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THE EVALUATION OF LEGAL SCHOLARSHIP

Philip C. Kissam*

all literature is to me me**

Gertrude Stein

Researchers, readers, academic committees, law school deans, research agencies, and editors of publications frequently evaluate works of legal scholarship. As manifest in the many writings on contemporary legal scholarship, this evaluation process has become more contentious and less certain.¹ The immediate causes of this fragmentation are not difficult to determine. They include a new diversity in types of legal scholarship,² the rising expectations of administrators and promotion committees that law faculty publish often and in prestigious places, a dramatic expansion in the quantity of legal scholarship, and the consequent competition for publication in prestigious journals and books.³

We have evaluated legal scholarship traditionally on an implicit basis with unquestioned assumptions about the values, purposes, and methods of this scholarship. Typically, we assume that scholarship should focus on legal doctrine, employ conventional methods of legal analysis and argument, and be useful to practitioners, or at least to appellate advocates and the courts.⁴ We also tend to evaluate scholar-

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⁴ See H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 32–33 (1972); Maggs, Concerning the Extent to Which the Law Review Contributes to the Development of the Law, 3 S. CAL. L. REV. 181, 183–84 (1930); Nowak, supra note 1, at 321–24; Rodell, Goodbye
ship intuitively and in general terms. Without defining terms or demonstrating how certain standards are met, works of scholarship are characterized as "original," insightful," and "outstanding," or conversely as "unimaginative," mechanical," and "routine." Today, these assumptions, these practices, and some equally parochial preferences for the values and methods of new approaches to legal scholarship appear to limit our abilities to read, to understand, to appreciate, and to employ the pluralistic modes of inquiry that are present in, and available to, contemporary legal scholarship.\(^5\)

The evaluation process requires new perspectives to enhance our writing, reading, and formal evaluation of legal scholarship. The diversity of modern scholarship invites us to engage in a more flexible and more reflective reading and evaluation process that appreciates multiple perspectives and gives explicit attention to the different values, purposes, methods, and contexts of each individual work. This evaluation process would recognize and promote the legitimacy of pluralistic modes of research, analysis, and writing, thus improving the fairness of evaluations and possibly the quality of much contemporary scholarship. These improvements could affect both scholarship which is designed to assist legal practitioners directly and scholarship with a more academic cast. In general, we need to construct a new language or understanding of contemporary legal scholarship. This essay is a step in that direction.\(^6\)

To avoid begging some important questions, I employ a rather broad and open-ended definition of scholarship. "Legal scholarship" will refer to any writing about the law or legal process that is printed in a form generally recognized as "a legal publication." This practice-based definition is consistent with the basic theme of this essay: that readers of legal scholarship should become more flexible and more

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explicit in considering the diverse values, purposes, subjects, and methods of contemporary legal writing. A university-based definition of scholarship might require certain kinds of research, particular methods of analysis, and most importantly, the discovery of knowledge. But this definition excludes much writing about the law that traditionally has been published and considered valuable by the legal profession. Consider, for example, the publication of teaching materials, continuing education materials, survey articles, and student case-notes that primarily involve the dissemination rather than discovery of knowledge. These kinds of writing may be useful to diverse professional audiences. I thus prefer to include this writing within a broad practice-based definition of legal scholarship, and to examine it under standards of value, quality, and importance, rather than exclude it merely as a matter of definition. The law school, after all, is a creature of both the university and the legal profession, and in a pluralistic world the university law school should be able to serve both university and professional missions.

This essay is in five parts. I consider first the diversity of social and personal values that scholarship can serve. I then analyze the more specific purposes of legal scholarship, the methods by which these purposes may be achieved, and a variety of perspectives from which evaluators assess or should assess legal scholarship. Finally, I shall try to explain why our evaluation of scholarship lags behind the development of the new pluralism in legal scholarship. In sum, if we are to understand and to assess our evaluation practices, we must consider the complex values, different purposes, diverse methods, shifting perspectives, and any social or political obstacles to the effective evaluation of contemporary legal scholarship.

A DIVERSITY OF VALUES

Let us imagine a philosopher who contemplates a universe of problems in order to choose a research project. This universe might include the morality of nuclear arms, the theories of social justice, racial discrimination and affirmative action, the moral basis of contract law, and other issues with a narrower focus. Suppose that our

philosopher decides to analyze a problem of very limited scope, say, the morality of hospital decisions that grant or deny patient admitting privileges to physicians who wish to join a hospital's medical staff. What values might this project serve?

One value or motive might be play. Our philosopher might hope to obtain sheer pleasure by attempting to resolve the conflicts between competing moral principles and the different perspectives of physicians, patients, and administrators. Alternatively, our philosopher may wish to exorcise the threatening shadows of some personal experience that involved hospital staff privileges and the welfare of his or her family. Or our philosopher may obtain pleasure by competing successfully with others who analyze the same issues. In other words, this philosopher may view scholarship in part or even primarily as a game or ritual.

Of course, the play factor may be quite personal to the investigator, and by itself may not justify publication of a paper or a favorable assessment of the project. Even so, the value of play constitutes an important if only partial explanation of much scholarship. An author’s choice of an unusual subject, a unique method, or seemingly bizarre style could all result from this play factor. Understanding this may help readers understand and appreciate the substantive insights that an author is trying to convey through playful scholarship. In addition, researchers, and evaluators with an interest in the well-being of the scholar, might consider play a positive factor in assessing the role and value of playful scholarship in a researcher’s career. Perhaps some playful scholarship should be appreciated simply because it helps one pursue a career of teaching and research with enthusiasm. This factor alone would not justify publication of the writing, but publication is really only one aspect of evaluation. Finally, playful scholar-

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ship may delight or inspire other readers, and this is surely another important value.15

A second value or motive could be that our philosopher's work connects to larger projects, even though the particular work lacks independent value. For example, an analysis of hospital privilege decisions, by itself, might not provide a practically useful discussion because it fails to consider these decisions within a sufficiently expansive context of hospital, professional, and moral practices. This analysis may simply order complex facts and relationships that would be most useful to the analysis of related but larger problems. In such cases, however, the analysis of hospital staff privileges could be helpful to our philosopher's teaching of applied moral philosophy or the ethics of health care. The analysis also might inform or inspire scholarly work on larger and more valuable projects, say for example, the study of medical credentialing16 or collective professional behavior.17

These connections, alone, may not justify the publication of many papers. Two qualifications, however, should be noted. In special cases, scholarly fragments or partial works may provide such valuable insights that publication is appropriate.18 More frequently, the publication of incomplete or partial works may encourage dialogue between readers and writers that enriches subsequent writing. This sort of publication enlarges the audience of both sympathetic and critical readers who can, by their comments, play a significant role in the development of a writer's thought.19 In any event, the readers and formal evaluators of scholarship will be aided by focusing on a work's possible connections to other projects. A reader is more likely to understand and appreciate an author's goals, methods, and insights by placing a particular work in the context of the author's other publications, the relevant literature, and the reader's own projects. In sum, this focus on connections should encourage readers and evaluators to become more active participants in the reading, interpretation, and evaluation of

15. See, e.g., Gabel & Kennedy, Roll Over Beethoven, 36 STAN. L. REV. 1 (1984); Hutchinson, supra note 1.
scholarship, and this in turn should encourage explicit rather than implicit evaluation of modern legal scholarship.\textsuperscript{20}

A third value or motive for our philosopher's project could be understanding, that is, the illumination of an interesting and difficult problem. The development of an investigator's understanding, by itself, would not seem to generate any social value that deserves to be recognized in evaluating scholarship. Readers, however, may wish to advance their understanding of complex problems such as hospital staff privilege decisions. Furthermore, both the investigator and readers may, in currently undetermined ways, be able to apply a new understanding of hospital staff privileges to other projects. The value or motive of understanding, even of such a relatively limited topic such as hospital staff privileges, may thus generate scholarship that deserves positive evaluation and publication, even if on first impression the project does not appear to have any direct or immediate practical value.\textsuperscript{21}

A fourth value may be the project's direct practical usefulness. This value underlies the previous ones, but in the earlier situations the possibility of practical value was indirect or more speculative than the values of play, connectedness, and understanding. Here we focus on the two practical dimensions of academic scholarship. First, this scholarship, if original and done well, may help a scholar earn tenure, increased salary, prestige, and other rewards in academic and professional communities. Second, this scholarship may assist readers, who, for example, teach medical ethics or wish to make informed hospital staff privilege decisions.

Several points about the direct practical value of academic scholarship are worth noting. Unlike prior values, this value requires readers, and thus practical scholarship presumably should be written for particular audiences. In many instances, however, the value of serving oneself and the value of serving others may involve different audiences. This may create a dilemma for our philosopher. On the one hand, to write for academic rewards may mean writing for analytical philosophers in the department and external evaluators who demand an analysis that relies upon the most recent philosophical literature, principles, and analytical procedures. On the other hand, to write for


\textsuperscript{21} Cf. Rotunda, \textit{supra} note 4, at 3 (most law review scholarship is not immediately useful, but is stored on library shelves to await the day when it has use).
teachers of medical ethics or health care practitioners, the author may need to employ a more concrete and straightforward analysis of the different kinds of hospital privilege decisions. Of course, our philosopher could write two articles on the same subject, but this might not be very interesting, would certainly take extra time, and only one might be published. This dilemma should be recognized by both the writers and evaluators of practical scholarship. If this dilemma is not addressed, chaos in the writing and in the evaluation process are likely to result because neither writer nor reader will be sure of the writer’s particular audience or language. In sum, we write for specific audiences much of the time, and we may need to tailor our evaluations of much practical scholarship with this factor of audience constantly in mind.22

A fifth value of our philosopher's work could be theoretical significance.23 For example, the project could illuminate the basic or underlying moral principles implicated in hospital staff privilege decisions. A work of theoretical significance provides a certain kind of understanding and may often be connected directly or ultimately to practical values. By “theoretical significance,” however, I refer to the less frequent but more important works of scholarship that change our way of thinking about the basic principles involved in difficult intellectual issues, in this case, the morality of hospital staff privilege decisions. As with practical usefulness, this value requires readers. Again, our philosopher may face a significant dilemma about the appropriate audience or audiences to reach and to influence. In a work of theoretical significance, this dilemma may be particularly severe if the work implicates multiple theoretical perspectives and thus invites writing for multiple audiences.

The previous values may be viewed as the ultimate ends or values of academic scholarship. The achievement of these values depends upon an author satisfying certain intermediate values or standards of scholarship. The first two of these standards are necessary for what we typically refer to as “good scholarship.” Other intermediate standards demark our relative and rough distinctions between “good,” “important,” and “outstanding” academic scholarship.

22. See generally P. Elbow, supra note 19, at 177–215.
First, a scholarly work must in some sense be original. In many disciplines, this standard can only be satisfied by the presentation of newly discovered knowledge, of a new interpretation of a difficult issue, or a new solution to some intellectual problem. But existing knowledge can be disseminated or reported in original ways, and such writing could satisfy a broadly conceived standard of originality. Although the dissemination of knowledge, by itself, will not be of theoretical significance, it can promote understanding and be of direct practical usefulness to readers. These latter values may not count for much in academic disciplines such as philosophy, but the dissemination of knowledge in an original manner may often be of considerable value to professional audiences. These audiences frequently obtain and use knowledge in a variety of ways, and the dissemination of knowledge in an immediately useful form may have a considerable impact on the application of knowledge to professional problems. I would thus allow the dissemination of knowledge in an original manner to satisfy the originality standard for scholarship in a professional discipline like law.

Second, our philosopher's work must also demonstrate some degree of competence or quality. We typically recognize and express this standard in such amorphous terms as "this is quality work" or "this writing is of highest quality." Unfortunately, we often fail to define our standards for competence or quality. Following William Nelson's proposed standards for "minimal scholarly competence" in legal history scholarship, we might consider the quality standard for academic scholarship to place the following demands on writers. Any valuable scholarship must be factually accurate, written in a comprehensible manner, and be based on appropriate methods, be they research, analytical, interpretive, or narrative, which are designed to achieve the scholar's purposes.

Third, scholarly work that is original and competent may or may not be "important." Academic conversations that distinguish between merely good and important scholarship suggest that the concept of important scholarship has at least two meanings. Important scholarship may have a relatively broad scope and thus a potential impact upon the lives and work of many persons. Important scholarship may also involve the analysis and resolution of particularly difficult intel-

24. See Nelson, supra note 5, at 448–51.
25. See supra text accompanying note 7; infra text accompanying notes 34–36.
26. Cf. Nelson, supra note 5 (arguing that this situation exists in the evaluation of legal history scholarship).
27. See id. at 478–85, 490–91.
lectual issues. For example, the morality of nuclear arms, as a subject, would support important work in both senses. The morality of hospital privilege decisions, by contrast, might support important scholarship only if the work involved the analysis and successful resolution of complex or difficult intellectual issues.

As a matter of degree, but in distinction to important scholarship, some writing may be characterized as "influential" or "outstanding" scholarship. This is writing that substantially affects the behavior of others or causes others to change fundamentally how they think about difficult issues. Not all scholarship can or should be expected to achieve this standard. Outstanding scholarship typically involves high risk work that is based on substantial research, long-term training, a wealth of previous experience, and the use of unconventional methods.

When applying this standard, however, there are some relatively objective, external kinds of evidence that can and should be used to measure the influence of any particular work. We can measure the traces of scholarship in the work of others, even though we may debate vigorously whether the traces of a scholar's influence should be measured primarily in quantitative or qualitative terms.

We should observe, finally, that many of the values of an individual work of scholarship, especially its practical or theoretical significance, originality, importance, and influence, will depend upon relationships between the work and related texts. In philosophy, these texts include other works on the same subject, other works on analogous subjects, and leading works on the fundamental principles or theories that our philosopher employs or should employ when treating the morality or hospital staff privileges. In law, the related texts will typically include not only the relevant secondary literature and related disciplines but statutes, legislative histories, cases, and the social history. This means, of course, that an effective evaluation of a scholarly work, if it satisfies

28. See, e.g., J.S. Nye, supra note 8.
29. Cf. Nelson, supra note 5, at 485–90 (describing "outstanding" legal history scholarship as that which has a certain lack of conventionality and a certain measure of influence).
30. See Llewellyn, On What Makes Legal Research Worth While, 8 J. LEGAL EDUC. 399, 402–03 (1956) (encouraging legal scholars to work patiently on new kinds of extra-doctrinal scholarship by working carefully with interdisciplinary ideas, and by building one's techniques of inquiry slowly by successive pilot studies); Tushnet, Legal Scholarship: Its Causes and Cure, 90 YALE L. J. 1205, 1221–22 (noting that legal scholars need substantial amounts of time to develop an understanding of social theory that might usefully be employed in extra-doctrinal legal scholarship).
31. Compare Nelson, supra note 5, at 489–90 (articulating qualitative measures of the influence of outstanding legal history scholarship) with Rotunda, supra note 4, at 7 (measuring the influence of legal scholarship by the number of citations it receives).
our standards of minimal competence, usually must be grounded on a substantial knowledge of the relevant texts. In academic law, however, with our traditions of a highly specialized faculty, an orientation towards practice rather than scholarship, and student-edited law reviews, the effective evaluation of scholarship in the context of relevant-other-texts often raises special institutional and practical problems that curtail the possibility of effective and fair evaluations. We shall return to this issue, but first we consider the more specific purposes and methods of contemporary legal scholarship.

I have employed the analogy of a philosopher to help us take a fresh look at the multiple and complex values of modern legal scholarship. This analogy promised to shift our focus, at least for a time, away from the fairly common assumption that legal scholarship should have some practical usefulness. This analogy also promised to help dislodge our rather common habit of evaluating scholarship simply as a matter of "originality," "quality," and "importance," without specifying either the ultimate values that are served by originality, quality, or importance or the exact nature of these standards. In the next sections, I turn to legal scholarship proper to analyze the specific purposes and methods of this scholarship, and then to analyze the shifting perspectives and standards of both individuals and institutions that are or should be involved in the writing and evaluation of contemporary legal scholarship.

THE DIVERSITY OF PURPOSES

Legal scholars may work with the foregoing values in mind, but their research and writing will be guided by more specific goals, functions, or genres of legal writing that for convenience I refer to as "purposes" or "categories." There are, I think, six basic purposes of legal scholarship. These purposes overlap and many works are written with more than one purpose in mind. These categories, then, are necessarily rather abstract and general in nature. Nevertheless, the analytical separation of legal scholarship into these purposes or categories should be useful in the evaluation of individual scholarly works.32

Lawyers frequently talk about "legal analysis." This concept commonly refers to diverse sorts of intellectual activity, but I will employ a limited conception of legal analysis to define the first category of legal

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32. In other contexts, of course, other taxonomies of legal scholarship may be more useful. See, e.g., M. Dan-Cohen, supra note 23, at 1-4; Fletcher, Two Modes of Legal Thought, 90 YALE L. J. 970 (1981); Posner, The Present Situation in Legal Scholarship, 90 YALE L.J. 1113 (1981).
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scholarship. The purpose of legal analysis as scholarship is to reduce, separate, and break down cases, statutes, and other legal materials into separate elements. Student casenotes, comments, or reflections on an individual case, survey articles, treatises, and articles that analyze or describe a series of cases, with little or no attempt at integration, and newsletters that report the holdings of recent decisions are typically written for the primary purpose of legal analysis. Similarly, the study and explanation of new statutes, complex statutory schemes, and new administrative rulings are in this category when they emphasize a careful and precise description of doctrinal details involved in these developments.

At a minimum, the scholarship of legal analysis involves the lawyer’s basic method of “case analysis” or “case briefing.” This scholarship often provides direct help to practitioners by interpreting a case or statute in ways they can use in their work. The scholarship of minimal legal analysis can be original if it is the first publication to comment on a new case or statute, to review a batch of cases, or to report case holdings in a way that is uniquely useful to readers. This scholarship can also represent good quality work if it is performed with accepted methods and generates useful results. This work may even be important if its scope is broad enough to induce many readers to rely upon the reported results or to employ the analysis in some more imaginative fashion.

The minimum form of legal analysis may seem unexciting to many researchers, readers, or evaluators. In addition, the minimum form of legal analysis is marginally related to the discovery of knowledge, because it presumably can be replicated by anyone who applies the same analytical methods to the same materials. This scholarship, then, may be disfavored in academic circles where the discovery of knowledge is assumed to be the university’s mission. Yet, in terms of intellectual method and practical usefulness, this minimum form of analysis has a legitimate claim to the label of legal scholarship that should be recognized not only by the legal profession, but also by university-based law schools. The concept of a university, after all, implies a notion of universality, which can encompass and serve both professional and academic values. We should, therefore, value the dissemination of new and useful knowledge as well as the discovery of

33. See Kissam, supra note 3, at 257.
35. See, e.g., Kansas Criminal Procedure Review (a journal devoted primarily to reporting the holdings of leading and recent decisions in criminal procedure law).
knowledge. Nonetheless, because of the disfavored status of legal analysis in many academic institutions, untenured faculty members, in particular, should perhaps view this traditional, but minimum form as suspect and controversial. A safer course to earn tenure is to write something of a more fulsome character, and only later turn to serve the legal profession by producing good and original if minimal legal analysis.

The scholarship of legal analysis can move beyond the mere analysis of cases and statutory provisions to offer nonobvious explanations, interpretations, and criticisms of the elements of the case or statute analyzed. This work involves more complicated methods, as for example, when an author relates the decision in a case to general trends in the relevant case law, or interprets and criticizes the decision from a policy-oriented perspective such as economic efficiency. This more complex analysis can serve the values of understanding and theory as well as practical usefulness. The analysis of a significant case may offer a new and insightful interpretation, which helps us appreciate and understand not only the case but its possible implications for other, as yet undetermined, situations. In this more complex form, the scholarship of legal analysis certainly produces new knowledge that satisfies the university's traditional standards of scholarship.

A second category of legal scholarship is that of legal synthesis. The purpose of this scholarship is to fuse the disparate elements of cases and statutes together into coherent or useful legal standards or general rules. In other words, legal synthesis involves the development of a standard that is consistent with, explains, or justifies a group of specific legal decisions. This scholarship, like legal analysis, typically provides direct practical benefits to readers by indicating "what the law is" on some prescribed subject. At times, however, legal synthesis can be designed simply to illuminate an interesting group of decisions, or to develop theoretical principles that would better explain or justify a line of decisions. In these situations, the writer may not try to provide a synthesis that is of direct practical value. In this work

36. See supra note 7 and accompanying text.
37. See, e.g., Travers, Does a Monopolist Have a Duty to Deal With Its Rivals? Some Thoughts on the Aspen Skiing Case, 57 COLO. L. REV. 727 (1986).
38. See, e.g., id. at 730-40.
39. See, e.g., id. at 740-45.
41. See, e.g., K. LLEWELLYN, supra note 34, at 49-51 (describing the synthesis of cases).
the scholar may not need to consider all the relevant cases in a comprehensive manner, all the details of a relevant legislative history, or all the practical policy arguments advocates might employ when arguing from and against precedents. In other words, legal synthesis for non-practical purposes may avoid the conventional language of legal practice, and indeed this language may interfere with the specific purposes of the investigation.

Like analysis, legal synthesis can be performed at minimum and more complex levels. The minimum form involves either the construction of an analogy between cases or the development of a specific standard or rule that reconciles the holdings and facts of a line of cases. More complex synthesis connects a line of cases to more general, but related legal traditions, or to relevant social contexts. Legal synthesis, even the minimum form, is more likely to satisfy the traditional university standards of scholarship than legal analysis. Even the minimum forms of synthesis, though not in principle more difficult than case analysis, will involve more writing and more apparent originality through the writer's proposal of a new standard that integrates complex materials.

The scholarship of legal synthesis can, nonetheless, be subject to serious misunderstandings by modern readers. As indicated, legal synthesis can serve not only direct practical values, but also the different values of understanding, connections, and theoretical significance. Practical synthesis must take into account all relevant doctrinal materials, and presumably considers conflicting policy arguments as well. On the other hand, doctrinal synthesis that serves other values can have a less comprehensive character with respect to doctrinal materials and policy arguments. Its focus may be to illuminate a particular aspect of doctrine rather than specifying "what the law is." Unfortunately, legal synthesis designed to serve nonpractical values can be misinterpreted as flawed or incomplete scholarship by readers who

43. See, e.g., id. (arguing that the tax decisions of the Burger Court can be explained by a principle of deference to the special competencies of legislatures, the Internal Revenue Service, and the Tax Court, as part of an effort to understand whether the United States Supreme Court is capable of handling tax appeals). For discussions of the practical arguments of precedent and policy that advocates typically make, see K. Llewellyn, supra note 34, at 70–77; Boyl6, The Anatomy of a Torts Class, 34 AM. U. L. REV. 1003, 1052–58 (1985); Llewellyn, The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions, 46 COLUM. L. REV. 167, 178–85 (1946).


45. See, e.g., Craig, supra note 42.
demand, usually implicitly, that scholarship serve practical values in a
direct manner. This sort of misinterpretation is another problem
caused by our implicit evaluation process.

A third purpose of legal scholarship may be described as the resolu-
tion of doctrinal issues. Legal synthesis, when it clarifies what the
rules are, may be thought of as one kind of doctrinal resolution. But
this category has other forms, covers many issues, and employs a vari-
ety of methods. Doctrinal resolution includes advising courts or cli-
ents on how legal doctrine should be applied to specific cases,
transactions, or other legal events, suggesting resolution of conflicts
between the decisions of different courts, and criticizing judicial
opinions because of their inconsistency with general doctrine or their
failure to promote policy values. Doctrinal resolution also includes
more theoretical work that resolves broad areas of doctrinal uncer-
tainty, confusion, or controversy such as the commercial speech doc-
trine or gender discrimination law under federal statutes. This
category of scholarship traditionally has employed the several meth-
ods of legal analysis, legal synthesis, and practical policy arguments.
For a long time, this kind of study has been the staple product of law
review publications if not of all legal scholarship.

This scholarship, by attempting to resolve some legal issue, will
always appear to have direct practical value. This scholarship also typ-
ically requires or seems to require rather extensive writing about cases
and policies. Thus, unlike minimal legal analysis or synthesis from a
nonpractical perspective, this scholarship is quite likely to survive the
implicit evaluation processes of the academy, at least if the writing
makes some attempt to combine doctrinal synthesis with policy
analysis.

Nonetheless, there is a sense of unease and discord in law schools
today about the nature and value of doctrinal resolution as a major

46. See, e.g., Knebel, Antitrust Counseling: The Five Factors of Antitrust Liability, 9 J. CORP.
L. 359 (1984); The Tax Clinic Column, in The Tax Advisor, (a series of columns offering specific
practical advice to tax practitioners).

47. See, e.g., Note, Walking a Tightrope Without a Net: Voluntary Affirmative Action Plans

48. See Nowak, supra note 1, at 324–28; Shapiro, In Defense of Judicial Candor, 100 HARV.
L. REV. 731, 731 (1987) ("Since they first began publication, American law reviews have seen the
criticism of judicial opinions as a major part of their mission. A typical law review note, or even
a leading article, will address an important judicial decision, or series of decisions, in an effort to
show that the court has misconceived the problem, the solution, or both.").

49. See, e.g., Nowak, supra note 1, at 321–22; Posner, supra note 32, at 1113–16.

50. See Posner, supra note 32, at 1113–16 (describing the combination of doctrinal analysis
and practical policy arguments that pervades traditional doctrinal scholarship).
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This scholarship employs a rather unsystematic combination of analysis, doctrinal synthesis, policy argument, and common sense judgment to support scholarly recommendations to lawyers and courts about how practical legal issues should be resolved. Traditionally, when law professors thought of themselves as elite members of the legal profession, perhaps even as its "ideal judges," academic writers did not worry or need to worry about the imprecise methods used to support their practical judgments. This was true even though they usually made these judgments one step removed from the context of practical problems. Today, however, law professors are losing their elite status within an increasingly commercialized and highly paid profession. At the same time, law professors have become more fully incorporated into the worlds of universities and university bureaucracies. Legal realism and the current post-realist movements in the legal academy also have introduced all law professors, especially our more prolific readers and writers, to the more systematic theories and methods of academic disciplines such as economics, political science, philosophy, and even literary theory. These trends may explain the current unease and discord about doctrinal scholarship in the legal academy, and they may also provide a basis for the criticism of much or all practical doctrinal scholarship.

The infusion of theories and methods from other disciplines into contemporary legal scholarship presents an opportunity for the development of a richer and more contextual doctrinal scholarship. This scholarship, one hopes, may ultimately integrate the relevant learnings.

51. See, e.g., id. at 1113-19, 1129; Schlegel, Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology, 34 J. LEGAL EDUC. 103 (1984); Stevens, American Legal Scholarship: Structural Constraints and Intellectual Conceptualism, 33 J. LEGAL EDUC. 442 (1983).
52. See, e.g., Llewellyn, supra note 43.
53. See Kissam, supra note 3, at 259.
54. See M. DAN-COHEN, supra note 23, at 1-2.
55. See Kissam, supra note 3, at 271-76, 288-89.
56. See, e.g., Posner, supra note 14, at 766-77.
57. Compare Kelman, The Past and Future of Legal Scholarship, 33 J. LEGAL EDUC. 432 (1983) (trashing traditional forms of legal scholarship) with Posner, supra note 32, at 1113 (arguing that doctrinal scholarship of the traditional kind is and should remain "the core of legal scholarship").
58. See, e.g., B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977) (developing Kantian and utilitarian theories of the takings doctrine in constitutional law); R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) (presenting an economic interpretation of antitrust doctrine); Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29 (1985) (employing a Madisonian theory of democratic representation to interpret the rationality doctrine in constitutional law and the hard look doctrine in administrative procedure law); see Ackerman, The Marketplace of Ideas, 90 YALE L.J. 1131, 1131 (1981) ("What is going on is a shift from one kind of doctrinal analysis to another kind of
of other disciplines and of theoretical legal scholarship into the analysis, synthesis, and resolution of doctrinal issues, even if doctrinal scholarship remains fundamentally a matter of pluralistic views and practical judgment. Conclusions about these questions, however, must take into account the categories, subcategories, and methods of our non-doctrinal or theoretical legal scholarship. Our ultimate judgments about these matters will also benefit from the development of a more explicit process for evaluating individual works of scholarship.

A fourth purpose of legal scholarship is the production of teaching materials. Consistent with a practice-based definition of scholarship, I include in this category not only casebooks and hornbooks, but all kinds of educational guides such as continuing education materials, bar review materials, and even case outlines produced for law students. These latter types of writing are writings about the law, and as a matter of practice and convention may be said to appear in recognized "legal publications." Furthermore, these kinds of writing explain legal doctrine and may involve the same qualities of analysis, synthesis, and doctrinal resolution as those in casebooks or hornbooks. Of course, the methods and quality, originality, and importance of these less formal educational guides may typically be of lesser note or more difficult to detect than those of the casebook or hornbook, but this presents a question of evaluation rather than definition of legal scholarship.

The final two purposes of legal scholarship might be called "understanding" and "critique." In these categories, the understanding and critique of legal doctrine or the legal process is based on some perspective, such as sociology, history, economics, or philosophy, that is outside the framework of legal doctrine. These purposes have always been present in our literature, but have become more prominent with the new pluralism in legal scholarship and are today replete with new subcategories and diverse methods within each subcategory.

doctrinal analysis. Speaking very broadly, the newer sorts of analysis are characterized by a more self-conscious and elaborate conceptual apparatus than the kinds they are displacing.

59. On the application to legal reasoning of Aristotelian ideas of dialectical reasoning, the coherent integration of general principles and particulars, and practical judgment that entails both sympathy for and detachment from competing arguments and interpretations, see H.G. GADAMER, TRUTH AND METHOD 289–305 (1975 Eng. trans.); Bodenheimer, supra note 44; Kronman, Living in the Law, 54 U.CHI. L. REV. 835 (1987); Lehman, Rules in Law, 72 GEO. L. J. 1571 (1984); Lehman, How to Interpret a Difficult Statute, 1979 WIS. L. REV. 489.

60. Cf. M. DAN-COHEN, supra note 23, at 1–4 (dividing legal scholarship into three categories: doctrinal scholarship, studies for the purpose of understanding the law, and legal theory, which attempts to illuminate and criticize the underlying principles of legal doctrine); Posner, supra note 32, at 1113–29 (dividing legal scholarship into three categories: doctrinal scholarship, "positive analysis with social science methods," and a "new normativism").
In this essay, I can provide only a brief sketch of these categories, but this picture will help indicate our need for a more flexible and more explicit evaluation process.

The understanding of legal doctrine and legal practices involves the explanation of causes, the analysis of consequences, and the interpretation of meaning, or some combination of these functions. The scholarship of understanding includes the new legal history that emphasizes the specification of relationships between legal doctrine and its social contexts, the economic analysis of law in its positive as opposed to normative forms, the law and society scholarship that specifies the social nature and consequences of legal doctrine and practices, and the critical legal studies literature that attempts to illuminate the explicit and implicit symbols and ideology of legal doctrine.

Another important if traditional subcategory of this scholarship may be called "clinical scholarship." By this I mean writing that analyzes, reflects upon, and interprets legal practices as opposed to legal doctrine. This sort of writing has been present for a long time in publications such as state bar journals and essays of law professors about their craft. In recent years, however, this scholarship has expanded greatly. The significant increase in the number of law professors, the growth of clinical legal education, and, since 1948, the availability and free distribution to all law professors of the Journal of Legal Education are probably all important causes of this development.

The purpose of understanding law, of course, serves the value of understanding. It also may serve the values of play, practical useful-
ness, theoretical significance, and connections to other projects, especially teaching, because this scholarship develops and demonstrates reasons for retaining or abandoning legal doctrines and practices. Accordingly, this category of scholarship requires especially sensitive evaluations by researchers, readers, academic committees, and publishers. Evaluators will have to assess the values that are actually served and to assess whether particular works employ appropriate methods from other disciplines that further our understanding of law and the legal process.

The sensitive evaluation of the scholarship of understanding will not be an easy task, at least for many of us. To evaluate this scholarship, we shall need to become more familiar and comfortable with new and often competing perspectives, styles, and methods within nonlegal disciplines. The costs of this endeavor will include substantial time, frustration, and learning to be cautious rather than bold in our evaluations, use, and performance of scholarship grounded in other disciplines. We shall need, that is, to put aside certain lawyerly images of ourselves as quick learners and masters of our domain if we are to make effective sense and use of other disciplines in their connection to the law. Without such careful and sensitive appraisal, the evaluation of the new scholarship of understanding is likely to result merely in personal opinion and fiat with little redeeming social value.

The sixth purpose of legal scholarship concerns the critique of legal doctrine and practice. From a perspective outside the framework of legal doctrine, the scholar in this field strives to understand some legal subject and then argue for a better way of doing things. The legal realists instituted this approach to legal scholarship. Its contempo-

68. See B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51-58, 65-73 (1921) (describing the "method of history" in judicial decisionmaking, which attempts to understand and apply legal rules in the light of their historical origins, and the "method of sociology," which attempts to extend or restrict legal rules in the light of public policy and the standards of right conduct); see also J.H. PLUMB, THE DEATH OF THE PAST 106 (1970) ("The historian's purpose, therefore, is to deepen understanding about men and society, not merely for its own sake, but in the hope that a more profound knowledge, a more profound awareness will help to mould human attitudes and human actions. Knowledge and understanding should not end in negation, but in action.")

69. Cf. Nelson, supra note 5, at 477-491 (calling for new and explicit standards of criticism for modern legal history scholarship in view of the different types of legal history and conflicting tastes and ideologies of reviewers).


Primary forms include the extensive normative work in economic analysis of law,\textsuperscript{73} the analysis of doctrine and practices from varying perspectives in moral philosophy,\textsuperscript{74} and the attempts of both critical legal studies and feminist scholars to argue that the legal system should be changed fundamentally to promote egalitarian and more contextual perspectives about social justice.\textsuperscript{75} Like the purpose of understanding, this purpose of critique can serve any or all of the ultimate values of legal scholarship. The modern scholarship of critique also requires sensitive and flexible evaluations by researchers and readers that assess whether appropriate methods are being used and whether ultimate values are or can be achieved by the work in question.

In sum, there are six somewhat complex and overlapping purposes of legal scholarship. Four of these are traditional among law professors, lawyers, and law students, but these types of scholarship are developing a new complexity in terms of the values they serve, their subcategories, and methods. Two purposes, understanding and critique, have obtained a new prominence as they have been developed by the various schools and movements of modern legal scholarship. If all this scholarship is to be read, interpreted, pursued, and evaluated with a maximum degree of fairness and effectiveness, the readers and evaluators of contemporary legal scholarship must become more flexible and more explicit in their evaluation processes.

**DIVERSE METHODS**

When one considers the specific methods that scholars employ to achieve their purposes, the new pluralism in legal scholarship becomes even more obvious and perhaps more confusing. In each category of scholarship there is considerable evidence of new tensions and complexities in and between the different methods employed by contemporary scholars. While some tension and complexity in methods have always been present,\textsuperscript{76} the pluralistic situation today seems confusing and disturbing to a profession that has placed great weight on the concept of authority and on conventional methods of inquiry. My reason for noting the current welter of scholarly methods is not to damn


\textsuperscript{76} See, e.g., K. Llewellyn, supra note 34, at 55–57, 67–76 (describing the uncertainty and tension in the conventional analysis and use of legal precedents).
them, however, but to praise them and to argue for a more careful evaluation of contemporary legal scholarship.

Legal analysis and synthesis have always contained a certain tension and conflict between two basic methods of interpretation. One method places primary reliance on the express doctrinal statements of legislatures and courts. The other method relies more heavily on the "relevant facts" of cases, the concept of statutory purposes, and conventional rules of inquiry that purport to determine standards that explain or justify legislative and judicial decisions. Today, however, two factors heighten this tension and complexity. First, most scholars now realize that there is usually a range of possible standards available to courts for interpreting and applying statutes and precedents to new situations. The conventional methods of the common law tended to limit the interpretation of doctrinal materials to the narrowest possible standard that explained or justified a single decision (legal analysis) or line of decisions (legal synthesis). But the jurisprudential revolution of the Warren Court, the modern academic's search of social contexts for attractive legal standards, and our increasing interest in arguing from precedent not only to establish certainty and fair notice, which invites narrow interpretation, but also to serve the egalitarian value of treating like cases alike, which invites to use of broad analogies and principles, now force writers of doctrinal scholarship to consider a wide range of potential standards in the analysis and synthesis of legal doctrine.

A second factor that heightens tension and complexity is the wholesale importing of "nonlegal" methods into legal analysis and synthesis. This phenomenon results from the contemporary interest in integrating legal doctrine and social context. Thus, to read and write the

77. See id.; Kornhauser & Sager, Unpacking the Court, 96 YALE L.J. 82, 103-04 n. 29 (1986).
78. See, e.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY 14-45, 81-130 (1977) (describing the general standards of legal principles and policies that supplement more specific legal rules in legal interpretation, argument, and the justification of judicial decisions).
79. See K. LLEWELLYN, supra note 34, at 49-51.
81. See Ackerman, supra note 58; Posner, supra note 14.
82. See R. DWORKIN, supra note 78, at 81-130.
modern scholarship of analysis and synthesis in an effective fashion, both writers and readers of these basic categories of legal scholarship often need to be equipped or ready to deal with economics,\textsuperscript{83} other social sciences,\textsuperscript{84} literary or Biblical interpretation,\textsuperscript{85} and historical interpretation.\textsuperscript{86} Of course, importing foreign methods into the traditional categories of legal analysis and synthesis can be dismissed as mere "academic stuff," but this dismissal is inconsistent with our professional traditions of flexibility, and comprehensiveness, and our willingness to learn anything that will be necessary or helpful.

As a result of these social and methodological changes, the scholarship of legal analysis and synthesis now ranges from the basic reporting of judicial decisions to more complex and less precise forms of legal interpretation. In effect, these changes move analysis and synthesis away from their routine, conventional, and easily replicated methods of inquiry towards pluralistic modes of inquiry and interpretation. In this view, these forms of scholarship may no longer deserve the scientific rubrics of "analysis" and "synthesis." The new kinds of analysis and synthesis, when considered together with the more exotic forms of scholarship of understanding and critique, may indeed reflect a fundamental turn away from the notion or concept of a "legal science." The new concept to which modern scholarship may be turning is the more attractive and more powerful idea of "law as interpretation," or in other words, a conception of the law that constructs the best interpretations of legal materials within the variegated and changing contexts of new conditions, new situations, and new social values.\textsuperscript{87}

The scholarship of doctrinal resolution is also exhibiting pluralistic methods. Traditionally, legal scholars resolved controverted or open doctrinal issues by employing two basic methods: the synthesis of precedents and a sort of seat-of-the-pants policy analysis of the issue in


\textsuperscript{84} See, e.g., Law, Private Governance and Continuing Relationships, 1985 Wis. L. Rev. 461 (describing social science approaches to contracting and contract law).

\textsuperscript{85} See Garet, Comparative Normative Hermeneutics: Scripture, Literature, Constitution, 58 S. CAL. L. REV. 35 (1985); Law and Literature, 60 TEX. L. REV. 373 (1982). For a good example of such interpretation, see Burt, Constitutional Law and the Teaching of the Parables, 93 YALE L.J. 455 (1984).

\textsuperscript{86} See Nelson, History and Neutrality in Constitutional Adjudication, 72 VA. L. REV. 1237, 1241-49 (1986) (describing different models of historical analysis that are relevant to constitutional law).

\textsuperscript{87} See R. DWORKIN, LAW'S EMPIRE (1986); Ackerman, supra note 58; Dworkin, Law's Ambitions for Itself, 71 VA. L. REV. 173 (1985); Dworkin, Law as Interpretation, 60 TEX. L. REV. 527 (1982).
question. Today, the same factors that complicate legal analysis and synthesis, as well as the more diverse and more systematic attempts to analyze legal policy in the scholarship of understanding and critique, have vastly increased the methods that scholars use to resolve doctrinal issues. For example, suppose one needs to interpret the fundamental purposes of a statute to help resolve contemporary doctrinal issues. The investigator may turn to economic analysis, the broader sociological consequences of doctrine, an historical account of the statutes and their interpretations, or to principles of moral and legal philosophy.

This choice may depend upon the ultimate values that an investigator hopes to serve by the doctrinal resolution. Without explicit consideration of the possible relationships among values, purposes, and methods, however, this scholarship is likely to suffer in terms of its writing, its interpretation, its evaluation, and ultimately its value, because neither the writer nor readers will understand why particular methods were followed.

The scholarship of teaching materials probably has been least influenced by the new approaches and methods to legal inquiry. Traditionally, the authors of casebooks emphasized either the exposition of legal doctrine or a presentation of cases and materials that challenged readers and analysts to develop their skills in critical reading, analysis, and synthesis. This work and the exposition of doctrine in hornbooks and less formal student guides involved the traditional methods of legal analysis, synthesis, and (to a lesser extent) doctrinal resolution. Most contemporary casebooks and other teaching materials follow these basic patterns, although there is some evidence of change. Today, a few casebooks and hornbooks attempt to integrate the study of doctrine and social context by employing methods of economic analysis, history, or moral philosophy. In addition, the law professor's definition of teaching materials may now include other kinds of

88. See Kelman, supra note 57, at 434–35; Posner, supra note 32, at 1114–16.
texts from disciplines such as economics, political science, and history. These developments could portend a new complexity and expansion in the nature of teaching materials that follows the developments apparent in other doctrinal scholarship.

Two points are worth observing about the obvious diversity of methods in the modern scholarship of understanding and critique. This scholarship, fortunately or unfortunately, borrows its methods from other intellectual disciplines and thus inherits the contemporary conflicts and diversity of methods in these disciplines. For example, the economic analysis of antitrust doctrine may depend upon structural theories of the Harvard school, the neo-classical price theory of the Chicago school, or the more dynamic analysis of contemporary economists who emphasize the detailed study of organizational behavior, transaction costs, and experience curves. Similarly, the historical study of legal doctrine may emphasize either "descriptive history" or one of several kinds of "contextual history." There are, I believe, no simple or exclusive answers to the choice of appropriate methods in either of these fields, or in other interdisciplinary scholarship such as feminist jurisprudence or critical legal studies. The choice of methods should fit the particular subject, values, and purposes that the investigator wants to pursue, but beyond this little may be said. Once again, however, the need for flexible, explicit, and particularistic evaluations of contemporary scholarship should be evident.

A second point about the scholarship of understanding and critique is perhaps more obvious, but still deserves emphasis. This scholarship already influences the purposes and methods of more traditional legal scholarship. Significantly, this influence is likely to expand rather than contract as our current generation of somewhat restless law professors looks around for new fields to conquer after tenure. This is a time in one's career when new trends in legal scholarship may appear particularly attractive, at least to those who are interested in


93. See Rowe, supra note 83.

94. See Nelson, supra note 86, at 1241-49.

95. Cf. Geertz, Blurred Genres: The Refiguration of Social Thought, in Local Knowledge: Further Essays in Interpretive Anthropology 19 (1983) (social behavior can often be understood only by reference to multiple perspectives, and social scientists today are constantly borrowing concepts and methods from other intellectual disciplines on an as-needed basis, notwithstanding their lack of formal training in these other disciplines).
trying to do seminal or outstanding scholarship. In view of these influences, all evaluators of legal writing, from casual or occasional readers of practice-oriented scholarship, to writers of practical scholarship, why even to law deans and academic recruitment committees, should take the new kinds of theoretical scholarship seriously and evaluate their influence at its source. This will not be easy in view of the plurality of styles and methods in the new scholarship, but this is likely to be the only effective and fair way to understand and critique the current legal scholarship of understanding and critique.

SHIFTING PERSPECTIVES IN EVALUATION

A final important factor in the evaluation of scholarship concerns the different and often shifting perspectives that writers and readers bring to writing, reading, and evaluation. This factor is reflected in the traditional concern among composition teachers about writing for specific audiences, and in the concept of modern literary and legal theorists that readers inevitably write their own texts as they read. In this section, I shall delineate these shifting perspectives and their implications for researchers, readers, administrators, and editors of contemporary law reviews. The basic points are that these different and shifting perspectives are legitimate or understandable aspects of legal scholarship, that they play an important if unrecognized role in the writing and reading of much scholarship, and that an effective evaluation process requires attention to these perspectives as well as to the diverse values, purposes, and methods of legal scholarship.

Legal scholars typically pass through two or more distinct career stages that influence their scholarship. Many start as members of law review staffs. In general, this scholarship is informed by law school training and employs the traditional or minimum forms and methods of analysis, synthesis, and doctrinal resolution. Subsequently, some legal scholars write while practicing law full-time. This scholarship

96. On the apparent restlessness of the current generation of American law professors, see Auerbach, supra note 66, at 67-72; Kissam, supra note 3, at 269-71.
98. See, e.g., Barthes, Writing Reading, in THE RUSTLE OF LANGUAGE 29 (R. Howard trans. 1986); S. Fish, Is THERE A TEXT IN THIS CLASS? (1980); Levinson, Law as Literature. 60 TEX. L. REV. 373 (1982).
concentrates on the four traditional purposes of doctrinal scholarship, including preparation of teaching materials of the expository kind. This scholarship, like most student writing, is likely to employ the traditional methods of legal analysis, synthesis, and policy analysis, but the scholarship of practitioners is more likely to emphasize the rich factual contexts of practice and the synthesis of complex legal authorities as a major component or purpose of the writing. Of course, the scholarship of practitioners raises the possibility of special pleading by writers who are advocates for clients' positions. Nonetheless, even special pleading, if done with originality and quality, deserves a place in our rather open universe of legal publications.

Many scholars also write within the two distinct stages of academic careers: pre-tenure and post-tenure. A writer's law review experience and usually brief practice experience, often as a judicial clerk and frequently as an associate in a corporate law firm, heavily influences most pre-tenure writing. This writing tends to be quite specialized, in part as a matter of prior training and experience and in part as a matter of writing with some originality to obtain a favorable tenure decision. Understandably, most pre-tenure writing employs the traditional purposes and methods of doctrinal scholarship. While this may limit the originality and importance of this work, the use of traditional purposes and methods is most likely to satisfy conventional and implicit notions about the quality, importance, and practical values of legal scholarship. Most pre-tenure writers, then, may be well served by following these conventional practices in order to construct the beginnings of their careers.

More complex choices and dilemmas face the scholar after a favorable tenure decision. In the post-tenure setting, scholars can in principle obtain time and other resources to pursue new subjects, new methods, and the more innovative purposes of legal scholarship. Of course, this approach to post-tenure scholarship may result in substantial deviation from the standard purposes, methods, and patterns of scholarship by law review members, practitioners, and pre-tenure scholars, and the risks of this approach may deter many putative


100. See Ackerman, supra note 58, at 1147-48.

101. On the backgrounds of American law professors at the time they enter teaching, see Fossum, Law Professors: A Profile of the Teaching Branch of the Profession, 1980 AM. B. FOUND. RES. J. 501.

102. See Kissam, supra note 3, at 275-76.
scholars. In any event, four distinct patterns of scholarship can be observed in the work of contemporary post-tenure scholars.

The work of "traditional scholars" continues to develop the perspective of law review and pre-tenure writing by employing the traditional methods of legal inquiry to carry out doctrinal analysis, synthesis, and resolution. A second pattern represents the work of "teaching scholars," whose publications tend to be closely related to or even part of their teaching of doctrine and skills to law students and practitioners. A third pattern is the work of a group we might call "practitioner scholars." The publications of these university-based scholars are often informed by research carried out under consulting contracts and they are designed to serve the immediate practical needs of the legal profession. The scholarship of this group, unlike that of the previous groups, often focuses on matters outside appellate courts and tends to feature rich understandings of practical professional contexts. The fourth pattern lies in the work of a group we might call "contextual scholars." These researchers emphasize the newer modes of doctrinal analysis, synthesis, and resolution as well as the purposes and methods of understanding and critique.

In my pluralistic view, each of these patterns of legal scholarship is understandable and legitimate. The more important point, however, is this: in each of these patterns, if the work is to be of high quality, significant originality, and substantial importance or influence, the scholar, in most cases, will need to break away from the more conventional approaches and methods exhibited by the earlier stages or perspectives of legal scholarship. The influential teaching scholar will need to discover new and effective ways to explain doctrine or challenge students to learn by their own critical reading and thinking. The influential practitioner scholar will need to enrich the analysis of practical subjects with the factual contexts and innovative methods of synthesis and policy argument that are crucial to the effective practice of law. The influential contextual scholar must master the methods and knowledge of other disciplines, perhaps several disciplines. Finally, even the traditional scholar will need to extend the use of conventional methods from the typically narrow and specialized subjects of earlier work to the broader canvasses of books or treatises that consider legal doctrine from a doctrinal point of view.

103. See supra note 30 and accompanying text.
104. See supra text accompanying note 99.
105. See supra text accompanying notes 83-96.
106. My reasons for doubting the possibilities for much important or influential doctrinal scholarship of the traditional kind lie with two basic developments: The completion of the
This breakaway, for most of us, will require time and the capability to master new systems of knowledge. These may include knowledge of more effective teaching and communication techniques, the tacit knowledge of outstanding practitioners, or simply the knowledge and methods of other academic disciplines. Attempts at break away will also involve substantial risks, because the time devoted to acquire these new kinds of knowledge may never result in the expected payoffs. Importantly, this break away process may be constrained by the formalist paradigm of traditional classroom work and scholarship. The young post-tenure scholar's work under this paradigm will have earned the scholar high law school grades, a measure of economic security, and at least some professional status. This paradigm, which worked so well, may thus limit the scholar's vision about the richer possibilities that might accrue from pursuit of more innovative patterns in contemporary legal scholarship. Perhaps this breakaway, then, can only be obtained by doing something out of the ordinary, such as practicing law full time or studying another discipline. If this is so, the best practical moment for this extraordinary something to take place may be immediately after a favorable tenure decision. At this time, the effect of the formalist paradigm on the young post-tenure scholar may be relatively weak for two reasons. The paradigm will not yet have been practiced and perfected over a long period of time, and the new post-tenure scholar may possibly be in a reflective state of mind about the directions of his or her future scholarship.

Distinct patterns are also evident in the reading of legal scholarship. These too should be kept in mind as we engage in writing and evaluating fundamental treatise work on legal doctrine in the first third of the twentieth century, see Auerbach, supra note 66, at 66–67; Schlegel, supra note 51, at 107, and the essentially contextual nature of the most important legal developments in contemporary American jurisprudence. See B. ACKERMAN, THE RECONSTRUCTION OF AMERICAN LAW (1984) (arguing that modern lawyers, including scholars, need to master economics and moral philosophy); Posner, supra note 14 (arguing that other academic disciplines are necessary for significant legal scholarship).

107. See Kissam, supra note 3, at 290–93 (describing the formalist paradigm of contemporary classroom work and doctrinal scholarship as a limiting factor on law school methods); Posner, supra note 32, at 1113–16, 1121–23 (suggesting that the paradigm of traditional doctrinal scholarship explains the resistance of many doctrinal scholars to new forms of nondoctrinal scholarship); Schlegel, Langdell's Legacy Or, The Case of the Empty Envelope (Book Review), 36 STAN. L. REV. 1517, 1532–33 (1984) (suggesting that contemporary law school formalism may be a product of the historical search by law professors for a professional identity and, more fundamentally, of the deep cultural attachment of most Americans to a rule-oriented notion of law). On the nature of scientific paradigms, or major scientific achievements, which are accepted as the models of inquiry in scientific research communities for periods of time, and which promote both efficiency in research and a certain blind resistance to new research ideas, see T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

108. See Kissam, supra note 3, at 311–12.
ing legal scholarship. One pattern is the common practice of instru-
ment reading in which we read to acquire knowledge directly
without further reflection or thought.109 A second pattern might be
called reflective reading. In this process, one reads scholarly texts to
obtain background information and ideas that may stimulate or
inspire some project by causing the reader to reflect on implications
of the text and to draw connections, of analogy, of attitude, or of method,
between the text and the reader's own projects.110 This sort of reading
may be the most likely to attract casual or occasional readers to the
new kinds of legal scholarship that involve doctrinal resolution, under-
standing, and critique. A third pattern of reading may be called criti-
cal reading.111 In this process, one applies some sort of external
standard to evaluate a text. These critical standards will vary from
context to context and can range from simply victory for one side in a
legal dispute, to the vindication of a reader's own theories or position
on some legal matter, to the standards of good, important, and out-
standing scholarship applied in formal academic evaluations, to the
complex triage process and committee judgments implicated in law
review decisions to accept or reject articles for publication.112

These different patterns of reading are relevant to the evaluation of
legal scholarship in several ways. First, both the writers and evalu-
ators of legal scholarship should be clear about the type of reading or
audience for which a work of scholarship is written. Scholarship writ-
ten primarily for instrumental reading should emphasize extreme clar-
ity of organization and style. Scholarship written for a reflective
audience, however, may benefit from more elegant and specialized
styles. These styles attempt to realize the values of economy, insight,
and suggestiveness by employing the concepts and vocabulary of a
legal specialty, for example, tax or bankruptcy law, or relevant disci-

109. See Grinols, supra note 20 (contrasting instrumental with critical reading).
110. See R. BARTHES, supra note 98, at 29 ("Has it never happened, as you were reading a
book, that you kept stopping as you read, not because you weren't interested, but because you
were: because of a flow of ideas, stimuli, associations? In a word, haven't you ever happened to
read while looking up from your book?") (author's emphasis); see also C. DUFFY, THE MILITARY
LIFE OF FREDERICK THE GREAT 300 (1986) (reporting the view of Frederick the Great that the
principles of warfare were to be acquired in part "from a continuous evaluation of one's own
experiences, and the officer who failed to make this effort would end his days like the pack mule
who followed Prince Eugene on his campaigns, and remained just as ignorant as when he set
out"); cf. D. SCHON, THE REFLECTIVE PRACTITIONER (1983) (arguing that the best professional
practitioners develop their practice in good part by continually reflecting on the uncertainties,
complexity, and value conflicts that confront them in their practice situations).
111. See Grinols, supra note 20.
112. On the committee decisionmaking process of contemporary law reviews, see Cramton,
supra note 1, at 8–9.
The Evaluation of Legal Scholarship

Disciplines like finance economics or critical social theory. This scholarship may be less accessible to the general reader, but its specialized style may be necessary or helpful to achieve the values of connectedness, understanding, and influence with a particular audience of scholars or practitioners. Finally, scholarship written primarily for a critical audience should presumably engage all the competing arguments and evidence that a particular critical audience will deem relevant. Some scholarship, however, may try to reach many audiences, and this frequently can produce adverse consequences. For example, the typical ornate, lengthy, and heavily-footnoted law review article may be the consequence of too many writers and editors trying to serve too many audiences by means of a single instrument. This heavily-criticized but common style of writing appears to be another unfortunate effect of our traditional implicit evaluation process.

Second, readers who are not involved in the formal evaluation of legal scholarship should also keep the three patterns of reading in mind. This perspective might allow many readers to serve their own purposes more efficiently, as they consciously shift back and forth between instrumental, reflective, and critical readings. Furthermore, in the informal evaluation of others’ writing, readers who can shift consciously between reflective and critical reading may provide especially helpful assistance to both legal writers and potential writers. The writing process involves two rather distinct stages, one of “creation” and one of “critical revision.” Readers can often provide writers with invaluable feedback if they offer “creative feedback” and “critical feedback” at the appropriate stages of writing.113 Reflective reading appears to be closely related to the creative thinking and writing process. Critical reading clearly is necessary to the process of critical revision. Thus, these different modes of reading, if employed at appropriate times, may promote good writing by generating more useful commentary and feedback on drafts of scholarly papers, and on other sorts of legal writing as well.114

Third, those engaged in critical reading will be more effective evaluators if they specify the external standards used in their critical reading. I do not claim that this will be an easy task, but it is a necessary one if our evaluation process is to respect the pluralism in contemporary legal scholarship. Critical readers will bring prejudgments or

113. See P. ELBOW, supra note 19, at 6–175; Elbow, Teaching Thinking by Teaching Writing, CHANGE, Sept. 1983, at 37.
114. See P. ELBOW, supra note 19, at 240–54; cf. Kissam, supra note 20, at 168–73 (discussing a two-stage writing process, with different kinds of reading and feedback at the two stages of this process, in law schools, law firms, and legal scholarship).
prejudices to their understanding and evaluating of any text, and this is not only inevitable, but desirable in a pluralistic world.\textsuperscript{115} Nonetheless, to be most effective, critical readers must respect the values, purposes, methods, and perspectives in scholarly work that are different from their own. Critical readers should strive to integrate or reconcile these different approaches or perspectives with their own. Without this kind of flexible and sensitive attention to the differences between one's prejudices and the values of others, the critical reading of contemporary legal scholarship surely becomes something of an ineffectual if not mindless muddle.\textsuperscript{116}

The analysis in this essay also supports some specific recommendations for law school administrators and law review editors about the nature of their evaluation processes. First, administrators, administrative committees concerned with scholarship, external evaluators, and law review editors should be flexible in their evaluations and take explicit account of the different values, purposes, methods, and perspectives involved in both contemporary scholarship and their evaluation processes. Second, law school administrators who wish to promote influential or other valuable scholarship by their faculty should encourage post-tenure "breakaways" from the formalist paradigm of traditional legal inquiry.\textsuperscript{117} The possible means for doing this include post-tenure leaves for the full-time practice of law or academic study, post-tenure "scholarship moratoriums," and post-tenure relief from teaching responsibilities. These different arrangements could give potential teaching scholars, practitioner scholars, and contextual scholars the time and other resources to follow individual practice plans or courses of study in appropriate nonlegal disciplines and subjects that would enrich their future scholarship. Law school administrators also might develop incentives to encourage joint teaching between younger and more experienced faculty members that could produce not only more interesting teaching, but also a richer scholarship.\textsuperscript{118}

Third, the growing divergence between the perspectives, purposes, and methods of many contemporary scholars and the perspectives and training of most law review editors appears to lie at the heart of the

\begin{itemize}
\item \textsuperscript{115} See H.G. Gadamer, supra note 59, at 235–74.
\item \textsuperscript{116} Cf. Nelson, supra note 5, at 490–91 (describing his view of an appropriate but limited role for a reviewer's aesthetic and ideological preferences in the evaluation of legal history scholarship).
\item \textsuperscript{117} See supra text accompanying notes 103–08.
\item \textsuperscript{118} Cf. Kissam, supra note 3, at 310–12 (describing these and other possible methods for encouraging a more contextual approach to law teaching and legal scholarship).
\end{itemize}
current criticisms of student-edited law reviews. These criticisms commonly propose to replace or reorganize these reviews, or to supplement them, with new faculty-edited law reviews. Nevertheless, the pluralism in contemporary legal scholarship and the implications of this pluralism for the evaluation of scholarship suggest an important argument for retaining student-edited law reviews. In a pluralistic world, where each academic professional is often captured by his or her single paradigm of inquiry, be this the formalist paradigm, economic analysis, or critical legal studies, the retention of student editors as the ultimate arbiters of legal publication could have a significant advantage. Especially as law school training changes, student editors may be less captive of any single paradigm of inquiry than more experienced scholars. Furthermore, student editors can cope with the new pluralism in scholarship by expanding their informal networks for advisory peer review of submitted articles by faculty members at the review's own school and university. Although these informal networks may offend our desires for procedural openness, objectivity in evaluation, and the values of meritocracy, these networks have always existed, and their expansion, which could include the use of faculty from the rest of the university, should provide useful and informed advice to the ultimate arbiters of law journal publication.

Another complaint about modern law reviews concerns their growing bureaucracy and government by committee, with the delays and common denominator decision making that this implies. One pluralistic answer to this problem would be to rotate the responsibility for different issues among editors, thus insuring an increased measure of student pluralism in the selection of articles. The use of practitioners and faculty members who serve as guest editors for specific issues could also promote scholarly pluralism in the publication policies of individual law reviews. A third approach might develop advisory

119. See, e.g., Cramton, supra note 1; Posner, supra note 14. For an early version of this criticism of law reviews, see Nussbaum, Some Remarks About the Position of Student-Editors of the Law Review, 7 J. LEGAL EDUC. 381, 381 (1955).

120. Cf. Carrington, The Dangers of the Graduate School Model, 36 J. LEGAL EDUC. 11 (1986) (arguing that student edited law reviews may be necessary to promote scholarship for professional audiences).

121. See, e.g., Kissam, supra note 3; Morgan, supra note 92; The Place of Economics in Legal Education, 33 J. LEGAL EDUC. 183 (1983).

122. See Kester, Faculty Participation in the Student-Edited Law Review, 36 J. LEGAL EDUC. 14 (1986).

123. See Cramton, supra note 1, at 8–9.

boards of practitioners or selected faculty members to help the student editors at law reviews solicit and screen articles that would serve both pluralism and the diverse interests of a review's readers and audiences.

CONCLUDING THOUGHTS: EXPLAINING THE LAG

Contemporary legal scholarship has become pluralistic in its values, purposes, methods, and perspectives. The evaluation of this scholarship should become equally pluralistic, whether done by individuals contemplating a scholarly project, the readers of legal scholarship, or evaluators committed to some formal institutional task. In view of the nature of contemporary scholarship, only a very flexible and self-conscious evaluation would take explicit account of the different values, purposes, methods, and perspectives involved in a work of legal scholarship. This kind of evaluation would also apply the standards of originality, quality, importance, and outstanding scholarship in a more explicit fashion.

The promotion of a pluralistic evaluation process might be advanced if we could understand why our evaluations have lagged behind the emergence of the new pluralism in legal scholarship. I see three basic reasons that might explain the continuing hold of implicit assumptions about the values, purposes, and methods of legal scholarship despite the new pluralism.

The first reason is a set of psychological and social factors that influence those who adhere to traditional forms of doctrinal scholarship. The work of these scholars, in both the classroom and doctrinal writings, concentrates on the careful, comprehensive, and precise analysis of relatively abstract doctrinal standards found in the legal forms of cases, statutes, administrative rulings, and legislative histories. This work engenders strong emotional attachment to the formalist paradigm of legal inquiry and to an ideology of neutral and objective law which requires a thorough analysis of legal forms. The formalist paradigm and ideology of objectivity, then, may cause many traditional scholars to dismiss without examination the more adventurous and pluralistic kinds of scholarship in today's academic world.125

125. See Jones, Some Current Trends in Legal Research, 15 J. LEGAL EDUC. 121, 133–38 (1962); Kissam supra note 3, at 290–93; Posner, supra note 32, at 1121–23; cf. supra note 107 and accompanying text (describing a formalist paradigm of law school methods that limits the ability of law professors to break away from their customary habits and engage successfully in nondoctrinal scholarship).
cantly, this paradigm and this ideology, because of their emphasis on semi-abstract doctrine as a necessary condition of scholarly quality, can preclude the effective and fair consideration of rougher, more practical kinds of problem solving and scholarship just as easily as they can disadvantage the academic scholarship of understanding and critique. Traditionalist readers and evaluators of legal scholarship may thus be as dismissive of new kinds of teaching and practitioner scholarship as they are of contextual scholarship, even though the new teaching and practitioner scholarship may be especially well-designed to serve traditional professional values.

A second reason for the lag of evaluation behind scholarship is a psychological and social factor that influences the evaluation of scholarship by revolutionaries. Revolutionary efforts of particular kinds, say the economic analysis of law, critical legal studies, or feminist jurisprudence, may require a certain sustaining faith or arrogance that is as dismissive of other kinds of scholarship as traditionalists are dismissive of the new forms. Perhaps time, as well as a degree of success for these revolutionary efforts, will encourage both our revolutionaries and our traditional evaluators to appreciate the pluralistic avenues in contemporary legal scholarship.

A third reason for the lag in evaluation behind scholarship is a more philosophical one, although this factor, too, may exist at both conscious and subconscious levels. Richard Bernstein recently described a "Cartesian anxiety" about the nature of knowledge that plagues Western intellectuals. This anxiety concerns the perceived need of intellectuals, since the time of Descartes, to ascertain or secure foundational principles that establish a criterion for certain knowledge or truth in any intellectual discipline. Only foundational principles, many believe, can save us from the one apparent alternative: the abyss of relativism, uncertainty, and ultimately nihilism. Foundational theories include scientific theories of empirical verification and legal theories that locate the foundational principles of legal knowledge in the positive acts of government tribunals or in the conventional meth-

126. Cf. M. DIILAS, RISE AND FALL 6 (Eng. trans. 1985) ("We had embarked on that course characteristic of every revolution: inspired fervor directing a reckoning of accounts. The more exalted the fervor, the more merciless the reckoning.").

127. See Posner, supra note 62 (on the relative success of economic analysis of law); Tushnet, Critical Legal Studies: An Introduction to its Origins and Underpinnings, 36 J. LEGAL EDUC. 505, 515–16 (1986) (on the apparent institutionalization of the Critical Legal Studies movement in law schools, at least as a matter of participation in symposia and workshops and possibly as a matter of tokenism in faculty recruitment policies as well).


129. See id. at 16–19.
The new pluralism in legal scholarship, especially the contextual purposes and methods, in effect attacks the previously accepted foundational principles of legal knowledge. The new pluralism may thus threaten not only our traditional methods of inquiry, which emphasize the legal forms, but also our belief in a distinct "legal expertise" based on a distinct specialized knowledge. If there are no foundational principles for legal knowledge, as the new scholarship suggests, how can there be a distinct legal expertise that is isolated or separate from the knowledge of other occupations?

Professor Bernstein suggests a route for escaping from the dilemma of Cartesian anxiety. His approach may be attractive to many lawyers and legal scholars if we could somehow relax our strong attachments to the paradigm of formalist legal inquiry, the ideology of neutral and objective law, and the related concept of an exclusive legal expertise. Bernstein proposes that we move "beyond objectivism and relativism" in matters of knowledge, and that intellectual work develop and maintain a pluralistic and dialogic search for pragmatic and contingent truths, be these truths of social behavior, social theory, or the interpretation of texts.131

Unlike objectivism, Bernstein’s pluralistic approach accepts the reasonableness or validity of reasoning from different paradigms of inquiry that contain varying premises and methods. Unlike relativism, which considers the adoption of any paradigm and its specific judgments to be merely a matter of taste, of politics, or of power, this pluralistic inquiry or dialogue remains open to several kinds of truths that can be established by the interplay of competing paradigms or models of intellectual inquiry.132 In some cases, the different paradigms may converge to support a single best answer to a problem at a particular time.133 In other cases, even though one cannot measure the specific answers supported by different paradigms against a single criterion of truth, we can compare the attractiveness of these different answers and choose one by argument and reflection as the best answer to a problem at a particular time.134 In yet other cases, the dialogue of pluralism

131. See R.J. Bernstein, Beyond Objectivism and Relativism, supra note 6, at 19–20.
132. See id. at 20–49.
133. Cf. M. Perry, supra note 80, at 109 (contending that "right answers" in constitutional interpretation and law frequently represent "a point at which a variety of philosophical and religious systems of moral thought and belief converge") (emphasis in original).
134. R.J. Bernstein, Beyond Objectivism and Relativism, supra note 6, at 52–93. 171–231.
may not generate a best solution at a particular time, but the presence of competing paradigms of inquiry may still improve our understanding of the paradigms and their different solutions to problems. Of course, this pluralistic interplay may also undermine perceived truths and theories and produce the unsettling experience of new patterns of thought, scholarship, and practice. Pluralism promises instability as well as stability.

Some recent works in legal philosophy and constitutional theory, which emphasize the nature of adjudication, methods of legal argument, and theories of interpretation, appear to be predicated on pluralistic inquiry, or in other words, on a dialogical inquiry which is aimed ultimately at the judicial construction of the best available answers to specific issues. We do not need to accept these particular theories to appreciate the implications of Professor Bernstein’s argument for the reading, writing, and evaluation of contemporary scholarship. This scholarship is based on several competing paradigms of inquiry which lie at the heart of our current unease and fragmentation about the nature and values of contemporary scholarship. To make the best of our pluralistic world, we should be attentive to the pragmatic and contingent truths that are available if we are willing to consider pluralism openly. To do this, we shall need to read, listen, imagine, converse, and write about what these answers might be. We shall also need to respect competing views in the sense that we remain willing to listen and change our views in light of persuasive arguments. We cannot afford exclusive attachments to the more comfortable unitary paradigms that may suit our personal or immediate political interests. Law is politics, but legal scholarship should be more than politics, should it not?

135. See P. BOBBITT, CONSTITUTIONAL FATE (1982) (describing six alternative and sometimes competing methods of constitutional argument); R. DWORKIN, supra note 87 (analyzing three competing conceptions of legal interpretation); W.F. MURPHY, J.E. FLEMING, & W.F. HARRIS, II, AMERICAN CONSTITUTIONAL INTERPRETATION (1986); M. PERRY, supra note 80, at 91–162; Nelson, supra note 86.

136. Cf. H.G. GADAMER, supra note 59, at 235–341 (describing the hermeneutical experience, or the interpretation of texts, as a complex dialogue between readers, texts, and previous interpretive traditions); Lehman, How to Interpret a Difficult Statute. 1979 WIS. L. REV. 489, 492–501 (describing the 16th century English jurist Edmund Plowden’s equitable method of statutory interpretation, which involves a passive method of conversing with, and listening for answers from, an imaginary lawmaker). But cf. Rotunda, supra note 4, at 6 (asserting that law professors achieve their academic prominence on the basis of what they write rather than what they read).