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AGAINST GAP-FILLING

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Legal scholars delight in gap-filling. They frequently claim that their works have identified a gap in the literature and to have filled (or begun filling) that gap. However, all too often, these same papers fail to explain why the gap needed to be filled at all.[1] Indeed, despite a robust tradition of meta-scholarship, the legal literature is largely devoid of a theory of academic gap-filling.

This essay fills that gap. In it, I argue that gap-filling for the sake of gap-filling is an error for three interconnected reasons. First, gaps might exist for a good reason. Second, concern with gap-filling is often a misguided attempt to address other issues that are tangential to legal scholarship. Finally, focusing on gaps is incredibly limiting. Instead, I suggest that legal scholars should focus on exploring questions that interest them, regardless of whether that exploration leads them to a "gap."

Gaps might exist for a reason. To begin with, there may be a good reason why a gap in the legal literature exists. It is possible that a question is uninteresting to other scholars, that there is scholarly consensus that the "problem" an article seeks to address is so minor that it does not merit

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[1] *See* Ashley T. Rubin (@ashleytrubin), TWITTER (May 24, 2021, 3:02 PM), https://twitter.com/ashleytrubin/status/1396904421347393538 [https://perma.cc/TNE3-22D9]("I've been reading a *lot* of research lately and I can't tell you how often people use a gap in the literature to motivate their work.").

attention, or that it exists only in the author's imagination.[2] None of these issues is a reason scholars should not try to fill a gap in the literature—as discussed at greater length below, scholars should address themselves to research that interests them—but they may explain why there is a gap. To the extent a researcher agrees that an issue is uninteresting, minor, or non-existent, it would be silly to address it solely because it has not been written about before. Scholars who choose to do so are like children with fingers plugging holes in a dike behind which flows only air.

More significantly, a gap in the legal literature may exist because a problem is more properly addressed by scholars in other fields. Of course, law touches on all areas of life, and there is value in translating work from other fields into legal scholarship. However, legal scholars are generally not well positioned to provide original insights into fields outside of law. For example, neuroscience can provide critical insights into a criminal defendant's guilt and culpability for an alleged offense, and legal scholarship that addresses the substantive and evidentiary issues related to neuroscientific research can ensure that relevant science informs our understanding of the law.[3] Criminal and evidence law scholars, though, typically do not have the expertise, facilities, resources, or funding to conduct original research in neuroscience.[4] To the extent they do, their scientific findings are better reported in the first instance in scientific journals, where they are subject to peer review, rather than in student-edited law journals. Thus, a "gap" in the legal literature may exist solely because the relevant issue is better addressed by non-lawyers.

Gap-filling as a stand-in for other concerns. Beyond the reasons why it might not make sense to fill a gap, gap-filling for the sake of gap-filling is typically a stand-in for addressing other issues. Three such concerns are particularly salient: Fear of preemption, a desire to be original, and the need to impress the student-editors of law journals.

Preemption occurs when a paper's arguments have been thoroughly covered by previous scholarship, or when developments in the law moot

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2 A variation on this theme is that a gap exists, but that the effort required to fill it is incommensurate with the importance of the question presented.

3 *See, e.g.*, Deborah W. Denno, *The Place for Neuroscience in Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF LAW AND NEUROSCIENCE 69, 72 (Dennis Patterson & Michael S. Pardo, eds. 2016).

4 Joni Hersch and W. Kip Viscusi, for instance, reported in 2011 that only 6.9 percent of professors at top law schools had Ph.Ds in disciplines outside of the social sciences and economics. Joni Hersch & W. Kip Viscusi, *Law and Economics as a Pillar of Legal Education* 21 t.1 (Vand. U. L. Sch. Working Paper, Paper No. 11-35, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907760 [https://perma.cc/RZ6S-9TH8]. Presumably very few of these were Ph.Ds in neuroscience.

the paper's thesis.[5] In either event, the paper is thought to not be worth writing, as it cannot make a useful contribution to the literature. Indeed, many law schools have preemption check guides—generally intended for students—that explain how to research a topic to determine whether an idea for an academic paper or scholarly work has been preempted.[6]

To a degree, concern with preemption makes sense. First, too closely following the structure of previous work could give the appearance of plagiarism. While "[p]lagiarism is not a crime or even a cause of action[,] . . . it is the 'academic equivalent of the mark of Cain.'"[7] Even accusations of plagiarism can have a serious impact on an academic's career.[8] Determining whether someone else has already made the precise claims one is interested in advancing can help avoid the appearance of impropriety (should one desire to do so). Moreover, if a paper is truly preempted it adds nothing to our collective understanding of the law. So, in addition to potential negative consequences for the author, the scholarship may not be particularly valuable as scholarship.

A paper that fills a genuine gap in the literature will not be preempted. But there are good reasons why concern with preemption is overblown, and why gap-filling for the sake of avoiding preemption is a mistake. New articles might retrace old ground because further developments in the law or facts require further consideration. A scholar

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5 These two forms of preemption are sometimes referred to as "preemption by author" and "preemption by law." *See, e.g.*, *Preemption Checking*, TEX. A&M UNIV. SCH. L. (May 16, 2023, 11:09 PM), https://law.tamu.libguides.com/preemptionchecking [https://perma.cc/TLC9-KT4K].

6 *See, e.g.*, *id.*; *Preemption*, NYU L., https://www.law.nyu.edu/students/studentwriting/preemption [https://perma.cc/C6LE-7HG4]; *Preemption Check Checklist*, UNIV. CHI. LIBR. (Jan. 10, 2023, 2:55 PM), https://guides.lib.uchicago.edu/preemption [https://perma.cc/T5DM-CYTJ]; *Preemption Checking for Law Reviews & Journals*, UNIV. S.F. SCH. L. (Oct. 10, 2023, 9:13 AM), https://legalresearch.usfca.edu/preemption [https://perma.cc/5CV4-MWFA]; *Preemption Checking for Law Reviews and Journals: Home*, LSU L. LIBR. (Sept. 7, 2023, 2:42 PM), https://libguides.law.lsu.edu/preemption [https://perma.cc/6MAN-JLKS]; *Writing Notes and Comments for Journal Members*, STAN. L. SCH. ROBERT CROWN L. LIBR. (Apr. 13, 2023, 12:13 PM), https://guides.law.stanford.edu/c.php?g=562172&p=3869757 [https://perma.cc/3SAR-2RSC]; Michelle Pearse, *Preemption Checking for SJD's and LLM's*, HARV. L. SCH. LIBR. (Sept. 12, 2023), https://guides.library.harvard.edu/preemptiongrad [https://perma.cc/Y28Z-89D2]. Law schools may provide other training as well. For example, when I was a student at William & Mary Law School, the *Law Review* provided a training on preemption checks during new member orientation, and the school's LexisNexis representative held one-on-one appointments with second-year students to assist them with preemption checks for their student note topics.

7 Noah C. Chauvin, *Enough Is as Good as a Feast*, 44 SEATTLE U. L. REV. 1, 17 (2020) (plagiarizing Brian L. Frye, *Plagiarize this Paper*, 60 IDEA: THE IP L. REV. 294, 296 (2020) (quoting K.R. ST. ONGE, THE MELANCHOLY ANATOMY OF PLAGIARISM 61 (1988))).

8 *See* Amy Ciceu, *Princeton Dismisses Kevin Kruse Plagiarism Allegations as 'Careless Cutting and Pasting'*, DAILY PRINCETONIAN (Oct. 13, 2022, 10:59 PM), https://www.dailyprincetonian.com/article/2022/10/princeton-cornell-conclude-separate-investigations-kevin-kruse-plagarism-allegations-errors [https://perma.cc/XPN3-6JAV] (detailing the months-long plagiarism investigations two universities conducted regarding Princeton historian Kevin Kruse, who was ultimately cleared of any deliberate wrongdoing).

revisiting arguments discussed in another paper may have a better, more efficient, or more compelling way of explaining them. Moreover, that multiple scholars have made the same arguments can be a useful signal: there is benefit in replication.[9] Gap-filling scholarship will not be preempted, but it also will have none of the advantages of a paper that risks preemption.[10]

Closely related to concerns about preemption, a desire to gap-fill may be driven by an aspiration to produce original scholarship. Legal scholars seek to gain recognition and acclaim by publishing creative, original work that distinguishes them from those who have come before.[11] Doing so can lead to professional advancement; influence on fellow academics, legal professionals, and policymakers; and even attention outside of academia.[12] Additionally, the fundamental pleasure of scholarship is developing new knowledge. A paper that genuinely fills a gap in the literature is per se original, a potentially powerful motivation. However, for the reasons discussed above with respect to preemption, gap-filling is a poor proxy for originality. A paper can be original—and valuable—even if it does not fill a gap in the literature.

Lastly, a focus on gap-filling may result from concerns about article selection decisions made by student law review editors. American law journals are odd in that it is second-year students, not professional editors advised by peer reviewers, who decide which articles the journal will publish.[13] Student editors do their best to select interesting and original

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9 *See, e.g.*, *Replicating Scientific Results is Tough–But Essential*, NATURE (Dec. 16, 2021), https://www.nature.com/articles/d41586-021-03736-4 [https://perma.cc/37JL-ABUF] ("The entire scientific community must recognize that replication is not for replication's sake, but to gain an assurance central to the progress of science: that an observation or result is sturdy enough to spur future work.").

10 This is to say nothing of the fact that preemption is in the eye of the beholder; it is at best a subjective measure.

11 *See* Lawprof blawg & Darren Bush*, LAW REVIEWS, CITATION COUNTS, and TWITTER (Oh my!): Behind the Curtains of the Law Professor's Search for Meaning*, 50 LOY. U. CHI. L.J. 327, 333 (2018); *see also, e.g.*, U. IOWA COLL. L., COLLEGE OF LAW TENURE STANDARDS AND PROCEDURES § II.B.3(b) (2008), https://law.uiowa.edu/sites/law.uiowa.edu/files/2020-08/Tenure%20Standards%20and%20Procedures.pdf [https://perma.cc/5XPG-GC67]; U. MINN. L. SCH., LAW SCHOOL STATEMENT OF STANDARDS FOR TENURE, PROMOTION, AND POST-TENURE REVIEW REQUIRED BY SECTION 7.12 OF THE REGULATIONS CONCERNING FACULTY TENURE 2–3 (2007), https://faculty.umn.edu/sites/faculty.umn.edu/files/2020-09/statement_of_standards_law_school.pdf [https://perma.cc/9F24-MXVZ].

12 *See, e.g.*, The Colbert Report, *Victory for Gay Marriage & the Rise of Amicus Briefs—Allison Orr Larsen*, COMEDY CENT. (Oct. 6, 2014), https://www.cc.com/video/ssmvma/the-colbert-report-victory-for-gay-marriage-the-rise-of-amicus-briefs-allison-orr-larsen [https://perma.cc/33BL-PGX8].

13 *See* Noah C. Chauvin, *The Banality of Law Journal Rejections*, 106 MINN. L. REV. HEADNOTES 18, 18 (2021).

scholarship for publication,[14] but they are not in a particularly good position to determine when an article satisfies these criteria. Scholars have developed several strategies to game the selection process; one is to claim (truthfully or not) that an article fills a gap in the literature.[15] An article that fills a gap may be more likely to be selected for publication because, while student editors are not well positioned to assess the paper on its merits, they can at least perform a preemption check and confirm that it is "original."[16] In this way, concern with gap-filling can be a stand-in for a desire to make an article attractive to the students who will decide whether it is published.

Here, too, there are reasons to question the motivations for gap-filling. To some degree, it is unfortunately necessary to impress student editors. Most importantly, the "quality" of journals a scholar publishes in can have a significant impact on law schools' hiring, tenure, and promotion decisions.[17] Nevertheless, trying to grab the attention of student editors is a mug's game that often reduces the quality of law review articles. For example, some authors include lengthy background sections in their papers to ensure that law journal editors understand the contribution the paper makes to the literature.[18] But with strict word limits on article length, the more space spent on background (particularly on background not necessary to sophisticated readers), the less there is to devote to the paper's substantive contribution.[19] This problem is particularly acute for papers focused on technical topics that require significant explication.[20] In this way, trying to make a paper attractive to law journal selection committees can make it worse.

Similarly, attempting to grab law journal editors' attention by claims of gap-filling can lessen the quality of a paper. Doing so can lead to

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14 *See* Leah M. Christensen & Julie Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those with all the Power—Student Editors*, 59 S.C. L. REV. 175, 195 tbl.6 (2007); Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 ALB. L. REV. 565, 589–90 tbl.4 (2008).

15 *See* Paul J. Heald, *The Law Review Scam: How to Humanely End Law School Exceptionalism* (U. Ill. Coll. L. Legal Stud. Rsch. Paper, Paper No. 22-19, 2022), https://ssrn.com/abstract=4086728 [https://perma.cc/UH6L-PUYM]. Other strategies include puffery, multiple submissions, and leveraging personal connections with student editors or their professors. *See id.*

16 *See* Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 404 (1989) ("[A] manuscript on a topic about which much has been recently written is less likely to be worth publishing than one on a fresh topic.").

17 *See* Frank T. Read & M.C. Mirow, *So Now You're a Law Professor: A Letter from the Dean*, 2009 CARDOZO L. REV. DE NOVO 55, 61–63 n.18.

18 Michael C. Dorf, *Thanks to a Joint Statement by Top Law Journals, Law Review Articles Will Get Shorter, But Will They Get Better?*, FINDLAW (Feb. 28, 2005), https://supreme.findlaw.com/legal-commentary/thanks-to-a-joint-statement-by-top-law-journals-law-review-articles-will-get-shorter-but-will-they-get-better.html (last visited Jan. 18, 2024).

19 *Id.*

20 *See id.*

puffery, with authors claiming a more significant contribution to the literature than they have actually made. As described above, it can also lead to authors genuinely filling a gap that existed for a (good) reason and need not have been filled. In either event, the paper may be more attractive to the students selecting articles for publication, but of lesser or no value to its readers once it has been published.

Focusing on gaps is limiting. Finally, focusing on gaps is inherently limiting because it requires scholars to choose a thesis that is confined by what others have already accomplished. Writing scholarship in so reactive a manner hamstrings true creativity. Legal scholars are not bound by reality in the same way as our colleagues in other fields: whereas they seek to understand and explain phenomena that have happened, are happening, or will happen, and are limited by the facts known or discoverable about these phenomena, our subject matter is the law—something that is (with apologies to adherents of natural law theory) wholly made up by people. Physicists, economists, and art historians, for example, must account for the world as they find it. But, to the extent a law, legal doctrine, or method of interpretation is imperfect, legal scholars can advocate for changing it. Legal scholarship concerns itself not with the world as it is, but with the world as it should be.

This is a gift, and we should treat it as such. As I have written elsewhere, one of the great joys of legal scholarship and academic publishing is its rank amateurishness, which "allows for creativity, for play;" it allows scholarship to "be *fun*."[21] Legal scholarship ought to be self-indulgent,[22] because its potential is boundless. Overemphasis on gap-filling qua gap-filling is needlessly limiting. Creative and original scholarship will fill gaps, of course. But we need not artificially limit ourselves by shackling our work to what others have already achieved.

For the three reasons I have identified (and, in all likelihood, for other reasons I have failed to identify), focusing scholarly attention on gaps in the legal literature, at least for the sake of gap-filling, is a mistake. How, then, are scholars to distinguish themselves? As explained above, attempting to distinguish oneself from other scholars is inherently limiting—defining yourself by what others have *not* done is still defining yourself by others. But still, the scholarly enterprise is defined in large part by the production of new knowledge,[23] and it requires at least some degree of originality.

I see little reason to worry too deeply about developing original work. People defy categorization and labeling; we are defined, fundamentally, by our individuality. Want to advance the scholarly

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21 Chauvin, *supra* note 13, at 25.

22 *See generally, e.g.*, Noah C. Chauvin, *Against Gap-Filling*, 2024 CARDOZO L. REV. DE NOVO 1 (2024).

23 *See* Chauvin, *supra* note 7, at 11–12.

discussion? Pick a topic that interests you. Learn a lot about it; then share your insights. They may not be interesting or profound, but there is little doubt that they will be original. Obsessing over finding a gap in the literature wastes time that could be better spent actually doing the work.