The Legal Scholar As Producer

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Abstract

Harvard Professor Clark Byse provides a commentary on what the appropriate attitude should be toward legal scholarship—a commentary which will, I suspect, stand as a classic along side those of Anthony Kronman, Thomas Bergin, and other, equally influential American law professors who have grappled with the interesting relationship between legal scholarship and law school teaching.
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"Rather than ask, 'What is the attitude of a work to the relations of production of its time?' I should like to ask, 'What is its position in them?' This question directly concerns the function the work has within the literary relations of production of its time."

— Walter Benjamin, from The Author as Producer***

Harvard Professor Clark Byse provides a commentary on what the appropriate attitude should be toward legal scholarship* — a commen-

* These comments provide an elaboration upon those offered extemporaneously at the time of Professor Byse's April 9, 1988, address to the Nova Law faculty on contemporary American legal scholarship.

** Professor of Law, Nova University Center for the Study of Law.


tary which will, I suspect, stand as a classic along side those of Anthony Kronman, Thomas Bergin, and other, equally influential American law professors who have grappled with the interesting relationship between legal scholarship and law school teaching. It is my purpose here to approach the issues raised by Byse, Kronman, Bergin and others in a rather different way: I should like to ask not, "What should our attitude toward legal scholarship be?" but, instead, "What is the position of legal scholarship within the relations of production of [producers of legal services]?" As we shall see, how we pose the question of legal scholarship may be decisive in determining the answers we are able to discover. It is my view that situating legal scholarship within the productive relations of legal education (within the context, in other words, of what law schools actually do: produce producers of legal services) makes it apparent that the relation between legal scholarship and teaching (or between legal scholarship and "education of bench and bar") is less critical than many have supposed. These relations turn out, in fact, to be epiphenomenal of the fundamental relationship between legal scholarship in the United States and the long-term effort to insure the profitability of the marketing of legal services by the American bar. First, we shall focus upon the general situation of contemporary legal scholarship in terms of "high end" and "low end" constraints upon the quality and quantity of legal scholarship produced, with separate attention paid to personal, institutional, and national conditions. Then we shall magnify our analysis of one specific sector of this overview — the low end constraints national accreditation associations place upon the quantity and quality of production of legal scholarship by United States law teachers — in order to better understand why the position of legal scholarship within these relations of production is more decisive than our attitude toward the relationship between teaching and writing, no matter what our attitude toward the latter happens to be.

I. The Model of Constraint

In Robert Bolt's play, "A Man For All Seasons," Sir Thomas More's personal situation becomes increasingly precarious. More's Steward observes: "All right, so he's down on his luck! I'm sorry. I don't mind saying that: I'm sorry! Bad luck! If I'd any good luck to spare he could have some. I wish we could all have good luck all the time. I wish we had wings! I wish rain water was beer! But it isn't!" Indeed not. Similarly, law professors might wish that once they had thought the issues through carefully, whatever conclusions they reached as to their own relation to legal scholarship would be acceptable to others. But just as we do not have wings, just any thoughtful attitude toward legal scholarship will not do. It is not that simple. The law student who knocks on the door of a faculty office, only to be told by a secretary that the professor is at home working on her new book and is unavailable for private appointments the rest of the week, may simply have to make do with his class notes. The professor who wants to stay after class and respond to student questions while attention is acute and curiosity intense (but is pressed for time since his unfinished law review article awaits in his office and the tenure committee awaits at the end of the semester), may just have to put the student inquiries on ice. Likewise, the professor who is desperate to write a couple more pages before going home for the evening, but suddenly finds her office flooded with students asking questions which had repeatedly been answered in class, may simply have to spend additional time the next day reviving the sense of creative high that was abandoned the previous afternoon. The law school which prides itself on its clinical and simulation teaching programs but is denied full accreditation by a national association because its faculty is not able to devote much time to serious law review publication, may just have to come back in a few years and try again (or hope to recruit some "legal scholars" to its faculty in the near future). Or a law school may have a rather dismal record in scholarship, but the school's dean may be so concerned about the failure of the university to provide adequate salary raises that she does not have the heart to cut into the time faculty members spend in "outside consultation," as would be necessary if overall faculty scholarly publication was


3. Bergin, The Law Teacher: A Man Divided Against Himself 54 VA. L. REV. 637 (1968) (There were of course women law professors in 1968, despite Bergin's title, and there are many more today, though not enough).


6. Id. at 56-57.
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I. The Model of Constraint

In Robert Bolt's play, "A Man For All Seasons," as Sir Thomas More's personal situation becomes increasingly precarious, More's Steward observes: "All right, so he's down on his luck! I'm sorry. I don't mind saying that: I'm sorry! Bad luck! If I'd any good luck to spare he could have some. I wish we could all have good luck all the time. I wish we had wings! I wish rain water was beer! But it isn't!" Indeed not. Similarly, law professors might wish that once they had thought the issues through carefully, whatever conclusions they reached to their own relation to legal scholarship would be acceptable to others. But just as we do not have wings, just any thoughtful attitude toward legal scholarship will not do. It is not that simple. The law student who knocks on the door of a faculty office, only to be told by a secretary that the professor is at home working on her new book and is unavailable for private appointments the rest of the week, may simply have to make do with his class notes. The professor who wants to stay after class and respond to student questions while attention is acute and curiosity intense (but is pressed for time since his unfinished law review article awaits in his office and the tenure committee awaits at the end of the semester), may just have to put the student inquiries on ice. Likewise, the professor who is desperate to write a couple more pages before going home for the evening, but suddenly finds her office flooded with students asking questions which had repeatedly been answered in class, may simply have to spend additional time the next day reviving the sense of creative high that was abandoned the previous afternoon. The law school which prides itself on its clinical and simulation teaching programs but is denied full accreditation by a national association because its faculty is not able to devote much time to serious law review publication, may just have to come back in a few years and try again (or hope to recruit some "legal scholars" to its faculty in the near future). Or a law school may have a rather dismal record in scholarship, but the school's dean may be so concerned about the failure of the university to provide adequate salary raises that she does not have the heart to cut into the time faculty members spend in "outside consultation," as would be necessary if overall faculty scholarly publication was


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to be genuinely improved and increased. Like More's Steward said, rain water is not beer; thus the model of constraint.

Beginning with the personal level of analysis, the individual law teacher encounters both high and low end constraints upon his or her ability to engage in legal scholarship. At the upper end, the professor's writing is constrained in terms of both quality and quantity by limitations upon time; however much ego satisfaction may attach to seeing one's name on the cover of law reviews published by Harvard, Yale, Chicago, or Stanford, the fact remains that law professors must find time to make fairly regular class appearances, must spend hours grading blue-book exams and (presumably) responding to students whom, one might say, are intrigued to learn the reasons why they received a particular grade, must attend seemingly endless faculty meetings, committee meetings, conferences and symposia, maintain reliable office hours, and devote sufficient attention to what they teach. If their classroom instruction receives adequate student evaluations as well as being held in high esteem by colleagues — all this comes before (or at least during) the research and writing of densely footnoted investigations into the latest developments in legal doctrine and policy. Then there is, of course, "personal life" (in theory) which amounts to whatever time one has left to spend, either with others or alone but outside of work. Acknowledgements to family members opening most scholarly books are pro forma and usually interchangeable, but some border on the pathetic: the author, for example, wishes to express appreciation to Sarah Jane, Buster, and Jenny for having been willing to do without a father for the past six years! What book is worth that much? Someone must have considered dedicating a scholarly bestseller to a former spouse: "Well, honey, here it is: the book that cost us marriage." It is perhaps too discouraging to add further to this list of "high end" constraints on the quality and quantity of scholarly production by law professors.

There are, at the same time, significant "low end" constraints on scholarship: limitations, that is, on the degree to which a law professor can avoid engaging in scholarship. These low end constraints take the form of "minimum standards" of scholarly accomplishment enforced at a series of graduated points along the professor's career path: hiring, retention, promotion to higher rank, and tenure versus termination. Furthermore, at some law schools, where scholarship is a particularly valued activity, there may exist psychological and financial incentives for publication by tenured faculty, who usually are no longer under direct peer review or colleague scrutiny. Even where the financial in-
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credibility among other law faculties in the area, or to produce at high levels in order to move up in the estimation of other law faculties (and, ultimately, that of undergraduate career advisors who steer students to particular law schools). But compared with the constraints imposed at the national level, these seems modest ones.

Specifically, high end constraints at the national level upon the quality and quantity of law professor publication derive from the national commitment made by the law schools to reproducing, decade in and decade out, a bar composed of competent practitioners. Law schools must not devote so much time to research and writing that they forget to respond to the demands made upon law schools as teaching — as training — institutions, demands made in different ways by the bar, by courts, by the public, and by national accreditation agencies which have life and death control over the ability of law schools to graduate students certified to take bar examinations. It is of particular importance, however, for us to take a look at the low end constraints on law professor scholarship, imposed by these last indicated bodies: specifically, the way in which the American Bar Association and the Association of American Law Schools have limited the ability of law schools to avoid engaging in scholarly production. It is important to understand that it is not the universities per se, but rather the accreditation bodies and their committees (functioning as middlemen, or "middlepersons") located precisely between the universities and the legal profession, which have had the job of constraining law faculty disinterest in scholarship.

II. The Professional Project Organizes Relations of Production

In spite of the willingness of most law professors to stake out a position on the significance of legal scholarship in terms of their own personal attitudes toward research and teaching and how the two might be balanced within contemporary legal education — with strongly defended positions ranging from one extreme to its opposite — the fact is that the balance between teaching and writing cannot be struck just anywhere, individuals are not "free to choose for themselves" since (as in most of life) we function within a regime of constraint. In order to highlight the limitations upon both high end and low end production of scholarly research by law professors, we have thus far deployed a "model of constraint" to inventory faculty alternatives and options.

Now we look with greater attention at one specific sector of this overview. In order to understand what the existing low end con-

straints upon law faculty scholarly work at the national level actually represent (why national accrediting agencies demand a minimum overall scholarly production from law faculties — what the reasons are for imposing this requirement, this limitation in a sense on the ability of law teachers to actually teach), we must illuminate first, quite briefly, the nature of the American legal profession's historic "professional project," the engagement, that is, by American attorneys in collective action for the purpose of controlling the supply of lawyers and the supply of legal services. During the 1930's, according to sociologist Richard Abel, "[the] the conjunction of several factors gradually increased the determination of the organized profession to control entry" to the American bar, including

the expansion of legal education (the number of law students doubled again in the 1920s), resulting in the growth of the legal profession by a third during this decade; prejudice against eastern and southern European immigrants and their sons, who increasingly were seeking admission; the advent of the Great Depression at the end of the decade, which drastically reduced the demand for lawyers services; and envy of physicians, who dramatically had curtailed the number of entrants.*

Step by step, every aspect of screening entry to the profession and regulation of the process through which new entrants would be socialized into professional values and interests was centered in the American university. Using the universities for this purpose was an important and unusual choice but one which, today, we so take for granted that it almost becomes invisible, outside the purview of current analysis of the state of legal scholarship and teaching. Centering the production of producers of professional services in universities dramatically simplified the process of legitimating both the restrictions placed upon who could become a lawyer as well as restrictions placed upon how legal services would be offered to those who would pay for them. The relationship between "credentialism" and economic monopoly in provision of professional services in the United States is, in reflection, striking.*

Responding to the question whether the "professional project" described here "allowed lawyers to extract a monopoly rent for their ser-

7. See Abel, supra note 4, at 210-12.
8. Id. at 190-191.
credibility among other law faculties in the area, or to produce at high levels in order to move up in the estimation of other law faculties (and, ultimately, that of undergraduate career advisors who steer students to particular law schools). But compared with the constraints imposed at the national level, these concerns seem modest ones.

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Now we look with greater attention at one specific sector of this overview. But in order to understand what the existing low end con-
is, of the way the world actually works.

Thus we may now reconsider the question of legal scholarship. Is it true that some faculty members at American law schools are better teachers, more valuable classroom instructors, because of their scholarship? Absolutely. Is it correct to believe that in some instances, judges and lawyers profit in their practice of legal decision-making or client representation from reading the work of law professors published in law reviews or bar journals? No question about it. Could we even become convinced that, at least in a few cases, American legal scholars have made important contributions to knowledge, to the general fund of information we have about the world, a fund which the universities are partly designed to manage and enhance? There seems to me to be no doubt but that we could even be convinced of this proposition.

But none of these questions gets at the real reason why legal scholarship exists. It was the decision by those dominating the legal profession to utilize universities to control the supply of lawyers in the United States, and to legitimate the monopoly over professional services which the bar has enjoyed, which explains the low end constraints on the production of legal scholarship and makes transparent why the law school’s “Hessian trainers” must also be legal scholars. However little writing they may generate in practice (and empirical surveys of how many tenured law professors regularly publish anything suggest that most are out of practice) the low end constraints imposed at the national level on production of legal scholarship (the limitations imposed through the accreditation and periodic review processes of the ABA and AALS, which have a ripple effect on the institutional and personal levels of surveillance of relations of production in the law schools) are directly related to the legal profession’s historic professional project and to the status and income of lawyers as a group or class within the American social structure. Law professors who loudly complain about the imposition of scholarship requirements by their faculty tenure committee or dean, or by the university administration or by the accredited

cial materialist critique. On Labriola’s work, see V. Lenin, 37 COLLECTED WORKS 135 (1967): “I am now reading the French translation of Labriola’s Essays on the Materialistic Conception of History. It is a very sensible and interesting book.” See also V. Lenin, 2 COLLECTED WORKS 486 (1960) (describing Labriola’s essays on historical materialism as “excellent”); P. Piccone, ITALIAN MARXISM (1983) (useful guide to Labriola’s work which, at the same time, mistakenly tries to conceive the founder of Italian socialism more as a Hegelian philosopher than Marxist proponent of both socialism and democracy).

16. On “Hessian trainers” in the law schools, see Bergin, supra note 3.

10. Abel, supra note 4 at 210.
11. Id. at 212.
12. Id. at 235.
13. Id. at 237.
15. See, e.g., A. LABRIOLA, ESSAYS ON THE MATERIALISTIC CONCEPTION OF HISTORY (C. Kerr, trans 1908). Labriola was, in important respects, the pioneer of historie

https://nsuworks.nova.edu/nlr/vol13/iss1/6
vices."18 Professor Abel concludes that it "seems clear that the professional project of lawyers did succeed in promoting their economic well-being."19 Perhaps what is most original about Abel's critique, however, is his appreciation of contradiction. The long-term results of the legal profession's rather calculated utilization of the universities to carry forward its own professional project have not been without ambiguity. Abel points out:

American lawyers have pursued the goal of professionalism with considerable success during the last hundred years. But the very structure of professionalism contains the seeds of its own demise. To begin with, the foundation of the professional project — supply control — inevitably is ephemeral. American lawyers were unique in seeking to gain such control by limiting entry to university law faculties. Although this had the advantage of simultaneously enhancing their status, it necessarily surrendered control to universities, both public and private, which followed their own, often divergent, agendas.20

Today, the professional project is eroding rapidly. "Lawyers exercise little control over their markets," asserts Abel, and "[t]he university (and the state, which often funds both it and its students) determines the number of entrants. Efforts to stimulate demand cannot compensate for this loss of supply control and carry the risk of displaying the commercialism of lawyers..."19 What is curious is the way this entire historical project has been carried out by the bar, from start to finish — from nascent efforts at organization of professional associations through the systematic control of supply of lawyers, supply by lawyers of professional services, and demand creation — without the entire operation or enterprise having been seen for what it is. Nevertheless, the generation of scholars which includes Jerold Auerbach,21 Magali Larson, and Richard Abel, has taken important steps in the direction of building a critique of professionalism in capitalist societies from the perspective of "historical materialism"18 — from the perspective, that is, of the way the world actually works.

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ing bodies, never think twice about the relationship between those requirements they find so inexpressible in a trade school context and the fact that as law professors, they receive the highest salary of any university category of instructor.

For example, in the Summer of 1988, the journal of the American Association of University Professors reported that

"Disciplinary salary differences within the occupation of college and university teaching are immense. Table 1 presents calculations based on a survey of large, mainly public institutions covering salaries in eighteen major fields. Among full professors the range — that is, the difference in average pay between the highest-paid field (law) and the lowest-paid field (fine arts) — was over $25,000 in 1987-88. Among new assistant professors the range was nearly $18,000."

Thus we have the supreme irony that the discipline within which there is the most debate as to the credibility of imposing scholarship standards, the need for trying to force law professors to pretend to be university intellectuals, is also the discipline which has been the most generously rewarded by the university in terms of faculty salaries. Of course, it can be argued that the "disciplinary differences and rank injustices" in university salaries merely reflect market forces. Indeed, the AAUP article suggests it is possible "that the existing salaries reflect market valuations of individuals' productivity and that those individuals and fields with the highest salaries are most valuable to society."

Without falling into the law-and-economics trap of confusing economic power with real value to society, we may simply observe that market forces may indeed account for the high salaries law professors receive: universities must compete with the income law professors presumably could make (and, many, of course, continue to make along side their university salary?) practicing law. But why, then, the salary differential in society at large? If being a law professor is economically more attractive than being almost any other kind of professor because being a lawyer is economically more attractive than being almost any other kind of professional, why have lawyers managed to make as much money as they have and insulate themselves as effectively as they have from public regulation? The answer, obviously, goes back to the historic professional project, especially including the recruitment of universities to provide supply control and legitimation services which helped insure the profit margins of producers of professional services in law. To put it very simply, the token amount of scholarship produced by American law teachers constitutes nothing more grand than a token upon the socially and economically useful premises and auspices of the American university. In short, scholarship = dues.

If some law professors are still displeased with the obligation imposed on them to become scholars, imagine how the legal profession feels about the erosion of supply control of attorneys, a mission once handled rather more "competently" than today by the colleges and universities. When Abel suggests that the legal profession's decision to go into business with the universities "had the advantage of... enhancing [lawyer] status," but also "surrendered control to universities... which followed their own, often divergent, agendas," he simply means to point out that even within the elite sectors of society (universities/professions) agendas may diverge, universities may not share identical interests with lawyers. It is hardly surprising, then, that law professors may discover that precisely the same relations of production which insure top university salaries for those who teach law also may be the source of demands upon law professors which interfere with their preferred agenda of spending a few contact hours with students each week and the rest of the time with paying clients. The important comparison is thus not between teaching and writing but law professor incomes as they are with what they might be had the legal profession failed to find some means for legitimating restrictions on the supply of lawyers and the supply by lawyers of professional services. In the general scheme of things, the big picture revealed from the perspective of relations of production in the law schools, is there really any basis for law teachers opposed to the burden of publishing to complain? The sort of critique provided here, the examination of the position of legal scholarship within the relations of production of producers of legal services, should provide a different angle on the teaching versus writing debate.

18. Id.
19. See, e.g., Byse, supra note 1, at 28 n.44 and accompanying text.
20. Abel, supra note 4, at 235.
21. See A Labriola, supra note 15, at 125: "Our doctrine has definitely outgrown the visual angle of ideology." Id. at 155: "Ideas do not fall from heaven. ..." (providing initial Italian socialist response, echoed later within Chinese socialism, to the question: Where do the correct ideas come from?).
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18. Id.