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Legal Scholarship as a Vocation

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David Luban

Law professors occupy a twin role as scholars and (most of them, at any rate) as lawyers. Deborah Rhode has pointed out, in her contribution to this symposium, that the lawyer role of the professor carries with it some frequently overlooked obligations, specifically the obligation to perform pro bono service. I agree with her, and have ventured similar arguments myself. Here I will address the more purely theoretical side of the legal scholar's vocation. The text I will take for my sermon is the famous speech on the scholar's role that Max Weber delivered to a student audience eighty years ago in Munich, under the title "Science as a Vocation." Weber's topic was not just the natural sciences. Wissenschaft, the German word for science, has a broader meaning than the natural sciences: it refers to systematic scholarly inquiry, regardless of the field. Weber's principal theme was the same as I take mine to be, the "inward calling for science."

He began, however, by describing the external conditions of the university career—the prospects facing young scholars, the pressures that material conditions exert on scholarly pursuits, and the obstacles that scholars must overcome. I will do the same, except that the story of legal scholarship today is not a story about obstacles so much as unexpected and no doubt undeserved luxuries.

The legal academy is subsidized, directly and indirectly, by the private bar. Directly, of course, through alumni contributions; indirectly, through the hefty legal salaries that make it rational for students to go $100,000 in debt to pursue a law degree. All that money makes law schools extremely comfortable places for scholars to work. Competition from law firms boosts the salaries of law teachers, even those like me who cannot practice law. As a result, legal scholars earn twice as much as our colleagues in the liberal arts, without (let's not beat around the bush) being any smarter or better educated or harder working than they are. We are provided with talented research assistants, unlimited photocopying budgets, offices that we don't have to share, journals that are eager to publish our stuff (without page limitations), and tenure-and-promotion requirements less exacting than those in the other liberal arts.

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1. Faculty Pro Bono and the Question of Identity, 49 J. Legal Educ. 58 (1999).
3. Id. at 134.

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professors have become television personalities, talking heads, public intellectuals. When they write books they get agents and advances, and that pretty much says it.

The attractions of law schools as places to work have not gone unnoticed by academics in other fields, many of whom now seek law school appointments. Of course, for almost thirty years—ever since the academic job market dried up—Ph.D.s have made career switches to law. Many of these lawyers with doctorates never really had the stomach for law practice and migrated to law teaching, where they often imported ideas and theories from their native disciplines into legal scholarship—which, in part, the emergence of the many “law-and” movements in the 1970s and 1980s.

Academic dropouts from other disciplines still enter the law professoriat. Today, however, we are just as likely to find young scholars who pursued the J.D. and the Ph.D. concurrently, who aimed for law school appointments at the beginning of their careers, and who could if they wished choose attractive careers in first-rate nonlegal academic departments. We also find distinguished older teachers from other disciplines who want very much to move to law schools. It isn’t only the money that attracts them, or the glamour (which inevitably seems to accompany money). There is also a genuine intellectual love of legal ideas and the study of legal institutions. But don’t forget the money and the glamour. F. Scott Fitzgerald once cautioned that you should never marry for money—instead, go where the money is and then marry for love. I hope I am not being too cynical in supposing that some of today’s interdisciplinary law teachers came where the money is and then married for love. I actually don’t think that matters: the legal academy is a better, more rigorous, more interesting place because of them.

The result is a law school that begins to resemble a miniature university—minus the physical sciences—rather than a single university faculty. In this miniature university we find philosophers and economists and literary critics and scholars of cultural studies and women’s studies. We find historians and sociologists and psychologists; we find anthropologists and theologians. I have read a fine article on Gödel’s Theorem and the law written by a Ph.D. mathematician who now teaches in a law school. My own faculty boasts an M.D., a Th.D., and a dozen Ph.D.s in nine different subjects. That is not an unusually high percentage of non-J.D. doctorates for a national law school; perhaps the only unusual thing about it is that only one is in economics. Some of these Ph.D.s have abandoned their ancestral discipline, but most continue to practice it in the context of legal problems.

Of course, most law teachers are and remain J.D.s with no side specialty. But the assumption, at least in the ambitious research-oriented law schools, is that everyone needs some understanding of the principal side disciplines that have permeated legal scholarship. Everyone needs to know what equilibria and agency costs are, what Rawls and Nozick disagree about, what Kammemann and Tversky have to say about cognitive biases, and why selfish genes and inclusive fitness might explain the limits of altruism. At the very least, everyone
needs to know that it’s infra dig to look blank when your colleagues start
talking about the Ultimatum Game or feminist epistemology.

What are the consequences of this metamorphosis of the law school into a
mini-university? One consequence, I think, is the much-discussed gulf be­
tween the academy and the practicing bench and bar. The fact is that in the
nonlegal academic disciplines, scholarship is written unabashedly for schol­
ars, not for outsiders, and the subject matter of scholarship is problems raised
in other scholarship. Probably this was always true of legal scholarship as well;
but it is surely and more obviously true now.

Unlike some, I don’t see this as a cause for either lament or celebration.
The late philosopher W. V. O. Quine pictured all our beliefs as an enormous
interconnected web. At the periphery of the web lies the world, and the outer
surface of the web is the sense perceptions that connect us with the world. Our
more theoretical beliefs are more deeply buried, connected with the outer
surface through multiple layers of inference and abstraction. When you
examine one of these interior beliefs, you will find that it attaches *directly* only
to its neighbors—other beliefs that are abstract and highly theoretical. That
might lead you to conclude that it has nothing to do with reality. But you
would be mistaken, for if you followed the network outward, you would come
to realize that even the most recondite element in the web is connected,
however indirectly, to the world. It only looks ethereal and impractical.

I take it to be a defining fact of Wissenschaft that the more professionalized
it becomes, the further into the web of belief it burrows. Some scholarly
problems have no direct importance at all. What makes them important is that
they are consequences of a theory that is important, and if you test them and
find them wanting, the theory has been tested and found wanting. Remember
that Einstein’s theory of relativity was tested by measuring a minuscule dis­
placement in the observed position of a star during an eclipse. No one was
interested in the position of the star for its own sake, only for the sake of the
theory that its measurement tested. Exactly the same thing can be true in the
inexact sciences and the humanities. Necessarily, then, a lot of good scholar­
ship may have no intrinsic interest to anyone but the specialist. And my point
is that law schools today are, unapologetically, homes to specialists.

Law schools continue to think of themselves as homes to generalists,
however. Archaically, they do not divide into departments, and everyone still
indulges in the fiction that they are fit to understand and judge the work of all
their colleagues. I suspect that what is at work is the same arrogance that
makes trial lawyers, who deal with expert witnesses and technical issues, think
that they can master any area of art or science to whatever level they need in
the space of a few months. Whatever its cause, the fiction of mutual compre­
hension is good for law school collegiality. Yet in the larger university it would
be very odd to think that a specialist in econometrics could tell good
Shakespeare scholarship from so-so Shakespeare scholarship.

Two consequences flow from this tension between the law school’s general­
ist pretensions and its increasingly specialist character. One is that those who
write specialized work for law reviews can never assume that their readers are
familiar with the current state of the debates they are joining. They can’t start
in medias res; instead, every article must begin with lengthy stage setting, sometimes thirty or forty pages of it, so that a First Amendment scholar can read an article on the economics of bankruptcy and have a chance of understanding it. It isn’t like that in other disciplines. To move to the opposite extreme from law, if you open a mathematics journal, you will find an introduction that sounds like this:

An elliptic curve over $\mathbb{Q}$ is said to be modular if it has a finite covering by a modular curve of the form $X_\Delta(N)$. Any such elliptic curve has the property that its Hasse-Weil zeta function has an analytic continuation and satisfies a functional equation of the standard type.

I’m quoting the first two sentences of Andrew Wiles’s celebrated proof of Fermat’s Last Theorem.¹ This sort of thing just will not do in a law journal, where you cannot assume that your reader knows anything at all about your topic; and the result is a scholarly culture in which every wheel must be reinvented and every advance must be grown from seed. If these articles were being written for the bench and the bar, that would be more understandable. But they really aren’t, and the result is wasted time and wasted trees.

A more important consequence of the tension between scholarly specialization and the generalist self-image of the law school mini-university is this: the notorious contempt that some academics feel for other disciplines—say, the economist’s suspicion that the literary theorist is an intellectual fraud coupled with the literary theorist’s suspicion that the economist is a narrow, technocratic apologist for capitalism—gets harder to bottle up. In the larger university, the economist and the literary theorist can simply avoid each other, but in the law school they judge each other’s tenure. If they share the illusion that both are studying the same object—“the law”—then along with contempt we might expect to find ideological hostility.

In most law schools, however, we find something different, namely an unspoken agreement to suspend disbelief in each other’s discipline and establish a modus vivendi—a way of getting along.² Thank heaven for the modus vivendi: the alternative would be religious war. But the agreement to suspend disbelief often means that scholars from different fields don’t apply standards to their colleagues’ work. They fear, perhaps rightly, that if they did they would find it all abominable. That allows slipshod work to get through the faculty workshop (or, for that matter, the tenure process) without being improved or sent back to the drawing board. The result is scholarship that is not as good as it could be, scholarship that makes a lesser contribution than it could, that sometimes makes no contribution at all or a negative contribution. These are the costs of comity.

So much for the material conditions of legal scholarship. At this point I would like to turn to one of Max Weber’s most fundamental ideas, one that

5. For an ingenious discussion of the academic modus vivendi, see David K. Lewis, Academic Appointments: Why Ignore the Advantage of Being Right in Morality, Responsibility, and the University, ed. Steven M. Kahn, 291 (Philadelphia, 1990).
drives the argument of "Science as a Vocation." This is the fact/value distinction, which Weber insisted on to distinguish the realms of science and politics. Science cannot set final ends; setting ends is the province of politics, ultimately of pure decision and will. Science provides at most means to those ends, because science studies only facts. "Science today," Weber wrote, is a "vocation" organized in special disciplines in the service of self-clarification and knowledge of interrelated facts. It is not the gift of grace of seers and prophets dispensing sacred values and revelations, nor does it partake of the contemplation of sages and philosophers about the meaning of the universe.6

Now I think it is fair to say that in the eight decades since Weber, the fact/value distinction has come in for some very rough handling. There has been pressure on each of its terms from the other. Many people now insist that facts are value laden. Indeed, it has become an article of faith in at least part of the university that facts are socially constructed, hence drenched with values through and through. On the other side, people argue that values can be read off from facts of human nature, or political economy, or evolutionary biology. So facts are permeated by values, and vice versa. Furthermore, many scholars suspect the motives of anyone who advocates a strict fact/value distinction: they think that the distinction is a rhetorical device to cloak political preferences in neutral, objective language.

Within the legal academy, it seems to me that the fact/value distinction receives a particularly frosty reception, because in addition to the reasons I've just alluded to, legal scholarship has always had a mission to make normative recommendations for improving the law, and as a result abjuring the realm of value seems like abandoning the whole point of the endeavor.

I appreciate the force of many of the criticisms the fact/value distinction has attracted. But for Weber there is a moral point to the fact/value distinction, and I think it is a sound moral point that legal scholars ignore at their peril.

Let me begin with the obvious: if you deny the fact/value distinction, you may wind up ignoring or falsifying facts because you don’t like them. The temptation to ignore inconvenient facts is great in any discipline, not just law, particularly when fame or money is at stake, but also whenever a new theory or method is clawing its way to dominance.7

In legal scholarship, however, the temptation to use facts selectively to support favored conclusions is especially great. The reason is that using facts selectively to support favored conclusions is what advocates do for a living—to paraphrase J. L. Austin, it is not their occupational disease but their occupation. Not only are legal academics used to adversarial advocacy, their training and experience do not incline them to seeing anything improper about it. There is nothing improper about it on the standard view of an advocate’s professional responsibility, which forbids lies but permits half-truths and all

7. Donald P. Green and Ian Shapiro have argued that rational choice theory is an example; see Pathologies of Rational Choice Theory: A Critique of Applications in Political Science (New Haven, 1994).
nonfrivolous arguments, and requires advocates to try to win. Furthermore, legal scholars who look around at their colleagues in other disciplines—particularly the natural sciences—see the same fierce competitiveness that they were used to in their days as litigators. (Consider the mathematician who said that he would rather that no one proved a theorem than that someone else proved it.) Why not conclude that in the adversarial game of Wissenschaft the rules of engagement are the same as they are in civil litigation?

The answer is that in advocacy it can be proper to keep information out of the forum or to spin facts. In scholarship it is not. I am not suggesting that legal scholars don’t realize this. Of course they do. But their instincts may not necessarily correspond with what they know intellectually, and I have read law review articles in the hundreds that read suspiciously like briefs for the author’s conclusion. To cite just one example: I once read a sixty-page law review article by a respected legal economist calling for the abolition of punitive damages in safety and environmental suits because they do no good and are “out of control.” The article was chockfull of data, but it never once mentioned that punitive damages are awarded in only two to four percent of verdicts and account for very little of the total cost of tort awards. Even if the author thinks that these data are misleading and that, despite them, punitive damages are out of control, he owes it to his readers to alert them to basic well-documented evidence running contrary to his conclusions. Then he can make his argument that the evidence is misleading.

Matters become worse when legal scholars take partisan private money to support their research and don’t disclose this fact. A few years ago, a law professor defended the practice of nondisclosure in the Journal of Legal Education. It’s better if scholars don’t disclose their corporate funding, he argues, because if they did people would discount their arguments because of the funding source, rather than examining them on the merits. Disclosure would thereby encourage intellectual sloth on the part of readers. This is a nice try, but the argument is too clever by half. It supposes that readers of legal scholarship are experts, fully equipped to spot logical and factual errors when they occur. In fact, most readers will not or cannot verify factual misstatements, let alone spot facts that have been omitted. Such readers should properly be placed on guard to the possibility that the research is in part a brief for the funder’s position, so that they are duly suspicious that facts may have been bent to support preconceived conclusions.

For Max Weber, the fact/value distinction does not mean merely that scholars must be scrupulous in their use of facts. It has another, more unusual moral point, one that pervades “Science as a Vocation.” The essay is an extraordinarily passionate one; as Karl Jaspers describes it, it is “tough, implacable, and moving.” For Weber, the scholar is a special breed of person—

someone who believes “that the fate of his soul depends upon whether or not he makes the correct conjecture at this passage of this manuscript.” He adds: “Without this strange intoxication, . . . you have no calling for science and should do something else.”

For Weber, the true scholar practices an almost unfathomable self-denial. “In the field of science,” he writes, “only he who is devoted solely to the work at hand has ‘personality.’” Science won’t make you a better human being. It won’t reveal reality to you, or guide you to nature, or to God, or to the meaning of the world, or even to happiness. Worse than that, as a scholar you toil in the vineyards knowing that whatever you accomplish will be superseded in a few years. For Weber the fact/value distinction was not just a principle of epistemology, or even a principle of intellectual honesty—it was a kind of astringent designed to extinguish the ego in the name of knowledge.

Weber was no fool. He knew that academics are no more interested in extinguishing their egos than anyone else. Indeed, in another essay he wrote that vanity is the occupational disease of the academic. What he meant with his moral strictures was that even the arrogant, strutting Herr Professor Doktor must set all of that aside when he turns to the work. Even Herr Professor Doktor must be, in a strange way, a kind of ascetic.

Legal scholars are not lazy. They work long and arduous hours. But, for the reasons I discussed earlier, they are comfortable, and Weberian asceticism does not come naturally to people who are comfortable. The legal profession prizes facility more than many other disciplines. Ideas are supposed to come readily, writing is supposed to come fluently, public speaking is supposed to come naturally, argument is supposed to come quickly. When Weber writes, “Ideas occur to us when they please, not when it pleases us,” he says something that strikes me as foreign to the world of legal scholarship. It is foreign as well to the world of agents and TV appearances and telephone calls from reporters. In Weber’s ethics, all the glitterabilia of academic celebrity is a distraction, or even a diabolical temptation.

I am not confident that he is right about all of this. But there’s no denying that Weber’s message appeals to me powerfully. It reminds me that an academic should never be too comfortable. At the same time, it’s a bitter and strange ethic, perhaps too strange. In the letter I quoted earlier, Karl Jaspers reminisces about an afternoon he spent with Weber, discussing “Science as a Vocation.” I leave it to the reader to ponder.

Max Weber, Thoma (a jurist), and I sat talking together one Sunday afternoon in the garden of the lovely house on the Ziegelhäuser-Landstrasse. Weber’s talk, which had caused a great stir at the time, was of course the main topic of conversation. . . .

I said something to this effect: You say nothing about the meaning of scholarship. If it is no more than what you say it is, then why do you bother

12. Id. at 137.
with it? I spoke about Kant’s “ideas” and said that every branch of science and scholarship acquires a meaning that goes beyond scholarship only by virtue of an idea. Max Weber knew next to nothing about Kantian ideas and did not respond. Finally, I said, turning to Thoma: “He doesn’t know himself what meaning scholarship has and why he engages in it.” Max Weber winced visibly: “Well, if you insist: to see what one can endure, but it is better not to talk of such things.”