Engaged Scholarship as Method and Vocation

Catharine A. MacKinnon

For the engaged scholar to talk about engaged scholarship is something of a contradiction in terms. A scholarship that is engaged is a scholarship of doing it, rather than talking about doing it: scholarship as action. The difference between doing it and talking about doing it is the difference between scholarship that enjoins us, say, to attend to race in feminist scholarship—which it may be an action to say once—and addressing issues and solving problems from a Black feminist perspective, which can be done for at least as many lifetimes as it has been ignored. This difference is not one of voice or subject or politics, ultimately, although all can be involved, but one of stance in relation to substance, and ultimately one of substance itself.

Having somewhat repudiated my task in order to frame it, let me start this comment on what we all do by asking, if "engaged scholarship" is not redundant, what about "scholarship" doesn't already mean "engaged?" If adding "engaged" adds something—as I thought something was added by subtitling Feminism Unmodified "Engaged Discourses in Life and Law" in 1987, a battle lost with the publisher—what does it add? Under prevailing academic norms as practiced, focusing here on legal academic norms, there is tension between the two terms. Engagement pulls in one direction, scholarship in another.

Scholarship as such, its epistemological roots in the nineteenth century’s separation of knower from known, fact from value or opinion, and law from

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2. Elizabeth A. Long Professor of Law at the University of Michigan Law School and James Barr Ames Visiting Professor of Law at Harvard Law School.


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politics, is ideally imagined to be, in a word, disengaged. Its disengagement is believed to conduce to objectivity, meaning beginning from no preconceived position, taking no sides, pulled by no consequence or advocacy necessity, making no judgments of value. The value dimension of the problem has been extensively ventilated in moral philosophy in particular and has especially concerned liberals who pursue the "good." My opinion is that bad views are so not the problem and good views are so not the solution, particularly where women are concerned.

Being more interested in the prior question of "what is," i.e., the real, I will focus on the dimension of knowing it that separates knower from known. Its traditional goal is finding "truth," ultimate verity; its narrower purpose is creating authority by producing scholarly work that is universally acceptable and indisputable, qualified neither by subjectivity (the bugbear of the 19th century) nor relativism (the challenge of the 20th century). Under this standard, involvement in the world of one's subject, especially its social world, is widely supposed to be constraining and contaminating rather than a source of knowledge and foundation for insight. Experience, rather than helping you know what you are talking about or serving as a source of insight, is seen to produce partiality, bias. It gets you dirty. To be on a side is thought to make the work slanted, non-scholarly—in law, a brief, not an article. Exposing the experiential roots of academic work is a common means of challenging its accuracy and reliability: its authority. Since law is a form of power, created by authority and creative of authority, this cognitive situated dimension is an especially sensitive one in legal scholarship.

To be engaged in the sense I mean—conscious of location and clear about position, open to the world of the known both going in and coming out, grounded in substance—centers on having and affirming direct involvement with the reality of the subject matter. Doing this violates the traditional academic grundnorm of above-it-all/out-of-it-ness. Most with-it scholars won't admit adhering to it when bluntly stated, even as they respect it like an invisible fence. Many would own it if more congenially coded, though. Say: from the Greeks forward, method is a way to truth, which since Descartes has become both a stance and technique of scholarship that serves as a shortcut to reliable knowledge and helps prevent error. In one contemporary instance, take Paul Kahn's (unacknowledged) reinvention of Karl Mannheim's free-floating, socially detached observer in his requirement of "[d]istance from one's own

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4. Peter Novick, That Noble Dream: The "Objectivity Question" and the American Historical Profession (1988). Novick's lucid tracing of objectivity as a norm in historical scholarship clarifies the intellectual history and dimensions of this imperative.

5. See Karl Mannheim, Ideology and Utopia 137 (1936). Mannheim was attempting to get beyond relativism toward objectivity. One means he offered was an "unanchored, relatively classless stratum [called], to use Alfred Weber's terminology, the 'socially unattached intelligentsia' (freischwebende Intelligenz)," a group supposedly less subject to social influence than lesser mortals. Id.
beliefs," and the related imperative to "abandon the project of law reform" as methodologically necessary for reconstructing legal scholarship. As Kahn puts it, "This imaginative act of separation, of creating a distance between the subject and his or her beliefs, is the model of understanding that I want to offer in place of the normative, practical reason that has informed both law and legal scholarship." He is advocating what is actually an entrenched element of the status quo's intellectual maintenance as if it would be a positive or even radical change.

In my experience, one can tell that disengagement, as a tacit model for what is aimed at, is being enforced when it is said that your work is not scholarship, it is just politics (or, if your field is politics, it is just journalism; or if your field is journalism, it is just activism), or you are not committed to scholarship or do not belong in a university. Not hiring practitioners, including the rule of thumb that a person is ruined for the scholarly life if they practice law for more than a couple of years, is another way. Not considering work in practice as bona fide "professional activity" for purposes of tenure, promotion, and merit salary increases in law school employment is another. Kahn could not be more wrong in his claim that law reform and law practice are the central projects of today's legal academy. Actually doing something in the world of law—making legal change being proof that you had intercourse with the real world much like pregnancy proves you had sex, both being a bit of a public embarrassment—can be virtually disqualifying for the serious scholar in some quarters. In our time, the resolution of the tension in the legal academy over whether the study of law is an intellectual discipline or an arm of the legal profession has tended to be resolved in favor of the desirability of legal academia being its own world, at least in its upper reaches. At the core of the tension is a stigma of appearing to be on a side—as in, resembling the adversarial legal system.

It is not news that people tend to conform to the shape of what they are rewarded and respected for; the process is called socialization when we study it being done to other people. Nor is it news that this tendency shapes the mind and reproduces itself through what and how we teach, including by example. There are of course many exceptions to the norm sketched; opposition to it has a long and strong history among scholars who respect and engage in practice. And it may be shifting. Surely it is increasingly acknowledged among

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7. Id. at 7 ("A new discipline of legal study must abandon the project of reform."). He further argues, "From the very beginning, the study of law is co-opted by legal practice. The independence of the discipline will never be possible unless the understanding deployed in theoretical inquiry can be distinguished from the reason deployed in legal practice," Id. at 18. He concludes that legal scholars must "marginaliz[e] ourselves, if the study of law is to free itself from the practice of law." Id. at 139.
8. Id. at 3 (footnote omitted). On the separation approach, see CHARLES BEARD, THE NATURE OF THE SOCIAL SCIENCES IN RELATION TO OBJECTIVES OF INSTRUCTION 19-20 (1934).
philosophers, especially where social scholarship is concerned, that objectivity as a norm is not only inaccurate as description, it is incoherent as theory, naïve as sociology and psychology, and unachievable as method. There is even doubt as to whether it is desirable to try. This is not to embrace relativism, cognitively meaning that anything and its opposite can be equally accurate, but to admit the overwhelmingly obvious: scholarship doesn’t come from nowhere.

The scholar’s choice of topic, because it is about something rather than everything, is a choice of agenda and priorities based on some ranking. Because it is done by a person situated in a context, speaking a language, with a history and a culture, professional training, and personal experience, employing concepts and following habits of mind, it is intrinsically a social endeavor. It has ideas, usually, and ideas do not come from nowhere. In a materialist perspective, they are based in reality; in social disciplines, that makes them based to some degree in the same reality being studied. Trying, in order to strike the pose of disengagement, to deny scholarship’s antecedents in intercourse with reality does not make it come from the stork.

Once it is realized that point-of-viewlessness is an illusion, that Paul Kahn’s “separation” is not possible and clinging to the illusion of it promotes an unconsciousness that is treacherous and even delusory, the question becomes not whether scholarship is engaged or not, but with what is it, in fact, engaged. Kahn’s scholarship, for example, is engaged with the male liberal academy. Tilting against a notion of “practical reason” that is scarcely practiced, it seems unaware that the hermeneutical theory of law’s culture he calls for—looking into the roots and meanings of the rule of law as such—has been going on over here in the land of engaged scholarship for some time.

Engagement with women’s lives has produced new scholarship on women across the academy, including in law. Its embrace of engaged method, the openness to and visibility of that engagement within the work, has made its method—its relation to reality—appear new. Maybe it is. Its consciousness of its relation to what it studies may be what is most new about it. Certainly its substance is new. But it should be recognized that men scholars have always been and still are engaged with certain things and in the lives of some people—rape law, underpinned as it is by the treatises of Blackstone and Hale, is not nearly unenforceable for nothing—just not these things, these people, in this way.


10. See, e.g., CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 119-21 (1989). The parts most responsive to Kahn’s points were written in 1972-73.
Where social topics are concerned, choice of topic, angle of vision, approach, and methodology are variously affected by the life of the scholar, otherwise termed personal. This is almost trivially true, but it opens onto something more contested and profound. In my experience, people feel your biography offers insider information on your work if you write about some subjects, say discrimination or sexual abuse. But this is no more true of these subjects and no less true of others, occupational choice research suggests, although it may be more obscure in antitrust or the UCC. If Lasswell's insight that much of politics involves the displacement of private problems onto public objects is true of politics, it is no less true of political science. If not everything the scholar thinks can be reduced to individual biography, what they have been through and seen is variously relevant to what they know or want to avoid or what they have a genius for illuminating or what field they choose to spend their lives tilling. Whether they will say what they know is another matter. That something real shapes the work is the at once denied and almost trivially true point. In other words, what Jerome Frank and the other realists observed of legal decisions—that they are made by humans in context—is no less the case of legal scholarship about those decisions.

Underlying even the most abstractly-presented thesis—perhaps most especially that one—is the elementary fact on which the sociology of knowledge is predicated: life motivates scholarship, social circumstances shape it, even as we reach beyond our limits. This dynamic has heightened visibility in highly contentious areas, but it is not confined to those areas. We all know instances. Someone who adopts a child of another nation or ethnicity becomes an expert on intercultural adoption. Desire to marry one's same-sex partner generates new discrimination theories. Pornography users create First Amendment scholarship that ensures they can keep using it. A parent who molests a child develops law to stop suits against parents for child abuse. Someone abused as a child litigates against abusers or tries to prove there is no such thing as repressed memory. The relation between experience and scholarly position, this is to suggest, is not always linear, far less always clear. That Heidegger was engaged with the Nazi party and wrote *Being and Time* does not make the relation between that life and that text a simple one.

11. HAROLD D. LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW 133 (1958) ("The politician displaces his private motives upon public objects, and rationalizes the displacement in terms of public advantage.").

12. See generally JEROME FRANK, LAW AND THE MODERN MIND (1970). Jerome Frank, who sat on the Second Circuit Court of Appeals, is often said to have contended that legal decisions may be less determined by legal texts than by what the judge had for breakfast. My contention is formally similar but substantively much tighter in terms of the relevance nexus: legal texts involving structural inequalities may be strongly determined by the status location and pertinent experiences, hence views, of the legal actor involved.

13. For some documentation and analysis, see VICTOR FARÍAS, HEIDEGGER AND NAZISM 59-67 (Joseph Margolis & Tom Rockmore eds., Paul Burrell trans., 1989). See also MARTIN HEIDEGGER, BEING AND TIME (1927).
Whether one’s scholarly work is propaganda is, I think, ultimately less about voice and method (although demagoguery and lies, even with footnotes, surely are scholarly flaws) than it is about substantive content. For present purposes, it is enough to observe that it is thought crucial in the academy that only the work part of scholarship, not the life part, be visible. The common advice to young women not to do scholarship on women, certainly not to make it the center of their professional work, offered with their best interests at heart, is a case in point.

If the dichotomy between engaged and disengaged scholarship is a false one, devolving into the question of what the scholarship is engaged with, that does not mean that there is no such thing as scholarship doing its best to be as disengaged as possible. This is alienated scholarship, fleeing as far from anything real as it can, strenuously appearing committed to nothing outside itself. These days it often seems driven by style and posture for its own sake and theory for abstraction’s sake, alternately pervaded by a sense of no one at home or navel-gazing self-involvement (what might be described as only the author at home). Such scholarship, I hazard, is often engaged with impressing an academic in-group or with career-promotion, especially with getting tenure. It is driven more by its relation to an academic social world and its byzantine rules, and anxiety about them, than by its topic. If its ostensible subject matter is quite incidental, the work is far from truly disengaged; it is merely engaged other than with its subject. To the existentialist’s question, “What is your project?” it answers (as hilariously parodied in Kingsley Amis’s Lucky Jim):

to be seen to do successful academic work as the academy defines it. Successful scholars in this vein say more and more about less and less, until finally they’ve said everything about nothing. Defending this orientation, Stanley Fish described it as proceeding from “[t]he nearsighted situatedness of those who remain within the borders of the academy.”

Put another way, in an irreducible epistemic sense, all scholarship, especially on social topics, is ineluctably participant observation, it is just a question of what it is participating in when it observes. Engaged scholarship is far from uncritical of its determinants; rather, instead of denying or pretending to repudiate them, it consciously takes them on board as not only awareness of limitations but an opportunity for access to knowledge. Once you see that the

15. I had thought this turn of phrase came from Mark Twain, but it seems Konrad Lorenz said it of the smaller question of specialization: “The specialist comes to know more and more about less and less, until finally he knows everything about a mere nothing.” KONRAD LORENZ, BEHIND THE MIRROR: A SEARCH FOR A NATURAL HISTORY OF HUMAN KNOWLEDGE 33 (Ronald Taylor trans., 1997); see also Nicholas Murray Butler, Commencement Address at Columbia University, in BARTLETT’S FAMILIAR QUOTATIONS 625 (Justin Kaplan ed., 17th ed. 2002) (“An expert is one who knows more and more about less and less.”).
pose of the less point of view the better, the less visible the better, is a shared illusion, you see that that illusion has a politics.

By the norm of disengagement, scholarship is most successful when it does not challenge the reality it studies in any basic way. To illustrate by counterexample, feminist scholarship came from women living under male dominance becoming conscious of it and determined to end it. Its view from inside and underneath, far from limiting the work, required that the fish become critically conscious of the water. This challenged the dominant ecology—something that wasn’t even supposed to be there—a tall order for method and career. As there was little to no scholarship for this departure to base itself on, this work had to be engaged with its world to have anything to study. And it has had (no coincidence) a serious struggle establishing itself as academically legitimate—a challenge that, in my view, has largely swamped it over time, making it more disengaged by the day. But feminist scholarship is, in actuality, no more engaged in the methodological sense than standard male-dominant scholarship is; it only appears to be. Indeed, it only appears to be coming from an angle of vision to the degree that it stands out from the social and scholarly background by contrast.

The norm of disengagement demands that the scholar leave the status quo of the subject fundamentally untouched, as Paul Kahn recognizes when he advocates the necessity to abandon the task of legal change. This is a relation to reality. For that feeling of absence of authorial presence that gives legal scholarship its special authority, it helps to affirm the arrangement of power as it is, which is why it is easier for some political persuasions to appear to be disengaged than for others. It helps if the ideological paradigm being used reflects the ideology that shapes the subject the scholar is investigating. Law reform work can be engaged but, from the standpoint of academic norms, it preferably does not challenge the lineaments of social power that underlie the law it would reform. Being Kuhn’s paradigm worker, tinkering at the margins, helps immeasurably. The norm of disengagement thus becomes a tool for disciplining the unruly academic or silencing opponents. Its voice of presencelessness, the voice that never speaks an ordinary language—the language of social reality—and cannot be distinguished from anyone else’s, submerged in the philosophical “we,” enhances that authority that keeps academic work from being marginalized or dismissed. This also makes it rare in the academy “to find,” as Robert Frost once put it, “[o]n any sheet the least display of mind.”  

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17. Sheldon Wolin didn’t say exactly this in his 1969 Political Theory as a Vocation, but I came to understand it better from his stunning analysis of “the behavioral revolution,” one feature of which is disengagement, and his defense of epic theory, one feature of which is engagement. Wolin, supra note 1, at 1062-82.
Another indicator of legal scholarship in the putatively disengaged mode is the pains taken to appear to spring only from the law of, rather than the life of, its subject—meaning the doctrine on the face of the text, preferably in a commentator or bystander role. Better still is when its context is other legal scholarship. This contortion is often painful to watch as well as doomed. Law, the subject of legal scholarship, although written in books, exists in constant and intimate engagement with its world, social reality. Among academic subjects, law is uniquely alive in this way. It is words in power; its texts live in social space, ordering and reflecting structures of power, even as lying there on the page. Unlike other literature, real heads roll directly depending on what is inscribed there. This makes legal scholarship not an intellectual discipline in the usual sense; legal scholarship is not to law as literary scholarship is to literature or historical scholarship is to history or political science is to politics. Law is always already real. Whenever you deal with it, including in scholarship and teaching (even, yes, at conferences), you are taking some part in that reality. Because law itself is engaged, legal scholarship is always already engaged. This does not make bias more inevitable than usual. It does make disengagement epistemically impossible, the illusion of its pursuit as a high calling arrogant, and the self-conscious embrace of engagement appropriately humble as well as productive, despite the fact of it being ineluctable.

As a result, while professors of English do not usually write novels (at least not very good ones), and historians as such rarely change the course of history (regrettably), and political scientists do not generally run for office (no loss, I suspect), law professors not only consult confidentially with judges and provide them judicial clerks who draft their opinions, they become judges and legislators with some regularity. And legal scholarship is cited in legal decisions (at least by the Supreme Court) and sometimes ghosts them in that plagiarism we call victory. Barbara Johnson can with some plausibility say in the literary context, “It is a grandiose fantasy of omnipotence to fear that by forgetting reality, a person might damage reality.” But for a judge or a legislator or a lawyer to forget reality is incompetent, even vicious. Legal professionals, including legal academics, indulge a fantasy of impotence if they think that, when they forget reality, they do no damage. I’m not at all sure he is right about this, but Stanley Fish can plausibly say of literary scholarship that, “Politics does not need our professional help; texts do.” Now really: what is law, text or politics?

For these reasons, it takes affirmative effort to try to kill off legal scholarship’s intrinsic engagement with legal and social practice. The tip of this intrinsic iceberg can be seen in civil law countries, where commentaries of

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scholars are used to interpret law, and in the doctrine of customary international law, which predicates the universality of a legal norm (a practically powerful conclusion) on the practice of states, opinions of jurists, and the work of scholars alike. Most legal practitioners in the United States do not read law reviews, although they ransack them on occasion for bits of some use for strategic deployment—most often (and ironically in light of my argument) when they are deliberately trying to change the status quo and have no more presentable authority at hand. But my point is larger: legal scholarship participates in historical and social life whether legal scholars try to or want to or not, not only as grist for its mill, but inexorably through what it does. Read Weimar legal scholarship if you doubt it. In our realm, to attempt to be truly disengaged is to strain to say so little that one’s scholarship weighs nothing at all on the scale of the legal quotidian. What an ambition. Imagine not only what is ossified but what is lost because of it.

In conforming to the disengagement norm, diligently emptying one’s scholarship of signs of interest in real life also helps, encouraging the substancelessness of so much legal scholarship, a pose that is all too successful much of the time, an unreality that has very real results. The effort recalls a story one philosopher told about another, a rational choice theorist, who was agonizing about whether he should take a job at another institution. The hassle of moving, his wife’s feelings, his children’s school, his future prospects, what to do? Mischievously, the first philosopher, modeling the second’s scholarly theories of rational choice, said, “Hey, Tom, it’s easy, just write down all the positives in one list, all the negatives on another, see which list is longer, voilà!” To which guy two snapped peevishly, “Come on, Dick, this is serious.”

Disengaged scholarship, you see, affirmatively needs not to take its subject seriously, meaning not to treat it as you would treat something that was real to you. Far from impossible, this is all too possible. It spells much academic success and siphons off much mental energy. But what must the world be like for this knowledge of it to be possible, one wonders? What is legal knowledge by this definition? In a mortal context, the question it raises is, why bother?

Disengaged scholarship, in the sense I have been discussing it, seeks to cover up who and what it is engaged with, its real project and raison d’être. The project of denying that one’s work has a project, particularly when its driving force is reflexively academic, comes from and results in a solipsism that, in my view, undermines more than enhances its fairness and balance, which are accuracy norms. Being serious gives you every incentive to be accurate. Disengagement twists work by imperatives that have nothing whatever to do with what it purports to be about in ways that, deflected by dead-handedness or fancy footwork on the surface, are hard to get at by design. But disengaged scholarship is no more ultimately possible of realization than is disinterested adjudication. The tilt of the work—inevitable even if it says next
to nothing, since it leaves the world of its subject alone—is just made less rather than more accessible and transparent. This way of approaching the subject is arguably responsible for the utter contempt (on my observation unique in degree if not kind, compared with other professions) in which most practitioners hold most legal scholarship, particularly the high-end sort, one defining characteristic of which is its ever-shrinking audience. This is not at all the same as disagreeing with it. It is my impression that both this kind of work and practitioner contempt for it are becoming more rather than less prevalent.

Practicing the law of the subject of one’s scholarship is, in my view, indispensable to engagement. The impulse of law and economics, however abstracted its intellectual apparatus can be, is fundamentally highly engaged with the real social world, although one keeps wanting to urge its practitioners to get beneath their assumptions and closer to the street. My work with Bosnian women, embodied in litigation, prosecution, and adjudication, is generating new definitions of and accountability for rape, new understandings of its place in conflict, and new models for victim participation in defining and vindicating international human rights.\textsuperscript{22} It all emerged from women close to the ground in war and genocide. Andrea Dworkin’s and my work, which proposed to legally empower people abused through pornography, emerged directly from their experiences and moved the theory of a subject stuck for centuries.\textsuperscript{23} By contrast, much legal scholarship, from the doctrinal to the postmodern, makes an effort to be as distant from the real world of the law’s lived roots and impact as it possibly can. Its above-the-fray stance defines the fray as akin to the medieval rabble, the perceived low-lifes who, however fashionable as objects of study, remain, along with the grittier and more unpleasant realities of their lives, decidedly unfashionable as members of the faculty. By distinction, from corporate litigation to state department advising, the breath of real air blows through engaged work, if permitted to.

For life to make new law, forge new understandings of law’s meanings, and create new theories, the life of the problem and the life of the law of the problem must both be engaged, in practice, directly. This method is risky in a hostile professional atmosphere but the upside gains can be big. The legal claim for sexual harassment as sex discrimination, for example, emerged from immersion in women’s experiences of sexual abuse in hierarchical contexts, about which nothing was being done. It became a law school paper that was used as the basis for rulings establishing the claim, which turned into a book analyzing the reality of the experiences and the theory behind the rulings that

\textsuperscript{22} Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995); Catharine A. MacKinnon, Rape, Genocide and Women’s Human Rights, 17 HARV. WOMEN’S L.J. 5 (1994).

the paper had participated in creating. So now there is a law against sexual harassment and (oh yeah) theory books too. Notice, the trajectory was not to think up an idea from reading books, scan the horizon for victims to use to test it out, and then to write about the results of test cases brought. It was being picked out to listen to victims to address an urgent problem that had yet to be solved, to have to create the theories that adequately responded to their situation because existing theories did not, and thereby to create new legal theory and legal change.

To connect these points to conventional politics, it is my observation that, in the legal scholarly world, liberals and conservatives tend to relate differently to reality and to ideas. Conservatives are more open to reality; liberals are more open to ideas. Conservatives are more interested in reality so are better at seeing how things are. Liberals are more interested in thinking about whatever it is they think about (usually the ideas of other liberals), so tend to be better at that. Methodologically, conservatives are thus grounded but stuck in the mud, and liberals soar in flight but are unable to land. In the terms of this talk, conservatives tend to be characterized more by engagement with the world, legal and social, as liberals have become ever more engaged with the academy. Hence the liberals’ children, the postmodernists. And the hiring practices of most top law schools. And many elections. But I digress.

Engaged scholarship at its best is both grounded and theoretical, actively involved in the world of its subject matter, and for that reason, able to think about it in fresh ways. The work may be “relevant,” or involved in “law reform,” the typical catch-phrases, or not. Submersion in the real-world reality of its subject makes it better, deeper, broader as scholarship; its walk on the street teaches what no book yet does. On the cognitive level, to be engaged in the sense I mean is to take the inevitability of location and the self-conscious immersion in reality as a source of knowledge and inspiration rather than as a barrier to thought and action. Being shaped by the social reality being studied—being consciously up close and personal with it—is its method. Paradoxically, just as claiming the particularities of the self who works can make the work less self-involved, immersion in the constrictions of the world can give the work a wider vision. At this point, it becomes unnecessary to

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25. Conservative commentator David Brooks helped me find some of the words for this. See David Brooks, The Wonks’ Loya Jirga, N.Y. Times, Dec. 14, 2004, at A33 (“[Y]ou have to remember that Republicans have a different relationship to ideas than Democrats. When Democrats open their mouths, they try to say something interesting. If the true thing is obvious and boring, the liberal person will go off and say something original, even if it is completely idiotic. This is how deconstructionism got started.”).
discuss feminism as method. It works for over half of humanity. Wouldn’t you think it might work, self-critically, for the other half?

Grounded theory of this sort is involved with the world of its subject as well as with creating the law that refers to and emerges from its world. From practice in at once the Marxist and legal senses of the word, you know what is real, because you know what the world was like before your piece of its practice was there. The discipline of reality born of engagement, including responsibility for consequences, sharpens the faculties, a bit like knowing you will be shot at dawn. The self-imposed uselessness of disengaged method, the superiority of its Olympian pose, offers a false freedom, and it is predicated, I will again hazard, on a fear of mattering, which cannot be avoided for fear of mattering. The pose of disengagement protects ignorance, ensures aridity, and virtually guarantees that nothing much, surely little new, will come from the legal academy—not to mention its destructiveness to diverse creativity. Grounded involvement, I am saying, is where real theory comes from, where new ideas are running around on the hoof, as well as how you know what you know and what you don’t know, hence how you come to have anything worth saying.

I am not saying that the only test of value in legal scholarship is value in use. I am saying that there is real value, including scholarly value, in being real. A key methodological difference between scholarship that embraces its engagement, and scholarship that keeps trying to disengage from the sticky grasp of the real world, can be seen in contrasting a 1920 poem by Robert Frost, with another written around 1976. You know that one by Robert Frost where he kneels at wells and sees only his own reflection? Then one day, just when he thinks he actually sees something down there at the bottom of that well, a drop ripples the water: “What was that whiteness? / Truth? A pebble of quartz? For once, then, something.” Did he see it? Was it really there? At least he knows that his image, before, wasn’t “something.” Something, for once, was out there.

About all that, with the law in mind, this other poem by legal scholar Gerald Torres says this:

Why the World Ain’t Obvious

and Robert Frost
gazed upon the well
water—
he sat and saw or
thought he saw or he
sat and thought he thought

26. ROBERT FROST, For Once, Then, Something, in NEW HAMPSHIRE 88 (1923).
about seeing or
he
thought about others who
thought about him
seeing and
spied a pebble
smooth white stone
with breeze
the quiet rippled pond
disfigured his face.  

Frost’s project here was seeing his own reflection framed by ferns and sky, reminding one again of how un-new the American postmodernist self-involvement is. Gerald’s project was to see through the water to the stone at the bottom. He observes the world seriously, not as a pretext to look at himself. When you are serious, neither the looker nor the looked at, Heisenberg-like, stay the same, and you know it. You are engaged. This does not prevent error; nothing does (I’m sorry to be the one to tell you). It does not end debate or guarantee that your politics will be my politics, but why should it? Of course I think reality is on my side, but whether it is or not is a question of substance, not reducible to stance. Because the knower is inseparable from the known, the world ain’t obvious, but it sure exists out there and will change the shape of your face.

Gerald’s poem—this rebuke to solipsism, this pithy forerunner of post-postmodern method, this spur to and embrace of practical action, this reminder that whatever goes on in your head, that rock, this breeze, is out there, the breeze changing how you can see the rock but not whether it is there, this recognition that the world engages you whether you face your engagement with it or not, this orientation, this inspiration, this challenge to keep looking deep into that well—has been sitting, since it was written, on my desk behind a shard of slightly stained glass from the Yale Law School’s front door.
