Demystifying Legal Scholarship

Roger C. Cramton
Cornell Law School, rcc10@cornell.edu

Follow this and additional works at: http://scholarship.law.cornell.edu/facpub
Part of the Legal Education Commons, and the Legal Writing and Research Commons

Recommended Citation
http://scholarship.law.cornell.edu/facpub/1006

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
Demystifying Legal Scholarship

ROGER C. CRAMTON*

INTRODUCTION

It is a great pleasure to join you today in celebration of legal scholarship. My pleasure is moderated by the penance I performed in preparation for today’s event: reviewing the verbose and narcissistic recent literature in which legal scholars have flagellated themselves and each other in an effort to portray a past, present, and future for our scholarly endeavors.¹ I am deconstructed, delegitimated, demystified, overwhelmed by contradiction, fed up with hegemonies (legitimate or illegitimate), and persuaded of the marginality of much of the exercise.² Even though I’m confused, uncertain, and exhausted, the search for the Holy Grail of scholarship attracts me like a moth to a candle. My only sure conclusion is that it must be more fun to be a trasher than a trashee.³

William James described a classic encounter between scientific truth and a commitment of faith. A prominent scientist had just given a brilliant lecture on the foundations of the universe. During the question period an elderly woman suggested that there was a problem with the professor’s analysis. “What is that?” asked the professor cautiously. “It’s all wrong,” the woman replied, “because the universe actually rests on the back of a giant turtle.” The professor, taken aback, forced a smile and then countered: “If that’s the case there is still the question, what is that turtle standing on?” The audience tittered, but the woman, undaunted, replied: “Another, much larger turtle.”

¹ For a modest sampling of this growing literature, see Legal Scholarship: Its Nature and Purposes, 90 YALE L.J. 955 (1981); American Legal Scholarship: Directions and Dilemmas, 33 J. LEGAL EDUC. 403 (1983).
² For illumination of this terminology, see Critical Legal Studies Symposium, 36 STAN. L. REV. 1 (1984).
³ See Freeman, Truth and Mystification in Legal Scholarship, 90 YALE L.J. 1229, 1230 (1981) (“trashing is fun”).
“But . . .” objected the professor. “I’m sorry, professor, it’s turtles all the way down.”

I begin with some idealism appropriate to an occasion on which a group celebrates one of its central activities. I draw from remarks of one of my favorite legal educators discussing the importance of the university law school as a special resource in the advancement of knowledge and the promotion of justice.

The university law school is more than a place that trains men and women to plead causes and to advise clients; it is a place for dialogue, for reflection, for definition and comparison of values. It is a special place, a unique social resource. Here there can be gathered a community of scholars with the luxury of time, the support of colleagues, and the devotion to inquiry that are the essential predicate for the development of new ideas and values concerning law, legal institutions, and the never-ending quest for justice.

Purely vocational training could be done well on the job in law firms or in free-standing law schools. The special contribution of the university law school, especially one connected with a leading research university, is its capacity to encourage, create, and transmit insights that deepen the way we think about the nature of law as well as its uses, its limitations, and its role in our striving for social justice.

A first-rate law school cannot remain insular but must become integrated into the university. “The interrelatedness of human knowledge is too apparent, and the kinds of social behavior that the law regulates too varied, to permit legal scholars to rely solely on legal reasoning, no matter how tough or good.” In addition to traditional legal reasoning, legal scholarship must employ the techniques and insights of other disciplines such as economics, history, literature, philosophy, psychology, and sociology.

In a pluralistic world of clashing cultures, a community of shared belief is fragile and evanescent. The scholar’s ideal of a community of truth asserts that a more enduring bond can be built on “the convergence of our

4. The origin of the “turtle” story is itself an interesting story, and one for which I am indebted to Thomas L. Shaffer and John J. McDermott. In essays entitled The Will to Believe, first published in 1897, William James illustrated the view of the “absolute moralist” by employing the following metaphor: “Like the old woman in the story who described the world as resting on a rock, and then explained that rock to be supported by another rock, and finally when pushed with questions said it was rocks all the way down . . . .” W. James, THE WILL TO BELIEVE 85 (1979). The “turtle” version was manufactured by a James commentator, who was presumably influenced by Hindu mythology, in which India and the universe are represented as resting on the back of a giant tortoise facing eastwards. Nowadays one encounters the turtle story, without attribution to William James, in various forms. See, e.g., Singer, Radical Moderation, 1985 AM. B. FOUND. RES. J. 329, 329-30.


6. Graetz & Whitebread, supra note 5, at 448.
independent personal experiences” of reality. The most important function of the university is to preserve and expand the community that truth promises. It does so through scholarship—inquiry devoted to the discovery of truth. “[T]he scholar seeks knowledge for its own sake, not for some further purpose, although the knowledge he acquires may be instrumentally useful for other ends. To understand the world as it truly is—this, and nothing else, is the goal of scholarship.”

The best and most important scholarship emerges from a community of scholars that functions in the way that only the best universities can: through an endless process of discovery, reflection, and dialogue concerning ideas, facts, and values carried on in an atmosphere of mutual support and understanding. Empirical, theoretical, and normative inquiry are indispensable not only to the creation of new knowledge but to the training of better lawyers. Law students who develop theoretical understanding, critical judgment, and the discipline to apply those qualities rigorously to a variety of situations will be able to deal effectively with the results of accelerating social and technological change.

You have just read excerpts from a talk I gave in 1985 to a group of major donors gathered together to kick off Cornell’s twenty million dollar campaign for an addition to the Law School. It was a pep talk, a piece of advocacy. If we are to speak truthfully to one another about the realities of contemporary legal scholarship, what else would need to be said? (1) Do we agree on the shared values that are implied by the scholar’s obligation to search for the truth? (2) Can professors who are also lawyers avoid the temptations of advocacy? (3) Can professors who are primarily teachers devote themselves to true scholarship? And (4) do we have sufficient tolerance and humility to accept each other’s gifts?

I. THE SEARCH FOR TRUTH

The most famous question in history, the one that Pilate put to Jesus, went unanswered. If Jesus believed, as John later stated that he did, that “I am
the truth,”¹¹ he also believed that it was example, not preaching, that would lead others to this truth. The truth that lies in silence¹² is not the kind to which legal scholars, who are better at talking than listening, give much credence, nor is it one with which they have much familiarity.

Our dedication to scholarship implies at least three beliefs: First, “truth” either exists or is a meaningful concept. Second, its pursuit is not only a good in itself but an important goal of academics. And third, the manner in which the search is conducted is governed by agreed-upon values and conventions. A fairly formidable belief structure is implied by these propositions. Do we accept these beliefs today?¹³

Paul Carrington produced a considerable firestorm a few years ago by claiming that some implicit commitments of belief or faith were assumed when you and I undertook the responsibilities of being a law professor in a professional school.¹⁴ “[S]ome minimal belief in the idea of law and the institutions that enforce it,” Carrington argued, is a requisite of someone who professes law in a professional school.¹⁵ Otherwise, law students might be “disable[d] from doing the work for which they [were] trained.”¹⁶ Although the university law school is committed to detached inquiry, that obligation should not be pursued “though the heavens fall” if it undermines “the premises on which the service of the profession is based.”¹⁷ Carrington offered the analogy of a divinity school, which may maintain its community of faith by limiting its faculty to those who profess its creed.¹⁸

¹¹ See John 14:6 (“I am the way, and the truth, and the life . . . .”).
¹² See Psalms 46:10 (“Be silent and know that I am God, saith the Lord”); see also F. Buechner, Telling the Truth: The Gospel as Tragedy, Comedy, and Fairy Tale 14-24, 98 (1977) (discussing the truth that resides in silence: “[I]n . . . silence we can hear the tragic truth of the Gospel, which is that the world where God is absent is a dark and echoing emptiness . . . .”).
¹³ See Levinson, supra note *, for a fuller discussion of the belief structure presupposed by the scholar’s commitment to truth.
¹⁵ Carrington, supra note 14, at 226.
¹⁶ Id. at 227. A more complete quotation is: “When . . . the university accepted responsibility for training professionals, it also accepted a duty to constrain teaching that knowingly dispirits students or disables them from doing the work for which they are trained.”
¹⁷ Carrington letter to Robert W. Gordon, Nihilism and Academic Freedom, supra note 14, at 10. At a later point in the same letter, Carrington refers to the “potential conflict between our duties as professionalizers and our obligations to profess truth.” Id. at 11.
¹⁸ Id. at 10. The recent controversy involving the status of Father Charles E. Curran as a theologian at Catholic University of America provides an example. See Berger, Vatican Tells Priest to Retract Views, N.Y. Times, Mar. 12, 1986, at A17, col. 1. Modern Protestantism is sometimes less exacting in its creedal demands on theologians. Cf. P. TILICH, The Theologian, in The Shaking of the Foundations 118-29 (1948) (one who does not doubt that Jesus is the Christ or that he continuously experiences the Divine Spirit “w[e] would not accept . . . as a theologian”). On the other hand, one who is estranged from the Church and does not feel the Divine Spirit, but who
A large number of well-known legal scholars disagreed vehemently with Carrington's portrayal of what a law teacher must or should believe. But their responses, while arguing persuasively that Carrington had gone too far in suggesting that a law teacher should be a cheerleader for things as they are, premised their arguments on academic freedom and the university's commitment to truth.19 Although the implications of the truth-seeking function were not spelled out, these scholars, "Crits" and all, impliedly accepted the scholar's creed that I have described.

Today, one need not, presumably, believe that absolute truth exists or will ever be discovered. The modernist view of tentative and evolving truth—that is, the notion that for the time being, at the present state of knowledge, one statement is worthy of greater credence than others relating to the same matter—is enough. But some distinction between knowledge and mere belief must be recognized in order to have any standards of evaluation at all.20 There is a "there" there—a reality that human beings, to some degree, can apprehend and communicate about in meaningful ways. Because the university is dedicated to maintaining and enlarging the store of human knowledge, all academics, including law teachers, have a duty to further this endeavor.

The search for truth also implies a set of procedural requirements or process values, even on the part of those who disdain "process values" as part of an autonomous legal system.21 Two that are universally accepted by scholars, at least as ideals, are integrity and openness. The scholar above all must be honest in presenting evidence and open in revealing the extent to which he has conformed to the methodological conventions of the discipline. Because academic inquiry seeks to establish a community based on truth, its methods

“asks again and again the theological question, the question of an ultimate concern and its manifestations in Jesus as the Christ, we would accept him as a theologian.” Id. at 121.

19. See, e.g., letters of Robert W. Gordon, Nihilism and Academic Freedom, supra note 14, at 9 (“the academic profession ought to be solidly on the side of the values of intellectual pluralism and the pursuit of uncomfortable truths”); Paul Brest, id. at 17 (“principles of academic freedom [do not] apply with less breadth or force to professional schools”); Guido Calabresi, id. at 23 (“The role of the scholar is to look in dark places and to shed light on what he or she sees there.”); Owen M. Fiss, id. at 24 (“Law schools . . . are also academic institutions, and by that I mean they seek to discover the truth.”); and Finman, Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington’s River, 35 J. LEGAL EDUC. 180, 187 (1985) (discussing whether Carrington’s thesis “violates the university’s commitment to the search for truth”). Since law is largely a social construct, created by human activity in an effort to deal effectively with social realities, a “value-free” approach to law is not possible. Analysis must always begin with categories and concepts that people, at a particular time and place, have thought are important. No one, not even the social critic, can escape the realities that are created by our thinking that things are so.

20. See Kronman, supra note 7, at 960.

21. See Levinson, supra note *, on which I have relied, for a fuller discussion of the process values that are implied by the scholar’s commitment to the search for truth. Levinson discusses and quotes from W. Metzger, Academic Freedom in the Age of the University (1961).

22. See letter of Guido Calabresi, Nihilism and Academic Freedom, supra note 14, at 23 (“the calling card of the scholar . . . is honesty in the pursuit of what others do not see”).
and findings are not trade secrets to be hoarded for private use. They belong in the public domain, subject to dialogue, argument, and testing. In the scientific disciplines, claims that meet the stricter tests of verification and reliability may have a greater claim of authority. But elsewhere in the university, including the law school, insights and conclusions arrived at by other methods and experiences cannot be excluded or discredited merely because they do not meet the falsification test. Values of testability, universal application, disinterestedness, and civility may be accepted as aspirations, but the deposit of dialogue, reflection, and insight in humanistic disciplines (including law) cannot and should not routinely meet these standards. The function of the modern scholar is “to transmit [an] orthodoxy [the body of knowledge currently recognized by the discipline as most authoritative] coupled with a technique for constructive dissent from orthodoxy.”

Modern thought is skeptical of concepts like truth, neutrality, or disinterestedness, which retain a strong barrier between the knowing subject and the object of knowledge. At the extreme, “truth” becomes a synonym for culturally shared conventions—socially-constituted assertions that are always up for grabs. As Nietzsche put it, “Truths are illusions whose illusionary nature has been forgotten.” Under this view, which I reject, the search for

23. For a comparison of the premises of the scientist’s methods of pursuing truth with those of other disciplines, see Perelman, Polanyi’s Interpretation of Scientific Inquiry, in Intellect and Hope: Essays in the Thought of Michael Polanyi 232-41 (T. Langford & W. Poteat eds. 1968).

24. Ashby, The Academic Profession, 8 Minerva 90, 99 (1970). I believe that Carrington’s critics, in advancing the moral ideal of the pursuit of truth in an academic setting, do not take sufficient account of his implicit claim that the social reality of law is largely dependent on communal belief in its existence and form. If one does not believe in the law idea—that there can be rules, for example, and that society can be subjected to their governance—and if others come to agree, then there will be no law. Even the radical critics of existing legal arrangements, it has been noted, draw on traditional liberal ideas (e.g., academic freedom, “the rule of law”) in criticizing existing law.

25. This sentence and the one following are paraphrased from Levinson, supra note *, at 22. Levinson is unable to accept the traditional vision of the university as “a center for detached analysis with truth as the only goal” because it rests on epistemological assumptions concerning truth that in turn he does not accept. Id. at 21. Graetz and Whitebread state that “law is fundamentally a normative business” and that value-neutrality is unattainable; they conclude that “[a]ll that should be required is that one attend consciously to values” and that pluralistic tolerance be observed. Graetz & Whitebread, supra note 5, at 455-57.

26. Nietzsche, On Truth and Lie in an Extra-Moral Sense, quoted in P. De Man, Allegories of Reading: Figural Language in Rousseau, Rilke, and Proust 110 (1979), quoted in Levinson, supra note *, at 22. Modern humanistic thought is rightfully skeptical of absolutes, but to follow Nietzsche, as some theorists appear to do, is to be improperly inattentive of developments in both science and philosophy. Our material environment is built on an interlacing foundation of well-grounded beliefs about natural processes and relationships, and we depend on the accuracy of these apprehensions in daily living. And modern philosophers have cogently argued that, even in the realm of social and moral beliefs, extreme relativism is unjustified. See materials cited infra note 27. An honest relativist must confine skepticism to major leaps of faith. For a useful discussion of relativism and truthseeking, see Crews, In the Big House of Theory, N.Y. Rev. Books, May 29, 1986, at 36.
truth becomes a process in which old illusions are discredited and new ones temporarily enthroned. The vital distinction between knowledge and belief dissolves under extreme forms of skepticism or relativism. A somewhat sturdier commitment to truth, I believe, is necessary to motivate and to justify academic inquiry.  

II. THE PROBLEM OF ADVOCACY

The moral ideal of the scholar is exemplified by the story and life of Socrates: a passionate commitment to truth tempered by deep skepticism concerning any particular claim of truth. In law teachers, this ideal struggles against another characteristic: our training and habituation as advocates and trainers of advocates. The task of the advocate, as Socrates pointed out long ago, is to persuade those who are empowered to decide. The advocate attempts to make the lesser argument appear to be the better one. Her attitude toward the truth is an instrumental one: she relies on the truth to the extent that it helps establish her position, and distorts or suppresses it to the extent that it does not. Socrates argued in Plato's Gorgias that the advocate's indifference to truth, made habitual by professional employment, would stunt the advocate's character and deform his personality. One need not accept that view to recognize that the law teacher, who has been trained as an advocate, who was selected for law teaching in large part because he has the qualities of a good advocate, and who spends much of his time training others in advocacy, is constantly in danger of carrying over his skills of advocacy to his scholarly endeavors.

Mark Tushnet has argued that much that passes as legal scholarship is more aptly described as advocacy. We fall naturally into the advocacy mode both in traditional doctrinal work, in which advocacy is disguised as policy, and in interdisciplinary writing, which often proceeds on the basis of similarly unexamined premises. A serious look at a sample of law reviews or a shelf of recent books provides at least a partial confirmation of Tushnet's view. Much legal scholarship pretends to an objectivity it does not deliver; it fails to state or to examine the premises on which it is based; and it conveys a hubris of truth and righteousness (and sometimes even moral indignation directed at those holding opposing views) that is inconsistent with the

27. For critical and persuasive discussions of moral relativism and moral skepticism, see R. Brandt, Ethical Relativism, in Ethical Theory 271 (1959); D. Lyons, Ethics and the Rule of Law 5-35 (1984); B. Williams, Morality: An Introduction to Ethics 1-39 (1972).

28. For two valuable contemporary discussions of Plato's Gorgias, see Kronman, supra note 7, and White, The Ethics of Argument: Plato's Gorgias and the Modern Lawyer, 50 U. Chi. L. Rev. 849 (1983). Kronman appears to accept the Socratic criticism of the lawyer as immoral advocate; White attempts (I think quite persuasively) to provide a moral justification for the "trustworthy lawyer."

humility of the true scholar. Much of the time we are like the trial lawyer who believes that he cannot persuade the jury unless his behavior conveys a passionate commitment to his client's cause.

If legal education is to be a form of graduate liberal education, if lawyering is to be more than advocacy,\textsuperscript{30} both teaching and practice need to be infused with a delight in conversation on important questions carried on with both hopefulness and humility. Advocacy has a reduced role in this dialectical effort to formulate more satisfactory concepts and theories.\textsuperscript{31}

III. CONFLICT WITH OTHER GOALS

The debate precipitated by Paul Carrington's claim that a law teacher was morally obliged to communicate the orthodoxy of the discipline of law (with opportunities for constructive dissent from it) reminds us that we are not pure scholars: most of our time is spent teaching those who wish to pursue law-related careers. This circumstance has implications for our scholarship.

Our dilemma stems from the reality that teaching and scholarship, instruction and inquiry, are only partially compatible endeavors. They tend to be congruent and synergistic activities to the extent that the student becomes an apprentice inquirer and the activity is tutorial or joint research. As the number of students increases and the level of inquiry declines, teaching becomes not only an activity that takes time away from scholarship, but one that requires skills, attributes, and arts that have little application to scholarship.\textsuperscript{32}

Since most law school instruction involves basic lawyering skills and "bread-and-butter" subject matter in large classes, the conflict between teaching and scholarship is substantial. Trends in legal scholarship away

\begin{itemize}
\item \textsuperscript{30} Tom Shaffer has argued, I believe correctly, that most of what lawyers do is planning and peace-making rather than advocacy. Good planning is not a win-lose game with enemies; it is resolving problems and conflicts (and creating new wealth and community) without the necessity of a dispute. In this more cooperative view of law practice, the principal moral problems of law practice are those related to vicariousness (the principal conscience at issue is the conscience of the other) rather than problems of limits on zealous representation ("what is fair in war"). See Shaffer, Advocacy as Moral Discourse, 57 N.C.L. REV. 647 (1979); T. Shaffer, AMERICAN LEGAL ETHICS (1985).
\item \textsuperscript{31} The concept of "reflective equilibrium" developed by John Rawls in A THEORY OF JUSTICE 46-53 (1971) expresses the philosophical idea. For the application of similar ideas to lawyering, see White, supra note 28.
\item \textsuperscript{32} Caws, Instruction and Inquiry, DAEDALUS, Fall 1974, at 18, 24, puts it too strongly: "[N]obody whose primary mission is instruction... for more than a few students at a time should be expected as a condition of employment to engage also in inquiry. The point at which instruction and inquiry coincide is always... at the very top of the cumulative structure of knowledge, and people who are helping droves of newcomers through the lower reaches of this structure (which is what most faculty members are doing) cannot at the same time be at the top." Depth of scholarship, of course, enriches teaching that is concerned with the same subject matter; and scholarly endeavors maintain intellectual liveliness, which results in turn in lively teaching.
\end{itemize}
from traditional doctrinal work written for a general legal audience and toward specialized interdisciplinary or theoretical work written for narrow academic audiences increase the conflict between teaching and scholarship. Seavey’s essays analyzing major torts cases, for example, are much more compatible with teaching the torts course than are the kinds of torts scholarship (whether economic, historical, or philosophical) that are most fashionable today.

It would be misleading to argue that instruction and inquiry in the professional school are inherently at odds. Our students are highly intelligent adults; and the disciplined rigor of classroom dialectic generates insights from students and teachers that enrich and inspire one’s knowledge of law in general or of its subfields. Ted Lowi has made this point elegantly, arguing that students are the key to keeping knowledge-seeking on a productive track: The teacher, in constantly attempting to explain to unspecialized students the significance and importance of specialized research, builds a bridge between teaching and scholarship.

The American law school may owe its success in part to its refusal to follow the prevailing image of the university teacher as an invariably productive research worker. In most disciplines this image is a troublesome pretense: only about half of professors do much scholarship at all; less than twenty percent are continually productive; and only a handful in any generation are responsible for reshaping a discipline’s agenda, methodology, or conventions. The stereotype that everyone can hit, run, and field all at the same time is “merely an invitation [for most] to look down on themselves

35. Lowi, Foreword to CLASSIC READINGS IN AMERICAN POLITICS at xvii (P. Nivola & D. Rosenbloom eds. 1986):

  Writing for [academic peers] subjects the author to the anonymous, professional peer review process of scholarly journals and book publishing. The college classroom subjects the teacher to the contrary pressure of trying to transcend the methods and results of research in the discipline by explaining its value to students. College students require of their teachers at least some concern for consequential argument as well as causal analysis. . . . [Teachers] have the difficult task of bringing specialized research and unspecialized students to a community of common concern . . . .

  A teacher’s attempt to be memorable by being consequential is the important bridge between the down-to-earth science of our research and the more elevated argument of our teaching.

36. See Swygert & Gozansky, Senior Law Faculty Publication Study: Comparisons of Law School Productivity, 35 J. LEGAL EDUC. 373 (1985), reporting that over 44% of senior law faculty members failed to publish anything during a recent period covering several years. Although the methodology of the study is flawed, see Kaye & Ellman, The Pitfalls of Empirical Research: Studying Faculty Publication Studies, 36 J. LEGAL EDUC. 24 (1986), the results are consistent with intuitive impressions and are similar to those of numerous studies of faculty in other disciplines.
when they perform their central tasks as teachers" or clarifiers. In the American law school, unlike most of the graduate departments of the university, teaching has been given a more rightful status. "Is teaching less important, less intellectually demanding, less an art to be mastered or an achievement to be admired and rewarded?"

Success of this nature, however, comes at a price. One price flows from the inherent difficulty of making reliable judgments about a person's future performance as a teacher and scholar solely on the basis of present teaching performance. The horizon of time—perhaps forty years of a tenured lifetime—is too long; and current evaluations of teaching are a very limited source of information. We are all familiar with the exciting teacher of thirty-five who becomes the old bore of fifty-five, constantly repeating stale ideas from the past. This sort of deterioration is probably linked to repetition; those who think the same thoughts at age fifty-five that they thought at age thirty-five become dull.

Sometimes one can acquire the necessary degree of confidence in a candidate's intellectual excellence and liveliness by an overall assessment of his motivations and interests: the tenure candidate evidences a lively interest in legal theory and its application, possesses unusual abilities to communicate insights to colleagues as well as to students, and demonstrates an imaginative curiosity about new developments and possibilities. But these judgments are difficult to make. The creation of scholarship, even if its product is not of world-shaking import, provides evidence of an ambition to succeed in communicating ideas about law to others. If scholarship becomes a habit, teaching is much more likely to retain freshness, depth, and interest throughout the teacher's career.

---

38. Id. at 29-30.
39. I am indebted to Lash Larue for this point.
40. An explicit statement of the relationship between teaching and scholarship, in which scholarship is a surrogate for intellectual excellence and continued intellectual liveliness, is found in the tenure standards of the Georgetown University Law Center:

First the quality of scholarship is a partial measure of the quality of the mind that produces it. Without evidence of an active, inquiring, insightful, intellectually curious mind, there can be no reliable prediction that the candidate will continue to function in all respects as a challenging, up-to-date, stimulating and knowledgeable teacher. Second, evidence of scholarly ability and actual productivity are some indication that the candidate's capabilities and professional pride will cause him to continually strive for personal growth, to search for new ideas and to avoid complacency with the level of his own personal and intellectual development. Evidence of scholarship is generally characteristic of a person who not only has achieved a high level of professional accomplishment, but who is likely to continue to develop professionally.

Georgetown University Law Center Memorandum of Standards and Procedures for Tenure and Promotion, Faculty Affairs Committee, June 1, 1976 (3d printing, containing Faculty-approved modifications, July 1986), at 6-7.
ure is one of predicting intellectual excellence and liveliness over an extended period. Mechanical requirements cast in terms of a specific number of articles of a particular form or in particular journals are likely to cause more harm than good.

The professional orientation of American law schools, while contributing to their success as professional training grounds, does interfere with the contribution that they have made and can make to better understanding of law and justice. The limited and instrumental focus of most traditional legal scholarship, addressed as it is to practitioners and judges, presupposes the existing set of institutions, actors, and values. Proposals for reform in traditional legal scholarship are limited and meliorist, since they take present arrangements for granted. Although rarely stated, the tacit assumption is that our system (minor blemishes aside) is as good as it is reasonable to expect a civilized society to have become at this stage of human history.

The rejection of status quo-ism lies at the heart of "trashing" by scholars affiliated with the critical legal studies (CLS) movement. Traditional legal scholars are viewed by CLS scholars as reflecting the sort of complacency that Bentham attributed to Blackstone; the kind of complacency that was later illustrated by the legal profession's general disinterest in the movement to abolish slavery. The legal profession and law schools are associated, with some justification, with social and political complacency. The irony is that the short-term utility of legal scholarship to the practicing profession (and most legal scholarship has been shown to have a very limited half-life) is largely dependent on the scholar's assuming the general soundness of current arrangements while proposing modest clarifications and improvements (what the extreme skeptic disparages by calling it "tinkering").

The dangers of complacency, parochialism, and insensitivity implicit in this world view are obvious. But attention to more limited goals and endeavors has its redeeming virtues, including humble usefulness. Should law professors undertake to reorganize the social order? How well equipped are they to carry on the type of scholarship that would be required? Who will attend to improving the current legal order if law professors do not do so? A law teacher may conclude that fairly traditional forms of legal scholarship, despite their inevitable limitations, are the best choice out of a sense of humility, a practical judgment about appropriate uses of one's gifts and talents, a desire to combine teaching and scholarship fruitfully in the profes-

---

41. I am indebted to a communication from David Lyons for this point.
42. See Maru, Measuring Impact of Legal Periodicals, 1976 AM. B. FOUND. RES. J. 227, 247, indicating that about 57% of citations of law review articles are to those published during the preceding five years, and less than one-fourth to articles more than 10 years old. The emphasis on currency in legal scholarship is similar to that in the sciences and unlike citation practices in the humanities, in which items published during the last five years account for only 10-20% of all citations. Id. at 248.
sional school context, and a justified fear of utopianism ("the perfect is the enemy of the good" is the classic French saying). The art of the possible, within a setting that provides many opportunities for improvement, has much to be said for it.

A handful of university law schools have stated a larger vision: the desire to contribute to society's basic understanding of law and justice, including an overhaul of foundational assumptions. But it is not clear that a professional school provides a hospitable environment for such endeavors. The degree of moral, theoretical, and doctrinal analysis that is useful in preparing students for law practice may be different in form and scope from that appropriate for a research institution exploring fundamental questions of law and social justice. There is no point in searching out deep philosophical assumptions when they cannot be put to any use in one's work. It is also natural for lawyers not to raise fundamental questions about the justice of the system that they have chosen to work in and that provides them with relative prestige and wealth. As David Lyons has said, "It is unrealistic to expect lawyers or law schools to play a significantly critical role in a society within which they fare so well and when their professional interests are in fact so closely associated with the most advantaged segments of the society."43

The difficulties are even more apparent insofar as empirical work on law is concerned. Law teachers are deficient in social science expertise, and the nature of law faculties would be changed by adding a large number of social scientists. Highly competent social research is enormously expensive and it is clear that neither law students (in the form of their tuition) nor the profession is prepared to underwrite the expense. Although some research grants are available from foundations and government agencies, funding is limited and grantsmanship is a highly competitive endeavor with which legal scholars are unfamiliar. Modest empirical efforts, such as field work or descriptive studies, may be within the capabilities of law teachers and congruent with students' interests in professional training, but the limits imposed by the law school environment on larger-scale social science endeavors are painfully evident from a candid look at current realities and recent history.44

IV. THE NEED FOR TOLERANCE AND HUMILITY

It is probably desirable that a small number of elite schools adopt the grad-

43. Lyons, supra note 41.
uate department of law as their model. Students may be attracted to these schools because they have a more intellectual approach; and, in any event, students attracted to the most prestigious schools are able to prepare for the profession on their own whether or not they are excited by the theoretical interests of the faculty. We need a number of institutions that give primacy to empirical and/or theoretical inquiry about law and legal institutions. More diversity in legal education is probably desirable for its own sake. In schools adopting the graduate school model, hiring, tenure, and other rewards can be based almost exclusively on the depth, breadth, significance, and quantity of scholarship.

Yet two problems flow from the trend toward the graduate school model at a number of the most prestigious schools. First, will such efforts succeed in grafting a research orientation onto a distinctive professional school? Second, if these efforts do succeed, will these models have adverse effects on other professional schools that operate of necessity in environments of more limited possibility? The difficulties of combining professional preparation with a dominant emphasis on research have been mentioned; but adverse spillover effects on other schools may not be so obvious. We now live in a copycat world in which the limited goal of academic prestige seems to be the dominant value everywhere; this is so even in nearly all of the law schools operated under religious auspices, which might be thought to have a special mission. If the elite schools go a particular route, it seems inevitable that nearly every university law school in the land will move or be moved in the same direction.45 There is now a national market for law teachers, and most new teachers attended one or another of the top-rated schools. Their ideas about teaching law and about legal education were formed at these schools; and their aspirations for a teaching career are not modeled along the lines of a Mr. Chips who devotes himself, with great loyalty and dedication, to students in a particular locale. Law teachers at nonelite schools who are shaped by the elite models will be moved in directions largely counter to the interests of their schools and students.

Under these circumstances, likely effects can be predicted: decreasing con-

45. The American Bar Association Standards for the Approval of Law Schools (1983) include the requirement that an approved law school “shall afford faculty members reasonable opportunity for leaves of absence and for scholarly research.” Standard 405(b). On several occasions in recent years the ABA, acting through the Council of the Section of Legal Education and Admissions to the Bar, has delayed the continued approval of sound law schools devoted to training practitioners for local practice because of doubt whether this standard was satisfied. Faculty members devoted themselves to teaching and to bar-related activities, such as continuing legal education, local practice manuals, etc.; the inspection reports criticized the nature and quality of scholarship as insufficiently theoretical or challenging and the failure of the schools to provide summer stipends or other measures supportive of “research.” Although many law schools do and should provide such amenities, I doubt whether regulatory authorities should force a local law school with a professional orientation to conform to national models set by elite law schools.
tact and increasing tension with the legal profession; increased unhappiness on the part of students, who will feel neglected and exploited when asked to pay through tuition for endeavors from which they believe they derive little benefit; and internal tension in the law faculty between those who devote themselves to vocational teaching and those aspiring to move elsewhere on the basis of their production of fashionable scholarship. Professors who publish, even those whose publications are trivial and mediocre, will earn more, get promoted faster, and migrate to the more “prestigious” universities. Since academic prestige seems to be the only game in town, personal and institutional decisions will tend to cut law teachers off from law students and the practicing profession, except for those teachers who cultivate remunerative consulting arrangements with local firms.

Scholarship, perhaps even more than other facets of human culture, is responsive to fashions. Current fads in legal scholarship favor types of scholarship, such as highly theoretical interdisciplinary work in economics or philosophy, that are very difficult to integrate with the teaching of law in a professional school. These and other current fads also have the unfortunate effect of calling on law teachers to perform difficult tasks for which they are ill-prepared. Traditional doctrinal scholarship had, and still has, considerable deficiencies, but at least lawyers had some comparative advantage in doing it. In addition, the doctrinal development was highly useful to the practicing profession and the judiciary, and blended fairly well with the day-by-day teaching activities of law professors. The ideas for reform that come out of critical and skilled evaluation of legal doctrine and legal institutions have a special kind of authenticity and are usually capable of social implementation. Finally, there is the lack of any alternative law reform mechanism: If law professors do not perform this social function, who will do so?

I must confess that a substantial portion of today’s faddish output strikes me as a continuing performance of Major Bowes’s amateur hour. It would be insidious to cite examples, but all of us are familiar with the genre: interminable and virtually incoherent metaphysical reinventions of the legal wheel, combining colossal arrogance with limited understanding. One encounters examples of papers combining many of these negative qualities:

46. Richard Posner argues that traditional doctrinal scholarship is on the defensive for a number of reasons: the gap in earnings between teaching and practicing law has widened, inducing many of the best doctrinal analysts to remain in law practice; law practice itself has become more interesting as paralegals and in-house counsel perform most of the routine drudge work; judicial tendencies to substitute explicit policy or discretion for a framework of detailed rules make doctrinal analysis less interesting and less possible; and, finally, scholars and deans infatuated with trendy new types of interdisciplinary or theoretical scholarship convey an impression that doctrinal analysis is less challenging and important. See Posner, The Present Situation in Legal Scholarship, 90 YALE L.J. 1113, 1116-18 (1981).
pretentiously ambitious, arrogantly presented pieces of unabashed advocacy replete with scathing criticism of other efforts to apply the same or another discipline to the same problem. Under critical examination by those fully at home in the other discipline, it is often revealed that the author's familiarity with the other discipline was painfully limited, and that on the main point in issue his conclusion is either wrong or unjustified.

Grant Gilmore is said to have opposed the trend toward interdisciplinary scholarship by law teachers on the ground that it was likely to be poorly done. Although I have always taken the contrary view, I question whether law teachers have the time, attention span, and discipline to master the other fields with which they are flirting. The worst of all worlds would be to abandon what we do well for things we do only badly. At the very least, the new conceptualists should be tolerant of those who continue to till the old vineyard—the one that treats law as an autonomous discipline with a language and institutions that can be reshaped and improved.

V. CONCLUSION

What are the implications of these comments? First, I believe that law is an autonomous discipline in which valuable scholarship can be done. Lawyers can learn from each other and others can learn from lawyers about the phenomena collectively referred to as "law." I reject the notion that law is a parasitic discipline that can be made meaningful only by those using the techniques of other disciplines, such as economics, history, literary criticism, philosophy, or sociology. Each discipline is, in a sense, a closed circle in which premises and conventions are taken for granted and ultimate foundations are uncertain. But each can contribute to human understanding and to the advancement of the community of truth. There is valuable work to be done by law scholars using legal modes of inquiry within the field of law. We

47. John Henry Schlegel and others confirm that Gilmore expressed this view orally, but believe that he never stated it in writing. For the Yale dalliance with empiricism, see Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 BUFFALO L. REV. 459 (1979).

48. The view that legal scholarship is parasitic on other disciplines is forcefully expressed in Priest, Social Science Theory and Legal Education: The Law School as University, 33 J. LEGAL EDUC. 437 (1983):

It is accepted today, virtually universally, that the legal system can be best understood with the methods and theories of the social sciences... [O]ne must reject the notion that the legal system is somehow self-contained or self-sufficient instead of simply another setting for the expression of whatever are the deeper determinants of human behavior. ... [Inevitable and desirable specialization in legal scholarship based on other disciplines will change the structure of the law school.] The law school will be comprised of a set of miniature graduate departments in the various disciplines.

Id. at 437, 441.
should not look down our noses at articles and treatises that clarify and organize current law; that modify our understanding of the role of legal rules or institutions; or that pave the way for modest improvements in their coherence or operation.\footnote{I agree with the assessment of John P. Dawson: \"[L]aw faculties have rendered an indispensable service in keeping our law as coherent and intelligible as it now is. . . . [I]n the modern world, only in Germany have the contribution and influence of academic lawyers been as great as they have been [in the United States].\" Dawson, \textit{Legal Realism and Legal Scholarship}, 33 J. LEGAL EDUC. 406, 410 (1983).}

Nevertheless, the relationship between law and society is such that inquiry from other disciplines that explores the relationships that flow in both directions is essential. Despite the risks of superficiality, distortion, and fragmentation, interdisciplinary inquiry is a necessity. The risks can be reduced if individual schools make a commitment to a particular discipline that affords a critical mass of scholars. Under those circumstances, dialogue, interaction, and quality control are possible; the whole will be greater than the sum of the parts. The competing model, in which a law school engages one economist, one historian, one philosopher, etc., is less promising. Individuals who are recruited under such circumstances are likely to be chosen because of their abilities as retail communicators of their discipline—their ability to translate its complexities in relatively simple terms understandable to law students and law faculty, who for this purpose are \textit{"lay people."} Since these nonlawyer recruits cut themselves off from interchange with colleagues within their original discipline and from the most stimulating kind of teaching their discipline offers—the supervision of graduate students—they are less likely to work at the forefront of that discipline. Creation of a mini-university within the law school by the \textit{"one of each kind"} route spreads resources too thinly and is likely to produce mediocre research. Concentration of resources on one mode of inquiry (or perhaps on a social problem viewed from the perspective of several disciplines) will result in research of a higher quality. Even under this approach, the difficulties of integrating other disciplines into the law school remain formidable ones.\footnote{Even if a law school develops a critical mass of scholars conversant with a particular discipline or methodology, there are difficulties in carrying on good work within the confines of the law school. \textit{See supra} note 44.}

Let me close these skeptical reflections with a reaffirmation of belief. The search for a community based on truth should continue to inspire us. Whether or not attainable, the quest is itself worthwhile. Skepticism of particular claims of truth, even of this one, is also appropriate as long as inquiry is something about which we care and are not indifferent. This moral example is not inconsistent with our teaching, but should pervade it. One of the most important things we can communicate to our students is our love of
truth and our hope for an enlarged community of truth.51

"Sez who?" comes a voice from above that sounds a great deal like Arthur Leff.52

Just me. As I told you at the beginning, it's turtles all the way down.

51. See Kronman, supra note 7, at 968.
52. See Leff, Unspakable Ethics, Unnatural Law, 1979 DUKE L.J. 1229, 1249.