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The Revolution in American Law Schools

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I. INTRODUCTION

A. A Decade of Ferment, Ideology, and Conflict

There is a continuing revolution in American law schools that is transforming legal scholarship, teaching, and the structure of the curriculum. The revolution is altering the law schools' relationships with the legal profession and judiciary. The revolution has not been contained within the schools, in part because it is being stimulated by events and sources outside the law schools with the schools being reactive rather than proactive institutions.

One legal scholar has described what is occurring as a chaotic period in which the post-World War II synthesis of Langdellianism and Legal Realism has broken down. Law schools are not alone in experiencing radical changes. Disciplines, institutions and social structures of all kinds are experiencing fundamental reordering of their basic paradigms. It

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1 Cramton, What It's All About: Teaching and Scholarship, The President's Address, AALS Newsletter 1 (Jan. 1985).
The revolution in American law schools is being generated and sustained by ten primary forces that are only loosely related. They include, in no particular order of priority, (1) the continuing consequences of the clinical, professional responsibility and humanistic educational movements that started within the law schools during the late 1960s and 1970s; (2) the methodological, political, intellectual and social effects of the Critical Legal Studies and the Law and Economics movements as well as the Feminist, and Law and Literature efforts; (3) a rebirth of jurisprudence and philosophy in the law schools, reflected not only in legal scholarship, but in the content of various courses, including core curriculum offerings such as Constitutional Law, Torts, Contracts, and Criminal Law; (4) rapid changes in enrollment patterns and faculty hiring that have produced far more diverse mixtures of law students and law faculty; (5) the Legal Skills movement, including alternative dispute resolution, advocacy teaching, interviewing, counseling, negotiation, and so forth; (6) the changing nature of law practice and the legal profession, along with the profession’s increasing interest in the quality of legal education; (7) judicially driven demands that law schools produce more responsible and competent lawyers; (8) undifferentiated dissatisfaction on the part of many law faculty concerning the meaning, function, and quality of law schools, law teaching, and legal scholarship; (9) a heightened desire on the part of many legal scholars to use legal scholarship and/or practical advocacy to help identify and/or resolve critical social issues; (10) the natural cycle of knowledge systems in which, following a period of stagnation, there is a surge of intellectual energy and experimentation; (11) the increased expectation that law faculty will engage in scholarly activity throughout their academic careers; and (12) the dramatic changes in student-faculty ratios that have occurred since the 1960’s, fueled by the rapid expansion in the number of law faculty positions.

Some legal scholars are greatly concerned about the consequences of several aspects of the revolution. Francis Allen, for example, warns of the dangers of a “new conceptualism.” Both Allen and Richard Posner urge legal scholars not to wander far from their traditional ties to the substantive interests of the judiciary and legal profession. Other legal scholars see the situation quite differently. Bruce Ackerman fears that

2 The ferment in fields of knowledge has even made the New York Times. See Campbell, Scholarly Disciplines: Breaking Out, N.Y. Times, Apr. 25, 1986, at A18, col. 1. John Naisbitt, author of Megatrends, wrote in 70 A.B.A. J. 45 (June 1984) that: “There are cities, companies and institutions in this country that are like dinosaurs waiting for the weather to change. The very ground is shifting beneath us. What is called for is nothing less than all of us — including lawyers — to reconceptualize our roles in a new society.”

3 Allen, Legal Scholarship: Present Status and Future Prospects, 33 J. LEGAL EDUC. 403, 404 (1983). “In part, the problem is one of communication. Many in the law schools are speaking a language incomprehensible to lawyers and judges.” Allen also suggests: “We feel less confident than we did formerly that we understand our colleagues’ judgments on questions of intellectual style, purpose, or technique. We sense a dissolving accord on what is good scholarly work.” Id.

the connection between the legal profession and the work of American legal scholars may already be too close. He sees a risk that many scholars might surrender their intellectual independence in exchange for economic gain. The increasing connections between law faculty and law firms may indicate that Ackerman's fears are becoming a reality. Similarly, the rapid increase in continuing legal education courses and the potential payoffs for law faculty could deflect faculty from true scholarship toward doing work that would be of interest primarily to the CLE market. Critical Legal Studies (CLS) scholars have accused more traditional legal scholars of contributing to the legitimation of a corrupt legal system. Christopher Stone evaluates legal scholars and finds them uncertain and afraid of taking risks. Paul Carrington, on the other hand, looks at the CLS critics of the existing core of American legal scholarship and indicts them as dangerous nihilists. Former Yale law professor and Haverford College president Robert Stevens remarks, however, in reference to the traditional doctrinal scholarship that has been performed by legal scholars, that while the "collection and regurgitation of doctrine might have seemed scholarly to Langdell; it did not impress those in other disciplines

5 Ackerman, The Marketplace of Ideas, 90 YALE L.J. 1131 (1981). Much of Ackerman's piece is a critique of Posner's article, supra note 4. Ackerman suggests: "(T)he practitioner role may become so dominant that clients may pay lawyer-professors to publish articles in law journals in the hope that a "scholarly" article will seem more persuasive to courts than the same material submitted in a brief." Id. at 1136.


7 Stone, From a Language Perspective, 90 YALE L.J. 1149 (1981); but see Barnett, Contract Scholarship and the Reemergence of Legal Philosophy, 97 HARV. L. REV. 1223, 1234 (1984), who concludes that "contrary to the assertions of CLS writers, there is less sense of 'crisis' in traditional legal scholarship today than in recent memory. In fact there appears to be a rapidly growing mood of self-confidence."

8 Carrington, Of Law and the River, 34 J. LEGAL EDUC. 222 (1984). This article should be read in conjunction with the exchanges of correspondence it generated. The correspondence is contained in, Of Law and the River, and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1 (1985). Hegland, Goodbye to Deconstruction, S. CAL. L. REV. 1203, 1221 (1985) chastises the "nihilists" and, to a lesser extent, Carrington for failing to use their talents wisely and for concentrating on "tiresome epistemology."
in the Twentieth Century."

The only undeniable fact amidst the revolutionary turmoil is that the intellectual tapestry of legal scholarship, teaching and curriculum is richer and more diverse than even a decade ago. The courses being taught are more complex and diverse. Law is no longer so easily and rigidly subdivided into "legal" and "social" or "moral" compartments, with only the "legal" issues the subject of law courses and legal analysis. Legal skills courses, as well as those focusing on the roles of lawyers and professional responsibility, have blossomed within the law curriculum. No longer is the world of the lawyer being ignored by law schools.

American legal scholars are ranging far afield in the world of intellect, hoping to uncover insights that might provide what Enlightenment philosophers once thought was represented by human reason, "the little backstairs door that for any age serves as the secret entrance way to knowledge . . . ." Some legal scholars are continuing in this spirit, seeking after methods that might strip away our veils of ignorance and reveal some form of true knowledge. For most American legal scholars raised in the post-World War II synthesis of Langdellianism and Legal Realism described by Cramton, this seeking after keys to wisdom and insight is a new experience.

The revolution in academic thought was generated by a rising tide of discontent with the quality of legal scholarship, as well as the increasing orientation toward technical concerns of law practice. In 1978, John Ayer described American legal scholarship as a "backwater of thought," out of touch with ongoing developments in important fields of knowledge relevant to law and legal thought. Ayer's claim was at least partly justified when made, although even by 1978, the seeds of the law schools' intellectual revolution had already been planted and were growing rapidly. The stage had been set for a revolutionary decade.

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10 I have developed these points in Barnhizer, Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America, 50 U. Pitt. L. Rev. 127 (1988) [hereinafter Prophets], and Barnhizer, The University Ideal and the American Law School, 42 Rutgers L. Rev. 109 (1989) [hereinafter University Ideal].
11 D. NOBLE, THE PARADOX OF PROGRESSIVE THOUGHT 7 (1958) (quoting C. Becker in his analysis of the eighteenth century Enlightenment). Our modern "problematique" is a loss of faith in any equivalent "secret entrance."
12 Ayer wrote in 1978 that,
Anglo-American law has let itself be shunted into a backwater of human thought, where fresh tides of insight have passed it by. It appears that we are trying to operate with outworn, or at least shop-worn intellectual merchandise.
13 A thorough overview of the various major approaches to analysis of law is provided by Lord Lloyd of Hampstead & M.D.A. Freeman, supra note 6. Of particular interest to legal scholars are chapters 5, Natural Law, 6, Modern Trends in Analytical and Normative Jurisprudence, 7, Sociological Jurisprudence and the Sociology of Law, 8, American Realism, 10, Historical and Anthropological Jurisprudence, 11, Marxist Theories of Law and State, and 12, The Judicial Process.
The revolution proceeded so rapidly that by 1985 the President of the Association of American Law Schools concluded that we were witnessing the end of the "dominant orthodoxy" of Langdellianism and Legal Realism. He observed:

The synthesis of Langdell's method with legal realism that produced the dominant orthodoxy of legal thought and legal education for the post-World War II generation has finally broken down. Our world is more confused and unstable, but new patterns of thought and action are emerging.\(^\text{14}\)

The "new patterns of thought and action" are taking various forms. Some have concentrated mainly on the processes of teaching, others on the functions of lawyers and judges. Still others have sought to extend the central knowledge core of law itself, considering that core to be connected in some important way to the articulation of doctrinal principles by judges.

Loose groupings of these compartments of experimentation include the Law and Economics movement,\(^\text{15}\) Law and Literature,\(^\text{16}\) Humanistic Legal Studies,\(^\text{17}\) Critical Legal Studies,\(^\text{18}\) clinical education,\(^\text{19}\) research into the sociology of law,\(^\text{20}\) historicism,\(^\text{21}\) considerations of professional role and

\(^{14}\) Cramton, supra note 1.


\(^{16}\) See, e.g., Symposium: Law and Literature, 60 TEX. L. REV. (1982) (included are articles by Levinson, Law as Literature, 373; Graff, Keep off the Grass, Drop Dead, and Other Indeterminacies: A Response to Sanford Levinson, 405; White, Law as Language: Reading Law and Reading Literature, 415; Nelson, Standards of Criticism, 447; Fish, Interpretation and the Pluralist Vision, 495; Hancher, Dead Letters: Wills and Poems, 507; Dworkin, Law as Interpretation, 527; Fish, Working on the Chain Gang: Interpretation in Law and Literature, 551; White, The Text, Interpretation, and Critical Standards, 569).


\(^{18}\) See sources on Critical Legal Studies cited supra note 6 and infra note 91.


morality, a new devotion to jurisprudence including natural law, professional technique, political science and political economy, linguistic analysis, Feminism, structuralism, and Constitutional inter-


23 One of the best works to emerge within the last decade is J. Finnis, Natural Law and Natural Rights (1980). See also R. Dworkin, infra note 54; S. Buchanan, Rediscovering Natural Law (1962); Lord Lloyd of Hampstead & M.D.A. Freeman, supra note 6, at 92-245.

24 An excellent source for references on legal technique is S. Goldberg, E. Green & F. Sander, Dispute Resolution (1985) (particularly "Collected References," 577-88). A careful examination of this work reveals how scholarship on technical aspects of law practice and legal institutions can nonetheless generate insights transcending the mundane and technical.

25 R. Franklin & S. Resnik, The Political Economy of Racism (1973). See also Hovenkamp, The Political Economy of Substantive Due Process, 40 Stan. L. Rev. 379 (1988). There is no automatic consensus about the content and focus of political economy. One view sees political economy as critique of orthodox economics. Another emphasizes the function of political economy as helping to develop alternative economic forms or improved methods of analysis. Insights into these themes are offered in What is Political Economy? Eight Perspectives (D. Whynes ed. 1984). The perspectives discussed include the "Austrian," Institutionalist, Marxist, and Public Choice approaches. The themes include the formal modelling of politico-economic relationships, examination of international political economy, consideration of the role of concepts of property, and understanding the legal system as an important element of political economy.


27 See, e.g., French Feminist Thought (T. Moi ed. 1987); see also various articles addressing the theme Women in Legal Education - Pedagogy, Law, Theory, and Practice, 38 J. Legal Educ. 1-193 (1988). Another excellent source is C. Weedon, Feminist Practice and Post-Structuralist Theory (1987). In a recent study of 1,950 full-time United States law professors ranked as being senior law faculty, Swygert and Gozansky found 1,872 (96%) men and 78 (4%) women. These figures reflect the consequences of hiring and promotion decisions made prior to 1976. See Swygert & Gozansky, Senior Law Faculty Publication Study: Comparisons of Law School Productivity, 35 J. Legal Educ. 373, 380-1 (1985). See also Press, With Justice for Some, Newsweek, June 4, 1984, at 85-86. Press offers statistics and commentary reflecting that women lawyers are still denied equal access to partnership positions in the more prestigious law firms.

28 A useful introduction for the legal scholar is Hermann, Phenomenology,
pretation. These various approaches often do not have much in common other than that each is a response to what are considered needed reforms of the traditional model of law school. Certainly they have not yet coalesced into clear patterns capable of defining the new models of American legal education and scholarship. They represent an extraordinary variety of approaches, admirable in breadth, but spread so thinly as to potentially overwhelm the quite finite intellectual, structural and economic resources of law schools. The schools have yet to come to grips with how institutional constraints determine, define and limit their capabilities and mission.

B. Loss of "Organic Unity"

As with any revolution, American law schools are filled with people intent on arguing that their particular vision of knowledge, life, morality, the legal profession, analytic method, or appropriate political community is the only valid approach. We, therefore, see less intellectual debate than conflict and unwillingness to be "tainted" by another's approach. Several of these intellectual and/or pedagogical movements have generated hostile camps based, at least in part, on self-interest, ideology and narrow vision.

There has been a loss of a sense of organic unity in the law schools because a unified vision has been replaced by a much more fragmented and complex collage of interests. The law schools' revolution is rooted in


30 See, e.g., Margolick, The Split at Harvard Law Goes Down to Its Foundation, N.Y. Times, Oct. 6, 1985 at E7, col. 1; Margolick, A Professor at Harvard Law Heads to West and to Right, N.Y. Times, Sept. 15, 1985 at 58, col. 1, discussing the "disastrous effect" of the Critical Legal Studies movement on the Harvard Law School faculty. Paul Bator, a departing tenured faculty member, charged that Critical Legal Studies has "politicized the Harvard faculty, lowered academic standards, blocked faculty appointments, and discouraged qualified professors elsewhere from going to Harvard — because, [Bator] said, 'serious and productive non-left scholars do not want to be at an institution devoted to guerrilla warfare'." Id.
a heightened awareness that law is a powerful tool for shaping society. Whether thought of as social engineering or instrumentalism, and regardless as to whether the intent is to engineer a "liberal" or "conservative" society, the past twenty years have brought large scale changes into the American law school. It took time for the changes to combine into a critical mass, but they have done so and are now redefining the law school. The concerns of women, civil rights, a rapidly expanded and more diverse law professoriate, powerful and compelling social issues and radical changes in society have altered the law, the legal profession and the judiciary. These changes have transformed the texture of law schools and legal scholarship. Francis Allen observes,

the sense of organic unity that has often characterized the law-school world and provided for many of its greatest attractions has become diluted; and the process seems likely to accelerate in the future. 31

There have been very few periods of intellectual inventiveness in the American law schools. By and large, American law schools have been musty, boring places bearing little resemblance to true centers of intellectual activity. This is presumably why Thorstein Veblen concluded American law schools did not belong in the university at all, and why Robert Stevens reported that scholars in other disciplines considered legal scholarship to be little more than regurgitation of doctrine. 32

In spite of a tradition often characterized by mediocrity, the American law schools have begun an intense, exciting, accelerated period of experimentation. The greatest difficulty for the schools will be in sorting out the truly insightful from the momentarily captivating. Given the limited resources and diverse missions of the law schools, equally difficult is the task of setting priorities. The law schools cannot do everything that arguably ought to be done by an institution dedicated simultaneously to the ideals of the university and obligated (or privileged) to educate those

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31 Allen, supra note 3. There has been a rapid, revolutionary transformation in the composition of the legal profession, judiciary, law student population and law professoriate. By 1984 women made up 15 percent of the United States judiciary, 38 percent of law students, and 16 percent of law professors. See Press, supra note 27, at 85. In an extensive statistical tome, D. Bogue, THE POPULATION OF THE UNITED STATES: HISTORICAL TRENDS AND FUTURE PROJECTIONS (1985) reveals that as of 1980 there were 524,806 United States lawyers, including 27,576 judges. Of that total 95.2 percent of the lawyers were white, as were 92.5 percent of the judges. The ranks of law professors were 95.7 percent white. The makeup of the categories by gender reveals women as 13.8 percent of law teachers, 13.6 percent of lawyers and 16.9 percent of judges. One of the most interesting statistics is that by 1980, 43.3 percent of all lawyers were between 25-34 years of age, reflecting the extremely rapid remaking of the legal profession over only one decade. The effects of long-term male dominance of the legal profession show in the disparate salaries received by male and female lawyers. In 1980 male lawyers ranked fourth among all occupations in terms of highest mean income ($37,546). Female lawyers, however, did not even appear in the top ten in terms of mean income, although female judges ranked tenth ($16,565). Id. at 529.

32 R. Stevens, supra note 9; T. Veblen, infra, note 100.
who will become the leaders of American society. It is clear, however, that American law schools will never again be as they were only a decade ago. The orthodoxy of Langdellianism and Legal Realism has been broken and will not be mended. The question that has not yet been answered is the nature of the new patterns that are only now beginning to emerge.

II. THE ADVOCATIVE ESSENCE OF AMERICAN LEGAL SCHOLARSHIP

Understanding the continuing revolution in the law schools requires awareness of the true nature of legal scholarship. Legal scholars, particularly in America, tend to have a different approach to knowledge than academic counterparts in other disciplines. This is in part due to the nature of the common law itself and to the system forged by Langdell that elevated judicial doctrine into the center of the scholarly thought done by law professors. This system created a relationship between the work of American law faculty and the judiciary that generated a unique and peculiar intellectual structure.

Some scholars search for abstract knowledge independent of any connections with human societies or human interests other than simply the basic human desire to know the deepest secrets of the universe. Mathematicians and physicists most readily come to mind when we try to identify the seekers after "pure knowledge." Other scholars are less interested in Grand Theories or unified structures of knowledge than they are in the empirical study of infinitesimal units of data. Still others seek to apply the methods of science to controllable compartments of social and/or human phenomena. An increasing number of scholars are, however, returning to the moral, political, philosophical and metaphysical traditions of inquiry that were shunted aside by the power of modern scientism.

American legal scholars are different in that they not only seek knowledge, but tend to be advocates. This orientation increasingly dominates American legal scholarship. Given their training, experience, and the materials with which they work, it is inevitable that legal scholars have an advocative bent. Legal scholars study processes of conflict resolution through advocacy. Judicial doctrines are temporary resolutions of conflicting positions presented by advocates. Even the classic justification of

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33 Robert Stevens suggests that the universities may have sought to educate the legal profession because "[p]erhaps it gave them greater influence among that powerful local elite — the lawyers." Stevens, Two Cheers for 1870: The American Law School, in 8 PERSPECTIVES IN AMERICAN HISTORY 403, 415 (D. Fleming & B. Bailyn eds. 1971). See also Madden's Foreword to R. NISBET, infra note 40, at vi.

34 One scholar has commented, for example, that: "Ordinary language, in which law is necessarily expressed (for how otherwise could its contact with real life be maintained?) is not an instrument of mathematical precision but possesses what has been happily described as an 'open texture'." LORD LLOYD OF HAMPSTEAD & M.D.A. FREEMAN, supra note 6, at 1139. For an explanation of Langdell's reforms at Harvard, see A CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817-1917 29-37 (1918).

35 See discussion in Prophets, supra note 10, at 129-39.
American law schools, that of teaching the skill of "thinking like a lawyer", is inescapably a method of advocacy. This inculcates in law students a method oriented to an advocative process, one linked intimately with the basic fabric of advocacy. Law school teaching educates students in the values, methods, and activities of the advocate. This occurs implicitly in the first year and more explicitly as students progress through law school. The mindset of legal scholars, lawyers, and judges inexorably becomes that of the advocate. For the legal scholar, this mindset becomes an integral part of scholarship; deceptive and powerful because its advocative nature is concealed, even from those who use it.

The simple fact that legal scholarship is advocative does not make it illegitimate. The legitimacy of legal scholarship also depends upon a broader understanding of the intellectual obligation of university scholars. Hans Morgenthau has described the responsibility of the modern intellectual as being a "prophetic confrontation with power." In a society grounded on the Rule of Law, there is a heightened obligation for legal scholars, acting as intellectuals of the law, to effectively confront institutions of power with challenges to wrongful use of their power. Legal scholars are not alone in this mission but have a special responsibility to confront unjust exercises of power because of their expertise and connection with the wielders of legal power.

Confronting overt or covert abuses of power through legal scholarship demands that the messages be delivered effectively. This generates the

36 See, e.g., Fletcher, Two Modes of Legal Thought, 90 YALE L.J. (1981); J.B. Conant, Two Modes of Thought (1964).
38 Rodell, Goodbye to Law Reviews, 23 VA. L. Rev. 38 (1936):
With law as the only alternative to face as a means of solving the myriad problems of the world ... the articulate among the clan of lawyers might, in their writings, be more pointedly aware of those problems, might recognize that the use of law to help toward their solution is the only excuse for the law's existence, instead of blithely continuing to make mountain after mountain out of tiresome technical molehills.

Id. at 43.
The contemporary intellectual, in his (Morgenthau's view) lived in a world that was distinct from, though potentially involved with, that of the politician. The intellectual . . . . seeks truth; the politician, power. And the intellectual . . . can deal with power in four ways: by retreat into the ivory tower, which makes him irrelevant; by offering expert advice, which makes him a servant; by absorption into the machinery, which makes him an agent and apologist; or by "prophetic confrontation."

Of the four modes of response, the last seemed to him most faithful to the intellectual's obligation. The "genuine intellectual," Hans Morgenthau wrote . . . . "must be the enemy of the people who tells the world things it either does not want to hear or cannot understand." The intellectual's duty is to look "at the political sphere from without, judging it by, and admonishing it in the name of, the standards of truth accessible to him. He speaks, in the biblical phrase, truth to power."
tendency for many scholars, including American legal scholars, to attempt to speak their truths in ways that ensure their messages are effectively communicated to those in power. Thus emerges the tendency to use the weapons of advocacy or rhetoric in an effort to increase the impact of the scholarship. This creates a dilemma and a danger.

Morgenthau's "prophetic confrontation" is a mission unshakably based upon opposing power with truth, a mission to which the intellectual must feel a commitment so deep it demands airing regardless of the consequences. Advocacy, on the other hand, is a tool capable of being used not only independently of truth but even in persuasive contradiction thereof. The medium of advocacy, as rhetoric, carries within itself the tendency to distort. Confusing the speaking of truth through "prophetic confrontation with power" with the techniques of advocacy is one of the constant threats American legal scholars must guard against if their work is to be intellectually legitimate. The threat emerges from the basic nature of advocacy, one expressed by Aristotle in his description of the principles of rhetoric:

(1) You must render the audience well-disposed to yourself, and ill-disposed to your opponent; (2) You must magnify and depreciate [make whatever favors your case seem more important and whatever favors his case seem less].

Similarly, as Plato observed,

rhetoric (is) . . . a universal act of enchanting the mind by arguments . . .

And:

[H]e who would be a skillful rhetorician has no need of truth — for that in courts of law men literally care nothing about truth, but only about conviction . . . .

40 Ward Madden describes the "academic dogma" in a foreword to R. Nisbet, The Degradation of the Academic Dogma (1971): The heart of the academic dogma is the pursuit of knowledge FOR ITS OWN SAKE. Knowledge and the processes of coming to know are good in themselves, and the university, above all institutions is — or used to be — devoted to them. To investigate, to find out, to organize and contemplate knowledge, these are what the university is all about. They constitute an ideal inherited from the Athenians, but first institutionalized in the form of the university during the Middle Ages.


42 The Works of Plato 292, 306 (I. Edman ed. 1928); Kronman, Legal Scholarship and Moral Education, 90 Yale L.J. 955 (1981), suggests that our advocacy oriented teaching of law students also influences our scholarly values. Kronman asserts that "the most important skill the law teacher imparts is the skill of advocacy . . ." Id. at 959. Some pages later he concludes that the problem this can create is that: "The indifference to truth that all advocacy entails is likely, it seems to me, to affect the character of one who practices the craft for a long time and in a studied way." Id. at 964.
The inherent dilemma of the rhetorician/advocate is that, as a bundle of techniques, written advocacy is the legal scholar's most important method for marketing knowledge. The legal scholar's reliance on advocacy reflects not only training and immersion in the advocative thought process but recognition that even the most profound insight must capture the attention of those toward whom it is directed. The desire to be heard and accepted increases the risk that the scholar will fall prey to the trap of subtly twisting one's work to gain attention. The dilemma becomes even more intense when it is understood that acceptance of one's scholarship often depends upon the degree to which it advances the "party line" of a particular orthodoxy, intellectual or political movement. Self-questioning truths, and legitimate insights contained within an "opponent's" work or an opposing school of thought, cannot be acknowledged for fear of lending credence to their arguments. These tendencies to distort, ignore, overstate, and attack may be increasing as consequences of our information explosion, a condition that makes it increasingly more difficult to be heard.43

Advocacy is inherently dialectical, creating an opposition of terms and beliefs.44 By itself such intellectual opposition is not bad. Much intellectual progress has been generated through the opposition of competing intellectual arguments.45 At least at the abstract level, however, syntheses that result from the interaction of antithetical premises, that have themselves been distorted, cannot produce anything "true."46 This premise has led some scholars to attempt to reject the dialectical process as a source of true knowledge and to seek to create a new methodological beginning.47 The irony is that such efforts have simply injected new antitheses into the equation.

43 J. Martin, The Wired Society (1978) describes a "knowledge explosion," whereby in the year 1800 there were only 100 scientific journals, 1000 by 1850, 10,000 in 1900, and 100,000 as of 1950. Id. at 116. Humans must cut their field of study into increasingly finer pieces to keep up with even an infinitesimal bit of the available knowledge. J. Ellul concludes in The Technological Society 132 (1967) that:

Everyone today has his own professional jargon, modes of thought, and peculiar perception of the world . . . . The man of today is no longer able to understand his neighbor because his profession is his whole life and the technical specialization of this life has bound him to live in a closed universe.


45 See, G. Rose, supra note 28.

46 This of course depends on how we intend the idea of "true." If we define truth only in terms of a single, ultimate unvarying measure for any proposition then there is little, even in science, that has been proved true. The ideas of uncertainty, randomness, and relativity that have come to dominate our intellectual structure have produced a significant degree of uncertainty regarding claims to truth. The dimension of law possesses even higher levels of uncertainty given the complexity and subtlety of its subject matter.

47 G. Rose, supra note 28.
In any event, given the distorting effects of rhetoric, achieving balance between truth and persuasive impact is difficult. The probability of subtle distortions by legal scholars is even higher because legal scholars have not understood the methods they use. Being barely aware of the nature and power of their methods, legal scholars are more likely to be captured by subjective value systems contained in those methods, in their data, and in their primary reference institutions, i.e., lawyers, the judiciary, and other legal scholars. The risk of distortion is further increased due to the "soft" nature of our knowledge about law and legal methods.48

III. THE CONTEST TO CREATE THE "RULING IDEAS"

It is increasingly difficult for American legal scholars to retain their intellectual balance because the warring schools of thought within the law schools have organized into political interest groups. Many of the new scholars are no longer simply individual scholars intent on learning and wisdom. They have become organized groups of true believers intent on turning knowledge into weapons to be used against their "enemies."49 Many have apparently come to accept Keynes's observation about the transcendent power of ideas, right or wrong, voiced in his concluding notes to the General Theory.50

[T]he ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by

48 Legal knowledge is "soft" and in our implicit recognition of this fact in a scientific world, we have been afraid to make fools of ourselves because we doubt the relevance, truth, or validity of what we have to say. Felix Cohen, for example, describes the European jurist Von Jhering as once dreaming he had died, finding himself in a "special heaven reserved for the theoreticians of the law" with all legal concepts in their purest or most true form. So that his mind would no longer be cluttered and encumbered with earthly knowledge Von Jhering, as were all new entrants, was required to drink the "draught of forgetfulness." Embarrassingly, the draught proved superfluous for jurists. It turned out "[t]hey had nothing to forget." Cohen, Transcendental Nonsense and the Functional Approach, 25 COLUM. L. REV. 809 (1935). Edward Levi describes the "soft" nature and dynamics of legal thought as follows:

[T]he kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied. More important the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them . . . . Not only do new situations arise, but in addition peoples' wants change. The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas.

E. LEVI, AN INTRODUCTION TO LEGAL REASONING 3, 4 (1949).

49 See, E. HOFFER, THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS (1951). Hoffer comments on the function of the "man of words" in the success of a movement, as follows: "[I]mperceptibly the man of words undermines established institutions, discredits those in power, weakens prevailing beliefs and loyalties . . . ." Id. at 120.

little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. . . . [T]he power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas. . . . Soon or late, it is ideas, not vested interests, which are dangerous for good or evil. 51

Many legal scholars have succumbed to the opportunity to be among those whose ideas provide the foundation principles for those in power. Scholars enjoying the trappings of power can easily be seduced into being, as Morgenthau described, “agents and apologists” using their intellects to preserve and protect rather than challenge the exercise of power.52 In such a process truth becomes less important than acceptance and continuance.53

Most legal scholars are, however, not agents, apologists or servants of power, but principled rhetoricians attempting to make important contributions to the quality of modern society. Just as were Hobbes, Locke, Pufendorf, Burke, Rawls, and others, the best of the scholars are political composers writing sonatas with ideas of the law and political belief systems serving as notes, rhyme, melody, and meter. Ronald Dworkin is concerned with saving modern liberalism, and asserts principles involving “rights” and a somewhat mystical description of how judges decide “hard” cases, i.e., cases for which there is no clear precedent.54 Robert Nozick, as classic liberal,55 fits comfortably within the framework of the

51 Id. at 383-84. (Emphasis added).
52 Schlesinger, supra note 39.
53 E. Hoffer, supra note 49, claims, for example, that “[t]here is a moment in the career of almost every fault-finding man of words when a deferential or conciliatory gesture from those in power may win him over to their side. At a certain stage, most men of words are ready to become timekeepers and courtiers.” Id. at 121-22. Jacques Ellul similarly suggests that given the increasing technical orientation of our educational system, the “intelligentsia will no longer be a model, a conscience, or an animating intellectual spirit for the group . . . . They will be the servants, the most conformist imaginable, of the instruments of technique.” J. Ellul, supra note 43, at 349.

In fact, and in spite of the fact that the views and attitudes of our remaining devotees of that older tradition are now generally described — correctly enough in one sense — as conservative or even reactionary, the old liberal ideal was a society of largely free or ungoverned or only self-governed, independent individuals, living together under and jointly supporting a small, simple, inexpensive government having only a quite limited sphere of authority or a few quite limited powers and functions.
American Neoconservative movement. Nozick advocates principles reflecting a Hobbesian sort of human nature, free will, private property and the "minimal state." While, as with any of the guiding principles, not one of Nozick's assertions has ever been proved "true," they are extremely powerful hypotheses, acceptance of which generates and determines distinct legal, economic, and political systems. Richard Posner offers a sort of semi-modern variant of conservative laissez-faire economic ideology relying heavily on the metaprinciple of "efficiency." John Finnis seeks to uncover a coherent moral basis for law. Roberto Unger, Duncan Kennedy, and others involved in the Critical Legal Studies movement assert a core of Marxist principles. These advocates of ideas fit into another of Keynes's insights, that of the gradual, rather than immediate, capturing of the field by the power of ideas.

[F]or in the field of economic and political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age, so that the ideas which civil servants and politicians and even agitators apply to current events are not likely to be the newest.

Dworkin, Nozick, Posner, Finnis, and the Critical Legal Studies "leftists" are all political scholars. The "legitimists" such as Dworkin, Finnis, Posner, and Rawls are, however, fighting on the real battlefield within which key institutions make policy, impose penalties, and allocate power. The "radical" Critical Legal Studies, as a political movement, at times seems engaged in a self-absorbed campaign waged on an illusory landscape. This is because American decision-makers, including the judiciary,
are neither Marxists nor socialists. Any substantive system that purports to take its principles from an idea structure that has been explicitly rejected by nearly all generations of Americans, represents an error in judgment at least from the perspective of being able to achieve political impact. Keynes's observation helps us to understand why Posner, Rawls, Finnis, and Dworkin have had significantly greater impact than Unger and Kennedy. The difference is not a function of the scholars' intellectual substance, but the extent to which the ideas being advocated fit into idea systems already held, whether true or false, good or bad. Recognition of this may explain why Duncan Kennedy has recently sought to recast Critical Legal Studies as continuing the tradition of Legal Realism.

Dworkin, Posner, Finnis, Kennedy, and Unger rank among our modern-day prophets of legal scholarship. In the case of CLS, however, there has been a failure to recognize that prophets derive their power from authoritative sources contained within their tradition and culture, not from external dogma. This realization is why the Chicagoans have reached back into the nineteenth century to ground their system on the cultural myths of laissez-faire capitalism. Whatever the realities of nineteenth century American economic beliefs and behaviors, as cultural myth, they comprise a deep-rooted system upon which a superstructure can be built. This is what the Neoconservatives have done, a strategy applied equally to Constitutional analysis and interpretation anchored to such myths as the "intent of the framers." Dworkin and Finnis have similarly anchored their arguments in traditional value systems that are integral, though implicit, parts of Western culture.

Very little of the political content of Critical Legal Studies, on the other hand, is anchored to American cultural myths. CLS, therefore, rests on

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62 Consider, for example, Ausubel, Cognitive Structure and the Facilitation of Meaningful Verbal Learning, 14 J. Teacher Educ. 217 (1963): "[E]xisting, cognitive structure... an individual's organization, stability and clarity of knowledge in a particular subject matter field... is the principal factor influencing the learning and retention of meaningful new material."


64 Prophets, supra note 10, at 190-94.


66 See R. Dworkin, Taking Rights Seriously, supra note 54; J. Finnis, supra note 23.

67 See, e.g., Unger, supra note 6; R. Unger, The Critical Legal Studies Movement (1986). In the book, Unger explains and defends CLS reliance on leftist theoretical traditions such as Marxism and structuralism as follows: [CLS'] starting points of social theory may seem on our part an act of intellectual self-destruction. After all, the major theoretical traditions that have served the left until now, such as Marxism and structuralism, have leaned heavily on the idea of a metaorder in either its compulsive-sequence or its possible-worlds variant. Nevertheless, this apparent intellectual suicide allows the basic intention and method of critical social thought to triumph over ideas that only imperfectly apply the method and express the intention.

Id. at 108. See also G. Rose, supra note 28.
an extremely soft political foundation and cannot reach the deep belief structures of Americans, including the judiciary. Even in making these comments concerning Critical Legal Studies, it is important to admit that CLS may ultimately prove to have made a greater contribution to the growth of intellectual quality in the law schools than will Law and Economics. The CLS arguments and methods will, however, be transformed as they pass through the medium of American legal scholarship, enriching that scholarship but losing their radical political content in the process. Law and Economics has been effective in the short term because of the apparent precision and power of economic method, but it may have less to offer over time.

Formal economic methods will prove unproductive in the context of most law cases. Conversely, the methodologies and conceptual languages provided by many CLS scholars offer languages of discourse that will prove far more rich, complex, insightful, and extensive than the technical language of formal economic method. This may be because the law is not a subject that lends itself to precise inquiry of the type represented by economics, except in very isolated units and small doses. Similarly, within the law, the utility of formal economic analysis is much more rapidly exhausted than that of the other methods of insight. Having, for example, identified and controlled the economic component as one relevant element of a legal decision, where does one go? Formal economic method can be a powerful and useful tool, but it cannot answer the complex issues reflected in many of the most vital areas of the law. When, however, the orientation to economics is understood as political economy, reflective of normative, structural, moral, and distributive judgments, then economic thought and principles will be understood as tools of significant use in clarifying the choices made by legal institutions. In this form, political economic analysis has already enriched American legal scholarship and teaching. We are only at the beginning of its potential.

IV. NEW LANGUAGES OF DISCOURSE

The changes within the law schools are generating new languages of discourse. Arthur Koestler has described how ideas and knowledge pass through definite cycles:

The new territory opened up by the impetuousness of a few geniuses, acting as a spearhead, is subsequently occupied by the solid phalanxes of mediocrity; and soon the revolution turns into a new orthodoxy . . . and ultimately, estrangement from

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68 Elliott, The Evolutionary Tradition in Jurisprudence, 85 COLUM. L. REV. 38 (1985), captures the essence of how legal thought seizes on the insights of other disciplines and converts them to terms relevant to the law. "Law," Elliott claims, "is a scavenger. It grows by feeding on ideas from outside, not by inventing new ones of its own." Id. at 38.

reality. . . . The emergent orthodoxy hardens into a "closed system" of thought, unwilling or unable to assimilate a new empirical data or to adjust itself to significant changes in other fields of knowledge; sooner or later the matrix is blocked, a new crisis arises, leading to a new synthesis, and the cycle starts again. 70

Koestler's cycle reflects excitement, genius, insight, experiment, refinement, and then a period of settling and consolidation as insight becomes accepted. Acceptance then becomes dogma and orthodoxy. For a time, the orthodoxy is sufficiently powerful to be able to ignore or suppress new insights. The excessive dominance of the orthodoxy ultimately, however, generates its own counterrevolution, just as has occurred in the law schools.

Familiar and accessible databases and the methods in which one has been trained play important parts in defining a controlling orthodoxy. Methods and databases create frameworks that establish boundaries and define structures of basic knowledge into which a particular field's scholars inquire and into which they, at any particular time, possess the ability to proceed. 71 Ideas, details, and methodologies outside the framework have a difficult time penetrating the intellectual membranes sealing off each disciplinary universe. 72 Charles Axelrod describes what happens in his Studies in Intellectual Breakthrough, 73 identifying how ideas "ossify" and how "new languages of discourse" emerge to challenge the existing system:

Ideas do not float freely among people; they become rooted in commitments, ossified and sustained within intellectual communities; they are cradled among avid sponsors and defenders whose work relies on their stability. Thus the tension of discourse refers not merely to the presence of one language addressing (and straining) another, but to the presence of one language addressing the inertia of another. 74

70 A. KOESTLER, THE ACT OF CREATION 255-56 (1964). Alfred Z. Reed described such a cycle occurring during the twenty-five year period following the Civil War as a vital one for law schools: A.Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 273 (1921).

In spite of the blind formalism and inglorious compromises [prior to that period] the first quarter century after the Civil War was a period of vital growth for law schools. It contrasted sharply both with the preceding and with the following generation. The technical changes . . . sprang from a general desire, on the part of both practitioners and schoolmen, to make legal education better than it had been before . . . .

71 I. COHEN, REVOLUTION IN SCIENCE 467-68 (1985) observes: Max Planck . . . is often quoted to the effect that "new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it."

72 Id.; see also A. WOLF, infra note 89, at 54.

73 C. AXELROD, STUDIES IN INTELLECTUAL BREAKTHROUGH, FREUD, SIMMEL, BUBER (1979). I. COHEN, supra note 70, at 468, describes "the shift of allegiance from one paradigm to another as an act similar to religious conversion."

74 C. AXELROD, supra note 73, at 2-3 (emphasis added).
Like Koestler, Axelrod describes a cycle within which the creative insight eventually crystallizes into a barrier against creativity. While this might seem a negative phenomenon, it is a critical element in stimulating the new bursts of creativity. Stagnant systems of thought draw challenge to themselves. By their existence and unwillingness to accept change, they generate the pressures that lead to their own weakening. Ultimately, the pressures must be released through new creative bursts.

Scholars in any discipline eventually exhaust the language of their paradigm. They have said all they can reasonably say with the language of what has become a closed system of discourse. Their discourse becomes sterile unless new language is infused into the discipline, or new content given the existing language. The law schools have been experiencing just such a process as is described by Axelrod. New languages are addressing the inertia of the preexisting mode of discourse. That older mode of discourse is reflected in what Cramton referred to as the synthesis of Langdellianism and Legal Realism. The malaise in legal scholarship identified by Christopher Stone and John Ayer was due partly to the exhaustion of the power of the language being used by legal scholars, not only in their writing but in their teaching and definition of mission as well.

The “myth of science” that underlay Langdellianism and Legal Realism is dead although even now its ghost dominates the perception of the mission of legal scholarship. Confronted by a rigid orthodoxy, many American legal scholars have been seeking to generate new languages of discourse. There will always be efforts to define law and legal scholarship as scientific, but the Langdellian illusion of law as science and/or pure rationality has been shattered. This does not mean that science is irrelevant to either law or legal scholarship, but it does mean that it is entirely inadequate as an explanatory vehicle or method for most, if not all of the important questions with which law must deal.


Difficulty is a severe instructor, set over us by the supreme ordinance of a parental Guardian and Legislator, who knows us better than we know ourselves, as he loves us better too .... He that wrestles with us strengthens our nerves, and sharpens our skill. Our antagonist is our helper.

Id. at 315.

See Stone, supra note 7, and Ayer, supra note 12.

J. B. Conant comments on Langdell as follows:

Law, considered as a science, wrote Langdell. What did he have in mind when he wrote that word “science”? Not the kind of activity in which at that time Clark Maxwell was engaged; not the development of the atomic-molecular theory .... Langdell was thinking of science much as was Bell or Edison .... To me, therefore, Langdell is to be placed among the great American inventors of the nineteenth century.

J.B. Conant, supra note 36, at 45.

See, e.g., J. Collins, Crossroads in Philosophy-Existentialism, Naturalism, Theistic Realism 33 (1969). Collins expressed the opinion that:

There are two false routes by which the human mind seeks to fulfill the need for a deeper grasp on being. One is the way of scientism, which refuses to recognize the essential boundaries of scientific thought. The other is an undisciplined appeal to sheer feeling and purported irrational sources of insight.
With the myth of science shattered, alternative intellectual paradigms of political, philosophical, humanistic, and metaphysical natures have flooded into the vacuum. This is why the sense of "organic unity" in the law schools has broken down. Rather than a linear sense of shared scientific or rational progress, we now experience idiosyncratic fragments of challenge to mainstream articulation of primary interests. This is why we are uncertain of the quality, content, and standards for judging much of the alternative scholarship that has emerged. It is why many are vying for the power to define the emerging models of law school. It is why many others are resisting the rampant experimentation they perceive to be threatening the integrity of the existing model of legal education and scholarship.

One problem with the law schools' revolution is that there is almost too much "new language." We are experiencing a form of intellectual overload from which it will take a decade or more to recover. Law faculty are neither formally trained as scholars nor experienced in application of the new methods and subject matters that are reflected in many of the intellectual experiments. Similarly, there are so many diverse approaches being used that there is little chance at present that the insights and methods can be generally shared. For a time, therefore, legal scholars will have lost the ability to sustain a fully coherent set of standards for either scholarship or teaching. Languages of political economy, economic efficiency, "hard cases," legitimation, justice, mystification, feminism, phenomenology, aesthetics, indeterminacy, literary criticism and deconstruction, humanism, power, structuralism and post-structuralism and much more, are, however, not symbols of disintegration, except perhaps in the narrowest sense. In language that the most conservative adherent of the Chicago School of Law and Economics would understand, the current process is nothing more or less than the cycle of "creative destruction" described by Joseph Schumpeter. It reflects an inevitable cycle of creation and transformation built on the residue and resources of the pre-existing structure.

While the essence of the traditional system of American legal education will not be destroyed, the transformation of the law school is well beyond a simple linear extension of the traditional Langdellian system. The continuing relationship between legal scholars, the judicial decision and the work of the legal profession will keep the new languages of discourse sufficiently enclosed so that the symbiotic connection between legal scholars and just decision-making will be sustained.

Allen, supra note 3.
J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1950) "The capitalist process not only destroys its own institutional framework but it also creates the conditions for another. Destruction may not be the right word after all. Perhaps I should have spoken of transformation." Id. at 162.
"After all, it is through law, legal institutions, and legal processes that customs and ideas take on a more permanent, rigid form. The legal system is a structure. It has shape and form. It lasts. It is visible. It sets up fields of force. It affects ways of thinking." L. FRIEDMAN, AMERICAN LAW 257 (1984).
V. THE RESENTMENT OF CREATIVITY BY THE GUARDIANS OF THE PREVAILING ORTHODOXY

The transition between the Langdellian/Realist law school and the models that will emerge from the schools' new revolutionary period will not be easy. The conflicts over intellectual direction are already intense with mainstream doctrinal scholars clashing with Critical Legal Studies advocates as well as with the more conservative and ideologically motivated members of the Law and Economics movement. The tendency of any threatened orthodoxy is to repress those responsible for the threat. This tendency must, however, be resisted if the law schools are to achieve the levels of quality and intellect at which they have much to offer American society.

Scholarship pursuing relationships between emerging and not yet understood conditions and needs occurs, not at the accepted center, but at the borders of disciplines and in the spaces between disciplinary constructs. Scholars must be willing to take risks, accept being unsure, not be afraid to be wrong. "Frontier" and "interstitial" scholarship is needed now rather than scholarship devoted to the continual retilling of settled ground. More than ever in their history, American legal scholars need to explore the outer dimensions of their discipline as well as the core principles, to evolve new methods, and to define the methods' potential as well as their limits. This has never been done in the law schools. Consequently, legal scholarship and the content of law courses have tended to be far narrower and less intellectually powerful than they ought.

Punishing younger scholars through use of the hiring and tenure processes in order to keep them out of the system totally, or to keep them from exploring by using the power of the orthodoxy to subtly define their scholarship, are extremely shortsighted behaviors for American law schools. Such behavior chains the explorers. It may preserve the system's "sense of organic unity" for a brief period, but ultimately erodes it. As Arthur Brown has suggested, such attitudes can even make a knowledge system "stupid." This does not mean that everything done by avant garde scholars is legitimate. There are boundaries of relevance, utility, resource priorities, even taste. But, the tendency of any controlling orthodoxy is always to set the boundaries too close to that with which they are comfortable. The tendency of a threatened orthodoxy, such as that of the American law schools, is even worse. The lines are drawn increasingly tighter, creativity is suppressed.

Orthodoxy is antithetical to creativity. Jacob Bronowski has described the interweaving of creativity, human reason and imagination in the following manner.

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83 Arthur Brown addresses the idea of institutional systems in his Foreword to D. Kerr, Barriers to Integrity: Modern Modes of Knowledge Utilization (1984). Brown notes, Institutions are social systems that shape not only our actions but our values and dispositions . . . . [T]o the extent that institutions shape our values and dispositions they can make us stupid . . . . and stupidity deprives us of our humanity. (Emphasis added).

84 See, Carrington, supra note 8.
Human reason discovers new relations between things not by deduction, but by that unpredictable blend of speculation and insight that scientists call induction, which—like other forms of imagination—cannot be formalized.\textsuperscript{85}

The creative insight is the intellectual's ecstatic reward. Rigor, discipline, and thoroughness are vital, but "to create," to have that sudden pure, clear vision is the poetic essence of those who spend their lives seeking after truth. Some would even say that the intuitive, creative insight is how we transcend the limits of conscious reason to see universal truths. Georg Brandes described the essence of creative spirit more than half a century ago, emphasizing the need for courage. Contrast Brandes's description of those possessing the courage to "create new forms" with Christopher Stone's judgment that, "[i]f I had to offer one broad generalization, I would call it [legal scholarship] overwhelmingly risk averse, clarity and not-being-wrong dominate imagination."\textsuperscript{86} Brandes remarked:

He who possesses talent should also possess courage. He must dare trust his inspiration . . . ; he must have gained the hardihood to expose himself to the charge of being affected, or on the wrong path . . . . [T]his is the universal formula of a gifted nature. It countenances neither fugitive rubbish, nor arbitrary invention, but with entire self-consciousness it expresses the right of talent when neither traditional form nor existing material suffices to meet the peculiar requirements of its nature, to choose new material, to create new forms . . . .\textsuperscript{87}

Very little of the output of academic or scientific knowledge systems is creative in the courageous, independent sense Brandes described, nor is it even intended to be creative. Academic and scientific knowledge systems generally involve processing of existing knowledge for specific interests and with quite limited ends. The ideal of continual striving after creative breakthroughs is for most academics an ideal to be voiced, but one rarely risked.

The abilities to critique, interpret and apply existing data within a given system are, in contrast with the creative drive, clearly bound. They can all be done with "rigor." It is safer, less controversial and less threatening to established positions to limit research to accepted values and

\textsuperscript{86} Stone, supra note 7, at 1153. Remember Felix Cohen's description of Von Jhering's dream with jurists having "nothing to forget." Cohen, supra note 48.

[In landmark cases . . . the Justices alter the puzzle itself and create law. Thus, while judicial legitimacy requires faithful adherence to precedent, legal development turns on creative acts. As a result, we call judges who follow precedent legitimate, but those who successfully break from it great.

https://engagedscholarship.csuohio.edu/clevstlrev/vol37/iss2/4
paradigms. Another benefit of limiting the scope and focus of activity is that the output is tangible and predictable. The traditional or mainstream scholar or scientist can be more certain that "something useful" (or at least publishable) will exist when the effort is completed. Few rewards exist for those who have struggled valiantly yet end up without concrete products to demonstrate their effort. Academics and scientists quickly discover that promotions, tenure, salaries and rewards do not go to those who have tried but failed and therefore could not publish.

Choosing "new material" or seeking to create "new forms" refuses to offer the same guarantees about having a publishable end product. The payoffs of efforts to achieve true creativity must, therefore, nearly always be personal. The drive to do so must nearly always be generated from within the person. The system will at the very least take a long time to appreciate the efforts, and is more likely to never do so. There is no certainty of being right. The early insight may be a dead end, and a researcher's career may by then have been sidetracked. Much is therefore being risked by scholars who seek to generate new forms of knowledge, method and thought. That is why Brandes emphasized the need for courage.

Creativity is not only an individual phenomenon. Creative bursts of activity by a substantial number of a system's members reflect institutional needs and capabilities more than individual ones. Individual creative insights occur continually, but they tend to be ignored or unrecognized because they do not fit the dominant paradigm or they are not understood as being significant. Involved in a discipline's ability to comprehend, accept and apply creative insights are questions of timing, need, capability and critical mass. Creative bursts within a knowledge system feed on and are driven by (1) high levels of need for breakthroughs, (2) the cumulative richness of a painstakingly developed but unsynthesized or unrealized data base now readily available at the right time, and (3) a subtle stream of assertions by pioneer thinkers who laid the foundation but who were premature because the system was not yet ready to comprehend or adapt to their insights.

Reflecting the cycles described by Koestler and Axelrod, it is important to understand that academic bureaucracies can be as rigid as governmental ones. Donna Kerr, writing under the aegis of the Academy of Independent Scholars, concludes in her book, Barriers to Integrity: Modern Modes of Knowledge Utilization, that "bureaucracy, professionalism, and the research system have lives of their own. . . ." and that "to survive in the 'system', we . . . engage in various forms of lying."85

One form of lying is self-deception. Within the cycles experienced by

85 D. KERR, supra note 83, at ix. See also R. HUMMEL, THE BUREAUCRATIC EXPERIENCE (2d ed. 1982). One of the reasons an orthodoxy possesses its power is suggested by Peter Berger in his INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE (1963). Berger observes that "most of the time we ourselves desire just that which society expects of us. We want to obey the rules. We want the parts that society has assigned to us." Id. at 93. Berger also adds that, "[i]nstitutions carry within them a principle of inertia, perhaps founded ultimately on the hard rock of human stupidity." Id. at 67.
knowledge systems, even the most creative people eventually become committed to their own sets of ideas. Commitments develop, an orthodoxy forms and reputations are established. Even the most creative scholars tend to develop "hardening of the categories." This hardening dilutes commitment to the excitement and intensity of the creative and compulsive search for knowledge. Several results occur. We work from a more closed framework of concepts that no longer drives us toward new insights. We become less aware of new developments, findings and insights. We actually perceive less because our existing conceptual structure limits our ability to see new forms not congruent with that existing structure. We may be aware of the importance of the emerging insights, but refuse to accept their implications and potentialities. As the originally creative insight ossifies, the once creative scholars become the enemies of the next group of creative thinkers, erecting barriers of disciplinary dogma, process and structure.

Academic bureaucracies fight against change because the new knowledge would alter the existing balance of power. It could make the intellectual "Old Guard" less honored and respected. It threatens to relegate them, at least in their own minds, to the status of historical relics no longer competent to function in advanced intellectual realms. This is a problem for even the best of intellectual systems because change is inevitable. So, therefore, is tension and conflict. Stress is unavoidable within rapidly changing systems, such as the American law schools.

The natural resentments created by attacks on a controlling orthodoxy are multiplied tenfold when it is the integrity of the scholars themselves that is being assaulted. Some of the attacks by Critical Legal Studies scholars on mainstream legal scholars have suggested that those tradi-

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89 A major example is the Seventeenth Century development of scientific academies outside the universities. In A. WOLF, A HISTORY OF SCIENCE TECHNOLOGY, AND PHILOSOPHY IN THE 16TH AND 17TH CENTURIES 54 (2d ed. 1950), the author describes resistance within the existing universities to being infected by the new ideas.

The Universities might have been expected to lead, or at least to share, in this movement for intellectual emancipation. But they did nothing of the kind. For they were controlled by the Church .... [T]he vast majority of the pioneers of modern thought were either entirely detached from the Universities, or were but loosely associated with them.

The Common Law possesses its own principles of inertia, R. DAVID, FRENCH LAW: ITS STRUCTURES, SOURCES AND METHODOLOGY (M. Kindred trans. 1972), describes the essential nature of the Common Law as viewed from the perspective of a Civil Law scholar:

English law [common law] was born of procedure, a fact which has implications not only for the technical form of the law but for legal philosophy as well .... English law is not an educating or moralizing law, but an esoteric, technician's law. Whatever is unrelated to litigation, does not concern jurists.

Id. at 76.

90 This seems an obvious point. In support, see the discussion of the university "power elite" in J. BALDRIDGE, POWER AND CONFLICT IN THE UNIVERSITY 175-77 (1971). A recent report of the American Council of Learned Societies was commented upon by Fred Hechinger of the New York Times. According to Hechinger
tional scholars are little more than apologists for an unjust regime. The bitter resentment of CLS scholars by colleagues who are more traditional is not surprising when we recognize that part of the CLS analysis is not only a positive suggestion of new fields of knowledge or new languages of discourse, but an accusation of illegitimacy directed at traditional scholars themselves.

Repression can be subtle in orthodoxies resting on "soft knowledge." Soft knowledge refers to a system, including law, where knowledge is not dependent upon or even articulable in strictly empirical, scientific, or rational terms. The softness and ambiguity emerge from a combination of the discipline's subject matter and the fact that human choices about controlling principles and methods tend to be much less precise than in the realms of "hard knowledge" science. A characteristic of "soft systems" of knowledge is that there will often be more than one acceptable path to whatever levels of truth the system is capable of attaining. Equally significant is that soft truths are often chosen and created by the process of choice. Among a limited set of alternatives one may be as "true," effective, just, or meaningful as another. The choice itself can be the act that makes the alternative "true." When this occurs in choices of fundamental judicial doctrines, hidden values and biases can influence choices of particular alternatives.

The connection of legal scholarship with courts and judicial doctrine contributes to the intense reaction to radical criticism by the academic orthodoxy. A symbiotic relationship has evolved between American law schools and the judiciary. This relationship integrates legal scholars into

the majority of scholars the Council surveyed in the area of humanities and social sciences remarked,

that the process (refereed journals) often overlooked pioneering voices in favor of conservative opinions sanctioned by the academic establishment or trendy views already approved by powerful intellectual in-groups.

Hechinger, Scholarly journals called prey of old boy networks, Cleveland Plain Dealer, Oct. 12, 1986, at 2-G.


92 Consider also Paul Goodman’s analysis of how Catholic universities and such “elite” institutions as Oxford and Cambridge often work to repress new ideas. In P. GOODMAN, COMPULSORY MIS-EDUCATION AND THE COMMUNITY OF SCHOLARS 195 (1969), Goodman describes the process:

The Dominican genius for putting out the fire of a dangerous idea by introducing lofty irrelevancies — invented in Paris — is still rampant in the style of tolerant bigotry of our American Catholic universities. . . . Oxford and Cambridge . . . have been peculiar masterpieces of how to imitate the pomp of a paternalistic Establishment and, loaded with privileges and architecture, to keep one’s mouth shut.

Berger supra note 88 at 11, observes: “Very potent and simultaneously very subtle mechanisms of control are constantly brought to bear upon the actual or potential deviant. These are the mechanisms of persuasion, ridicule, gossip and opprobrium.”

93 See, E. LEVI, supra note 48.
a system extending into dimensions distinct from the orientations of pure knowledge systems. It involves dimensions of action, choice and power. By being part of the judicial system, legal scholarship is deflected from what it would be if the relationship did not exist. The judicial system operates on its own terms and for its own purposes. It is a political sub-system oriented to problem resolution.94

VI. THE "POLITICAL ECONOMY" OF LEGAL SCHOLARSHIP

There is a "political economy" reflected in the linkages, mutual benefits and feedback effects that operate between the system of legal scholarship and the institutions of law. A central aspect of this political economy is the special bond that exists between the American judiciary and legal scholars. American legal scholars derive much of their force and effect from the unique academic-professional structure they inhabit, one not replicated elsewhere in the world.95 Legal scholars are a different breed of scholar than most. They are provided with a window of opportunity providing the chance to "do justice" because of their ability to "speak truth to power" to those exercising judicial power, and increasingly to members of the legislative branch as well.

Just as with an economic system, changing one key factor in this relationship alters the other elements of the system. Both Allen and Posner have been concerned about the harmful effects they perceive the changes in legal scholarship and the law schools to be producing. Allen has warned legal scholars not to stray far from the central themes of their system.96

Allen sees a danger that, "[t]he farther law-school scholarship strays from the law as a source of values and methodology, the more unlikely it becomes that it will influence the behavior of legal institutions."97

See, e.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 54: "[J]udicial decisions are political decisions, at least in the broad sense that attracts the doctrine of political responsibility." Id. at 88.


By severing ties with Roman and Canon law the common law practitioners severed their ties with the universities .... Academic men, trained in Italianate legal science, would have found it a painful and fruitless task to fit within their spacious system what no doubt seemed to them an unorganized mass of meaningless technicalities.

Allen, supra note 3, at 403, 404.

Id. at 404.
Richard Posner, in essence, supports Allen and asserts that "doctrinal analysis . . . is and should remain the core of legal scholarship . . . ."\textsuperscript{98} Such remarks demonstrate the recurring tension about the nature and intellectual functions of the university law school in America.

On one hand we see a university ideal that has been described as the pursuit of knowledge for its own sake.\textsuperscript{99} The law school is situated within the university and has the responsibility to serve that institutional mission. The law school is, however, also committed to the education of graduate students intent on preparing for careers as practicing lawyers. Those committed to classical educational concepts of the university and to its traditional scholarly ideal would argue, with some accuracy, that the less that university legal scholarship and law teaching have to do with the legal profession and its interests, the better it would be.\textsuperscript{100}

Yet, the comments of Allen and Posner suggest a close relationship is justified between the schools and the legal profession, including the judiciary. In fact, what they have done is to accept Morgenthau's definition of the role of the intellectual, that of "speaking truth to power." Both Allen and Posner seek to preserve the linkage between the law schools, the legal profession, and the judiciary so that legal scholars can have impact upon those who exercise significant power and influence in the formulation and application of law.

Ironically, Critical Legal Studies, as well as those involved in the Feminist critique of law, can also be understood as being oriented to the same process of critiquing and confronting power. A basic question arising in relation to some of the strategies and methods used by these efforts, however, is whether intellectuals housed within law schools can speak truth to power effectively if the message is not intelligible or palatable to the desired listener. This question lies at the foundation of many of the current disagreements.

The question of the values and orientation of the critique of power is fundamental. American legal scholarship derives the greatest part of its practical legitimacy and power, and virtually all its intellectual approbation, from its primary reference communities — the legal profession and judiciary. American legal scholars should not go too far in assuming that the existence of the unique institutional structure that supports their work is decreed by God or is the natural product of widespread admiration for the profound truths legal scholars utter. The system of legal schol-
arship derives its substantial numbers of scholars, its supportive resources and salaries and the grudging tolerance of university administrators, directly from the monopoly granted by the organized legal profession.

The legal profession has granted the system of American law schools a monopoly entitling them to be the exclusive entry mechanism for the practice of law. Absent this monopoly, one suspects, and history supports the conclusion, that there would be far fewer university law schools in existence. The legal profession obviously can and has existed without university-based law schools. University-based law schools had been and would, at best, be only pale shadows without the professional monopoly. It is, therefore, both impolitic and hypocritical to deny the existence of a substantial obligation to serve the profession's needs for intellectual insight, criticism, information, and training.

This does not mean, however, that American legal scholarship should not be far-ranging and diverse. It does not mean that legal scholarship is defined or bounded only by the demands of practicing lawyers or judges. It also does not mean that the current widespread experimentation in legal scholarship is actually threatening the relationship between scholars and the judiciary, and between the law schools and the legal profession. It does mean that legal scholars should recognize the fact of their relationship with the legal profession and the judiciary, and define and honor the terms of the monopoly "contract." Even more, legal scholars need to recognize that the nexus of social forces, morality, political philosophy, emotion, needs for institutional change and stability, social engineering, justice and reason that is played out through the interpretational lens of the judicial system provides an exciting, and if properly understood, even an awesome intellectual challenge.

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With formal legal education maintaining a virtual monopoly over preparation for entry into the legal profession, it is assumed that law schools are or ought to be the primary source of the skills and knowledge requisite to the practice of law.

Id. at 123.


103 A. Chroust, supra note 95, at 173-75. An extensive discussion of the formative years of Harvard Law School during the Stearns and Parker period is found in A. Sutherland, The Law at Harvard 43-91 (1967). Other sources for a history of the period and of legal education in the United States include: J. Auerbach, Unequal Justice (1976); A Centennial History of the Harvard Law School - 1817-1917 (1918); A.Z. Reed, supra note 70.
A. The Function of Doctrinal Analysis

Doctrinal analysis provides the critical mechanism for ensuring that American legal scholars are fulfilling their obligations, not only to the judiciary and profession but also to an American society that needs to know the profession and the judiciary are being challenged to adhere to strong standards of justice. Doctrinal analysis is American legal scholarship's "internal combustion engine." You can tinker with doctrinal analysis, change the number of principles, increase the power of certain principles, or improve the efficiency. Options can even be added to make the doctrine more attractive. However, from the perspective of the system of legal scholarship, if the engine of judicial doctrine is removed it is no longer really a complete vehicle, just a shell. As troubling as it might be to some, Posner and Allen are saying, in effect, that in our haste to redesign the aerodynamics, internal computers, stereo systems, and cosmetic elements of legal scholarship, we must not lose sight of the need to have an engine to power the system.

Stating that doctrine ought to remain the main data focus of American legal scholarship does not mean that it should be done as it has in the past. American legal scholarship tends to address legal phenomena as discrete bits, largely out of contact with the myriad other aspects of the overall legal system. Legal scholars have tended to deal with doctrine as if it were self-contained and self-defining. With rare exception, the articulation of doctrine has been accepted as a given, with analysis restricted to evaluating the internal consistency of the judicial decision or the judge's adherence to chains of precedent. Seldom, until quite recently, did American legal scholars examine doctrines as expressions of deep strategies or social values. Rarely did concerns of right or wrong, justice, discrimination, efficiency, distribution, or politics come into the processes of doctrinal analysis. Hardly ever, other than for a brief period with the Legal Realists, did legal scholars seek to transcend their own closed "natural law" logos of neutral principles. Never, for all practical purposes, did legal educators and scholars inquire into critical aspects of the legal profession, processes of dispute resolution through legal institutions, or how bundles of judicial doctrines might demonstrate overarching structures of good and bad action with deeper meaning.

B. Extension of Doctrinal Analysis

Urging a sustained focus on judicial doctrine as a primary source of raw data, therefore, does not mean that everything remains as it was. Scholarship that deals only with a single aspect of the specific interests or needs of compartmentalized legal doctrines or subsystems produces a

limited piece of knowledge. The knowledge produced tends to be useful on the levels at which such subsystems function, and, if done with depth and insight, is well worth doing. Analysis of the doctrines of self-defense or legal insanity, for example, helps judges, lawyers and other scholars understand and/or apply a specific, finite element of a particular piece of the operating subsystem. This is important from a functional perspective, but is not sufficient in itself. When it is essentially all that is done by legal scholars, it fails to serve the intellectual mission of the university law school. This concentration by legal scholars on practical knowledge that is "of use" or applicational is consistent with the general American approach to knowledge that Toqueville identified as a fascination with knowledge requisite to application rather than wholly structured or deep metaphysical insights.\(^\text{105}\)

Specialization by knowledge disciplines made inevitable the subdividing of legal scholarship into increasingly smaller doctrinal units. Relatively little scholarship has been produced by American legal scholars that seeks to view the legal system in its totality.\(^\text{106}\) Roscoe Pound and Karl Llewellyn are perhaps the most visible exceptions to the traditional approaches by legal scholars. Unger, Posner, Dworkin, Finnis, and Lawrence Friedman are striking examples of how modern legal scholarship has begun to extend the scope and scale of inquiry. These scholars have attempted to offer significant syntheses of legal thought, rather than be content with limited, and limiting, analyses of discrete doctrines. Generally, however, American legal scholars have been content to work within the limits of particular doctrines, expanding that focus only through collections of doctrines in the form of law casebooks.

This traditional orientation is only partly due to Christopher Langdell's elevation of the judicial decision as the exclusive data of American legal science.\(^\text{107}\) It is also a function of the orientation of judges and lawyers to

\(^{105}\) de Tocqueville observed that:
In America the purely practical part of science is admirably understood, and careful attention is paid to the theoretical portion which is immediately requisite to application. On this head the Americans always display a clear, free, original and inventive power of mind. But hardly anyone in the United States devotes himself to the essentially theoretical and abstract portion of human knowledge. In this respect the Americans carry to excess a tendency which is, I think, discernible, though in a less degree, among all democratic nations.

2 ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 43 (H. Reeve trans. 1899).

\(^{106}\) In his MEDITATIONS at 202 (C. Eliot, ed. Harvard Classics ed. 1909), Marcus Aurelius described the need to try to understand in holistic terms, when he wrote: "This then must always bear in mind, what is the nature of the whole, and what is my nature, and how this is related to that, and what kind of a part it is of what kind of a whole."

Hans Kelsen has stated the vision in terms relevant to legal scholars: "The cognition of Law, like any cognition, seeks to understand its subject as a meaningful whole." Quoted in C. Murphy Jr., MODERN LEGAL PHILOSOPHY: THE TENSION BETWEEN EXPERIENTIAL AND ABSTRACT THOUGHT (1978).

\(^{107}\) J.B. Conant, supra note 36, spends some time analyzing the connection between Langdell, legal science and science. Conant quotes the following passage from C. Langdell, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871):
directly applicable knowledge. As legal scholarship extends to less directly applicable forms of intellectual inquiry, the degree to which the legal scholar's product has utility or meaning becomes less clear to those who are informed by scholars' arguments. While this apparent gap will often not be a real one, if perceived as real by those toward whom the scholarly insights are directed, the apparent gap can have the same negative impact on the acceptability of legal scholarship. The scholarship will be ignored, rejected, or even generate a counter-reaction as has CLS.

VII. PRELIMINARY RESULTS OF THE INTELLECTUAL REVOLUTION

Many of the recent events within the law schools have been far more political than intellectual. The revolution in the law schools is not primarily one of detached, "ivory tower" intellect. The revolutionaries have specific agendas that are action driven rather than consistent with a contemplative ideal of knowledge. Eric Hoffer once commented on the roles of "fault-finding men of ideas," understanding that they created uncertainty and prepared the way for change. Lenin also recognized that the arguments of intellectuals play important roles in undermining a challenged system. Intellectuals to Lenin were a weapon against the dominant political system, one useful for cracking the orthodoxy's foundations and casting doubt on its legitimacy. When intellectual arguments are used in this way, truth becomes subservient, even irrelevant, to the strategic need to marshal arguments that weaken the opponent. Intellect, therefore, becomes a powerful tool serving political ends, a tool made even more powerful by the careful pretense that the arguments are in fact true.

This use of intellect reflects a political strategy, not only by attacking scholars such as those in Critical Legal Studies, but also by ones already in power as a means to legitimize their control. When used in this way the arguments are propaganda, distorted definitions of reality chosen to achieve desired ends regardless of truth. Too often now there is less truly intellectual debate in the law schools than exchanges of propaganda designed to attack or defend positions. Three of the major strands of scholarship that have emerged in the law schools over the past ten years, Law and Economics, Critical Legal Studies, and the conflict over Constitutional interpretation, are predominantly propagandistic.

For the university, use of intellect as a weapon independent of a commitment to truth violates the spirit of the institution's fundamental ideal. Yet, the lines between such uses of intellect, and its use in service of an

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Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility to the ever-tangled skein and hence to acquire that mastery should be the business of every earnest student of the law.

*Id.* at 44.

The scientific mastery of the law was to be acquired through the systematic study of the growth of the law "through a series of cases." *Id.* at 47.

advocated position believed to be both just and true, are often extraordinarily difficult to see clearly. Scholars seeking to challenge what seems to them to be the unjust actions of a corrupt aspect of the legal system also risk succumbing to a Machiavellian "ends justifying the means" system of values.

Both Law and Economics (Chicago) and Critical Legal Studies are political movements that are based upon and emerge from coherent schools of political thought and preference. This does not mean that nuggets of truth and insight are not contained within the scholarship. Propaganda is even more effective when elements of truth are contained within the arguments. A substantial part of the scholarship produced by adherents to these movements is shaped to serve the political beliefs and goals of the particular school.

Much of what has been written by Critical Legal Studies scholars emerges, for example, from a deliberate political strategy aimed at undermining the foundations of the existing system of legal thought, value, assumption and action. The fact that CLS may not be up to the task it has chosen does not change the mission. The thinking of some CLS scholars is most likely that, since they consider there to be no truth in the existing system, facilitating its disintegration is appropriate. In fact, the intent of the deconstructive method is to reduce an existing analytic/political system to chaos so that a true system can emerge from the rubble. Viewed in this light, it can be understood why CLS scholars consider strategies of demystification, delegitimation and deconstruction of judicial and legislative institutions to be necessary before there can be any chance of positive or constructive truth. The argument is that real truth cannot exist until the distorting foundations of the existing, corrupt system have been destroyed. We would then supposedly be able to see more clearly once that false system is dismembered. A true system could then be constructed without the biases, prejudices, masks and class-preserving injustices assumed to be inherent aspects of the existing legal system.

The Chicago School of Law and Economics represents a much more focused political strategy than Critical Legal Studies. Both the Chicagoans and CLS have targeted the Liberal political tradition, particularly the institutions of law. CLS has sought to crumble the foundations of Liberalism while the Chicagoans have striven to deflect Liberalism from the Welfare State. Concentrating on values and doctrines used by judges, the Chicagoans have been seeking to re-engineer the legal system, to

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109 Id.
110 See Louis Menand's biting critique of the extreme gap between Critical Legal Studies' professed goals, its capabilities, and behaviors in Menand, supra note 6.
111 See generally G. Rose, supra note 28. Rose critically examines the post-structuralist work of Deleuze, Derrida, and Foucault remarking that the deliberate "destruction of knowledge" they seek "is justified by its perpetrators as the only way to escape the utopian projections and historicist assumptions of dialectic; 'eternal repetition of the same' is said to be a harder truth than the false and dialectical promise of reconciliation."
reflect what they consider to be the values and preferences of the majority of Americans, rather than what they consider an intellectually dominant minority, known as “Liberals.”

CLS scholars, on the other hand, have only begun to try to work out the nature of the system that might emerge if they were successful in undermining the foundations of the Liberal Rule of Law. The Chicagoans, conversely, have a very clear picture of what they want to achieve. The Chicagoans’ vision is seen in the works of Irving Kristol, Richard Posner, Milton Friedman and George Gilder. Posner is the only Law and Economics member, but the others are leaders in the Neoconservative movement from which the Chicagoans’ strategy emerged. In this Neoconservative world, women are better off at home or receiving lower pay if they must work; affirmative action to correct past wrongs is highly undesirable; government is nearly always a less preferable actor than individuals; and the “magic of the Market” is to be worshipped. In the Neoconservative vision, God was the First Capitalist.\(^\text{112}\)

The valid insights offered by both Law and Economics and Critical Legal Studies, therefore, need to be carefully extracted from the massive baggage of their political rhetoric. Each movement has unquestionably brought vitally needed insights to the law schools. Among the most important contributions of Critical Legal Studies have been, (1) bringing new tools of textual and linguistic analysis to bear on the formulation and application of judicial doctrine, (2) deconstructive methods, (3) recognition of the limits and distortions of rationalism as well as formal philosophic method, (4) continuing in the Existentialist tradition of working through literature to bridge analytic and methodological gaps, and to seek to make philosophy something that can be done and shared by intelligent, thoughtful people rather than only by a specialized philosophic profession removed from human reality, (5) bringing important Marxist concepts to American legal thought, including language of demystification and legitimation as well as the effects of economic and class structures on the content and uses of law, and (6) enhancing our steadily growing recognition that law is political behavior.

The Chicago School has also brought important insights to the law schools. While not as abundant or diverse as those of CLS, they have been powerful and useful. Justice Holmes asserted nearly a century ago that to understand the law legal scholars must understand the principles of political economy.\(^\text{113}\) Until very recently legal scholars failed to follow Holmes’ urging, tending to rely instead on the internal content of judicial doctrines. Economic theory and analysis is, however, a dominant and inescapable reality of the modern world. Economic analysis and political economy are becoming even more important elements of intellectual strategies as economic decisions and policy infuse every level of political


\(^{113}\) Holmes, The Path of the Law, 10 HARV. L. REV. 457 (1899). “[I]t seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me in evidence of how much progress in philosophical study remains to be made.”
decision-making in an increasingly resource conscious world. Fernand Braudel, for example, recently described economics as a "remarkable science", concluding:

So great has been its contribution to theory that it offers a system of rules that can be easily manipulated. When you begin to grasp the idea of deep economic structures, you become aware of those elements of history that change slowly but that bear significantly on the world economy. Economics not only shapes people; it also manipulates them. It functions in an unconscious, almost Freudian way. It sheds light on everything. It occupies every level of activity.\(^{114}\)

Economic theory, tools of economic analysis and the languages of political economy are inescapably languages of power. They are, therefore, languages of the law as well which is the formalization, institutionalization, and allocation of power within society. Understanding these languages and their underlying assumptions, abuses, and limits, is no longer something that legal scholars can or should avoid. Prominent British economist Joan Robinson has, for example, warned that economics must be understood "to avoid being deceived by economists."\(^{115}\) Regrettably, this warning is well-heeded in examining the work of both the Chicagoans and Critical Legal Studies.

Whatever the deficiencies, distortions, and abuses of Law and Economics, there have been significant contributions. These include, (1) a new language of efficiency, economic values, and effects, (2) a conscious extension of law and legal scholarship into realms of economic policy, (3) a greater clarification of the Conservative/Liberal debate, (4) a sense of the legitimacy of extending legal scholarship into related fields, and (5) that legal scholarship could not be contained within the often circular internal content of judicial decisions.

If both Critical Legal Studies and the Chicago School have demonstrated that law and legal scholarship must transcend narrow doctrinal boundaries in search of ideas, solutions, insights and methods, neither has demonstrated the limits of the quest. This is the dilemma of modern legal scholarship and it is one that is both practical and intellectual. The world of law is enormous in scope, diverse in content, and myriad in its complexity. Yet, law is itself rendered small by the overall universe of knowledge.\(^{116}\) Until the end of the Eighteenth Century it was thought possible to master the whole of human knowledge. The university was organized to teach the scope of our knowledge. However, modern science rendered this universalist orientation impossible, with nothing but the liberal arts orientation left to reflect the assumptions of mastery.\(^{117}\)


\(^{116}\) See J. Martin, supra note 43.

\(^{117}\) J. Brau, supra note 43.
Because the enormous mass, diversity, and range of potentially available knowledge will otherwise render nearly any discipline meaningless, rigid boundaries and definitions now control the conditions studied by a discipline. Standards, comparability, quality, coherence, and utility will be impossible to maintain absent legitimate, limiting, and intelligible disciplinary paradigms. But, how are the limits set, how do they change, who establishes them, and are there disciplines for which such limits are counterproductive?

Answering these questions for the discipline of law involves defining the university law school in America, including its educational, professional, and intellectual missions. Such definitional analysis I have attempted to do elsewhere, but several comments are appropriate. First of all, Christopher Langdell, in taking the raw data of appellate judicial decisions as the focus of law schools and ultimately legal scholarship, and claiming that these decisions contained the law, permanently altered the nature of American law schools and legal scholarship. From this choice emerged the linkage of law schools, legal profession, and judiciary that remains to this day.

Langdell was hired by Charles Eliot, Harvard’s new president, because twenty years earlier, when he was a student at Harvard, Eliot had been extraordinarily impressed by Langdell’s approach to legal study. When Eliot later recruited Langdell, Harvard’s Law School was in serious trouble with declining enrollments and widespread dissatisfaction with its quality. If Eliot had not met Langdell two decades earlier, he might have succumbed to the view that education of lawyers did not belong in the university. Eliot might have closed Harvard’s Law School, just as it had been shut down in 1829 when enrollment fell to one student. In closing Harvard Law School, Eliot might logically then have instructed the departments of philosophy and political economy to deal with whatever they considered important and legitimate about law. If this hypothetical set of events had occurred, there could have been a decoupling of the universities and the legal education of people eager to become practicing lawyers. If so, both legal education and university scholarship about law would have evolved in very different patterns.

If academic scholarship examining law were freed of the influences, methods, commitments, values, and interests of career-minded students intent first and foremost on becoming lawyers, of practicing lawyers; of judges, and of peers oriented to professional/academic/doctrinal legal scholarship, then the kinds of research being done would unquestionably be very different from that of Langdellian law scholars and teachers. Perhaps it would have taken on a more Continental gloss, or developed a coherent social science of law. This does not mean that the “more in-
intellectual" or scientific scholarship of law would be better. The point is simply that it would be a distinct variety or varieties of scholarship, with different methods, data, hypotheses, and missions. In any event, Langdell did become Dean of Harvard Law School. Langdell and Ames molded a system from which it would be impossible to extricate legal scholarship and law teaching. By focusing on collections of appellate judicial decisions, doctrinal analysis, and educating aspiring lawyers, the Langdellian paradigm that later joined with the American Bar Association (ABA) and Legal Realism has foreclosed forms of intellectual inquiry that would have developed if the law had instead been placed in university departments of philosophy, political economy, political science, social science, or even in a university department of law not oriented to educating students intent on becoming practicing lawyers.

If the Langdellian model had not preempted the field of inquiry into law, as well as defined law as judicial doctrine, many of the methods now being brought to bear upon law would have emerged long before they entered the consciousness of American law faculty. This would likely include economic analysis, literary criticism, analysis of justice, morality, political economy, Feminist critique, Marxist analysis based on considerations of class and economic structure and so forth. The Langdellian/ABA paradigm is, however, dominated by its orientation to the profession and the judiciary. There is some room within it for what could be called pure scholarship, or knowledge sought for its own sake, but the space allocated for such activities is relatively small. When the amount of scholarship that does not directly serve the needs of the Langdellian/ABA paradigm increases beyond a given level of tolerance, the system reacts against what to it seems first an irritant and then a cancer.

The system's resistance to pure intellectual activity is significant. This is because lawyers, judges, law students, and most law professors are not intellectuals, but people who use intellect primarily to achieve specific ends. The vision of the pure scholar has little relevance for such people because they are pragmatists who are responsible for taking effective action and resolving problems. In their active, problem solving mode, they have little interest in abstract propositions. They need active, concrete, effective applications of knowledge. The inhabitants of the Langdellian/ABA paradigm, consequently, have scant use for much of the scholarly work being generated by Critical Legal Studies, Law and Literature, or Law and Economics scholars. This in no way means the work of these groups is not logically relevant to the activities of judges, lawyers, and traditional legal academics. It does mean that the key factor is not logical relevance but proximity and utility defined by the project or task of judges and traditional scholars, not by more abstracted relevance.

The new legal scholars, on the other hand, have little patience with those they consider to be sources of prejudice, analytically unsound, or

122 See, e.g., R. Hofstadter, Anti-intellectualism in American Life 26 (1970) "[F]ew of us believe that a member of a profession, even a learned profession, is necessarily an intellectual ... [I]ntellect may help but intelligence will serve well enough. We know that all academic men are not intellectuals ... ."
anti-intellectual. Many of the new scholars are intent on advancing the messages of their particular schools of thought, advocating their particular version of truth, or creating their vision of what university scholarship in law would be if the Langdellian/ABA paradigm had never been constructed.

These competing attitudes, abstracted relevance and direct application, produce an irresolvable tension. At the boundaries of the traditional paradigm and the more extreme aspects of the new legal scholarship, the tension is not even productively dialectical because the interests are so profoundly and unalterably dissimilar. Common ground can be identified, however, once we move past the extremes. This common ground is where the real revolution in legal thought is occurring. The real intellectual revolution in American law schools increasingly recognizes the productive interface between legal scholars, teaching, law students, lawyers, judges, and legislators, as well as scholars in other disciplines. During the second decade of the intellectual revolution, there will be some consolidation and refinement of the diverse thinking that has been done. Law and Economics will soften its ideology and become understood more as “economic methods and political economy.” CLS is already becoming less strident and has much to offer in terms of “methods of identifying the political content and biases of law and judicial decisions.” Constitutional interpretation might be better seen as “the necessity and role of authority in preserving the legitimacy of law and legal institutions.”

VIII. CONCLUSION

A. Visions of Justice

The second stage of the law schools’ revolution is beginning. The basic principles involved in the revolution’s second stage include, (1) recognition of the vital importance of the metaprinciple of justice as the critical component in the emerging paradigm;¹²³ (2) development of respect among law faculty for law students, for lawyers, and for the judiciary, including the recognition that it is largely through these mechanisms that justice is realized; (3) insistence that these groups themselves recognize, understand, accept, and adhere to principles and behaviors consistent with principles of justice; (4) development of clear understanding of emerging social needs and the roles law can play in achieving equitable solutions; and (5) orientation of research and teaching toward development and attainment of just and equitable solutions to critical social problems, ones amenable to being addressed in some meaningful degree by law and legal institutions.

¹²³ W. Galston, Justice and the Human Good 1 (1980): “Unlike many problems debated heatedly but fleetingly, justice is both theoretically meaningful and practically important.”
Much of modern legal scholarship derives either from a positive conception of justice or emerges as a particularized reaction to conditions perceived as unjust. The Chicago School, for example, can be understood both in terms of its ideal vision of justice, and the substantial distributive injustices its vision arguably imposes upon disadvantaged groups. Critical Legal Studies, as well as the Feminist critique, emerge from ideas of justice, albeit ones that are often phrased more negatively as critiques of the injustices of the existing system. CLS, for example, assumes that the existing capitalistic system is unjust and that law and legal institutions help preserve its ability to be unjust. Similarly, the debate over the techniques to be used to interpret the Constitution is not really about techniques. Arguments about techniques of interpretation are simply the point at which a political dispute that is grounded on specific visions of a just (or at least preferable) society has been joined. To some extent it is an intellectual non-debate. The fact that it has gone on as long as it has reflects the deep political nature of the real conflict.

The negative analytic techniques are approaching the end of their usefulness, at least for a time. The main political messages have been delivered. We know by now that the law is not value-free or comprised of neutral principles. We know that women and racial minorities have been discriminated against. We know that judicial decisions reflect judicial experiences and human value systems, ones that can be as right or wrong as those of any other humans. We know that law is a political system, and that judges are political actors. We know that new methods are needed to enrich legal thought. We know that economic analysis can be a powerful tool for legal scholars.

The new languages of discourse that have been injected into the law from outside its academic boundaries have rapidly entered the awareness of many legal scholars. They are now in the process of being re-interpreted into the more traditional frameworks. The more radical aspects of the critiques of either the Right or the Left have passed their points of significant usefulness, politically and intellectually. Unless they are able to generate richer, more just, constructive contributions, the radical positions will become tiresome. Fortunately, a richer dialogue does seem to be emerging. Some Law and Economics work is developing apart from the political mission of the Chicago School. Critical Legal Studies scholars such as Tushnet and Unger are making important and thoughtful contributions. The conflict over the legitimate processes of Constitutional interpretation overlaps CLS, the Neoconservatives, and other unaffiliated legal scholars who are aware of the importance of the debate over the limits of judicial power.

125 See, e.g., Tushnet, Legal Scholarship: Its Causes and Cure, supra note 91; Tushnet, Critical Legal Studies and Constitutional Law: An Essay in Deconstruction, supra note 6; see generally R. UNGER, supra note 67.
B. How Does This Relate to Students, Lawyers, and Judges?

What do the current controversies have to do with law, lawyers, law students, judges, or virtually any other relevant interest group in American society? The answer is, to this point, very little. The works of the new legal scholars have had scarcely any impact upon, are not understood or even read by those primary interest groups. Hardly any one other than the already converted reads the products of American legal scholars, particularly those being produced by the leading intellectual movements of the decade. This, of course, does not mean that the work of those scholars is intellectually illegitimate or that it will not ultimately have substantial effect on the scholars themselves and on lawyers, students, and judges. Immediate acceptance of one’s work may even be a sign that it is already dated. It may take considerable time before new ideas and findings are able to infiltrate and penetrate the protective covering of a dominant paradigm. Existing orthodoxies fight hard to maintain the integrity of the system that has been painstakingly constructed, recognizing that change can cause an unraveling. This leads to recognition that the mere fact that a scholar’s analysis is not quickly adopted by other scholars or key reference groups says little about the merit of the scholarship, either good or bad.

With few exceptions, however, the scholars who have recently produced the truly seminal work that has changed our perceptions are not even American legal scholars. Richard Posner is an exception, but Roberto Unger, John Rawls, Ronald Dworkin, and John Finnis were either trained in a different system (Unger, Finnis), are not legally trained at all (Rawls) or, even though educated in the American system, grew to maturity in the traditions of Oxford (Dworkin). The texture of the works of scholars like Rawls, Finnis, Dworkin, and Unger is of a different kind than the work of scholars writing within American law schools. The depth, scale, breadth, and nuance of the works of those seminal scholars is on another level. Critical to understanding the significance of each, however, is recognition that these scholars, including the oft-maligned Posner, have had significant impact because they have sought to synthesize and construct, and were not simply content to analyze and deconstruct. This reveals one of the deficiencies generated by the too extreme and self-contained concentration on analysis of legal doctrine as taught in the processes of American legal education. It also puts scholars such as Roscoe Pound, Lon Fuller, and Karl Llewellyn in a special light, and perhaps also the treatise writers and restatement editors who, whatever their faults, were nonetheless attempting to either create or describe a significant and coherent subsystem of law. Compare that to the past twenty years of American legal scholarship, the basic theme of which seems to be “attack and dismember.”

The American system has been producing scholars highly skilled at dismembering others’ work but who cannot “see the forest for the trees” and have little sense of the “ecology” of law. While American legal scholars should be appreciated for their analytic and deconstructive brilliance,
their scholarship has been producing an absence of something rather than an extension of the substance of our intellectual awareness. To the extent that legal scholarship has been unaware of the abuses of law in both its macro and micro senses, scholarship that challenged the abuses is wholly legitimate. Those who are highly skilled in analytic dismemberment will always be respected for their intellectual acuity and acerbity. But, such scholars offer the intellectual equivalent of "one-liners," uttering amusing or shocking analyses that quickly flit out of existence. Such strategies are necessary and will always be a useful tool for disturbing a complacent power structure. At some point, however, the cycle of knowledge systems needs to harvest the best insights from the challengers and the traditional perspectives and synthesize or construct new conceptions. Even Marx, perhaps particularly Marx, is remembered for what he attempted to construct in *Capital* rather than his many earlier insightful critiques of the abuses of industrial society.\(^{126}\)

There are strands of constructive intellectual activity now emerging in the law schools. These include a rebirth of jurisprudence, with the idea of Natural Law providing important concepts for understanding the roles and limits of law in political communities. Whether dealt with in formal courses on jurisprudence or contained within other courses, justice-oriented themes are being raised in many contexts. No longer is there an assumption of value-neutrality either in the application or the structure of law. In the same way, courses on professional responsibility, ethics, and the roles of the lawyer and the legal profession are introducing concepts of justice and responsibility.

Nor is the revolution in the law schools limited to abstractions. Clinical legal education began as an exercise in social justice.\(^{127}\) Whether defined as professional responsibility, technique, or role, clinical education was based on assumptions of the social and political responsibility of the lawyer. Clinical education contained an implicit political vision and it was no accident that many of the main figures in the earlier period of the clinical movement had backgrounds in civil rights and legal services for the poor.\(^{128}\) Until the latter half of the 1970s, the clinical movement sought to advance a powerful conception of social responsibility for lawyers. It then underwent a transformation into method and professional technique, a change which essentially marked the end of the clinical


\(^{127}\) See, Pincus, *supra* note 19, at 295 (1971);

movement, as a movement, and signalled the birth of the legal skills movement.\textsuperscript{129}

Very closely related to the justice-oriented phase of the clinical movement was the Humanistic Legal Studies movement founded by Jack Himmelstein.\textsuperscript{130} Like its clinical counterpart, legal humanism contained a vision of how the enlightened lawyer ought to behave. Many of the people involved in clinical education were also participants in the humanistic movement, although there was significant involvement by other law faculty.

Both the clinical and humanistic movements generated widespread impacts outside their own borders. These “ripple effects” may have been the primary triumphs of each movement, just as the unanticipated effects are likely to be the most important consequences of Law and Economics and Critical Legal Studies. Both clinical education and legal humanism generated scholarship and course content that focused on the roles of lawyers, the responsibility to do justice, and critiques of the legal profession and courts, including the trial courts. These were areas that had been almost totally ignored in the development of legal thought, both in American law schools and elsewhere. Similarly, there was very little written prior to 1970 concerning the nature of the human dimension of being a lawyer. The same was true about the skills of law practice. Trial advocacy texts written in the 1960s or 1970s, with the exception of Robert Keeton’s classic work, seem crude in comparison with the quality of those now in existence. The quality, scope, and abundance of writings on the concerns of courts, on legal techniques, and on subject matters such as negotiation, advocacy, interviewing, counseling, pleading, drafting, damages, mediation, arbitration, and so forth have grown so greatly over only a decade that the change is amazing to those who have been around since the beginning of the transformation.

Without a sense of recent history, it is easy to miss the scale of the changes within the law schools. Members of the practicing bar and judiciary can easily fail to understand the nature of the law schools of 1990 because they can mistakenly think that their law schools of ten, twenty, or thirty years ago accurately represent the nature of current legal education. Many of the current debates about law schools seem blind to the revolution the schools have experienced in content, structure, method, demographics, scholarship, and mission. Since, however, the changes are not even well understood by the faculty of the law schools, it is not surprising that others lack accurate perceptions.

The scale of the changes makes it difficult to understand the widespread belief among leaders of the legal profession that the law schools are refusing to adapt to the needs of the legal profession.\textsuperscript{131} There has of


\textsuperscript{130}Himmelstein, supra note 17.

course not been complete adaptation, nor should there be. The law schools are not servants of the interests of either the profession or the judiciary, but are creatures of the university and society.

C. An Example of Reforms in the Content of Legal Education

The majority of this Article has considered some of the changes that have come about in the focus of legal scholarship. Of equal importance are the shifts in curriculum and content that the schools have experienced. In some ways the shifts mirror changes in academic focus but curricular change has by and large altered much of what is actually done in the law schools while seeming, on the surface, to remain largely the same. The curriculum of the Cleveland State University College of Law provides an example of how law schools have responded innovatively to an expanded sense of professional responsibility.

In addition to the traditional core curriculum of the first year, the College of Law offers first year students a course in “Legal Writing, Research, and Advocacy.” A recently added requirement is that first year students select from a menu of approximately fifteen “perspectives” courses designed to provide context beyond that gained in core courses. Each first year law student is required to select a “perspective elective” from a list that includes Jurisprudence, American Legal History, Comparative Law, “When Justice Fails,” Law and Society, English Legal System, International Law, Legislation, Law and Economics; and Law, History, and Economics.

Clinical law programs and judicial externships are offered in addition to several courses in professional responsibility and the legal profession. An extensive advocacy curriculum has been developed. It includes a concentrated “full-immersion” two week course in trial advocacy, various one semester courses in trial advocacy, as well as specialized courses such as Motion Practice, Psychology of the Courtroom, and Advanced Litigation. The advocacy curriculum includes Trial Evidence, a course that combines a traditional evidence course with a trial advocacy program. Along with these courses are ones in Alternative Dispute Resolution, Appellate Practice, Class Actions, Complex Litigation, Section 1983 Litigation, Discovery Practice; Interviewing, Counseling and Negotiation; Lawyers' Strategies, Remedies, and Pre-Trial Practice. The Pre-Trial Practice; course is an intensive, semester long program that has virtually all the characteristics of a clinical program except that it uses specifically developed simulated cases as the experience base for the law students.

In addition to these programs, the College of Law has established a joint program in Law, Politics, and Policy with Cleveland State University’s College of Urban Affairs. This program combines clinical experiences with courses on legislation, urban problems, research, and strategies. The College of Law was also one of the first institutions in the United States to establish a Street Law program in which law students teach law in area high schools. From the Street Law program emerged a partnership between the College of Law and the Cleveland Public
Schools to create and manage a Law and Public Service Magnet High School to provide a national model for educating disadvantaged urban youth.

The College of Law's programs suggest how far American law schools have traveled in their efforts to meet their extensive responsibilities to society, to law students, and to the legal profession. Such efforts simply did not exist even a very few years ago and are transforming and reflecting the mission, content, and nature of the revolution that is going on in American law schools. The depth and scope of the schools' efforts have expanded greatly. Focused educational efforts directed toward legal skills, lawyer ethics, student analytical capabilities, and expanded philosophical awareness have burgeoned in an amazingly short period of time. In part this reflects the equivalent trends in academic research but there is also a significant pedagogical and curricular revolution proceeding largely independent of the scholarly dimension. The various movements that have already been described can take credit for much of the experimentation, but faculty who came into the law schools in clinical roles and/or participated in the humanistic movement have played particularly important roles in what has happened in changing law school teaching and course content. The diversity and intensity of the revolution has been extended as well by legal philosophers, feminists, economic theorists, practicing lawyers, and by Critical Legal Studies scholars. Their contributions have not only been through their own scholarship but are direct consequences of the pressure their challenges generated, forcing more traditional law faculty to respond to their critiques.

The scale and rapidity of the changes is startling. The changes are fundamental, but unfinished. A different kind of institution is ultimately evolving although, like the common law, it will tend to look much the same to the external observer. Many within the law schools are trying to solve the new equations that will determine the future shape of American law schools. The legal profession and judiciary must participate in the debate, but must also recognize their own biases and that the law schools are creatures of society, not servants of the narrower interests of lawyers, students, or judges, or for that matter, of self-interested academics. The profession and judiciary have not yet caught up with the new reality of the American law school. Neither, however, have many law faculty.