progressive and that the right progressive way is that those paths would deviate is very wrong. For a hundred years practice the formed and shape of legal education and informed the shape of scholarship. This is how the treatises and how the law really got written. And meanwhile, this is happening when beyond the borders of that village is crushing unmet legal need and a legal profession that's crumbling under its structural inadequacies to deal with that need. Now it's not like people in this room aren't trying to help with that problem, but my goodness, to say let's celebrate legal scholarship because you know, practice will take care what? Let's even pose the question, why care about practice? In these times is to me, stunning. And then finally it boils down for me to this, it's the importance of legal scholarship measured against the importance of the legal profession and

law itself to life in this country and beyond. We have the capacity to help in ways that are broadened and can be expanded, but because we don't think of it that way I think we're preventing ourselves from doing that. Mark Tushnet said there's no major intellectual history of intellectual history in the United States, and I'm sorry, but this is what he said, that would have a serious section on legal scholarship. Now that may in your mind be wrong. He may be wrong, but this is the problem that we don't want to hear this and address this. And I think in difference to allowing time for questions and other things I will stop with that. But I will say, well let me say, okay I'm to do five more minutes and then I'll yield the floor. The sort of, how did we get here? Because we're all well meaning people. We have jobs, we want to do them well. Many of us came into this profession because all of those pressing needs are ones we cared very strongly about. I think you can look at it as a failure of counter balancing incentives because that's we're talking about. Incentivize the production of a different type of scholarship. You can think of it as a failure of self regulation. That mirroring the legal profession's struggle to modify its response to the pressures of modern life. You can think of it at capture. You can think of it as garden variety resistance to change. But I tend to think of it as from, with I'll leave you, I think it's always a good day when you end with a little [indiscernible]. So I think I'm going to leave you with an analysis of this. This is what Neber says, he says in self interests get aggregated into collectivities that when they have power to do things and take on a personality, and it's not a really flattering

personality. How could it be? Because in his view it's going to be less than the ability of any individual to exercise reason and high moral sort of thinking. And the collective personality is one that is morally complacent, self righteous, it adheres to simple moral distinctions either or thinking. It doesn't have the power of self transcendence. And I think that's why I view myself as bringing a perspective that is urging us as a group to try and just for a moment transcend the way we see ourselves and to entertain the possibility that others may have something to say about what we could do better. Thank you.

[Applause]

>> Thank you, Amy. And as your co author said this morning, very bracing remarks, very thought provoking and very well said. We now turn, my simplistic structure here, to the defenders, although I'm sure the defenders will acknowledge some of the concerns that have been expressed. So we're first going to hear from Judge Nina Pillard. Judge Pillard was appointed to the United States Court of Appeals for the DC Circuit in 2013. And she really brings three perspectives to this panel. First of all, she's a judge. Before that she was a professor and before that she was a practitioner because having graduated from law school she clerked and was a fellow at the ACLU. Then served as Assistant Council at the NAACP Legal Defense and Education fund. Served as an assistant to the Solictor General of the United States. And then as Deputy Assistant Attorney General in the office of Legal Counsel in the Justice Department. She then went into the academy and taught for many years at Georgetown Law School before her appointment

to the bench. And among other things was Co Director of the Supreme Court Institute at Georgetown. So please welcome, Judge Pillard.

[Applause]

>> I've been moderator many times and I have to feel for Dean Weich because I think we're failing in the one task that he set for us, which is to set up a clash of views. Because I really appreciate the remarks that Judge Hamilton and also Professor Mashburn and there's more coincidence among our remarks than we might have planned. So in an effort to be contrarian I've framed my talk as an argument why law professors should write for themselves, as lawyers. [Laughter] One critique of the state of legal scholarship takes is the premise that law reviews should be useful to judges. You think I'm going to jump right on that bandwagon now that I'm a judge, but the critique envisions that the professor's the producer and the judge and the consumer of legal scholarship and that's admittedly a simplified version, but it is a strand that has been out there and perhaps most articulated by my colleague, Judge Harry Edwards of the DC Circuit. For years he's been saying more or less something along those lines and it's been echoed in critical comments by Chief Justice John Roberts and by several others. And according to that critique, the legal academy has gone off the rails by producing way too much scholarship that is esoteric, abstract, impractical, non doctrinal, interdisciplinary, theoretical and just not very useful. The articles in their view should be more doctrinal or if aimed at a legislator audience, maybe more policy prescriptive and it's all more useful to advocates, lawmakers and people

who are out in the professional field and with limited time in trying to get it law right. And we've all observed that the critique has always been given extra energy, given the economic hit on the profession and on the legal academy due to the recent economic crisis. And there's just been a lot of criticism, what are we doing wrong? How can we do better with less? There's so many new pressures on the academy and on faculties to better justify ourselves, themselves, no longer in the academy. Including scholarly priorities. So maybe this was a long standing problem, but it's come to the forefront and given a lot more scrutiny because of the economic times and squeeze. And the legal employers are under economic pressures too. They're devoting less time than they did in fatter years, in lean times, the practitioners are turning to the law school deans and saying look, give me more practice ready students. So there are these calls coming from practice and that too places pressure on law faculties to do things that are more practical. I would say even in the terms of that standard critique, that things are not so dire. As Judge Hamilton observed, particularly in areas that are very important, that are relatively novel to the bench, in my view of the work product of my own court, areas in particular of international law or separation of powers where our own cases just really don't begin to answer the questions before us, we do rely and we rely quite seriously and heavily on legal scholarship. But as I said, I would question the basic premise of the critique about what the purpose of legal scholarship is. And in my contrarian proposition, a law professor's duty is not to write for the judge or the lawmaker, but to write for herself. Bear

with me while I try to explain a little bit what I mean by that preposterous indulgent sounding kind of fantasy notion. I think that in order to evaluate legal scholarship we have to ask ourselves what is it and what it should be all about. And I think it's not all about making law faculties at the helm of a grand kind of law associate training program. We all go in to law teaching and are excited by law teaching because it's much more than that. So basically my first prescription for the legal scholarship woes is that, starts with law hiring. That law schools should hire faculty that are people whose ideas about justice, whose proposed strategies for pursuing deeper understandings of the best functioning of the legal system are ideas and strategies that are appealing to the people that are doing the hiring. If you hire people whose projects you think are worthy and admirable, then with varying degrees of appropriate attention to curricular needs, you are going to come up with, I think, worthy scholarship. I think that is in fact what most law schools actually do. Does that mean everything's great? Not necessarily. But I do believe in academic freedom. I think people do work of various skill levels. Some people are more successful with theory, with practice, and integrating them and with interdisciplinary scholarship, but I'm not irate over the state of legal scholarship. That said, my own taste applying my own rule of thumb about who I would hire is for people with more practice, experience and I think there is a trend actually, sort of coinciding with some of the economic pressures to be a little bit less allergic to people who have practice experience. I do think there's a large role in the law schools for work that is doctrinal,

practical, policy minded and oriented towards practitioners and the current problems that we immediately face. And I think that schools need to be hospitable to that. And I think the schools have really moved away from that model that kind of still dominates the legal imagination that's sort of the mild 20th century Harvard model where the dean calls up the Supreme Court justice and finds out who's coming off the clerkship and hires that person who hasn't done anything else his life. So I do think we're really broadening what we look for and that people with really interesting experience are coming into the academy. I do agree that also, law schools need to do more to teach practical things. They need to teach more broadly, not just doctrine, but reading and understanding and drafting legislation, regulations, the law making process, writing in a clear and organizing and candid way. All of the sort of skill stuff, absolutely. But I think that the critique, the basic sort of misstep of the critique that I'll attribute to my friend and colleague, Harry Edwards is that it just misses the hybridity of what it is to be a law school and a law faculty. Of course it's a professional school. Most of our students, unlike those of our colleagues in the rest of the university, don't grow up and become us. They don't become scholars. They're going on to do something different. They're going on to practice law. But as I said at the outset, I think the thing that excites us, and also that gives the legal academy its value, is that it's both inside a practice and creating people for practice, but also outside. It also is a truly academic discipline. And that inside/outside quality is sort of the basis for me of my push back against the

critiques. I think there's a really important place in the law for interdisciplinary work, historical work, economic work, sociology work. There's a really important place for work that uses models and data sets. There's also a very important place for highly specialized writing that doesn't speak to the generalists, that might strike a sitting judge's gobblety gook because it's so picayune, but that in fact is part of a dialogue that's taking place within a subpart of the profession. So I, like all of us, have the articles that I see that make me sigh and roll my eyes and think, oh come on, really? Why is that important? Why is that valuable? But if I step back just a little bit I realize that that is the academic enterprise and it's a really important part of what it is to have a thriving legal academy. So I'm questioning the producer consumer idea that the legal academy, the writing of articles is for the people in the field. And one way that I'm questioning that is that it's obviously not only such a direct exchange, and I think back on my own experience as a law student taking classes with professors who were extremely involved in the major theoretical debates of the day whether it was law and economics or CLS or critical and perspective thinking or practical ethics. Their writing was very much in these impractical modes. It infused their teaching, it informed their teaching. It really became part of the world view that they imparted, you know, through very doctrinal classes, to generations of law students. And to me that was really the sort of mark and the architecture of the academy. It was something that was not necessarily even itself read, again, by anybody but the scholar when in fact it was read by a whole community

of academics, but the notion of part of what the scholar's responsibility is, is to think deeply about the law as someone poised to transmit to students who themselves may never read this stuff, but to transmit to them something that is informed by that deeper study, by the broader study and by the really critical engagement rather than just being a participant and perpetuating a trade. Again you have the yes, we're perpetuating a trade, but I think the thing that excites us not just as academics, but as people who practice in the law, is that it is both a practice that has an impact in the real world, but it is also a practice that strives for an ideal of justice. That touches on all these different fields and draws on all these different fields. In light of that hybridity of the field and therefore role for lots of different kinds of scholarship, I would point out that there are some real hazards that we face that other academics don't face. If you're validly teaching, maybe I'm misunderstanding, but if you're teaching accountants it's pretty straight up the professional side. If you're teaching academic historians, you know, it's straight up the academics. The hybridity is a hazard for legal academics because we're situated in a practice and we can become committed to its current ways and inadequately able to distance ourselves and be critical. We're teaching in an academic field that tries to sort of be deep and critical and above it all, and we can de resonate from the practice which is really the life's blood and the purpose of what we're doing. The comfort, sort of the purchase of the traditional academic of objectivity and disassociation from the real world and the real professional trainer of complete sort of service to the

field, neither of those is really quite available or should be, I think, available to the law professor. And the last thing I want to do is point, not just to the importance of being attentive to sort of these two faces of academy, but also the role of practice in fueling the current malaise over legal scholarship. I think that the disappointment and rising critique of legal scholarship may actually be more symptomatic of what's wrong with the profession than what's wrong with the academy. What do I mean by that? A suspect that a lot of the anger that is shown is a partial displacement of anger over the state of the profession and the state of the field of law. And I think it's the, the cry is going out, not really because law professors are somehow essentially the culprit, but because there's a generalized disappointment that a lot of lawyers feel about justice, more generally. That people's experience as practitioners of justice aren't living up to the ideals that a lot of the different constituents hold. Teachers hold, practitioners, clients, the public in general. There's a lot of sense that we wanted, that we thought when we got into the law there would be more meaning and effective life and I think what we're hearing in part is practicing lawyers mad at the academy because they're really yearning for a legal practice that helps them do more to live up to what drove virtually all lawyers into the field in the first place. And I think some of those beyond my talk really diagnosed the field and they're familiar to the pressures that we see now more than 20 years ago or in the good old days. There's a lot of unhappiness in the profession based on overwork. The increasingly profit driven practice. The competitive pressures

to clients, I think puts additional strain on lawyer's ethics. Lawyers want to serve their own sense of justice, they want to be servants of the court and of the law and more competitive pressures they're under, the harder that is to maintain. I think it's inevitable and a beneficial department, but the law is becoming very specialized. One of the things that was sort of ideal was the dawn of modern legal education, a lawyer could really be generalists and we have part of that. We don't have departments within the law school, but it is very hard to keep up with the scholarship across, even a single faculty and really be able to be meaningful and engaged with other people. So there's a splinter in specialization that threatens our sense of coherence and I think, you know, threatens that pluralism will tip over into kind of vulcanization, if I can. Seeing Jack back there in the audience. And I think it's important that we don't abandon the ideal of a civic discourse that lay people and generalists lawyers can use, but I think it's a frustration that people are. So you have in a sense I would put more of the blame on the practitioners who are wanting not only wanting the professoriate to sort of create better more relevant legal memos for them, but you know, for their actual work, but also to help them retrieve a sense of meaning that they invest in the law. And I think that we all should invest in the law, to be a source, not just of useful skills, of useful resolutions, but also of an image of justice. An improving image of justice that really meets our most, our harshest and most surging scrutiny. And in terms of scholarship, what I come back to is what I started with which is the idea that if you hire law faculty

that have a vision of justice and really a program that's appealing and they really honestly go after it with all the tools available to themselves and try to speak to the world, not only as it could be, but the world as it is now, which is the hybridity and the strength of the field of law, I think it's a tremendous contribution. I think that's what we're at our best, our most successful that we do and I think that we should keep doing it.

[Applause]

>> So CJ has allotted us a little bit more time, which I appreciate because I do want to leave time for questions. I want to thank Judge Pillard. Her take proves, you can take the judge out of the academy, but you can't take the academy out of the judge. She obviously has a home in law school teaching and I hope she'll get back there at some point, even why she continues her judicial service. Finally, last but not least, we will hear from Professor Rashmi Dyal Chand who is on the faculty of Northeastern University School of Law where her research and teaching focus on property law, poverty, economic development and consumer law. She's published extensively and her article, "Human worth as Collateral" won the Association of American Law School's scholarly paper competition for new law teachers. Before that she practiced the law firm of Foley and Hoag and with the non profit housing developer. So she's well equipped to talk about the value of scholarship to practice. And I invite her to come up. She and I have agreed that she'll talk for about ten minutes. I'm going to actually cut her off, with her permission, so that there is ample time for discussion and questions. Thanks,

Professor.

>> So I think I I'm going to add Judge Pillard's statement that this is really less of a divide between the defenders and the skeptics then maybe it is a view of the same glass, but some of us are thinking it's more half full than half empty. In many ways I think I'm really presenting a part two to some of the comments, especially that were made by Amy. So what I want to do is really present a guardedly optimistic argument about the value of legal scholarship to the legal system. It's a normative argument. Here we are, we're talking about scholarships and let me just raise the term. It's a normative argument. It's also kind of baldly aspirational. It's not necessarily a statement about what legal scholarship is today. Some descriptions, some skeptical descriptions of which I certainly agree, but rather about what it has the potential to be and the ways in which we might think about measuring it. And in fact it's a highly optimistic argument about the potential value of legal scholarship. It's only guarded because I think legal scholars need to do a great deal more to maximize the value of our scholarship to a different and broader range of audiences and in doing so, we need to think about how best to communicate with those new audiences. So my main argument, if I get nothing else out at least I'm do that, is, and really it's a drawing together of a number of themes that have already come up in this half day that I hope will be further elaborated upon during the rest of the conference. But the main argument is that the primary audiences for a good deal of legal scholarship that's produced today need not and perhaps should not be judges or even other experts

in the law or even certainly at the primary level, other law professors. Instead our primary audiences ought to be non experts in the law, lay members of civil society. And the corollary to this argument is that some of our most important work is therefore translational work. And I'm using the term here differently than Professor Allen did this morning, really to mean scholarship in which we work as legal scholars to make the law the vocabulary of civil society. So a couple of years ago my law school, Northeastern, held a conference on contemporary writings in legal scholarship and I'm very grateful to CJ and the other organizers of this conference for this opportunity to bring together the conversation we had at that conference with the important one we're having here. In some ways I'm just channeling aspects of that conversation as well. One of the most consistent themes that emerged out of that conversation at Northeastern was the value of the law and of legal scholarship in providing a common language for the ordering and functioning of civil society. And this is a function that's meaningfully displaced, as many members of that conversation noted. It's recently been displaced by the vocabulary of business practice. So Patricia Williams, who's already been cited at this conference, once gave a keynote at our conference in which she really beautifully described this displacement of law by spreadsheets and the thing the evaluation of a broad range of programs on the basis of such concepts their entrepreneurial nature is another nature of the displacement of legal vocabulary by business vocabulary. So the second piece of my argument then is that we really ought to just judge legal scholarship and look for ways in which

to value it, partly for its translational value, for its contribution to the language and the structure of civil society. And then the third piece of my argument is that this translational work is important in its own right, but it's also important for the purpose of bringing about systemic change. I'm not saying [inaudible], I'm saying systemic. Paradigm changes in the law. And here I come back full circle to the audience because these kind of systemic shifts are probably best achieved not through communication by legal scholars to judges and then from judicial opinions to society, there are other reasons why, you know, it may not be the most appropriate communication strategy judges as Judge Hamilton has noted, to rely in first instance on these kinds of secondary sources. But rather such paradigm shifts probably are better accomplished in a trickle up process from scholars to civil society and finally through judges and into formal law. So I want to spend my remaining time giving a few examples, without trepidation, and then also perhaps drawing some lessons about how we might make better sort of, better fulfill the translational potential of our work. But first a couple of caveats. First, I by no means I'm trying to suggest that we should not be writing at all for judges and practitioners. Indeed I think, especially coming from a place like Northeastern that that's an important function that we still have. Rather I'm arguing for a broadening of our audiences. And secondly by no means am I defending law reviews as a primary media of publication nor citations counts as a primary means of measuring the value of our scholarship. Indeed, I agree wholehearted with Jeff and Amy's recommendations, but I want to add some additional

basis for considering the value of legal scholarship and that's my primary purpose. So moving to just a few examples, and I offer these not as justifications for current scholarship, but as a basis again for considering the transitional value for legal scholarship, at least of some examples and the ways we could better support it. So perhaps the best or most well known recent example of the translational function of legal scholarship and of law is in the development of human rights as a language for protecting and advancing human development. So in its recent namely post-World War II history as a formal concept, human rights originated in the collaboration of world leaders working with and through the United Nations to develop rights and principles and also laws to protect those human rights. And from the protection of human rights to the various covenants and treaties that followed it to the up taking and development of these principles by non governmental organizations to the critiques of human rights and indeed of rights as a basis for legal remedy and more broadly for justice, the vocabulary of rights has been a critical driver of human and social development since World War II. And I think it's entirely non controversial that legal scholars have been deeply involved in that conversation. They are interpreted the legal status and force of rights for use by non legal advocates in developing frameworks for justice and development and they've contributed enormously to the various critical paradigm shifts that have occurred in the conversation about rights and the potential of human rights to advance civil society. I want to cite some additional examples as well, one in particular, but the rest of these examples really more are suggestive. They're

I think suggestive of the potential for legal scholarship to serve that translational function, but also suggestive of the ways in which that function has not entirely been fulfilled and still has yet to be. So first a prominent example from my own field of property law. Almost 30 years ago Joe Singer published an article in the Stanford Law Review titled, "The Reliance Interest in Property Law." In it he revisited the holding in the well known case of local 1330 United Steel workers versus U.S. Steel in which the judge affirmed the right of the U.S. Steel corporation to close a plant in Youngstown, Ohio. Although the judge was sympathetic to the union's claim that the company should be required to sell the plant to the union on the basis of a property right, in the ongoing operation of the plant, he concluded that there was no precedent to support such a property right. In his article, Professor Singer argued that there was a basis in the common law for finding such a right and that it was grounded in the idea of reliance. And this article really spawned a conversation that began actually in the terrarium that Jeff and Amy refer to in their article, among property scholars that's on going today in which we have explored the multiple sources of property rights, formal and informal purchased or acquired by a means of labor or reliance, Unitarian or fragmented and the limitations of those rights. Now while legal scholars differ greatly in their conclusions about the sources and limitations of property rights, I can't imagine teaching, to harken back to our first panel of the day, or understanding property law today without acknowledging the existence of this range of views about property rights. So in delineating a reliance interest in property

law, I would argue that Professor Singer translated the common law of property relationships to develop a broader understanding about what rights could flow from those relationships. Now at the time he wrote the article I would guess, I haven't asked him, but I plan to now, that Professor Singer was targeting judges as his main audience but in a recent article revisiting his 1988 discussion of the reliance interest Professor Singer seemed to acknowledge that the real impact of this debate among property law scholars in part, has been in helping Americans to understand and to interpret the effective property rights and relationships in contexts like the recent financial crisis whereas he stated and to quote him "it is apparent to all that regulations of property are needed to prevent and respond to the externalities associated with arrangements that are indifferent to the rights and needs of third parties and to the nation as a whole." 30 years later in that article he also focused on the primary importance, one that he felt was still unfulfilled of developing a public vocabulary about what property rights, about the property rights that are recognized and their sources and their limitations. so I would imagine that we could think of such examples in many, many other legal fields. I'm looking to Ron for time.

>> Three.

>> Okay. So I won't give more examples, even though I have a few that I would like to. [Laughter] You know, but consider, I think Dean Testy gave a number, I would add to that some other wonderful ones, but I'll have to save that for another day. I will say that in the examples that I have in my mind, legal scholars have

translated the rules and the role of law for a much broader audience than just each other, just judges and just legal experts. And they have at least begun to generate a conversation that makes use of law as a common language of engagement among those who are not experts in the law. And here my argument really overlaps greatly with those who are more skeptical, and I'm thinking here of both Jeff and Amy, we need the develop means of measuring this kind of impact. One obvious example would be by looking at the extent legal scholarship, legal scholars present the core of their arguments in out lets like the popular press. So I want to end then by just exploring what we as legal scholars could do because if you said you agreed with my normative claims, what could do to maximize our legal scholarship as translational work that targets those who are not legal experts and that has the potential to contribute to important paradigm shifts in the law. And I have several themes that I want to focus on. Again, some of which have already been raised in this conference, to my delight. The first is of course on the subject, on the theme of audience. So we need to write in such a way as to acknowledge and value the translational function in our work. Why are we analyzing doctrines? For whom are we doing it? Why are we using theory? What values do these things serve for translation and for affecting civil society's understanding about such concepts as property ownership or constitutional amendments. I was going to use that as an example. Or immigrants or Hiroshima Timora has discussed in a couple of his recent books. That's the first thing. The second is about the issue of norms and prescriptions and basically what I want to suggest is that we need to

revise our own sense of what it means to do normative and prescriptive work. Should judges be the primary targets for our prescriptions, for example? And more basically, what does the focus on translation mean for normative scholarship? Third, I think we need to think about our scholarship using a couple of different time frames. We should think about and be judged by the value of our scholarship both in the near term as translational work and we should look for ways in which to measure its value over the longer term as contributing to para time shifts. And for these purposes I want to emphasize and urge us all to work with our own institutions to reconsider the value of descriptive scholarship. And finally, we, and this is an important one, of course, we need to think about where we publish so that we reach these new audiences and we accomplish these additional functions. And I heartily agree with the discussion of a variety of outlets and books being one example, but I would also say that some of the most effective legal scholars today are those who develop a series or chain of publications for their major scholarly arguments. These chains may include book published in an academic press, a book published in a trade press, a law review article, a series of articles published in newspapers and popular magazines and a poster too. They can be part of the same chain of dissemination, but again used for the purpose of reaching a range of audiences. And another promising and interesting trend seems to be that of co authoring in order to reach interdisciplinary instances and of course, tenure committees and others who judge our work should think about this also. And I think those of us in the role of research deans or directors should have

conversations with our colleagues about using different media of publication to reach different audiences should be part of our standard package of services that we offer. So in short and in conclusion I hope as we continue to think about the potential and the fate of legal scholarship we can look for ways to affirm and judge the value of legal scholarship as a formal service to the profession, something that so many judges from Edwards to Roberts have emphasized, but that we can define that service more broadly and aptly to capture some of the most important contributions in legal scholarship over the last few decades. Contributions that I think would pass our gut test for having added value, but deserve a more articulation of exactly why.

[Applause]

>> So a major apology to Rashmi for rushing her in any way. I encourage others to speak to her at the break about other example that I deprived her the opportunity to talk about. But let's take a couple of minutes for questions. Anybody that has a question come up to the front. I'll kick things off with a couple of thoughts and questions. But if people would want to gather before the microphone, please do so. I think the interesting theme that emerged in this panel was the question, who is the audience? And I heard of couple of different answers. I think judge Hamilton was saying, judges, he's thinking like a judge. He's saying tell me what I need to know to resolve this thorny issue that's in front of me. Maybe he would say that to other audiences, but certainly wants to be one of the audience members. I heard that Judge Pillard said, write for yourself and that, you know, she was

candid in saying it sounded indulgent, but she has a theory for why that actually serves a broader audience. And Rashmi Dyal Chand I think says non experts in the law. So let me Amy Mashburn, who do you think the audience should be?

>> Law professors and others. We focused in the article on judges only in the section of the paper where we were looking at citations but I couldn't agree more that we ought to be writing for a broader audience and we ought to find ways, as was mentioned to structure and consider that and educate our university level promotion and tenure committees to value it. In fact, I would say we need to take over the means of production of legal scholarship and publishing venues that in creative ways can target exactly the type of audiences that were mentioned because I think that's exactly right. So my argument would be not just law professors.

>> Judge Pillard, does it disturb you to think about targeting audiences? Should professors be so strategic, Marty Lederman, trying to reach a judge on the morning of an argument?

>> No, I actually think, you know that any audiences are great, but I think the plea that I want to make in light of the call for more practical work is the basic research, if you will, that the legal academy supplies and no other actors in the law do supply, which is to really think with the luxury that the law school gives to the law faculty. Really think about and bring all critical tools, all analytical tools to bear on this question of what is going to be a more just society. Because if it's not happening here, then it's just politics and I think that that's, we do have a competitive advantage in the legal academy in doing that work. And

then of course, sending it out to many audiences.

>> Okay. Let's get some questions gathered. I see Professor Greg Doland from the University of Baltimore.

>> So my question I guess I wanted to [inaudible]

>> Microphone.

>> Oh is it on? So the question that I wanted to ask Judge Pillard and I guess is the physiology that perhaps, can be so fine tuned is that you said that law faculty in hiring should pick people who basically who, whose research would be interesting to existing law faculty, if that's what, I mean at least that's what I understood. And if that's sort of the standard, then it seems to me that there's at potential to be in danger of kind of self replicating and not having sufficient intellectual diversity. You taught at my Alma Mater, as you perhaps know there were at times, at least at the time I graduated, I think there was maybe one conservative on the faculty and he was on loan to the White House. So I just wonder how do we, how do we guard against that so we do not have a uniform law faculties or the vulcanization that we have the law school, George Mason that is known to be a conservative law school and Georgetown that is known to be a liberal law school.

>> That is a great corrective question because I didn't at all mean advocate self replicating and I do think that's a real challenge. And I it's in particular a challenge across world views. And I've been hiring committees and I've been on faculty hiring and it's very difficult to appreciate the importance work that's

asking questions that you yourself don't think are that interesting. And I think we should have in university for the other reasons that I mentioned, I think it's really important to have intellectual diversity on a faculty. And I have, it's all confidential again voted for conservative hires because I really do believe that, although I also have to just defend the academy. I think a lot of the reason the people who are interested, people are interested in business and tend to be more conservative, they don't applaud law professors because there's a lot more money to be made out there in the field. I just think that there's a notion that there's a lot of bias against conservatives. I would push back on that to some degree. But I don't mean to say, you know, pick people who please you, but who challenge our collective wisdom and who really seem to have a plan of how to bring things up to a higher level. And it's, you know, and I acknowledge it's hard to do and there are perils that have to have to do with intellectual diversity and we should overcome them.

>> Rashmi are you concerned about diversity on faculty and how that effects the communication from the legal academy to the profession?

>> Yes, although I think it's more of, I really do think it's more of a mentoring expectations set of issues that stand as barriers to envision that I was articulating rather than the question of diversity. I think we, and this has been raised before, I have been told about which scholarship ought to be valued more and which should be valued less and actually what I'm hoping is that by talking about the possibility of articulating the same argument in a range of publications,

that we can start to break through that set of barriers in a more productive way. Diversity is always an issue. I think we should always be concerned about it. And certainly, you know, a more diverse faculty across the board would promote the translational function that I'm talking about. But I also think that just on a basic level there are a set of barriers that have been set by the current judgments of values of scholarship.

>> Judge Pillard.

>> I absolutely hear you, but I also think it's becoming increasingly difficult to credit work that might be in untraditional form or untraditional formats, in part because of the specialization. If somebody is writing on intellectual property and writing in news letters or something it's very hard for a faculty of generalists to part from, oh that appeared in the Stanford Law Review. You know it's hard for the faculty to assess, so we do have some issues of kind of metrics and competence and as a field of journalists that is increasingly specialized.

>> I take that point. Absolutely.

>> Questions from the audience?

>> Patrick Wood here again. Supreme Court Fellow but I'm here for myself. The question is for the two judges and it may seem oddly specific, but I beg your indulgence on it. You acknowledged that are occasions when you consult legal scholarship when you're evaluating a case, but no citation to that scholarship makes its way into the opinion whether you wrote it or another member of the panel

wrote it. So my weirdly specific question is, what are the odds in one of your cases of when you consult something it making it into the opinion and in your case, judge Hamilton if that changed between when you were a district court judge and when you became an appellate court judge. I would like to know.

>> I cannot begin to quantify, sorry, because in the course of preparing opinions both my law clerks and I will read a lot of things that will not make it into the opinions. Cases and other sources and it may be part of a broader framework rather than a tighter argument, so it's very hard for me to quantify that at all. I would say that my demand as one consumer, by the way I agree with that I'm one category of consumers, I don't mean to suggest that that's the only purpose or goal of legal scholarship, but we are an audience. And my appetite in essence has gone up from district court work to appellate work simply because of the nature of questions and the concern about making sure that we understand, if what we're writing is precedential, and it almost always is in our court, then I want to make sure that I understand consequences beyond what the briefs and the particular case might have identified and scholarship would be very helpful in doing that.

>> I have cited scholarship but I've also consulted and not cited scholarship. And one of the challenges in citing something is you don't necessarily want to be seen an incorporating it by reference. And I know scholars make all kinds of claims and part of the academics is to be provocative and you know, you often are thinking, you know, do I want to put this in for a particular proposition and then

be taking on the larger baggage? I think one place where you see, I mean you do see citation of very classic articles other, you know, well established principles. You often will see almost in the way the treatise people will say, John Matting, what's your interpretation or you know, whatever. People on something that they are known for. But you know, we are supposed to be neutral arbiters and to the extent that academics are writing for, you know, they're writing the Marty Lederman brief. There's a real question whether that should be given credit and maybe even read. So it's, you know, I think there is a real threshold for citation of you know, why would I necessarily go there?

>> Did we have one more question?

>> Well I actually have a comment.

>> a comment.

>> To kind of break this thing up I'm going to use this comment to transition to thanking the panel and moving to the next thing. It's a comment and I invite observation too. But just in the response to the last question and the two judge's responses to that question, it strikes me that there's kind of an interesting market failure than been kind of revealed by some of this discussion, which is that judges seem to find useful some of these less formal less traditional expressions of scholarship that are facilitated now by modern technology and things like blogs. And yes there's a reluctance to cite to them and less reluctance to cite to the more traditional published heavily footnoted law review articles or books because those are more traditional source of authority for judicial decision making. So

here in lies the potential strange market failure, if that's the right way to describe it. That maybe we could figure out a way to remedy it whereby there is actually some use for this nontraditional scholarship. It actually is having an impact but it's not a measurable impact because judges aren't citing it and therefore there is some lack of incentive, except for the very dedicated like Jack Balkan and his crew to actually spend time producing it. So I'm going to take the last word and use this as our opportunity to thank the panel for another tremendously interesting discussion.

[Applause]

We're now about 15 minutes behind the schedule on the program so what we're going to do is just push things back by 15 minutes, the next program back by 15 minutes. So we're going to start the concurrent sessions at 3:30, which is in about 15 minutes from now. In the meantime, there are snacks available out in the atrium outside this room. The concurrent sessions of which there are three that are listed on the sheet that you hopefully have a copy of and if you don't there is a copy of it back in the back of this room on the table.

[Event concluded]