Why Law Professors Should Not Be Hessian-Trainners

Robert M. Jarvis*
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Abstract

In his thoughtful remarks on the current state of legal scholarship, Professor Clark Byse touches on many of the questions which today surround legal education.

KEYWORDS: professors, trainers, law
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I. Introduction

In his thoughtful remarks on the current state of legal scholarship, Professor Clark Byse touches on many of the questions which today surround legal education. Among the issues discussed by Professor Byse, and the one to which I wish to speak, is the conflict between the law professor's duty to teach and the law professor's obligation to engage in scholarship.

As Professor Byse notes, the seminal work on whether law professors should pursue excellence in the classroom or in the library is Professor Thomas F. Bergin's classic work in which he described the law professor as a man (and now also a woman) divided against himself. In Professor Bergin's opinion, almost all law professors belong to one of two camps, which Professor Bergin has classified as "authentic academics" and "Hessian-trainers". According to Professor Bergin's thesis, those who belong to the former camp possess unique scholarly abilities, while those in the latter camp excel at preparing law students for careers at the private bar.

In Professor Bergin's view, the existence of these two camps has caused law professors to suffer from intellectual schizophrenia by making them (as well as others) believe that law professors should be both authentic academics and Hessian-trainers at the same time. The result, according to Professor Bergin, is highly counterproductive: authentic academics attempt to teach, with miserable results, while Hes-

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3. Id. at 638. Although Professor Bergin admits that some individual law professors represent distillates of both personalities, and pronounces such persons "healthy," he contends that their numbers are few. Id.
4. Id. at 656-57.
5. Id. at 638.
sian-trainers struggle to engage in scholarship, with equally miserable results.\(^6\) To cure this schizophrenia, Professor Bergin urges that both camps be liberated so that the authentic academics and the Hessian-trainers can be "fully one or the other."\(^7\) Thus, Professor Bergin would allow authentic academics to devote all of their time to scholarship and would permit Hessian-trainers to spend all of their time teaching.\(^8\)

In revisiting Professor Bergin's article twenty years later, Professor Byse has come to the conclusion that Professor Bergin is wrong, and argues forcefully that law professors have an obligation both to teach and to engage in scholarship. Although he believes that law professors can choose which task to emphasize,\(^9\) Professor Byse is firm in his view that all law professors must contribute to "both roles to the full extent of our abilities."\(^10\)

Is Professor Bergin right? Should both the authentic academics and the Hessian-trainers be allowed to follow their own callings? Or is Professor Byse correct when he states that except in a few elite institutions, law professors are "morally bound" to be authentic academics and Hessian-trainers? As the title of my response indicates, I believe that both Professor Bergin and Professor Byse are wrong with respect to how the schizophrenia of law professors should be cured. In my opinion, authentic academics should not co-exist with Hessian-trainers in law schools and law professors should not strive to be both authentic academics and Hessian-trainers. Rather, law professors should be — indeed, must be — authentic academics, and should leave Hessian-training to other members of the legal profession.

II. The Law Professor's Agenda

As Professor Byse notes, law professors have remarkable control over the setting of their professional agendas.\(^11\) The right (for it is always described as a right rather than a privilege) to set one's own agenda as a law professor is variously defended as a necessary part of academic freedom and an important counterweight against the lure of greater financial rewards offered by private practice.\(^12\) Moreover, as Professor Byse points out, the right is not a completely unfettered one, for all law professors must devote "an irreducible minimum of time and effort" to "nondelegable" obligations, such as preparing for and teaching classes, drafting and grading examinations, judging moot court competitions, serving on law school and university committees, and supervising student papers.\(^13\)

Thus, it may strike some as heretical for me to suggest that both tenured and untenured law professors have an agenda which requires as its primary order of business the continuing production of scholarship.\(^14\) Although Professor Byse agrees that law professors should be producing more scholarship than they do at the present time,\(^15\) and argues that stricter tenure standards combined with decanal and peer pressure may be useful in achieving this goal,\(^16\) he stops short of saying that law professors have an actual duty to either engage in scholarship (if they are not already engaged in scholarship) or engage in more scholarship (if they are already engaged in some scholarship). Rather, Professor Byse opts for an individualistic standard in which "the decision to or not to engage in scholarship" is seen as a highly personal one which "must be made by each of us in a conscientious and responsible manner."\(^17\) Although Professor Byse ends his remarks by saying that all law professors have an (undefined) moral duty to engage in scholarship to the extent that our abilities (as well as our non-teaching obligations, professional and otherwise) permit, he answers Charles Frankel's

6. Id. at 656-57.
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8. Professor Bergin also suggests that the law school curriculum be redesigned to offer students a choice between earning a practical degree (which would be called an L.L.B.) or an academic degree (which would be called a Ph.D. in law). Id.
10. Id. at 31.
11. Id. at 29.
13. Byse, supra note 1, at 29. See also Stubbs, Only Nine Hours a Week!, 21 J. LEGAL EDUC. 566, 566-67 (1969).
14. To a certain extent, of course, non-tenured law professors have such an agenda forced upon them due to the relatively short period of time (normally five to seven years) between appointment and tenure review and the requirement that they have published prior to receiving tenure. See further Abrams, Sing Muse: Legal Scholarship for New Law Teachers, 37 J. LEGAL EDUC. 1 (1987); Kane, Some Thoughts on Scholarship for Beginning Teachers, 37 J. LEGAL EDUC. 14 (1987); Richmond, Advice to the Untenured, 13 Nova L. Rev. 70 (1988).
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Is Professor Bergin right? Should both the authentic academics and the Hessian-trainers be allowed to follow their own callings? Or is Professor Byse correct when he states that except in a few elite institutions, law professors are “morally bound” to be authentic academics and Hessian-trainers? As the title of my response indicates, I believe that both Professor Bergin and Professor Byse are wrong with respect to how the schizophrenia of law professors should be cured. In my opinion, authentic academics should not co-exist with Hessian-trainers in law schools and law professors should not strive to be both authentic academics and Hessian-trainers. Rather, law professors should be — indeed, must be — authentic academics, and should leave Hessian-training to other members of the legal profession.

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important question by writing that mastering the art of teaching is as important as mastering the art of scholarship.

III. Why Law Professors Must Make Scholarship Their Single Most Important Task

Why must law teachers make scholarship the single most important item on their professional agendas? Why can't members of law school faculties live in a world composed of authentic academics and Hessian-trainers, as Professor Bergin suggests? Why isn't it enough for law professors to strive, within their own limits, to be both authentic academics and Hessian-trainers, as Professor Byse believes? There are two reasons, which are really two sides of the same coin.

First, law professors are not equipped to be Hessian-trainers, although other members of the legal profession are very well equipped to be Hessian-trainers. Second, law professors are very well equipped to be authentic academics, while no other members of the legal profession are equipped to be authentic academics. Since I take as a given that society needs both authentic academics and Hessian-trainers, the question becomes one of resource allocation: in what activity can the efforts of the law professor make the greatest contribution?

Turning to my first proposition, which states that law professors are bad Hessian-trainers while other members of the legal profession are good Hessian-trainers, Professor Byse's comments are accurate but incomplete. As Professor Byse states, "Our students come to us, for the most part, to be educated to become practicing lawyers. . . ." As a result, law students and law professors differ in a way which is much more fundamental than what Professor Byse describes as the absence of a "community of scholarly purpose." Not only do law students not seek to do what their professors do, as Professor Byse points out, law students seek to engage in the very activity that their professors are prohibited from engaging in. While law students enter law school to join the practicing bar, law professors join law school faculties by leaving (some might say by escaping) the practicing bar.

Given the disparity of goals between law students and law professors, it is clear that law professors are not suited to being Hessian-trainers, regardless of whether they themselves ever were proficient Hessian. If the law professor once was a successful Hessian, he cannot remain one over time. At some point in his career as a law professor he will become too far removed from the actual practice of law to remain a modern Hessian-trainer, living as he must on worn-out war stories and telling students about how law used to be practiced. On the other hand, if the law professor was a bad Hessian, then he will be a bad Hessian-trainer from the very beginning, and will remain so.

24. The rules of the American Bar Association state that a law school shall have no fewer than six full-time faculty members, and defines a full-time faculty member as: one who during the academic year devotes substantially all working time to teaching and legal scholarship, and has no outside office or business activities and whose outside professional activities, if any, are limited to those which relate to major academic interests or enrich the faculty member's capacity as a scholar or teacher, or are of service to the public generally, and do not unduly interfere with one's responsibility as a faculty member.

American Bar Association Standards for Approval of Law Schools Standard 402(b) 1987. Nevertheless, it would be the exceptional law professor who could honestly say that he does not believe that at least one of his colleagues (whether at his own law school or at another law school) is not ignoring the proscriptions of Standard 402(b).

25. While many law professors have practiced before joining a faculty (although a sizeable minority have not), the reality is that those who have practiced usually have done so for three years or less. Indeed, it generally is agreed that a person who has practiced for more than five years is a less-than-ideal law professor candidate. See further Glickstein, Law School: Where the Elite Meet to Teach, 10 NOVA L.J. 541 (1986).

26. Even if he chooses to ignore standard 402(b) and serves as an active consultant to private law firms, see supra note 24, such consulting cannot serve as a complete substitute for actual practice.

27. Dean Prosser long ago concluded, however, that those who fail in the practice of law only rarely are hired to serve as law professors. See Prosser, Lighthouse No Good, 1 J. LEGAL EDUC. 257, 260 (1948) ("With due allowance for the inevitable exceptions, the venerable gentlemen who compose our faculties were once, whatever
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20. As Professor Bergin observes, society needs authentic academics to improve the social performance of law and requires Hessian-trainers to assure an adequate supply of practicing lawyers. Bergin, supra note 2, at 638-39.
22. Id. at 20.
23. Id. at 19.
Even if a law professor could somehow become or be trained at Hessian-training, one must ask whether there is any reason for him to do so. The answer is clearly no. The legal profession, which has witnessed explosive growth in the past fifteen years, already has more than a sufficient number of Hessian-trainers. These Hessian-trainers can be found in the associate training programs of both small and large firms, in the growing number of continuing (and in some jurisdictions mandatory) legal education programs conducted across the country, in the seemingly endless number of practical articles and treatises which are produced each year, and in the myriad of other self-improvement efforts in which the organized bar participates regularly. Thus, even if law professors could become Hessian-trainers of the highest caliber, there is no reason for them to undertake such an effort.

This fact leads to my second proposition, which is that only law professors have the possibility of becoming and remaining authentic academics. To understand fully this proposition, one must keep clearly in mind how few law professor positions exist in this country. As anyone who in recent times has tried to become a law professor knows, obtaining a tenure-track position in a law school is nearly impossible. 28

28. See further Zemoll & Barron, So You Want to be a Law Professor?, 12 J.L. & Educ. 379 (1983). Although no one knows how many persons seek to become law professors, see Bruce & Swygert, The Law Faculty Hiring Process, 18 Hous. L. Rev. 215, 221 (1981), it is clear that there have been many more applicants than positions. See Prosser, Advice to the Lawmen, 3 J. Legal Educ. 505, 507 (1951). That there is intense competition for the few available law professor positions is not surprising, especially when one considers the demographics of the legal profession. As Professor Byse points out, there are currently 4,500 law professor positions in the United States. Byse, supra note 1, at 14. By the same token, there are now 700,000 attorneys in the United States, a number which is expected to grow to 1 million by the year 2000. T. Morgan & R. Rotunda, Professional Responsibility - Problems and Materials 2 (4th ed. 1987). Thus, at current levels, only 1 out of every 156 lawyers can be a law professor at any given time. Moreover, it has been predicted that the number of law professors in the future will be considerably less than in previous times, when the entrance of women and minorities into the legal profession, the opening of new law schools, and the growth in the scope and breadth of course offerings (due to the addition of such new courses as environmental law), created an unparalleled demand for new teachers. See Pye, Legal Education in an Era of Change: The Challenge, 1987 Duke L.J. 191, 195. It is true, however, that if one does manage to find a position as a law professor, the likelihood of receiving tenure is quite high. Although in recent times there have been a few highly publicized cases of persons affiliated with certain scholarship movements being denied tenure, such as Clare Dalton at Harvard University and Drucilla L. Cornell at the University of Pennsylvania, see Moss, Would This Happen

Those who are lucky enough to become law professors* have a social responsibility to choose carefully what they do with their professional time. Since law professors can structure their professional lives with a freedom unknown to other members of the legal community,* and since there are so few law professor positions in the country, law professors must not conduct projects which could be done as well (or done well enough) by non-law professors.

As an example of my second proposition, consider the following. Although any member of the legal profession may write an article

to a Man?, 74 ABA J. 50 (June 1, 1988), the reality is that most law professors do not receive tenure. See Christie, supra note 12, at 310. In comparison, a recent study found that the chances of making partner in a New York City law firm ranged from ten to twenty percent. Wise, Past! Wanna Make Partner?, Nat‘l L.J., Oct. 26, 1987, at 1, col. 2. See also Christie, supra note 12, at 308.

29. In using the word “luck,” I do not mean to imply that those who receive positions as law professors in any way are not qualified for their jobs. Rather, I simply mean to say that in addition to possessing the proper academic and past employment qualifications, see Glickstein, supra note 25, one must also be in the right place at the right time. In most law school faculty recruiting committees seek to hire not the best available candidate but the best available candidate who can fill the law school’s curriculum needs. See further Zemoll & Barron, supra note 28, at 401. See also Prosser, supra note 28, at 507-08.

30. Zemoll & Barron, supra note 28, at 391. As Dean Prosser once wrote: “The professor works when he feels like it; and if, on any given afternoon, he decides to go to a ball game, he merely closes his office and walks away, whistling cheerily as he goes.” Prosser, supra note 27. The disparity between the freedom enjoyed by law professors and other members of the legal profession in general, but particularly with respect to being able to pursue scholarship, has become very pronounced as law firms have increased associate salaries to astronomical levels. In some New York City law firms, the starting salary for new law school graduates has reached $76,000 per year. See Lyne, Weil, Goshtal Sets $76,000 Going Rate, MANHATTAN LAW., July 5-11, 1988, at 1, col. 2. In exchange for such large salaries, firms insist that associates concentrate on nothing but the firm. As Professor Roger C. Crampton of Cornell University has noted: “Law firms not only expect a lawyer to be zealous on behalf of the client, but they expect the young lawyer to make the law firm his or her principal commitment— ahead of family, friends, and outside interests.” Behof, For Love or Money?, STUDENT LAW., Nov. 1987, at 16, 19. In an attempt to make themselves more attractive to graduating students, some law firms are now allowing associates to “buy back” some of their time by accepting reduced salaries in return for having the opportunity to pursue non-firm matters. See, e.g., Kilbourne, The 77% Solution: Kronish, Lieb Offers Yale Grades More Freedom at Lower Pay Scale, MANHATTAN LAW., Nov. 17-23, 1987, at 3, col. 3 (reporting that the Manhattan law firm of Kronish, Lieb, Weiner & Hellman is offering Yale Law School students the opportunity to join the firm at 77 percent of its usual starting salary in return for being allowed to spend up to one-third of their time on such pursuits as “public interest law, scholarship or even politics.”).
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geared to the practitioner or produce a text on some practical aspect of lawaking, only law professors have the time, not to mention the library and research assistant resources, necessary to produce a scholarly article or a scholarly book. Similarly, law professors make poor use of their time when they act as Hessian-trainers. Since we have more than enough Hessian-trainers, law professors should be seeking out and engaging in activities which only they can do, namely, the production of scholarly works which are marked not only by thorough research (whether such research is doctrinal or empirical in nature) and ample citation (whether such citation is to legal or non-legal sources), but by the sort of informed and thoughtful analysis which can come only through long periods of unhurried consideration, reflection, study and discussion with others, the sort of periods which no practitioner could ever record on his timesheet.81

IV. Conclusion

Should I be understood as saying that law professors should be bad teachers? That they should come to their classes either unprepared or not at all? That they should have little or no passing familiarity with the content of the textbooks they assign? Of course not. After all, the mere size of our students’ tuition notices prohibit any such thing. What I am saying is that law professors should realize that their highest obligation is to scholarship, and that this obligation does not begin in the year before they come up for tenure and end in the year after tenure is obtained. It is lifelong, it is constant, it is the justification for our collective existences.82 Hessian-training, on the other hand, should be pri-

31. In some circumstances, however, it can be very helpful for a law professor to engage in writing projects which are practical rather than scholarly in nature. As Professor Robert H. Abrams of Wayne State University has demonstrated ably, the production of what he terms “busy work” (including bar journal articles, survey pieces, and previews of U.S. Supreme Court cases) and “lower order” work (typified by glorified casenotes, state-of-the-law articles, and treatise sections) can be a useful first step towards the production of such “higher order” work as affirmative thesis articles, law reform articles, and frontal attacks on citadels of major legal doctrine. Abrams, supra note 14, at 2-3.

32. Of course, many believe that the primary (or only) justification for the existence of law professors is that they train future lawyers, and that the requirement that law professors publish is one imposed not by the bar (which is indifferent to whether law professors engage in scholarship) but by the universities with which law schools have chosen to affiliate. See further Chase, The Legal Scholar as Producer, 13 Nova L. Rev. 57 (1988), and Hurst, Research Responsibilities of University Law Schools, 10 Nova L. Rev. 1 (1988).
Jarvis: Why Law Professors Should Not Be Hessian-Trainers

IV. Conclusion

Should I be understood as saying that law professors should be bad teachers? That they should come to their classes either unprepared or not at all? That they should have little or no passing familiarity with the content of the textbooks they assign? Of course not. After all, the mere size of our students' tuition notices prohibit any such thing. What I am saying is that law professors should realize that their highest obligation is to scholarship, and that this obligation does not begin in the year before they come up for tenure and end in the year after tenure is obtained. It is lifelong, it is constant, it is the justification for our collective existence. Hessian-training, on the other hand, should be pri-

31. In some circumstances, however, it can be very helpful for a law professor to engage in writing projects which are practical rather than scholarly in nature. As Professor Robert H. Abrams of Wayne State University has demonstrated ably, the production of what he terms "busy work" (including bar journal articles, survey pieces, and previews of U.S. Supreme Court cases) and "lower order" work (typified by glorified casenotes, state-of-the-law articles, and treatise sections) can be a useful first step towards the production of such "higher order" work as affirmative thesis articles, law reform articles, and frontal attacks on citations of major legal doctrine. Abrams, supra note 14, at 2-3.

32. Of course, many believe that the primary (or only) justification for the existence of law professors is that they train future lawyers, and that the requirement that law professors publish is one imposed not by the bar (which is indifferent to whether law professors engage in scholarship) but by the universities with which law schools have chosen to affiliate. See further Chase, The Legal Scholar as Producer, 13 Nova L. Rev. 57 (1988), and Hurst, Research Responsibilities of University Law Schools,
In short, Professor Bergin is wrong in his belief that law schools have a place for both authentic academics and Hessian-trainers alike. They do not, because there simply are not enough law faculty places to go around. Likewise, Professor Byse is wrong that law professors should strive to be successful authentic academics and successful Hessian-trainers. Whether a law professor is successful or fails totally at becoming a Hessian-trainer will be irrelevant in the lives of his students, since they will be surrounded by Hessian-trainers forever as soon as they leave law school and join the practicing bar. What law students will have only for a brief time, however, is the chance to be surrounded by authentic academics. Moreover, if law professors fail to become and remain authentic academics, they will be robbing society and the profession of the unique scholarly contributions which only a person leading the life of a law professor will ever be able to make.

34. Although today's law student comes to law school possessing, at a minimum, a bachelor's degree, and in a number of cases a master's degree or even a doctoral degree, I do not believe that the experience of having been surrounded by non-legal authentic academics is an adequate, or even partial, substitute for being surrounded by authentic legal academics.

This is not to say, however, that law students want to be surrounded by authentic academics while in law school, nor is it to say that they will enjoy being in such an atmosphere. In fact, quite the opposite is and will be true. As has been noted elsewhere, law students want their law professors to be Hessian-trainers, as do their future employers. See McFarland, Students and Practicing Lawyers Identify the Ideal Law Professor, 36 J. LEGAL EDUC. 93 (1986) (reporting that both law students and practicing lawyers believe that the ideal law professor is one who prepares law students for the active practice of law). Moreover, law professors are giving in to this demand, for a variety of reasons. See D'Amato, The Decline and Fall of Law Teaching in the Age of Student Consumerism, 37 J. LEGAL EDUC. 461 (1987). Of course, some legal educators believe that from "sequencing" to student pressure, this is how law school ought to be. See Rohr, The Law School for the Consumer, 13 Nova L. Rev. 101 (1988).


Advice to the Untenured

Gail Levin Richmond*

When offered the opportunity to comment on Professor Byse's remarks, I was in the process of thinking through an analogy involving Super Mario Brothers1 and the many roads to success in law school teaching. The analogy perished during the revision process, but several of its premises survived. The comments that follow reflect my feelings about faculty success. Because these are my personal comments, I begin with background information about myself.

I have spent the past sixteen years as a law school professor, the last seven of them as an Associate Dean for Academic Affairs. In the latter capacity, I have counseled many entry-level faculty members on course selection, committee assignments, and research assistance. I believe that each faculty member's obligations extend to teaching, scholarship, and service to the community and that a law school's administration should provide support for each.

Many of the thoughts which follow reflect advice I have offered various junior colleagues. Other statements reflect advice I would give if asked the right question. I have grouped my thoughts into brief sections on teaching, scholarship, and service followed by some concluding general rules. Although these are my personal beliefs, they have been molded by my experience at this and other law schools.

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1. In late spring I began investing a half hour (sometimes more) daily in the challenge of Nintendo's Super Mario Brothers game. Now I am the champion of the household, having bested an eleven-year-old boy who can conquer any video game ever devised. What have I learned from Super Mario Brothers, other than the time span needed to generate stiff fingers and an aching back? Which of its mysteries can I share with the new law professor? Much of this essay reflects insights I probably already had but which took on new clarity during my as yet fruitless endeavors to rescue the princess.

2. Junior faculty members bring varying strengths to the law school. Some of them need (or want) minimal advice; others are less secure (or perhaps more willing to indulge an opinionated colleague).