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Forward: Scholarship and Legal Education

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Scholarship and Legal Education

DONALD J. POLDEN

I appreciate the opportunity to introduce volume twenty-four of the Memphis State University Law Review. I would like to preface the volume by discussing a topic of current significance to legal education and to law reviews. This also permits me to articulate some general views about the relevance and importance of research and scholarship in legal education. This description requires, in the first instance, a brief development of current perspectives on the role of scholarship in legal education and an identification of the tensions that characterize academic discourse about the roles of scholarship. Then, I offer some general views on a comprehensive model of research and scholarship and describe its applicability to the functions of law schools and the purposes of legal education.

The topic of scholarship in legal education has generated considerable interest, controversy and scholarship of its own. The principal areas of discussion concern appropriate forms or types of scholarship and the proper purposes of legal scholarship. In significant part, current legal scholarship tends to be doctrinal or theoretical. Professor (now Judge) Richard Posner has further defined these general forms of scholarship as consisting of doctrinal analysis, positive analysis using social science methods, and normative analysis. Posner recognized the tension within the legal academy

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1. See, e.g., John Elson, The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?, 39 J. LEGAL EDUC. 343 (1989); Mary Kane, Some Thoughts on Scholarship for Beginning Teacher, 37 J. LEGAL EDUC. 14 (1987); Richard Posner, The Present Situation in Legal Scholarship, 90 YALE L.J. 1113 (1981); Anthony Kronman, Legal Scholarship and Moral Education, 90 YALE L.J. 955 (1981).

2. Posner, supra note 1. According to Posner, doctrinal analysis "involves the careful
concerning appropriate forms of legal scholarship, particularly the primacy of theoretical scholarship over doctrinal analysis. He argued that law schools should be more accepting of doctrinal analysis while fostering interdisciplinary research and analysis. This tension between forms of legal scholarship, some of which stems from political or philosophical differences, appears in the scholarship itself, or within the tenure, promotion and salary processes at individual schools.

The tensions and institutional conflicts about the proper forms of scholarship have raised concerns about the proper purposes of legal scholarship. By some accounts, the purpose of legal scholarship is to assist law teachers in their search for the truth and them in creating in their students a desire to find truth. Other commentators have argued that the process of legal scholarship merely fulfills the self-serving promotion of the scholar's financial success and professional prestige. Still other writers have argued that scholarship serves not only the individual scholar and her students, but also promotes broader public objectives by relating the role of law to social needs.

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3. Id. at 1129.
5. See Bruce Ackerman, The Marketplace of Ideas, 90 Yale L.J. 1131, 1135-41 (1981). See also Kane, supra note 1, at 14-19 for a discussion of the political and personal differences may shape the reception of a piece of scholarship by colleagues.
6. See Kronman, supra note 1, at 967. Kronman argues, from a communitarian perspective, that law teachers must prevent their students from developing a "cynical carelessness about the truth" which can undermine the "important good of community." Id. Legal scholarship and the way it is brought into the classroom, according to Kronman, is an important way that teachers can combat the cynicism of their students about the tasks of lawyering. Id. He contends that the role of scholarship is more than merely reporting on what a teacher has discovered, but rather it should be viewed "as a type of comportment, a way of presenting oneself as a bearer of distinct values." Id.
7. See Ackerman, supra note 5, at 1132-34.
8. Michael Graetz & Charles Whitebread, Monrad Paulsen and the Idea of a University Law School, 67 Va. L. Rev. 445, 454 (1981) ("A university law school is among the few institutions for anticipating future social needs and for relating the role of law to furthering those needs. It must produce lawyers for tomorrow.")
Recently, other legal academics, such as John Elson claim that legal scholarship is commonly recognized as a preeminent value in legal education, but assail its status arguing that it impedes the development of lawyering competencies in law schools. These academics premise their argument that legal scholarship diverts teachers from their real responsibilities on the perception that teachers do not develop lawyering competencies in the classroom because they are preoccupied by scholarship enterprises.

Professor Elson's attack on the role of legal scholarship as an essential part of legal education expresses some political or philosophical disagreements. Specifically, Elson disagreed with the notion that traditional forms of research and scholarship shape and determine the hierarchy of work performed by law teachers and articulates a concern that the ordering of that work impedes the primary mission of educating law students for the practice of law. Besides political concerns, his argument clearly focuses on the narrow construction given by some law school administrators and legal academics on what constitutes acts of scholarship. Moreover, it requires consideration of the role that traditional legal scholarship should play in the overriding mission of the law school.

The issues of defining and valuing the typology of scholarship is not specific to the legal academy; indeed, these are issues that interest many disciplines. In 1990, a special report on academic scholarship authored by Ernest Boyer of the Carnegie Foundation argued for a broader description of scholarship and for university academics to accept a comprehensive model of their varied research.

9. See Elson, supra note 1, at 355.
10. Id. at 355-56. Professor Elson argues:
Because their primary attention is devoted to individual scholarly pursuits, teachers have little time and energy for collaborating with the rest of the faculty on the research, development and evaluation of a curriculum that is capable of meeting students' professional needs. In addition, the desire or pressure for scholarly production causes most law teachers to avoid the world of practice. They thereby deny themselves access to knowledge that is critical to developing and maintaining effective approaches to the teaching of professional competence. Finally, because their most serious and sustained thinking is devoted to their research on matter of complex theory, faculty are likely to teach in ways and on subjects that are most compatible with their scholarly concerns. As a result, classroom discussions devoted to neutral doctrinal analysis and abstract theory displace the role-oriented, practice-grounded teaching that best develops the habits of mind necessary for professional competence.

Id.
and scholarly interests. The types of scholarship acknowledged in the model are scholarship of discovery, the scholarship of integration, the scholarship of application and the scholarship of teaching. The traditional research activity, characterized as the search for knowledge for its own sake, connotes the scholarship of discovery, and this activity is well known and honored at most academic institutions. The scholarship of integration fulfills the need of some scholars to give meaning to, and to put into perspective, otherwise isolated facts and events; it creates a sense of "connectedness" between and across disciplines and areas of thought. The scholarship of application, according to Professor Boyer, is a dynamic undertaking rooted in the notion that new intellectual understandings can arise out of applying a theory to a reality or a practice. Finally, Boyer identifies a scholarship of teaching, which represents the process of acquiring knowledge of material, developing a pedagogical strategy, communicating material so that effective learning occurs, and evaluating the teaching and learning that occurs in the classroom.

The scholarship paradigm offered by Boyer imports a greater sense of coherence to the purposes and roles of research and scholarship in legal education. Moreover, the breadth of the model acknowledges the contributions made by many legal educators to the development of lawyering competencies and professional skills. This refreshing view acknowledges the integrity and importance of

12. Id. at 16.
13. Id. at 17.
14. Id. at 18-19.
15. Id. at 23. This form of scholarship reflects the potential service to humanity that can occur when scholarship addresses the "huge, almost intractable problems [which] call for the skills and insights only the academy can provide." Id.
16. Id. at 23-5. Although not explicitly articulated as an aspect of the scholarship of teaching, the need for the publication or other written or verbal manifestation of the learning process appears necessary or, minimally, desirable. Without some extension or distribution of the significant process to others, then it becomes impossible to distinguish the act of teaching from the act of scholarship.
17. The range and importance of the many lawyering competencies was recently articulated in the TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 5 (1992). The Report identifies a significant array of fundamental lawyering skills which lawyers are expected to demonstrate in the modern practice of law, including the following: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work and recognizing and resolving ethical dilemmas.
work that does not fit the traditional model of legal scholarship, yet does not condemn all acts of scholarship as distracting educators from their roles in preparing students for the practice of law. Rather, the perspective recognizes that all rigorous, serious work that promotes understanding of law and learning by students should be considered scholarship and should be accepted for the value it contributes to the educational and professional training missing at law schools. However, recognition of this more comprehensive model of legal research and scholarship will require institutional reflection and discussion.

I hope that the pages of this law review, and others as well, provide an instrument for the widespread dissemination of the many forms of legal scholarship that informs the process of legal education and prepares law students for the tasks they will encounter after law school.