

## JUSTICE AND LAW JOURNALS

Gabriel “Jack” Chin\* & Adam B. Wolf\*\*

### INTRODUCTION

What is the role for a law journal in advancing justice? What is the role of a justice-minded practitioner in furthering legal scholarship? And what is the intersection—practically and normatively—for law journals, legal scholars, practitioners, and justice?

This brief Article attempts to lay a foundation for answering these important, but oft-neglected, questions. In the following conversation, a frequent contributor to the *Michigan Journal of Race & Law (MJRL)* and a former Editor-in-Chief of the *Journal* posit some ideas on how legal scholarship engages with justice, and how race-conscious practitioners can interact with race-conscious legal scholars.

### CONVERSATION

*Jack Chin:* When I went to Michigan, there was no *Michigan Journal of Race & Law*. I am envious of those of you who started it and had it as part of your Michigan experience. Nevertheless, I feel like I am part of the *MJRL* family, in part because, I met you, Adam, in 2001, when you were Editor-in-Chief of Volume 6, and I was publishing a paper in the *Journal* for the first of many times. Since clerking, you’ve spent most of your time practicing, and some of your time as a law professor. Since clerking, I’ve spent most of my time as a law professor and some of my time practicing. I am very proud of the matters we have worked on together. But I notice that in most of our joint work, even we did not cite any law review articles. As a practitioner, what role do law journals play?

*Adam Wolf:* Likewise, Jack, I am very proud of our work together—both the scholarship we have produced and the cases we have litigated together. Hopefully this conversation will be productive, not just for our respective work, but for advancing a dialog about the potential reinforcing and supporting relationship between law journals and the practice of law.

I think that legal scholarship should interact with legal practice in three dimensions: First, it should help to provide another perspective for courts that are grappling with difficult, often novel, issues. Much of the scholarly attention here focuses on influencing Supreme Court opinions, but it can be—and should be—equally applicable (maybe even more so) to lower court opinions and orders.

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\* Professor of Law, UC Davis School of Law. J.D., University of Michigan Law School, ‘88.

\*\* Partner, Peiffer Rosca Wolf Abdullah Carr & Kane, A Professional Law Corporation. J.D., University of Michigan Law School, ‘01, Editor-in-Chief, *MICH. J. OF RACE & L.*, Vol. 6 (2000-01).

Second, legal scholarship can influence practitioners. I'll provide an example below, noting how *MJRL*, in fact, influenced my thinking regarding a case before the Supreme Court.

Third, practitioners can influence legal scholars. This is an area that has not been exploited as much as it should, and may be an important way for *MJRL* to interact with legal practice going forward.

*Jack Chin:* Let's dive into all three areas. First, you mention how scholarship can help courts. I'll offer my perspective on that. As a scholar, I do a lot of work with the collateral consequences of being swept up into the criminal justice system. My scholarly interest was shaped by my experiences in practice. I was at Skadden, Arps, Slate Meagher & Flom in Boston and New York, and then at the Legal Aid Society of New York, where I worked on criminal appeals.

In civil practice, we were acutely attentive to the collateral consequences of legal actions; a tiny lawsuit might have collateral estoppel effect in a huge case, for example, or a minor civil enforcement action might, down the road, result in the loss of an essential license. On the other hand, I saw lots of criminal cases where criminal defense attorneys completely ignored collateral consequences. For example, a client might plead guilty to a minor offense, get straight probation, and, unbeknownst to him, become deportable, lose his taxi license, and/or get himself or his family kicked out of public housing. Courts routinely upheld counsel's disregarding collateral consequences when challenged under the Sixth Amendment. I thought this was a mistake, and sought to change it. I did not pursue a test case or impact litigation. I wrote a law review article. I sometimes joke to other professors that "the most effective means of social activism and change is the law review article." That is obviously an absurd overstatement. But I believe that law reviews are a legitimate, reasonable, and occasionally effective means of seeking legal and social change. Articles can make ideas respectable.

Here's my theory: As a criminal appellate lawyer, I worked hard developing novel legal claims, and those briefs would often disappear, win or lose. Even when you won, a court might ignore your best or most interesting issues. On the other hand, a published article is out there forever. (However, judges don't have to read articles, and they really are supposed to read the briefs.)

Ultimately, in *Padilla v. Kentucky*,<sup>1</sup> the Supreme Court did what I wanted, holding that lawyers have an obligation to advise their clients about the possibility of deportation. For better or for worse, in a later case, they did not find the decision retroactive.<sup>2</sup>

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1. 559 U.S. 356, 367 (2010) (citing Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002)); *id.* at 375 (Alito, J., concurring).

2. *Chaidez v. United States*, 133 S. Ct. 1103, 1109 (2013); *id.* at 1120 n.7 (Sotomayor, J., dissenting).

As a former law clerk to judges on the U.S. Court of Appeals and U.S. District Court, what role do you see for scholarship in those courts? As a law clerk, how often did you read law review articles? How often do you cite them now?

*Adam Wolf:* I have to admit that, when I had the pleasure of working for my judges, we rarely, if ever, read, much less relied upon, legal scholarship. First, there just wasn't the time for it. The district court and circuit court docket are packed enough; it is hard to imagine reserving time to peruse legal scholarship. Second, litigants just do not cite scholarship. But these are issues to which we will return later.

*Jack Chin:* I firmly believe that there is a unique role for legal scholarship. I do not think briefs can do the job in all cases. One reason is that the norms of scholarship require candor and balance. By this I don't mean not taking a position. By the time I publish an article, I am usually convinced that one answer or approach is better than another. But a good article is expected to fully and fairly ventilate the weaknesses and counter-arguments. With briefs, you are ethically required to disclose only controlling authority that is adverse to your position. The attitude of an advocate would be unacceptable for a scholar. The great Jerold Israel, writing about the great Yale Kamisar, noted that Professor Kamisar "has never remotely suggested that he writes from a neutral, detached perspective."<sup>3</sup> I think Professor Kamisar's work is consistent with my point, because although he had views, he explained the premises for those views and tested and defended them in a reasoned way.

There is a more fundamental reason. Lawyers in practice rarely have the time to look at a particular legal issue in the kind of depth necessary to write a student note, to say nothing of a scholarly article. The professors who write for *MJRL* might spend the equivalent of six months or more on not just a single case, but rather on what might be a single question, a single issue in a larger case. I assume you've never spent that kind of time, in your role as a practitioner, on a problem?

*Adam Wolf:* As a factual matter, that is of course correct. I cannot possibly devote six months (or more!) to a single question in any one of my cases. The most time I have devoted singularly to one case was for my representation of Savana Redding in the U.S. Supreme Court.<sup>4</sup> It was my first Supreme Court argument, and my colleagues were generous in helping with the rest of my docket, so I could focus three full months on writing the briefs to the court, putting together our amicus strategy, and preparing for the oral argument. I've never been so prepared for any argument in my life. What a luxury!

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3. Jerold H. Israel, *Seven Habits of a Highly Effective Scholar*, 102 MICH. L. REV. 1701, 1712-13 (2004).

4. *Safford Unified School Dist. v. Redding*, 557 U.S. 364 (2009).

As a practitioner, I surely cannot survey all the legal scholarship written on any aspect of any of my cases, which, again, is where new scholarship can come into play. As a practitioner who often works on novel issues, I would love to be in touch with legal thinkers who will do that deep dive and generate scholarship on important issues in my cases.

I mentioned how, during my clerkship years, I do not recall combing through legal journals to find articles that touched upon the cases before us. Do you know how your article found its way to the chambers of Justices Stevens, Alito, Sotomayor, and Ginsburg, who cited it in their *Padilla* and *Chaidez* opinions? More generally, how do you think that legal scholarship can even end up in a jurist's chambers?

*Jack Chin:* Well, I send my articles to judges, including the Supreme Court justices, if I think the issue may ultimately get to the court, but is not there yet. (I think of myself as enough of a lawyer to regard an on-point article as too close to an unauthorized amicus brief if I know a case is before them now.)

But this article in particular got to the Court because I was a co-author of an American Bar Association (ABA) amicus brief in *Padilla*, and we cited it. Other litigants cited it, too, and other courts had done the same. I suppose some courts and lawyers just did research in the area, but I suspect some of them knew of my work because I had gotten my views out there on ABA and Uniform Law Commission committees, projects, and CLEs. I did not just publish articles—I also publicized the ideas. So essentially, I counted on other lawyers to get my ideas to the courts.

*Adam Wolf:* Right. I think it is also important not to lose sight of the role that scholarship can play in a case, even if a practitioner or court does not cite the particular article that animated an idea. I have a good example that, fortunately, involves *MJRL*, and which also brings us to the second idea, which is how legal scholarship can influence practitioners:

When I was Editor-In-Chief of the *Journal*, we published a piece entitled “Cracking the Code: ‘De-Coding’ Colorblind Slurs During the Congressional Crack Cocaine Debates.”<sup>5</sup> It grabbed me immediately. I had known for some time about the inequity of the crack-cocaine guideline and sentencing policy, but this article provided much of the untold story of the congressional debates that led to the racially unjust law.

The publication of that article pre-dated *United States v. Booker*.<sup>6</sup> It was published in a world where guideline sentences were almost always mandatory. *Booker* changed that sentencing process, and with it, effective challenges to the crack-cocaine sentencing regime loomed on the horizon.

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5. See Richard J. Dvorak, *Cracking the Code: “De-Coding” Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611 (2000). This influential paper was mentioned in *Simon v. United States*, 361 F. Supp. 2d 35, 43 n.9 (E.D.N.Y. 2005), and it has been cited in several legal briefs and thirty-five journal articles.

6. 543 U.S. 220 (2005).

*Kimbrough v. United States*<sup>7</sup> was the follow-on case that drastically changed the crack-cocaine sentencing landscape. It asked the Court to consider whether district judges may depart from the crack-cocaine sentencing guideline based on policy disagreements with the guideline, including a belief that the guideline had racially pernicious effects; and further, if district courts were to depart from the 100:1 crack-powder sentencing ratio, was there a more just ratio to employ in a crack-cocaine case?

I had the good fortune of being Counsel of Record for the American Civil Liberties Union (ACLU) for its amicus brief in *Kimbrough*. My thinking about the broad implications of the case and the ACLU's position in the amicus brief emanated from Mr. Dvorak's article: because the crack-cocaine sentencing policy was borne of such racism, not only should district judges be free to jettison the guideline, but sentences in these cases should not be tethered to any particular ratio. This was further than Mr. Kimbrough himself was willing to argue. But ultimately it prevailed at the Court: the *Kimbrough* majority recognized that the guideline was deeply flawed and that district judges need not impose a sentence that corresponded to any particular crack-power ratio, much less the entirely inappropriate 100:1 ratio.<sup>8</sup>

I was indebted to Mr. Dvorak and *MJRL* for influencing my thinking on this case. The criminal justice system owes a debt of gratitude to the *Journal*, as well, for publishing that article. While not cited by the Supreme Court, the article was influential in helping to arrive at a just result for Mr. Kimbrough and so many others caught in the net of the criminal justice system.

*Jack Chin*: Several important points here. The first is that scholarship can be influential even if it is not cited. Honestly, as professors, we are evaluated in part based on citations, and we like to be cited. But the most important thing is the ideas. Just as a court does not commit plagiarism when it copies from a brief, a lawyer is free to take ideas, cases, and arguments from a law review article without attribution. In some cases, I suppose a set of legal arguments might be more authoritative if a court knows it is endorsed by a scholar or it appears in a particular journal. In others, as a matter of advocacy, it may be smarter to do some "idea laundering." And just as you were influenced by an article that you did not cite, courts and law clerks might do the same.

The challenge here is the happenstance, the fortuity. You were asked to perform a legal task as part of your job, and it came out the way it did, benefitting your employer and the legal system, because you happened to have read that article as a student! What if Mr. Dvorak had published his influential article somewhere else, or if the *Journal* had selected a different

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7. 552 U.S. 85 (2007).

8. *Id.* at 109.

paper? What an indictment of the legal system that important information is transmitted, or not, in a haphazard, random way.

*Adam:* I basically agree with that. But I see this concern as less an indictment of the legal system than a necessary—albeit unfortunate—byproduct of the incredible volume of legal scholarship and vanishingly small amount of time that we can devote to any particular issue or case. Legal scholarship, like life, requires being in the right place at the right time. But as you note, a scholar certainly can influence whether her scholarship ends up in the right place at the right time.

The third issue is how practitioners can influence legal scholars. Much less has been written about this topic. But I think it's important. Have you, as a legal scholar, been influenced in your writing and thinking by practitioners?

*Jack Chin:* Oh, sure. I like to get practicing attorneys to comment on my drafts before they are finalized. And I certainly get ideas from what practicing lawyers do. I sometimes learn that there is a simple explanation for something that seemed puzzling to me, or that what first appeared to be a small problem, or one that never occurred to me, is actually quite significant.

But let's focus on *MJRL* specifically for a moment. What do you think *MJRL* should try to accomplish outside of the Law Quadrangle to bring together practitioners and scholars? I mean, much of what it does is intrinsic. Students get experience doing serious research and writing, and reading articles. This is good training in and of itself, and is a résumé line, even if they never publish an issue. What else, though, can *MJRL* do to advance the cause of justice and scholarship jointly? What can its editors do to increase the impact of what they publish?

*Adam Wolf:* I always have thought that *MJRL* can play a special role beyond that of other excellent law journals. Lots of *MJRL* alumni continue to care about and practice law in areas that concern race. I would like to think that, just as lawyers act as referral sources for cases, they also can act as referral sources for legal scholars who are interested in writing about race.

One idea for the *Journal* it is to link practitioners who litigate race-related cases to scholars who are interested in writing on the subject. These cases often involve novel issues for which scholarship could be helpful to the court and litigants who are wrestling with complicated—and previously unexplored—issues. In the process, perhaps the court will cite the *MJRL* article that was published on the issue, providing greater exposure to the *Journal*, as well.

*Jack Chin:* That makes an enormous amount of sense to me. *MJRL* has unique assets: A platform, and students, alumni practitioners, and alumni scholars who share an interest in racial justice. If it wanted to, *MJRL* could leverage those assets. For example, alumni in practice and in academia could be involved in article selection, in commenting on notes and articles,

offering ideas about cutting-edge problems and solutions, disseminating articles to practitioners once they are final, and getting them into the hands of courts by including them in briefs. The student editors of the *MJRL* also could send out copies of articles to the judges and legislators they address.

*Adam Wolf:* Of course, the *Journal* provides substantial benefits to the community, including for the editors and law school more generally, separate from its scholarship. For me, it was a place to grow, it provided a community of people to talk about race, and it helped legitimize important conversations that otherwise may have gone unaddressed. But its scholarship is of course how the *Journal* interacts with the public outside of the Quadrangle. Hopefully this dialog and the ensuing discussion at the conference will help broaden those scholarly interactions and *MJRL*'s impact on courts, scholars, and practitioners.

