Writing Law: Reflections on Judicial Decisions and Academic Scholarship

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Both judges and legal academics strive to offer unbiased and balanced perceptions of the law. At first glance, this would suggest commonalities between academic papers and judicial decisions. These commonalities, however, are limited. This essay, written from the perspective of both an academic and a judge, compares these two forms of legal writing by looking into their underlying objectives and the institutional constraints that shape them. As a result, it points to their fundamentally different contributions to the legal arena.

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Introduction

Writing constitutes a major component of legal work. Advocates write arguments and submit them to courts, draft contracts and write legal opinions that they present to their clients. Legislators and their staff draft bills, which ultimately become statutes. Interest groups write *amicus* briefs for courts. Judges write decisions. Law professors write articles and books.[1] From that variety, this essay concentrates on the writing products of judges and legal academics.

I focus on these two types of legal writing because of a conundrum: Both seem to share an aspiration to give unbiased and balanced perceptions of the law, and yet, often the work they produce and the methods they use are very different. Both judges and legal academics aim to present their best judgment regarding the right solution to legal problems. Unlike advocates representing parties, they do not claim to advance the interests of particular persons or litigants but rather profess to promote ideas and principles.[2] Despite this background similarity, judges and legal academics have very different missions when they write—missions shaped by their immediate goals, the respective audiences they address and the institutional contexts in which they work. All these background conditions lead to vastly different work products. The following discussion will explore how they give rise to divergent legal writing styles when both judges and academics are trying to "get it right".

The relationship between academic writing and judicial work has been the subject of some heated debate. The discourse focuses mainly on the discontent expressed by judges that legal scholarship in general—and law review articles in particular—has developed in a way that often makes it

1. This essay limits itself to the analysis of the research and scholarly writing of legal academics. In fact, academics write much more. Some academics also write newspaper and magazine articles (discussed below in the text accompanying note 50), *amicus* briefs and reports. Most of them compile reading lists and course materials, and formulate fact patterns and legal problems for exams and student research papers in the context of their teaching responsibilities.

2. This is not to say, at least with regard to academics, that the consideration of these principles is necessarily objective. Academic writers may also advance agenda-driven analyses or arguments. See also text accompanying note 41, *below*. However, they represent their own views about the way the law should be interpreted, and do not merely serve the interests of a particular party.

irrelevant to the uses of judges, as it is too theoretical, too long, centered on purely philosophical problems and written in academic jargon.[3] This criticism does not address treatises, which are designed to aid judges and practitioners,[4] but the argument is, in fact, reinforced by the weakening tendency of academics to dedicate their careers to writing treatises since they are not regarded as a good vehicle for getting academic promotion.[5]

Though some scholars also lament the growing gap between legal academia and legal practice,[6] current trends in legal scholarship indicate that this is not the prevailing view within the academy. Many academics believe that legal scholarship should focus on developing knowledge and theory for their own intrinsic value.[7] Consequently, current legal scholarship does not often analyze the internal logic of case law and legal rules but rather examines law as a social phenomenon (as exemplified by law and society literature or empirical legal studies).[8]Another important

3. See e.g. Judith S Kaye, "One Judge's View of Academic Law Review Writing" (1989) 39:3 J Leg Educ 313; Harry T Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91:1 Mich L Rev 34; Interview of Chief Justice John G Roberts Jr by Brian A Garner, "Interviews with United States Supreme Court Justices" (2010) 13 Scribes J Leg Writing 5 at 37; Adam Liptak, "When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant", *The New York Times* (19 March 2007), online: <www.newyorktimes.com>; Adam Liptak, "The Lackluster Reviews That Lawyers Love to Hate", *The New York Times* (22 October 2013), online: <www.newyorktimes.com>.

4. Fred R Shapiro, "The Most-Cited Legal Books Published Since 1978" (2000) 29:1 J Leg Stud 397 ("The best measure of the success of the treatises is probably their totals of citations in judicial opinions rather than citations in periodical articles" at 404–05).

5. Erwin Chemerinsky, "Foreword: Why Write?" (2009) 107:6 Mich L Rev 881; Richard A Danner, "Oh, The Treatise!" (2013) 111:6 Mich L Rev 821.

6. David Hricik & Victoria S Salzmann, "Why There Should be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves" (2005) 38:4 Suffolk UL Rev 761; Deborah L Rhode, "Legal Scholarship" (2001) 115:5 Harv L Rev 1327.

7. Richard A Posner, "The Deprofessionalization of Legal Teaching and Scholarship" (1993) 91:8 Mich L Rev 1921; Erwin Chemerinsky & Catherine Fisk, "In Defense of the Big Tent: The Importance of Recognizing the Many Audiences for Legal Scholarship" (1999) 34:4 Tulsa LJ 667 at 673–77; Richard A Epstein, "Let 'the Fundamental Things Apply': Necessary and Contingent Truths in Legal Scholarship" (2002) 115:5 Harv L Rev 1288 at 1303, 1311–313; John R Nolon, Keith Hirokawa & Sean Nolon, "Towards Engaged Scholarship" (2013) 33:3 Pace L Rev 821 at 827–29.

8. See Theodore Eisenberg, "Why Do Empirical Legal Scholarship?" (2004) 41:4 San Diego L Rev 1741.

development has been the rise of multidisciplinary works of "law and . . .".[9] This has resulted in a proliferation of legal scholarship that branches out into multiple areas, many with distinctive schools of thought and style.[10]

It is worth adding that judges' writing styles have likewise faced criticism—often for the length of judicial opinions, but also for other shortcomings, such as lack of clarity and consistency.[11] Recently, some commentators have questioned the extent to which judges use the assistance of their staff in writing their decisions.[12]

My purpose here is not to enter the fray on the criticism of judges' and academics' writing. I do not discuss the question of the mutual references of judicial decisions and academic work. I am also not interested in addressing questions of quality. Instead, I mainly aim to compare these two forms of legal writing in order to better understand their nature and

9. Examples include "law and economics", "law and literature", "law and society" and more. Commentators often divide the different types of legal scholarship into two broad areas: "doctrinal" scholarship, which is more practically oriented, and "theoretical" scholarship, which is more abstract and concerned with developing knowledge and ideas. Interdisciplinary legal scholarship tends to fall into the latter camp. See Richard A Posner, "Legal Scholarship Today" (2002) 115:5 Harv L Rev 1314; Richard A Posner, "Against the Law Reviews" *Legal Affairs* (November 2004), online: <www.legalaffairs.org>.

10. See Martha Minow, "Archetypal Legal Scholarship: A Field Guide" (2013) 63:1 J Leg Educ 65; James Boyd White, "Why I Write" (1996) 53:3 Wash & Lee L Rev 1021. White argued in this context that "what may look at first like the same activity—'Writing'—is actually very different in different lives, with different motivations and significances". *Ibid* at 1022. With this growing variation, another challenge has been the issue of evaluating the quality of legal scholarship. See Karen Petroski, "Does it Matter What We Say About Legal Interpretation?" (2012) 43:2 McGeorge L Rev 359.

11. See e.g. The Honorable Abner J Mikva, "For Whom Judges Write" (1988) 61:5 S Cal L Rev 1357; Steven Stark, "Why Judges Have Nothing to Tell Lawyers About Writing" (1990) 1 Scribes J Leg Writing 25. In addition, recognizing the fact that the drafting of a judicial opinion is a skill that needs to be developed and studied, there are courses that focus on this form of legal writing. See Ruth C Vance, "Judicial Opinion Writing: An Annotated Bibliography" (2011) 17 Leg Writing 197.

12. See Richard A Posner, *How Judges Think* (Cambridge, Mass: Harvard University Press, 2008) at 221. It has even been argued that the failure of legal academics to appreciate the fact that judicial opinions are often drafted by law clerks perpetuates a "legalistic" understanding of adjudication that is at odds with the actual thought process of judges. *Ibid* at 221. See also Stephen J Choi & G Mitu Gulati, "Which Judges Write Their Opinions (And Should We Care)?" (2005) 32:4 Fla St UL Rev 1077; William Domnarski, "Judges Should Write Their Own Opinions", *The New York Times* (31 May 2012), online: <www.newyorktimes.com>.

inherent differences.[13] In doing so, I hope to reshape current expectations regarding their mutual contribution to each other.[14] In Part I of this essay, I address the different goals of judicial decisions and academic writing. I compare the underlying objectives of each of these forms of legal writing, as well as the day-to-day missions of their respective authors. Part II examines the institutional constraints and conditions in which academics and judges produce their work. Part III examines the different styles of reasoning employed in written judgments and academic papers.

I. Goals and Missions

Despite the aspiration of both judges and academics to get to the "truth" and to be "neutral" in approaching the law, there is obviously a major difference in the professional goals that drive these endeavours. Judicial work is about decisions in actual cases involving real people in concrete circumstances. The primary purpose of judges' work is to resolve legal disputes. As a consequence, their judgments are prescriptive: They can be enforced against persons by agents of the state.[15] In contrast, academic work is about developing knowledge and ideas.[16] The primary goal of academics' work is to explore these ideas and theories within the context of a conceptual debate, and to present cogent arguments and analyses about their meaning, implications, interconnectedness and relevance. How are these differences reflected in the everyday work of the judge and the law professor?

13. I should add that I have a personal interest in clarifying the standards that should be applied to these kinds of work, as they are the two forms of writing I have produced during my life in the law—for the most part as legal academic, and currently as a judge. A related issue, not to be discussed here, concerns the question of if and how the professional background of the judge (e.g., having been an academic or a practitioner) influences his or her judicial style.

14. Especially against the background of the criticism directed at academic legal scholarship by judges and practitioners. See sources referred to in note 3.

15. See Robert M Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601 ("Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life" at 1601).

16. See Larissa Katz, "The Law Review Mission: A Student Editor's Point of View" (2001) 39:3 Alta L Rev 684. See also sources referred to in note 7.

The most obvious difference between judicial writing and academic writing is that the law professor chooses the subject that she wishes to think and work on.[17] In contrast, the judge does not choose the subject matter of the case. She wakes up to discover a new surprise on her table. That being said, the judge still decides what needs to be addressed in her written decision. For example, sometimes a case can be resolved by addressing one fundamental question, which makes the others redundant or irrelevant. In such circumstances, the judge can decide whether to write *obiter dicta*, discussing ancillary or tangential matters, or refrain from doing so and focus only on the *ratio decidendi*.[18] But this is still very different from the scholar's freedom to make the original choice of subject matter, which may be even a relatively minor and marginal issue she wishes to address.

As a consequence of cases coming to her, the judge must be oriented towards finding a solution to the legal problem before her and then has to be able to translate her solution into a remedy. In contrast, the law professor can limit herself to the discussion of a problem. In some cases, academics will "problematize" a particular legal issue in an area of law that appears to be settled, rather than aim for a solution.

On a more pragmatic level, legal problems taken from real life often require a judge to discuss several questions together, even if they are not close in terms of theory or subject matter. For example, a judge may have to address questions of standing, tests for leave to appeal or admissibility of evidence before getting to the legal questions at the heart of a case. Once these issues are resolved, the judge will sometimes have to grapple with several legal issues argued by the parties—isolating claims from different

17. In addressing the question of "Why Write?", Erwin Chemerinsky described his experience with academic writing, and the choice of one's subject matter, as "an act of self-definition", explaining that, "[w]hat we choose to write about, the voice we employ, the points we choose to make, all are important expressions of the self. " Chemerinsky, *supra* note 5 at 893. For an earlier expression of these ideas see Chemerinsky & Fisk, *supra* note 7 at 678.

18. *Black's Law Dictionary* defines *obiter dictum* as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)". *Black's Law Dictionary*, 10th ed, *sub verbo* "obiter dictum". On the difficulty of distinguishing between cases' *obiter dicta* and *ratio decidendi*, and for proposed solutions with new definitions, see Maxwell L Stearns & Michael Abramowicz, "Defining Dicta" (2005) 57:4 Stan L Rev 953; Michael C Dorf, "Dicta and Article III" (1994) 142:6 U Pa L Rev 1997.

areas of law and examining each on its merits.[19] The result is that judges produce legal texts that have several foci rather than one main theme. In contrast, academics can limit themselves to only one aspect of a legal controversy—that is, they may engage in "cherry-picking".[20]

In addition, judges have to dedicate much time to fact-finding procedures—either as trial judges who decide on the facts (or instruct juries in this regard), or as appellate judges who review such procedures and their products.[21] These procedures lay the ground for the presentation of the factual basis of the written decision.[22] In contrast, academics may take the facts as given. Most often they are experts in imagining facts, when they create "hypos".[23] In other cases, scholars work on the basis of assumptions[24] or can rely on empirical studies as foundations for their arguments.

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19. This description characterizes mainly the experience of judges in general courts, in contrast to specialized tribunals. However, even in specialized tribunals the judge still has to deal with several layers of each case—substance, procedure and facts. For more on the difference between the two, see text accompanying note 48, *below*. Posner discusses in this context the unique position of the Supreme Court vis-à-vis other appellate courts in the United States. He argues that, "[u]nlike the Supreme Court . . . the courts of appeals must decide all the dispositive issues presented by a case, however many there are, and a single case may present issues in several different fields of law". See Posner, *How Judges Think*, *supra* note 12 at 205–06.

20. Posner believes that part of the reason for the growing gap between the legal academy and the judiciary is the increasingly different roles of the academic and the Judge: Judges must be generalists because they have to decide cases in various areas of law under time pressure, whereas legal academics are expected to become specialists in narrow fields. See Posner, *How Judges Think*, *supra* note 12 at 205–06, 216.

21. See generally Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1950).

22. Indeed, much attention has been dedicated in academic literature to the understanding of judges as "story-tellers" and "narrators" of facts. See e.g. Peter Brooks & Paul Gewirtz, eds, *Law's Stories: Narrative and Rhetoric in the Law* (New Haven, CT: Yale University Press, 1996); John Leubsdorf, "The Structure of Judicial Opinions" (2001) 86:2 Minn L Rev 447.

23. On the use of hypos in legal academic teaching, see Thomas W Holm, "A Journey of Faith, Love, and Teaching" (2010) 58 UCLA L Rev Discourse 215 at 226; Philip E Areeda, "The Socratic Method" (1996) 109:5 Harv L Rev 911 at 920.

24. For example, in the area of law and economics, the analysis is often based on standard assumptions, such as the characterization of the parties involved as rational actors who strive to maximize their benefits and act on the basis of full information.

More generally, whereas judges must deal with the facts that are presented, academics can rely on their imagination. Usually, the more imaginative one is, the more resourceful a scholar one is considered to be. I will note that appellate courts deal less with facts, and in this regard render decisions that are mostly dedicated to the resolution of legal questions, like some academic commentary. However, appellate court judges are still constrained by the facts of the case before them and the issues raised by the parties.[25] Unlike academics who can draw upon a variety of resources to bolster their claims, judges are not at liberty to rely freely on evidence that is not presented in court; at most, they will sometimes refer to well-established sociological trends.[26]

Last but not least, although judges often write decisions, the goal of their everyday work is not necessarily the creation of a text. Some cases may call for elaborate decisions with a full exposition of an area of law and a normative judgment. Other cases call for short and simple texts—perhaps an order consisting of only a few sentences. In some cases, there may be no text at all. A legal controversy can—as indeed happens quite often—also be resolved with a compromise. When parties argue in a court of law, the judge may highlight the difficulties in each side's position and suggest that they reconsider them. This may lead to an agreement that resolves the controversy—a settlement that may receive formal approval as a judicial order for purposes of enforcement.[27] In contrast, full-time academics[28] have to produce texts because texts are how they present their

25. For the different experience of trial courts see Austin Sarat, "Judging in Trial Courts: An Exploratory Study" (1977) 39:2 J Politics 368.

26. See e.g. *Brown v Board of Education of Topeka*, 74 S Ct 686 at 692, n 11 (1954) (for the famous commentary on the social and psychological problems attributable to racial segregation).

27. See e.g. Anthony DiSarro, "Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation" (2010) 60:2 Am U L Rev 275.

28. I refer here only to full-time legal academics, and not to practicing lawyers who teach practical skills courses at law schools, such as trial advocacy, legal research and writing, negotiation, mediation, etc.

ideas, and it is largely on the basis of their publications that they receive promotion. As the well-known saying goes: "publish or perish".[29]

II. Institutional Constraints and Work Conditions

The fundamental differences in the professional goals of judicial writing and academic writing lead to other, derivative, differences between the two. Judges and academics work in very different environments, with judges facing a number of constraints that academics do not.

Since judges must resolve problems according to the law that governs the case, they are mostly focused on domestic law, though the intensity of this focus varies by jurisdiction. Some systems are friendly and open to the use of comparative law. Others resist it strictly.[30] Even in jurisdictions that welcome the use of foreign precedents and the importation of ideas, however, these serve as secondary sources and have only a persuasive role in the context of interpreting domestic law. For academics, political and geographic borders are not a barrier. Academics can pick and choose the foreign legal principles and precedents that will best support their work. They can study and develop interests in any legal system, purely for intellectual purposes or for the sake of a comparative analysis of different legal cultures.[31]

Moreover, judges have to focus on prevalent law, in contrast to addressing the ideal legal solution (although they aspire to interpret the law in the best light possible). In addition, they are chained to solutions that are within the boundaries of the institutional capacity of the judiciary. Academics can imagine an ideal, focus on reforms and even

29. Of course, whether a judge's goal should be to seek a compromise, issue an order or deliver an exhaustive judgment will depend on contextual considerations, like the level or kind of court on which she sits. For example, appellate-level judges are more often expected to clarify the law and even to develop it so that it remains internally consistent or able to address new factual scenarios. Having said that, the nature of expectations on judges and academics with respect to their writing products is still quite different.

30. See generally Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (New York: Oxford University Press, 2010).

31. In fact, certain jurisdictions with influential legal cultures like the US or the United Kingdom get a disproportionate amount of attention from legal scholars as comparison points to their own country's system.

develop proposals for promoting them. They can critique the decisions of courts and also offer solutions without regard for institutional roles. By focusing on the law more generally, academics can suggest reforms that are designed to be promoted by the executive and the legislature. Sometimes, judges also point to solutions that should be considered or implemented by other branches of government, mostly by the legislature, but usually they do so in an incidental manner.[32]

There are also differences in the work environment of judges and academics—in background conditions that have important consequences for their writing products, such as time constraints. Professors can often take extensive periods of time to reflect on their ideas. They may stop or postpone working on a project if they feel that they need more time to digest materials and elaborate on them, or even if they experience "writer's block".[33] Judges do not have this privilege. More sophisticated judgments may take more time to write, but judges' freedom in this regard is very limited by formal rules which dictate the duty to render a decision within a reasonable period of time. As is often said: "Justice delayed is justice denied".[34]

Another crucial point is that professors may consult anyone they please. Academics draft work products that get presented, discussed and critiqued in various forums. Metaphorically speaking, academic papers can have "long pregnancies" that allow for additional thinking and comments from diverse sources. These sources can include fellow academics from their own or different institutions, legal practitioners, editors, students and more. In contrast, judges are not able to circulate drafts of their opinions openly or consult widely. Though there is room for deliberation and even debate within the court, the discourse takes place within a closed

32. An exception to this is when a court reviews the constitutionality of legislation and points to an unconstitutional defect in a law.

33. See Joan Acocella, "Blocked", *The New Yorker* 80:16 (14 June 2004).

34. Posner also describes this discrepancy in work conditions:

> A law professor does not have to write 25 articles a year (roughly the current minimum number of opinions published by a federal court of appeals judge; some publish many more, and all are responsible for a number—invariably a larger number—of unpublished opinions) on topics not of his choice. The professor can, without losing his academic standing, write just one or two articles a year on the one or two topics about which he has an original thought.

See Posner, *How Judges Think*, *supra* note 12 at 206.

community consisting of a small group whose membership remains fairly constant. In general, judges are precluded from discussing judgments outside of this small bubble, which includes only their colleagues on the bench and their close professional staff.[35] Moreover, the whole process of consultation and deliberation is subject to strict time constraints due to the demands of other cases, which also must be resolved within a reasonable period of time.[36] Once this limited period for deliberation is over, judges have only one shot: The publicized decision is the only text presented for general consumption.[37]

Finally, it is important to note that judges cannot go back to their decisions and change them, even if they come to change their opinion on the law at a later date. This is an inherent part of the finality of legal judgments and it serves the goal of maintaining stability in the law. The consequence is that particular judgments have an indelible impact on persons' lives. Even if judges express a change of heart regarding a decision they gave in the past (for example, in a memoir), it will have no bearing

35. See e.g. The American Bar Association, *The Model Code of Judicial Conduct*, Chicago: ABA, 2010, Canon 2, r 2.9(A)(2)–(3). See also Douglas E Abrams, "Judges and Their Editors", *Precedent* 4:1 (2010) 32 for a personal reflection on the process of in-chambers consultation. The limitations on judges apply to consultation on specific cases; they do not preclude engagement in discussion of abstract legal questions in forums such as professional conferences.

36. See generally Yale Kamisar, "Why I Write (And Why I Think Law Professors Generally Should Write)" (2004) 41:4 San Diego L Rev 1747 (discussing the contrast in time and resources in academic work vis-à-vis judicial work). The intensity of judicial work may also lead to mistakes that would have been corrected in an academic drafting process. This type of problem was recently illustrated in the commentary surrounding Antonin Scalia J's dissenting opinion in *EPA v EME Homer City Generation LP*, 134 S Ct 1584 (2014). See also Jonathan H Adler, "Justice Scalia Is Not the Only One Making Errors" (1 May 2014), *The Volokh Conspiracy* (blog), online: <www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/01/justice-scalia-is-not-the-only-one-making-errors/>; Eugene Volokh, "Errors in Supreme Court opinions" (2 May 2014), *The Volokh Conspiracy* (blog), online: <www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/02/errors-in-supreme-court-opinions/>.

37. While this is the general rule, commentators in the US have recently noted the Supreme Court's practice of making minor, but significant, changes in judgments after they have been issued. See Adam Liptak, "Final Word on U.S. Law Isn't: Supreme Court Keeps Editing", *The New York Times* (24 May 2014), online: <www.newyorktimes.com>.

on the finality of the judgment as originally given.[38] In general, even a later change in the legal precedent which led to a decision will not change the actual result of that decision.[39] Academics, on the other hand, can go back and reconsider their previous arguments, opting either to withdraw them entirely (not a common choice) or to write a new article or book on exactly the same material in order to reflect changes in their opinion. Academics can do this without concern for institutional considerations. It is the force of their arguments and ideas that matter, not the implications for others. They need not be concerned with the "stability" of discourse in their area.

III. Modes of Reasoning

These conditions and institutional constraints under which judges and academics operate lead to significant differences in style between judicial decisions and academic scholarship.

First, as the judge always addresses an actual, live case, the needs of the case before her dictate where she starts the analysis and where she will eventually end it. As a result, the judge will not necessarily have to locate her analysis within the broader legal context of the relevant branch of law or legal theory (other than to cite the relevant precedents). For example, if the law governing the case is fairly settled and clear, the decision-making process will usually focus on its application to the facts of the case. In contrast, the academic, seeking to influence an academic debate, will necessarily locate her arguments in the broader context of the discourse.

38. A relatively well-known example is Powell J's regret regarding joining the majority in the controversial decision given in *Bowers v Hardwick*, 106 S Ct 2841 (1986). See Linda Greenhouse, "Black Robes Don't Make the Justice, but the Rest of the Closet Might: In the Powell Legacy, Lessons on How Life Informs Even Lofty Opinion", *The New York Times* (4 December 2002), online: <www.newyorktimes.com>.

39. Of course, there are exceptions to this rule. For example, the decision in *Browder v Director Department of Corrections of Illinois*, 98 S Ct 556 at 564 (1978) referred to a common law rule recognizing the power of the court "to alter or amend its own judgments during, but not after, the term of court in which the original decision was rendered". This rule was later supplanted by the time limits laid out in the Federal Rules of Civil Procedure, rules 52(b) and 59(e). More recently, based on the precedent which recognized the unconstitutionality of mandatory life imprisonment for juveniles, inmates who were sentenced to mandatory life imprisonment for offences they had committed as juveniles have tried to demand re-sentencing. See *Miller v Alabama*, 132 S Ct 2455 (2012).

Second, judges rarely commit to one grand substantive ideology or world view, such as "efficiency", "liberalism" or "feminism", beyond those implied by foundational legal documents, like a constitution (i.e., constitutionalism) or by the concept of law itself (i.e., the rule of law). At most, in order to add legitimacy to the solution they endorse, judges may point out that it is also "efficient" or "just". In contrast, academics are often committed to a theory or an idea, and try to advance it through their written work. This distinction may not be strictly binary, since judges can commit to certain interpretive theories, such as "originalism" or "textualism", especially in constitutional decision making.[40] However, notably, these interpretive theories dictate the method of decision making and not the desired solution. In addition, while academics may adopt a political stance in their scholarly or popular writing, acting judges may not. If their decisions are, or are perceived to be, influenced by political considerations, they will be heavily criticized.[41]

Third, as a consequence of the academics' focus on theoretical models, they are generally deterred from referring to "justice" in the abstract. Instead, they feel compelled to explain the form of justice that they endorse (e.g., utilitarian justice, distributive justice or corrective justice) in order to stake out ground within a particular academic debate. Judges—for better or worse—are less deterred from referring to justice as such. The broader notions of justice they speak of—often associated with other general ideas like the rule of law, democratic values or constitutionalism—are meant to be widely accessible.[42] Judges may even tend to use metaphors rather than

40. Justice Antonin Scalia of the US Supreme Court is probably the best known proponent of originalism. See e.g. Antonin Scalia, "Originalism: The Lesser Evil" (1989) 57:3 U Cin L Rev 849.

41. The decision in *Bush v Gore*, 1211 S Ct 525 (2000) has been widely criticized because many commentators believed it to be political, although it was never presented as such. See e.g. Jack M Balkin, "Bush v. Gore and the Boundary between Law and Politics" (2001) 110:8 Yale LJ 1407; Michael J Klarman, "Bush v. Gore through the Lens of Constitutional History" (2001) 89:6 Cal L Rev 1721.

42. Examples of these broader, more intuitive appeals to "justice" sometimes occur when a judge decides a case with exceptional circumstances and tries to distinguish it from the common case. See e.g. *Riggs v Palmer*, 115 NY 506 (1889), where the New York Court of Appeals decided against the right of a murderer to inherit from his victim. In his majority opinion, Earl J found the principles informing the law against such inheritance to be "dictated by public policy, [having] their foundation in universal law administered in all civilized countries". *Ibid* at 511–12.

a precise theoretical model.[43] Indeed, this is not always the case. Judicial culture has also changed, and some judges now will go beyond general statements regarding justice and fairness in order to better illustrate specific principles. However, in general, academics trying to carve out original insights in a tangle of theoretical analyses have to be much more exact in their use of nuanced terminology.[44]

Fourth, judges are committed to precedents (subject to the variation between legal systems on this matter).[45] Usually, inferior courts are completely bound by the decisions of superior courts, whereas superior courts are bound by their own precedents subject to their ability to depart from them when they have a strong reason to do so.[46] As a result, judges develop the law incrementally and only rarely overturn precedents—a move that always calls for justification. In contrast, for academics, breaking old traditions is not something that has to be excused. Originality and

43. Michael R Smith, "Levels of Metaphor in Persuasive Legal Writing" (2007) 58:3 Mercer L Rev 919.

44. Posner criticizes the appeals to abstract notions of justice and fairness in legal argumentation. He argues that they were once more prevalent in both judgments and academic writing and explains how their use has declined in the last half of the twentieth century. See Posner, *How Judges Think*, *supra* note 12 at 209.

45. See generally Julius Stone, "The Ratio of the Ratio Decidendi" (1959) 22:6 Mod L Rev 597. *Black's Law Dictionary* defines *stare decisis* as "[t]he doctrine of precedent, under which a court musr follow earlier judicial decisions when the same points arise again in litigation." *Black's Law Dictionary*, 10th ed, *sub verbo* "stare decisis". A classical defense of the use of precedents is found in Benjamin N Cardozo, *The Nature of the Judicial Process* (New Haven, Conn: Yale University Press, 1921):

> It will not do to decide the same question one way between one set of litigants and the opposite way between another. "If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles" . . . Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice.

Ibid at 33–34 [footnote omitted]. See also *ibid* at 150. For later sources, see the US Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 at 854–55 (1992); Lawrence B Solum, "The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights" (2006) 9:1 U Pa J Const L 155.

46. These two forms of *stare decisis* are sometimes called "vertical" and "horizontal". See Stearns & Abramowicz, *supra* note 18 at 955–57.

innovation are usually celebrated and aspired toward. Sometimes they even become an independent goal.[47]

Fifth, judges write in different "genres". They write long and short opinions; they write operative orders that mandate compliance—temporary and final ones. Some of their decisions are concentrated on facts and others primarily address questions of law. Also, judges are usually dealing with many areas of law which, on their own, may influence their style of writing. While some judges sit on specialized courts, many judges sit on courts of general jurisdiction. This means that they must be familiar with diverse areas of law and accustom their writing to the differences between these fields. Writing a decision on a commercial dispute is inherently different from writing a decision in a criminal case; writing a decision about the tort of negligence requires a different approach than authoring a decision on fairness in administrative law.[48] Academics, on the other hand, can remain within the same genre and practice the same mode of writing for their whole careers.[49] Although some academics engage in more popular forums—writing for newspapers, magazines or

47. See also Chemerinsky & Fisk, *supra* note 7 at 667; Posner, *How Judges Think*, *supra* note 12 at 206.

48. This is not to say that there are no common denominators to judicial work in different settings. See e.g. Aharon Barak, *Judicial Discretion*, translated by Yadin Kaufmann (New Haven, Conn: Yale University Press, 1989).

49. As already stated, there are different schools of legal scholarship, but academics tend to choose among them and then follow the principles of a certain tradition. In addition, law review articles are written following a standard formula regarding structure and style.

blogs, or appearing as consultants on radio or television—these forums are not considered the arenas of their "real" work.[50]

Sixth, it is important to note how academic and judicial audiences influence modes of reasoning. For judges, the professional community is only one of their several audiences.[51] Judges write first and foremost for the parties appearing before them, for the state's agents who are in charge of enforcement,[52] and for the public. Although judgments are professional legal documents, and sometimes involve complex technical and legal analyses,[53] they should also be accessible, or at least explicable,

50. It is worth noting that despite his critical attitude toward the detachment of academics from the professional arena, Chemerinsky believes that not all of the writing products of academics should be taken into account in the context of academic promotion. He argues that

> [l]egal scholarship can be defined as writings that make an original contribution to the analysis and understanding of those engaged in the field of law. The ultimate test for tenure and promotion that should be applied to any writing is what it adds to the knowledge of those in the field. Will those reading the piece learn something that is not available in any other source?

Chemerinsky, *supra* note 5 at 891.

51. See Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton: Princeton University Press, 2006). Mikva describes the gradual expansion and diversification of the audiences for judges' opinions and notes the impact this has had on judges' writing styles, making them longer and less focused. See Mikva, *supra* note 11 at 1364–366; Robert J Hume, "The Use of Rhetorical Sources by the U.S. Supreme Court" (2006) 40:4 Law & Soc'y Rev 817 at 818, 824 (examining how having several—primarily professional— audiences in mind affects judges' composition strategies).

52. See Cover, *supra* note 15.

53. Felix Cohen pointed to the fact that legal discourse in general is dominated by professional terms that do not always make reality clear. See Felix Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35:6 Colum L Rev 809.

to people who are not professionals, as they define the law for a larger community.[54]

In contrast, academics write mostly for the professional academic community, and mainly for a subgroup within it—the specialists in their discipline.[55] This allows them to employ a form of reasoning that may be comprehensible only to members of this small group, who have advanced knowledge of the references and terms of discussion. Generally, academics need not be concerned with their product's accessibility or applicability to the public.

54. This may partially change according to the area of law with which the decision deals. In commercial law, the writing is mostly for professionals; in criminal law, it often addresses the wider public as well. This is also, to a large degree, a normative matter. Not everyone believes it is important that legal opinions can and should be accessible to lay people. Various commentators have expressed different views on this point. Posner contrasts judges who write their opinions in a "pure" style, replete with technical legal terms, whose audiences are primarily lawyers and judges, with judges who write in an "impure" style that is jargon free, whose intended audience includes lay people. Most judges, says Posner, fall somewhere between the two extremes of exclusively "pure" or "impure" stylists, though their audience is most likely professional. Posner himself believes judges write primarily for their colleagues (other judges) and secondarily for a broader audience. See Richard A Posner, "Judges' Writing Styles (And Do They Matter?)" (1995) 62:4 U Chicago L Rev 1421, 1429–432; Posner, *How Judges Think*, *supra* note 12 at 62, 166, 206. Drury Stevenson makes the point that the average citizen almost never reads court opinions, and that the real audience of courts is the State—particularly, state actors such as other courts, agency officials and enforcement officers. The public is only the indirect audience of the law, and receives it through the actions of these actors. See Drury Stevenson, "To Whom is the Law Addressed" (2003) 21:1 Yale L & Pol'y Rev 105. In a similar manner, Frederick Schauer disputes the argument that judicial opinions are central to engaged public deliberation, pointing out that, in fact, ordinary people do not read judicial opinions. Therefore, he thinks, judges should not be criticized for writing in an inaccessible style from the perspective of the public. See Frederick Schauer, "Opinions as Rules" (1995) 62:4 U Chicago L Rev 1455 at 1463–65. In contrast, Tony Mauro, a journalist who covers the US Supreme Court, argues that the public and the media are as important an audience for judicial decisions as practitioners and that judges ought to modify their styles in recognition of this fact. See Tony Mauro, "Five Ways Appellate Courts Can Help the News Media" (2007) 9:2 J Appellate Practice & Process 311.

55. See also Sanford Levinson, "The Audience for Constitutional Meta-Theory (Or, Why, and to Whom, Do I Write the Things I Do?)" (1992) 63:2 U Colo L Rev 389; Posner, *How Judges Think*, *supra* note 12 at 206, 211. For the criticism on the growing gap between academic writing and the professional community outside the academy, see sources referred to in note 3.

Lastly, following on the previous point, judges are "players" in the legal arena of "real life". Judgments, in contrast to academic writings, are operative texts and are prescriptive; they dictate the actions of persons in society. For that reason, judgments should be clear to a degree that will enable the parties to comply with them and the relevant state agencies to enforce them. Judgments cannot leave the central legal questions unanswered (in contrast to peripheral questions that do not bear on the result and therefore can, and sometimes even should, be left without a decision). The influence judgments have on real life makes clarity in judicial writing and solidity in judicial reasoning imperative. People cannot confidently plan their behavior, refrain from prohibited activities or conduct business transactions if the law is riddled with uncertainty or ambiguity. The clarity of legal judgments is, of course, important also because every legal judgment can become a precedent for future cases.

Academics, in contrast, have the advantage of observing the players and analyzing their moves. While many academics write articles and books that have an impact on judicial thinking or that influence public policy, their writings are not required to have such consequences. In fact, it may be both inappropriate and undesirable to make clarity and general applicability imperatives for academic work products. Academic freedom requires that academics ought to be able to explore ideas and engage in arguments without being constrained by criteria of wide comprehensibility, applicability or even balance. Although academic papers may have little or no application to the law in particular cases before courts, they may encourage us to think about the law in other important ways—exploring theories of development, economics, sociology and politics.

Conclusion

I can end where I started. Despite the fact that judges write learned opinions that sometimes resemble scholarly writing, and although academics may aspire to offer alternative solutions to cases decided by judges—in fact, they are mostly doing very different things.

Judges resolve concrete legal problems. They focus on the issues presented by the cases before them and give orders that implement their decisions. They are constrained by the facts and issues of the case, prevailing law and their institutional capacity. The role of judgments is to give answers to the questions at issue, but they are still written in full awareness of their precedential value and their normative implications.

In contrast, academics are free to follow their intellectual curiosity and their desire to make original contributions to legal scholarship. They address big questions, but they are not required to solve anything in particular. Legal scholarship is aimed at developing ideas and exploring the broader implications of the law. Therefore, it cannot always be of immediate practical relevance to judicial decision making. Sometimes, the role of academia is primarily to ask questions and reveal blind spots in the system rather than to produce answers—an endeavour that is no less important to the development and understanding of the law. As a result, academic ideas could have great influence—or no effect—on the real world at all. Or, they may only have such an impact after the passage of a considerable period of time.

With these differences in mind, I return to the question of reshaping the expectations we have for judicial and academic writings. The fact that judges and academics are guided by different missions means that their respective work products should be evaluated according to different criteria. Academic papers certainly can, and sometimes do, have an impact on the way judges interpret the law or how legislatures make reforms. They can also clarify the law where it is confusing or incomplete and may offer a statistical analysis or research that supports a certain interpretation of the law or demonstrates its actual effect. However, they need not always have such implications. In contrast, judicial opinions are aimed at solving problems, even when they engage with more conceptual questions about the law, thereby providing good fodder for academic debates. Therefore, as desirable as a conversation between academic and

judicial writings might be, it will not always be appropriate to hold either kind of writing to the standards of the other.

Of course, this is only a characterization of the common case. At times, academics might aspire to have a more concrete effect in the world, while judges may wish to develop a more comprehensive theory without having to grapple with the procedural demands and the facts of the case before them. On a personal level, I can say that I have shared both aspirations. As a law professor, I often desired the challenge of dealing with *real* problems that make a difference in people's lives. In fulfilling my judicial role, however, I sometimes long for the leisure to think about the larger and more abstract implications of the law, outside the constraints of a particular case.

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