Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education

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Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education

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Academic freedom in law schools? One might question the necessity of assembling so much talent to address an issue so little fretted over or even raised. To toiling lawyers harassed by noisome clients, pinched revenues, and haughty authorities, law professors lead lives of wide liberty, researching topics of their own choice and expressing their own views, not merely making arguments tailored to secure client interests. To academic colleagues pinched by the penury of the humanities or in thrall to the labyrinthine bureaucracy of the sciences, law professors feast on wealth and autonomy, their minor mental exertions (tenured professors who have not written books!) reaping scholarly eminence and, even more unforgivable, the attention of government and media. Why would legal academics, who enjoy the very best of the richest academic culture in the world, worry about academic freedom?

We law professors should begin by acknowledging the clover in which we cavort. Indeed, we do not fear external threats to our freedom to publish, speak, or teach as we see fit. Neither government directives nor market pressures uncomfortably constrain our autonomy. No McCarthy suspiciously searches for heresies; no judges, legislators, or bar officials demand painful reform. Even in a deep economic recession thousands of bright college graduates clamor to study under us. Nor need we even interest grants boards in our research projects: to write we need only chair, word processor, and library.

If legal scholars fear neither censorship nor constraint from beyond the academy, they may worry about confusion of purpose and method within, an erosion of tacit consensus that might promote insipid scholarship or permit bumbling, even well-intentioned collegial censorship. If there is peril today, it is that of prosperity; if threat, it is internal. Reflecting on academic freedom in legal education may enrich our understanding of these nagging concerns. Academic freedom signifies the university’s insistence that each professor’s

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work be evaluated only by appropriate scholarly standards, so that valuable knowledge may be distinguished from prejudice and interest. To examine the character of academic freedom in the law schools, we must consider the disciplinary structures and normative foundations of these interesting institutions.

My topic for this essay is the role of institutional political neutrality in fostering a vital academic freedom within a law school. It is necessary to explain what this inquiry embraces and why it is a useful entry into our concerns. Traditionally, the political neutrality of the university has been seen as the foundation for the academic freedom of the professoriate. But the media today vibrate with complaints about "political correctness" in legal education, meaning an administrative sponsorship of certain social ideals in a manner that restricts criticism or debate.¹ Also, political contention over the shape of legal education has been seen as corrupting faculty hiring and promotion. Given these concerns, it is helpful to consider the nature of the political neutrality that supports academic freedom and consider the extent to which it appropriately applies to legal education today. I take up these difficult questions not with the hope of escaping criticism, but in the hope that forthright debate about the purposes and procedures of legal education will genuinely illuminate our position and options.

This essay does not discuss constitutional or statutory law, except where such discussion explains underlying concerns. Legal regulation lies lightly upon law schools; legal rights need rarely be invoked.² We need more to stimulate conversation among members of our own legal academic community, where rhetorical recourse should be to shared norms and circumstances, rather than to amassed authorities for unnecessary legal defenses.

To explain my focus requires brief summary of traditional understandings about academic freedom that arose in the development of social science departments in America and have been fostered by the American Association of University Professors. This I undertake in Part I of the essay, which develops into a comparison of the structures and beliefs of strictly academic disciplines and those of professional schools. I hope to explain why academic freedom in practice flourishes in law schools but always seems to be under internal threat. This part concludes with the suggestion that legal education needs a more concrete understanding of academic freedom adapted to its own circumstances. At this point it becomes possible to suggest the significance and limits of political neutrality in legal education.

Part II seeks to build on the prior discussion to examine more carefully the obligations that professionalism imposes on legal education. To some extent,

acceptance of professional duties for legal education may ameliorate confusion about the intellectual context, but it can also foment divisive friction. At this point I reconsider the only real scholarly examination of academic freedom in legal education that has penetrated the journals in the last decade: the debate surrounding Paul Carrington’s strictures on “nihilism.”

Part III turns to the integration of clinical legal education into the moral fabric of academic freedom. Here I hope to harvest some fruit from prior discussion about professional duties for legal education. I take up criticisms of a “leftist bias” in client selection at law school clinics leveled by the Washington Legal Foundation, a self-consciously conservative legal endowment. This discussion may help explain how retention of some workable norm of political neutrality remains essential to the success of legal education.

I. Legal Scholarship and Political Neutrality

Academic freedom provides both functional and aspirational norms for the university. It reflects both the premises of transnational scholarship and the peculiar mores and anxieties of American life. Academic freedom always remains enmeshed in the changing fortunes of higher education in the larger society, yet its meaning cannot be exhausted in contingency and pragmatism. It maintains our connection with an ideal academy where disinterested scholars pursue living knowledge with rigor and grace.

In an earlier essay, I described the development of academic freedom as an effective norm during the emergence of modern research universities from the 1870s through the Progressive period. I argued that professors obtained freedom from nonprofessional evaluation of scholarship and teaching on the basis of a broad consensus about the “scientific” and apolitical basis of knowledge and the replacement of religion by a more materialistic conception of social welfare as the ideological foundation for political support of higher education. I also argued that professorial proselytizing established academic freedom as an organizational norm protecting scholarship and teaching from threats within institutions—largely without positive legal protection. Academic freedom protected by the First Amendment emerged (in the 1950s and 1960s) to protect the traditional institutional autonomy of universities from government control, when government sought to turn higher education to more narrow, short-term political and economic benefits.

Some brief allusion to these theses about the character of academic freedom generally is required to highlight the special position of law schools. For our purposes, only two points need to be emphasized. First, the ideological appeal of academic freedom as a norm distinct to the university has depended on a view of the scholar as employing in good faith methodologies sanctioned by his discipline to separate knowledge from prejudice; interference by lay


trustees or attorneys general threatens the suppression of knowledge by ignorant orthodoxy. Second, claims for institutional autonomy invoke the moral appeal of intellectual training in these disciplines and in the cultural legacies of world civilizations: the university is conceived as a world apart from the cash nexus, where young adults can mature into rounded citizens of poise and independent judgment while maintaining their "character" despite the seductions of market society. That university life often fails to resemble these ideals has not destroyed their power to shape expectations and moderate behavior. So long as people perceive them to express a core of truth and an enduring potential, we shall have academic freedom in its traditional form; should they be abandoned as shams, higher education will change rapidly in directions we cannot predict.

The political neutrality of the university played an integral part in these traditional understandings of academic freedom. It has been thought that an individual scholar's political commitments may obstruct her search for truth, which requires perspective and objectivity. Much worse, since lay trustees formally establish institutional policies, institutional political commitments will reflect the prejudices of ignorant laymen and can only impinge on scholarly peer review. At the same time, these institutional commitments undermine the college's separate mission to foster learning and judgment; they draw the college into the world of interests and mobilization. For those reasons, professors demanded that their institutions hold no political views, so they themselves could freely pursue their inquiries without fear of reprisal.

Again, any academic will recognize how inadequately this vision encompasses all the motives and compromises of our universities. But it may be even more striking how much influence the vision still exercises over the conduct of higher education. For example, the United States distributes billions of dollars to fund university research each year. While the subjects chosen to be investigated properly reflect public priorities, such as control of the HIV virus or improvements in conductivity, the procedures employed by granting agencies, such as the National Institutes of Health and the National Science Foundation, exist to hold politicians' preferences at far remove. Also, these agencies have demanded that researchers adhere to traditional norms of scholarly disinterestedness. To an impressive extent, policies shaping new, expensive, and potentially revolutionary investigations adapt traditional academic values to quite new settings. Even in my law school, the Department of


6. For detailed debate about the significance of institutional autonomy for academic freedom, see Rabban, supra note 3; Byrne, supra note 4, at 311-39.

Education in a Republican administration funded a massive effort to reformulate first-year legal education along lines that encourage more trenchant criticisms of the status quo, yet this point hardly merits mention.

Legal education developed along institutional and ideological lines quite distinct in important aspects from those of more strictly intellectual disciplines. The gist of the difference lies in the role of legal education in equipping students for active professional lives as lawyers. I believe that the connection of university legal education to a powerful, organized profession affects significantly the shape and role of its academic freedom. I wish now to explore the particulars of professional education and suggest how they render problematic the traditional academic ideal of political neutrality. We will see that law professors have relatively weak claims to exclusive criteria for peer review, and that inescapable commitments to the legal profession compromise institutional autonomy. The challenge for legal educators is to articulate a positive norm of academic freedom despite these departures from archetypical structures.

The desirability of university professional instruction in law became apparent long before there was much sense about how law professors should write or teach. Unlike departments of economics, history, or biology, law schools found a home in the university before they had any consensual methodology for identifying knowledge. The establishment of social science departments in the last quarter of the nineteenth century depended crucially on widespread enthusiasm among intellectuals about the application of scientific methods to broad areas of human concern. Although pioneer university legal educators, such as Dean Langdell, adopted the jargon of science to justify the inclusion of law within the university, the engine for inclusion appears to have been the aspirations of the organized bar for a better educated, more elite profession. University legal education was based on the need to qualify for admission to state bars and cemented by the hiring criteria of elite law firms.

In this context, law professors have had to be credible educators rather than pioneering scholars. The first purely academic lawyer, James Barr Ames, appointed in 1873, combined classroom mastery of the case method with

8. Langdell’s best-known aphorism is: “If law be not a science, a university will consult its own dignity in declining to teach it.” Speech (Nov. 5, 1886), reprinted in 3 Law Q. Rev. 123, 124 (1887).

Of course, there have been numerous efforts to refound legal scholarship on properly scientific grounds, culminating, perhaps, in the empirical research of the legal realists. See Laura Kalman, Legal Realism at Yale, 1927-60 (Chapel Hill, 1986). From our vantage, these efforts have a somewhat zany yet pathetic aspect. Scientific aspirations persist in the law and economics movement, of course, but this has undermined the validity of law as a separate discipline. The best-known recent article on empirical research in legal scholarship seeks to explain its absence. Peter H. Schuck, Why Don’t Law Professors Do More Empirical Research? 39 J. Legal Educ. 323 (1989). Contemporary legal scholars often can be characterized as intelligent conduits of the insights of other fields to problems that vex the legal system.

historical essays restricted to distilling common law rules from ancient cases.\textsuperscript{10} Since then most successful law professors have varied the content but not the structure of Ames's achievement, combining classroom magnetism with intelligent scholarship of doubtful value.\textsuperscript{11} Law professors to this day typically do not earn a separate research degree in law, such as a Ph.D., but enter teaching only with the basic professional degree required of all lawyers.

There has always been a discontinuity between the "success" of legal education, whether measured in terms of number or quality of students and faculty or of public esteem, and the rather marginal character of legal scholarship, spanning a twilight landscape between the concerns of intellectuals and those of practicing lawyers. Worse than that, many of our students lack interest in legal scholarship, viewing the study of law as an expedient means to career goals. Our status as gatekeepers to a lucrative and powerful profession condemns us to teach bright students who have little sympathy for scholarly endeavor. Yet their relentless march fills school coffers with that which ensures our affluence and subsidizes an intellectual life of conferences and papers that rarely address the concerns of our patrons.

If one accepts that the production of scholarship has not been the chief function of law schools, what follows for academic freedom? First, we lack essential methodologies around which we can build consensus about what constitutes outstanding legal scholarship. Equally serious and intelligent professors can disagree utterly about the value or thoughtfulness of a book or article; the disagreement can grow bitter because all of legal academia may seem at issue. This can lead to fearsome disputes about hiring, promotion, and tenure, in which opponents doubt each other's good faith about academic freedom. Methodological disputes divide other disciplines, of course, but legal scholars seem less determined to resolve them internally by purely intellectual criteria. In this law schools most closely resemble literature departments, where internal disputes about methodology collateral raise controversy about the claims of professors to privileged expertise in, for example, evaluating novels.\textsuperscript{12} Many nonacademic lawyers doubt that professors understand law better than they do.

Second, the politicization engendered by this lack of a disciplinary core is exacerbated by the subject of our writing. Whatever its methodology, most successful legal scholarship explains how and why current law fails and how it can be improved; clarification and taxonomy, while valued, rarely suffice. The legal scholar must invoke and defend norms of justice or efficiency and apply

\textsuperscript{10} See, e.g., The Disseisin of Chattels, 3 Harv. L. Rev. 23 (1889); The History of Assumpsit, 2 Harv. L. Rev. 1 (1888).

\textsuperscript{11} See Paul D. Carrington, Butterfly Effects: The Possibilities of Law Teaching in a Democracy, 41 Duke L.J. 741, 787-88 (1992). Each law professor cherishes a small list of heroes and heroines who have risen above the average in brilliance of scholarship, inspiration of teaching, or contributions to law reform.

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them to contentious issues of legal and social conflict. Often these norms seem inextricably bound with the writer's scholarly methodology. Debate about the intellectual value of a methodology, such as originalism in constitutional interpretation, cannot be neatly severed from political contention, such as that about the legitimacy of a constitutional right to abortion. Again, other disciplines share this conflation, but the consistent focus of legal scholarship on better laws ensures a unique influx of partisan passion into legal scholarship.

Third, unlike, say, English departments, law schools are rich. Students jam our halls, without ever weighing the value of legal scholarship. Wealth often saves schools from embittering choices: the pie grows, and all views can be accommodated. Moreover, law professors enjoy immensely pleasant professional lives, in which thirty-two weeks of fifteen to twenty hours of teaching, preparation, and grading garner the material support for engaging in esteemed scholarly and public service pursuits. All law professors share an interest in keeping such rewarding institutions afloat; radical reform proposals usually go no further than to give Wall Street-bound graduates guilty consciences. Innumerable legal journals, devoid of peer review, publish every jotting of every professor every year. Discontented professors can shift fairly easily to other legal employment, an option unavailable to sour philosophers. While the intellectual ambiguity of law school makes every appointment or promotion issue a potential civil war, material abundance ensures that bloodshed rarely occurs.

Fourth, law schools enjoy a peculiar institutional autonomy. Viewed from one perspective, they have less autonomy than traditional academic departments, because of the historical partnership with the organized bar. Law schools are accredited by the American Bar Association, whose concerns are professional rather than scholarly; the ABA sets minimum standards for education and prescribes a small part of the curriculum. And state bar examiners exert powerful, albeit indirect, influence on law school curricula. Viewed from a different perspective, however, law schools enjoy unusual autonomy. Because they are net profit centers within most universities, law schools often enjoy relative freedom from central administration control. Law professors can ignore public research needs because they seldom need outside funding for their research. And the accrediting officials and state bar boards take no interest in the substance of legal scholarship. The sum of these influences appears to be that law school instruction must meet some professional criteria but that scholarly agendas can be formed without regard to any substantial external constraint.

But what instruction can we draw from these observations about the practice of academic freedom in law schools? Foundational methodology cannot greatly ease the difficulty for law faculties in making personnel decisions solely on the basis of professional competence, with no improper political bias. Because we often lack a common language for discussion, we may fail to understand or trust each other's motives or procedures. In such a setting, peer review, the institutional bulwark of academic freedom, may not be adequate to channel judgment in appropriate directions. We may not have sufficient confidence to leave ourselves alone with ourselves.
The problem of political neutrality in the law school is not so much a problem of reactionary trustees or left-leaning state legislatures as it is a problem of the faculty's seeking to replicate itself. The battlegrounds are hiring and tenure. The combatants are faculty, though sometimes with crucial interventions by students, alumni, or central administration; deans and committee chairs do not so much constrain faculty choice as function as levers for its exercise. Nearly all participants view themselves as acting in service to truth and decency; very few would acknowledge distinctly political motivations. Though few clear injustices occur, risk abounds.

Despite the absence of organizing or validating methodologies, good legal scholarship of all schools displays intellectual virtues that merit the protection of academic freedom. These virtues manifest the desire to extricate truth from prejudice and constitute the operational means by which discourse within the legal academy may be rendered worthwhile. Any legal scholar must demonstrate knowledge of the primary statutes and judicial decisions applicable to her problem and consider how legal officials might enforce those laws in a particular situation. The careful attribution of authority permits readers to judge how fairly or intelligently the writer has interpreted relevant legal or scholarly sources. Any legal scholar will be expected to treat a chosen subject in depth and to set forth and defend the premises from which she begins, the steps of reasoning, and the scope and consequences of her conclusion. Technical jargon must be suppressed, or be used consistently. Contrary arguments should be answered rather than ridiculed or ignored.

None of these virtues guarantees the "truth" of the writer's analysis or conclusions, but adherence to them facilitates scholarly debate and permits revision in light of additional arguments and perspectives. Participation in these conversations may engender the sense, however difficult to justify philosophically, that careful and open thought is providing a richer, useful, more substantial, and, in a broad sense, "truer" portrait of the problem and its possible "solutions." Because depicting legal problems and devising legal instruments to address them presupposes some irreducible normative orientation, analytic legal closure never is complete.

But the contribution of these virtues of legal scholarship to truthful depiction can be highlighted by comparing them to the devices of advocacy in a professional lawyer's product. An appellate brief, too, depends upon a number of complex normative assumptions that facilitate engagement between appellant and appellee, such as the understanding that an advocate may not fabricate authority to support his position. But the skillful brief writer will suppress complexity in favor of a specious clarity; all authority will be interpreted to support the client's position; the goal is persuasion rather than understanding. Of course, a legal scholar may hope to influence legal outcomes that benefit groups or interests, but to have standing as scholarship her work must contribute to the understanding of those who are indifferent to her groups or interests.

Can legal scholars adhere to a morality of mutual evaluation that will foster academic freedom despite the absence of a central methodology? At a minimum, legal scholars must resist a spiral down into entrenched combat among
competing political factions. When such struggle becomes an end in itself, the virtues that permit intellectual life disappear: reflection, skeptical regard for the views of colleagues, and scrupulous honesty. Such an eruption does not differ in consequence from political persecution from without, except that it may not so assuredly rally professorial solidarity behind the banner of free scholarship.

Law schools must remain politically neutral in this sense, that faculty must not seek to eliminate a method of analysis from institutional discourse because of concern with its political tendency. Each faculty member has a moral duty in personnel decisions, for example, to suppress personal political antipathy when considering the scholarly merits or potential of a candidate. Professors who become concerned that a colleague is not dealing with personnel issues on the merits serve their ideals of free scholarship best by acting upon them, not by descending to counterinsurgency. Clear and persistent efforts to subvert peer review merit institutional sanctions, including loss of tenure, but only through open accusation and fair hearing.

It also seems mistaken to act as if each variation of every school of thought has a right to be heard within every law school. Modern universities thrive on bureaucratic accommodation of intellectual conflict, multiplying positions, departments, buildings. Our properly relativist standards for free speech in the society at large might suggest that academic freedom should shield from adverse judgment all tender shoots of individual expression.

Law schools, indeed, have indulged this attitude to some extent during the expansions of the seventies and eighties, but this growth may not be sustainable. Nor perhaps should it be. Collective judgment remains the distinguishing characteristic of organized scholarship. Has not our lassitude, our lack of intellectual identity, been aggravated by a failure to engage across methodologies, to argue trenchantly—as those responsible for the intellectual life of the law—how we should imagine it? Upon mature consideration, a faculty can conclude that game theory need not be applied to child custody or anthropology to secured transactions. These judgments may be wrong, but acting upon them in good faith and defending them provide focus to the collective exertions of scholars. Such judgments do not offend academic freedom; they

13. I am far less comfortable about the consonance of academic freedom with a law school’s decision to employ only professors who pursue a particular methodology, such as economic analysis. Obviously, if the school anoints the methodology because of its political tendency, such a standard must be condemned emphatically. Where the school establishes the methodology because of a sincere belief that it represents a qualitatively superior understanding of the legal system, the question is more difficult. I support qualitative judgments by the faculty, and the aggregation of such judgments will tend toward reproducing what most faculty value most highly, resulting in different concentrations of scholarly emphasis among schools. But an institutional rule directing employment from only one camp forestalls this evolving and changeable faculty judgment. A faculty cannot effectively debate the value of a methodology when the school employs only those who affirm its worth. Such a rule privileges one method among many that compete, but, as I have stressed, law lacks any consensual criteria by which such a choice can be conclusively justified. Moreover, individual scholars either within or seeking employment at such an institution must experience greater than usual pressure to conform to the prevailing orthodoxy.

No commitment to professional training, such as those examined below, independently justifies the single-method school. Enrolling students are unlikely to appreciate the signifi-
give it vitality.¹⁴

Obviously, I have put us in a dilemma. I have warned against the enhanced
dangers for law professors who judge legal scholarship on political grounds,
and I have insisted on the necessity for judging scholarship and pruning
relatively sickly growths. No methodological orthodoxy can guarantee us
salvation. No new layer of expert administrators can choose for us. We must
make our judgments as best we can. Being aware of the political sirens that
surround us, we must exert our moral intelligence to appraise work solely on
scholarly grounds, by its penetration, comprehensiveness, creativity, and util-
ity. If we exercise poor judgment, our field will decline in intellectual signif-
cance. But if we exercise our judgment in good faith to the best of our ability,
we will have satisfied the demands of academic freedom.¹⁵ For legal scholars,
this may be the normative aspect of living in a “pluralist universe.”

Though living by these principles may be difficult, academic lawyers have
traditions and training that provide surprising strengths for the task. First,
American lawyers are steeped in a legal system that is remarkably heteroge-
neous, in which authority is divided and divided again, and no one worries
very much about how sensibly the pieces fit together. Legal education and
practice remain case-centered; attempts to describe any relation among cases
remain idiosyncratic; formal legal reasoning elicits ridicule; even our statutes
reflect ad hoc political coalitions, eluding codification and mocking canons of
interpretation. American lawyers are accustomed to the incommensurable
and can avoid calling it chaos. Second, the adversary system breeds an accep-
tance of conflict as inevitable, containable, and resolvable only by compro-
mise or fallible judgment. Similarly, lawyers understand that effective advog-
cacy requires brinkmanship with the truth. Third, of all people, lawyers are
least likely to idealize human nature or be shocked by taint; the perjurer may
now speak truth and the paragon humbug. We should recognize that these
paradoxical virtues of legal culture contribute to a hard tolerance and endur-
ing skepticism that nurture our messy academic freedom.

Legal scholarship recalls the mores of rather old-fashioned liberal arts
colleges. Specialization of subject matter or methodology remains far from
complete among most legal scholars. We are expected to navigate through the
universe of legal problems as much by the exercise of individual tact and
judgment as by the expert wielding of universal methodology. Exercises in
special methodology retain a homemade flavor that preserves their accessibil-
ity. A scholar like Richard Posner owes his celebrity in part to the relative

¹⁴. What is often debilitating in our practice is that these judgments are made only over the
backs of live candidates in hiring and promotion decisions. Faculties need to find mecha-
nisms to discuss these issues on the plane of principle rather than as submerged elements in
personnel decisions.

¹⁵. See American Association of University Professors, Some Observations on Ideology, Compe-
tence, and Faculty Selection, Academe, Jan.-Feb. 1986, at 1a.
simplicity of his conceptions, which allow others without formal training to embark upon economic analysis; scholars like Mitchell Polinsky who enjoy advanced training continue to present their work in a form that can be approached by the nonspecialist. Candidates for hiring and promotion who enjoy technical facility in other fields must be voted upon by colleagues who cannot pretend to mastery of the candidates' fields. The absence of special training for legal academics and the resistance to departmentalization within law schools preserve the humane flavor of earlier collegiate education. We should see that this is a strength for our academic community as well as a risk of prejudice.

So far, I have held my focus on the evaluation of junior by senior law professors as the area of legal education where academic freedom is threatened with subversion. I have considered why the risks of political corruption present themselves so forcefully in law schools and why the traditional antidote of methodological competence provides only marginal assistance. I have argued that law professors must become so intellectually cosmopolitan that they can judge new intellectual moves with mature consideration and without recourse to political commitments. Thus, I have reached the modest observation that political neutrality in law school stands less for the type of exclusion of lay judgment emphasized in traditional accounts of academic freedom than for an aspiration toward intellectual sophistication and equipoise on behalf of the faculty members.

One might object that my account portrays legal education as some pleasant tea party that has value only for its participants, or that I have slighted the dangers from law school administrators. Both these issues require more consideration, which may fruitfully be given in a separate section examining the relationship between the type of political neutrality I have prescribed for the faculty and the social mission of law schools.

II. Institutional Goals and Political Neutrality

To this point, we have considered primarily the nature of political neutrality as it pertains to the academic freedom obligation of professors themselves. I hope I have justified this priority to you by stressing the exceptional autonomy of law faculty from outside control and the vulnerability to political passion inherent in the multiplicity of criteria for what constitutes good legal scholarship. But now I want to consider institutional influences that may assume political dimensions. Perhaps we have underestimated the capacity for institutional priorities to constrain the autonomy of faculty; perhaps that capacity could be exercised beneficially to enhance the social responsibility of the law professor. These issues are seasonable given the widespread anxiety about "political correctness" that lingers in our law schools, and I hope to address that problem after saying something about weightier concerns.

The only recent, published debate about academic freedom in legal education concerned Paul D. Carrington's "Of Law and the River."16 Most of you will
recall that Carrington concluded an essay about the empowerment of aspiring lawyers with the suggestion that "legal nihilists" voluntarily should leave law schools for more strictly academic university departments. This suggestion elicited a storm of protest, particularly from those who read Carrington to be attacking the academic legitimacy of critical legal studies, then still an insurgent movement in legal education.\textsuperscript{17} Surely, the fierce edge of that debate has been blunted by time: CLS has become an established (I almost said establishment) school of jurisprudence, the objections to which have been thoroughly rehearsed. Perhaps I may be permitted to rake among the embers of that debate, because issues were raised there about the peculiar obligations of law schools that seem to me to have continuing significance. In brief, the questions may be phrased as whether law schools must be committed to certain values incident to their role in preparing future lawyers and whether any such commitment would breach the academic freedom obligation to political neutrality.

Carrington argued that professional competence in law requires intellectual courage in the face of uncertainty, which courage cannot flower without the lawyer's believing to some extent that law and legal institutions do restrain the exercise of power. Carrington expressed concern about scholars who maintained that the apparent neutrality of the law merely cozened the poor and the dispossessed into accepting the justice of their suppression: "Teaching cynicism may, and perhaps probably does [sic], result in the learning of the skills of corruption: bribery and intimidation." He urged that nihilists had an ethical obligation to leave law schools for departments that did not have a commitment to effective professional training. He dismissed the inevitable complaints that his approach impinged on academic freedom by arguing that when "the university accepted responsibility for training professionals, it also accepted a duty to constrain teaching that knowingly dispirits students or disables them from doing the work for which they are trained."\textsuperscript{18} It is this last assertion that I find most pregnant and that I will examine closely in a moment.

Much of the response to Carrington's essay disputed his characterization of critical legal scholars, the understood targets of his criticisms. Although somewhat self-serving, these objections seem to me well-taken: Carrington abstracted one strand from a complex web of arguments and based his prediction of corruption on the logical consequences of such a doctrine, without weighing the mass of actual experience that belies his concern.\textsuperscript{19} Perhaps some of you disagree with this assessment, but permit me to pass on to the view of the law school that Carrington posits.


\textsuperscript{18} Carrington, \textit{supra} note 16, at 227.

\textsuperscript{19} These include the moral optimism of much CLS writing, the number of practicing lawyers of the highest ethical standards who have studied with CLS advocates, and the number of unethical lawyers who have not.
In critique, Paul Brest denied any distinction between law schools and other parts of the university, and retorted: "I do not think that principles of academic freedom apply with less breadth or force to professional schools than to other parts of the university."\(^2\) Owen Fiss made a slightly broader argument:

Law professors are not paid to train lawyers, but to study the law and to teach their students what they happen to discover. The law school . . . is an integral part of the university, and by virtue of that membership and all the commitments it entails must be pure in its academic obligations.\(^2\)

In response, Carrington both defended his evaluation of the moral tendency of CLS writings and insisted that law schools "are not pure in their academic obligations," but bear the primary function of training lawyers.\(^2\)

The gripping and difficult issue Carrington raised is whether law schools have assumed a moral commitment to the professional training of lawyers that properly may qualify the meaning of academic freedom. I want to offer some thoughts on this question, which lies at the heart of the concerns that prompted this symposium. We must also evaluate whether any such moral commitment violates the political neutrality that we sought to define in the previous section. This inquiry is not prompted by animus toward any school of legal thinkers but only by reflection on the peculiar structure of legal education. Perhaps it is best to begin by considering the objections offered to Carrington’s suggestion.

Those professors who promptly affirmed the full measure of academic freedom in law schools seemed more concerned to discourage Carrington than to explain their thinking. Several lines of thinking can be abstracted, however. First, one may insist that a law school conform to the prevailing understandings of academic freedom because it is an integral part of the university.\(^2\) This is undoubtedly true to a very large degree both as a normative and as a descriptive proposition. But Carrington took this proposition as his general premise and asked only whether the professional dimension might offer some limit at the margin. Academic freedom cannot have the same application within every school and department, because it is based on a particular model of scholarship understood as scientific inquiry. While a university fine arts program should be conducted on the basis of academic freedom, it has never been obvious how an ethos of a detached search for truth applies to studio instruction in sculpture. One cannot stipulate what the spirit of academic freedom requires in a law school until one has weighed more critically what happens there.

Second, one may assert at this point that legal scholarship and teaching do conform substantially to the scientific model upon which academic freedom is

\(^2\) 35 J. Legal Educ. at 17.
\(^2\) Id. at 26.
\(^2\) Id. at 25.
\(^2\) E.g., id. at 16 (Paul Brest).
based. Professor Fiss argued that legal scholars "seek to discover the truth" and "teach their students what they happen to discover." He draped legal academia with the rhetoric of science. But it is worth considering the extent to which this is true. Can legal scholars determine, as Fiss suggests, whether law exists? Plainly not, in the sense that investigators can be adequately certain from available evidence that the Holocaust occurred or that carbon emissions deplete atmospheric ozone. Lawyers lack a consensual method for answering such questions; some other discipline, perhaps sociology, might be able to answer the question to the satisfaction of its adherents, but would necessarily eliminate from the inquiry most of what lawyers care about in arguing it. Indeed, academic lawyers get far more benefit from arguing what the question means than from progressing toward any solution to the problems that it suckles. Nonetheless, as suggested above, honest and learned debate about the meanings of the existence of law does hold out the promise of an enhanced, more truthful understanding about the nature of the legal system. I will return to this slippery point.

Third, some commentators seem to have grasped the bloody flag of academic freedom less from conviction than from anxiety that maintenance of anything less than the full creed would leave law schools defenseless against political coercion and acrimony. In contrast to the arguments for the sciencelike quality of legal scholarship, this position may underestimate its truth value or fear mutual lack of credibility among legal scholars. Though rarely expressed as such, this view has been widely persuasive. Because mutual tolerance must be secured to permit any valuable scholarship, academic freedom must be embraced regardless of its ambiguous applicability to professional schools. Indeed, from this perspective, its ambiguity is an advantage. Every scholar wishes for a rule of scholarly autonomy that is overinclusive, and the costs of such a rule will be decried only by students or the public.

All these views seem to slight the distinctive features of legal education. Our lecture halls are flooded with bright students not because we are imparting a compelling intellectual tradition or methodology, but because they are avenues toward a professional life where students hope they can combine fortune, engagement, independence, and public service. Faculty offices are filled with those who excelled in law school and concluded that the advantages of professional life are more certainly secured as teachers than as practicing lawyers. The stream of professional students generates the economic means to create a gigantic national legal professoriate from whose intellectual efforts society demands little, for their scholarship is not indispensable to their function. It is childish to forget that law schools can subsist happily on student tuition to a degree impossible in nearly every other subject. The opportunity to argue about whether law exists is more compensation for grading Property blue books than the performance of a social duty. Teaching

24. Id. at 24, 26.

25. This I take to be the rejoinder of Dean Calabresi. Id. at 23-24.

26. I may be quite wrong, but I think that Paul Brest's responses evince this anxiety. Id. at 16-17.
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This position of privilege imposes moral obligations on legal educators. We must equip our students for the intellectually and morally strenuous professional life that lies before them. This, of course, involves the traditional initiation into thinking like a lawyer, but it also requires initiation into organizing ideas about law and the broader society that provide the contexts within which legal rules are forged and applied. Much of this curriculum has come to resemble a kind of applied liberal arts, in which the interplay between legal problems and techniques is considered in relation to persistent inquiries about justice or wealth, with the students encouraged to develop their own capacities to evaluate central questions. An indispensable feature of such education is bringing home to students the inevitability of moral choice in lawyering and some suggestion of the means for choosing. This requires more than sharing with students the gleanings from our personal research; it requires serious and sustained foundational pedagogy, such as Professor Fiss himself no doubt imparts. Effective and inspirational teaching must be taken more seriously in the law school than in other departments, because our privileges can be justified only by our success in preparing our students for professional life.

Law professors also bear obligations to society greater than those of scholars in purer disciplines. We have been given the niche from which to observe the legal system without being beholden to competing interest groups or clients. Surely we should devote effort to public education about the legal system, such as through expert testimony, journalism, or media appearances, to law reform, or to representation of unrepresented persons or viewpoints. Professional ethical obligations attach to academic as well as to practicing lawyers. What responsibility schools should take to encourage or demand pro bono activities (other than scholarship) is a delicate issue which I am not prepared to address today. But it does seem that the adoption of a mandatory pro bono rule for faculty should not be considered to violate the academic freedom of a law professor, although there is a strong argument that a similar requirement imposed on philosophers would violate their rights.

Does the attribution to law professors of professional obligations breach a bar on political neutrality by imposing an ideological context on legal academics? This is not a question to which only one answer is possible. Many will see my suggestions as an abridgement of purely intellectual criteria for faculty appointment, as they are in principle. Some will see any abridgement as necessarily an entering wedge of political ideology, and a few will see my

27. Law professors cannot avoid, of course, conveying normative ideas about the function and role of the lawyer in society, even if unconsciously. See Carrie Menkel-Meadow, Can a Law Teacher Avoid Teaching Legal Ethics? 41 J. Legal Educ. 3 (1991). When unconscious and unexamined, such teaching may convey "moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism, an individualism tending toward atomism, and a faith in reason and democracy tending toward mere credulity and idolatry." Roger C. Cramton, The Ordinary Religion of the Law School Classroom, 29 J. Legal Educ. 247, 262 (1978).
inclinations as forcing faculty to prop up the existing edifice of professional privilege by tepid reformism.

There are two responses to such concerns. First, an obligation to serve or engage does not presuppose any particular ideological tendency to such service, any more than a requirement to write dictates the political tendency of such writing. Similarly, an obligation to teach effectively need not entail a sectarian notion of effectiveness.

Second, a law school does necessarily embody some vague ideological commitments that may be binding on its faculty. Law schools surely affirm that the legal profession and the institutions it dominates ought to serve “the public interest,” that existing laws should be improved, and that individual lawyers ought to be competent and ethical. Although these nostrums may give new meaning to indeterminacy, they nonetheless provide a cultural parameter to legal education. A professor who actively opposed them—who, unlike Carrington’s bogey crits, did in fact argue that the only valid purpose of the legal system was to make lawyers rich, that questioning the perfection of existing laws was blasphemous, or that lawyers should bribe officials whenever it serves their clients’ interests—would be treated like a biologist who asserted that moonbeams give birth to living organisms. Such professors may be condemned as incompetent, but we should concede that their incompetence lies in advancing views that undermine the social purposes law schools exist to serve, perhaps in a manner analogous to a scientist who denies the meaning of testing hypotheses by experiment. Professional schools take on social as well as intellectual responsibilities by assuming the role of training people to practice an existing profession.

An obvious danger here is that the academic freedom of a professor to argue a substantive position may be attacked as unsuitable for a professor in a professional school. This was what respondents feared was the tendency of Carrington’s misplaced attack on critical legal scholars. This would involve a deplorable loss: scholars must always remain free to question in a professionally responsible manner any existing orthodoxy. How can this line be marked to prevent death from friendly fire? Any professional book or article must be absolutely privileged from questioning on the grounds of professional tendencies (rather than quality of the scholarship); this is a line of clarity in aid of

28. This observation suggests a fresh viewpoint on the much debated issue whether academic freedom protects a professor’s speech in the political marketplace, out of a scholarly context, against university recrimination. AAUP statements and rules have protected such speech if uttered in a professionally appropriate manner. William Van Alstyne argued some time ago that while such speech is protected by the general speech norms of the First Amendment, it is not protected by academic freedom because it is unrelated to the professor’s or the school’s mission. The Specific Theory of Academic Freedom and the General Issue of Civil Liberty, in The Concept of Academic Freedom, ed. Edmund L. Pincoffs, 59 (Austin, 1972). Subsequent commentators, including me, have followed this argument.

Yet, if one subscribes to the view that law professors should speak to the general public as a service to society, it may make sense that academic freedom should protect such public utterances. The professor’s speech advances the ethical obligation of the professor and the academic mission of the professional school. Such speech in the role of professor might still be distinguished from overtly political speech by the same person in a nonacademic role.
an indispensable norm. At the same time, a law school may insist that teaching, at least in core classes, equip and empower students for the futures they face. For example, a law school may balance the range of methodological views that first-year students will be exposed in assigned classes. And a law professor who employs racist humor in class or one who condemns as racist every view with which he disagrees hampers effective education. While a school must be concerned with how chastising such a professor burdens legitimate debate, it cannot be that academic freedom itself immunizes either professor from professional censure. Such censure does not in my view serve debased notions of political correctness, but merely takes seriously the school’s obligation to educate its students.

I argued above that law schools today resemble old-fashioned liberal arts colleges. The discussion in this section permits some expansion of the earlier comparison. The old-time college grew from the need to prepare men for a particular profession, the Protestant ministry. Education retained a strong moral content, it was not purely vocational or intellectual, and the faculty, largely without doctorates, preached and lectured to a broader public, providing ethical perspectives on current political controversies, such as slavery and tariffs. Law schools are heirs to aspects of this tradition. We do not train our students to be professional scholars, but to be effective and benign counselors in a fractured society. Our graduates most need an enlargement of analytic and imaginative resources, a confidence with printed and breathing authorities, and a sophisticated apprehension of the complexity of legal affairs that can inform judgment or persuade the ignorant. The faculty have much to say directly to society at large about the relation between current controversies and the persistent norms of a republic of laws. Law schools need not maintain strictly intellectual self-images to qualify as legitimate academic institutions.

III. Clinical Legal Education and Political Neutrality

In this section, I hope to tie together themes raised in earlier sections and at the same time to consider a particular problem: whether choosing clients to be represented by law school clinics implicates the academic freedom or political neutrality of the law school. The focus of my discussion is allegations in a 1990 study by the Washington Legal Foundation that law school clinics

29. That is, a school might withhold sanction from concern about the “chilling effect” on legitimate, though controversial, teaching, but not from concern for a right to wield epithets in class.

30. See J. Peter Byrne, Racial Insults and Free Speech Within the University, 79 Geo. L.J. 399 (1991); see also Mark Tushnet, Political Correctness, the Law, and the Legal Academy, 4 Yale J.L. & Human. 127, 144 (1992).

serve only left-wing "special interest" groups and indoctrinate their students with the ideologies of those groups. After setting out the charges in the report and evaluating their merit, I discuss more generally the relationship among clinical legal education, academic freedom, and professional ethical commitment. Finally, I use the WLF report as a benchmark for evaluating the virtues of university legal scholarship.

The Washington Legal Foundation is a nonprofit public interest law and policy center devoted to the advocacy of conservative causes. WLF surveyed law schools to develop a picture of public interest activities at the schools, primarily clinical activities but also such programs as loan-forgiveness funds and mandatory pro bono work requirements. The WLF report concludes that faculties use law school clinics and other programs to promote liberal special interests, such as "environmental overkill" and "consumers über alles." Not only do clinics serve only liberal causes, but faculties intentionally use them as a means to indoctrinate "young left-wing idealists, who will fight to implement the agenda rejected at the ballot box." WLF specifically charges that an ideologically committed clinical program, among other faults, breaches the law school's political neutrality and "adversely impacts on academic freedom" by deterring students who reject the views advocated by the clinic from benefiting from clinical education.

My brief summary does not capture the breadth or vehemence of the charges the report directs at legal education, which is accused of a "broader practice of politically biased classroom and clinical legal indoctrination." The report frequently employs hysterical rhetoric that vacillates between fear and scorn. Much that WLF condemns as leftist extremism involves only attempts to enforce existing laws. Nonetheless, the report seizes upon a theoretical problem that has long divided law professors: the applicability of traditional concepts of political neutrality and academic freedom to clinical teaching.

34. WLF Report, supra note 32, at 1.
35. Id. at ii.
36. Id. at 20.
37. Id. at 58.
38. For example, Paul Craig Roberts claims, "The absurd legal theories used to justify the criminal indictment of Exxon [for the Valdez oil spill] were largely conceived by environmental groups that have close ties with law school public interest programs." Introduction, in WLF Report, supra note 32, at i, ii. Passing the easy use of guilt by "close ties," one might recall that Exxon was indicted primarily for violations of provisions of the Clean Water Act that date to 1972. See 33 U.S.C. § 1319(c) (1988). The view that corporations can be held criminally liable for the negligent acts of their employees is hardly radical. See Richard A. Posner, Economic Analysis of Law, 4th ed., 421-22 (Boston, 1992). Both the passage of the Act and the indictment of Exxon occurred during Republican administrations.
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Some law schools have resisted inaugurating clinical programs because of concern that they do not fit easily into the more scholarly norms of traditional legal education. Application of the structure sketched earlier in this article may help to clarify real concerns. The lurid colors in which the report paints the political tendencies of clinics may even, paradoxically, simplify our task.

But first it is necessary to trim the allegations down to a plausible compass. WLF’s allegation that clinical education generally pursues partisan political goals is hopelessly untenable and is contradicted by its own survey, which found that most clinics serve the mundane needs of indigent people. WLF also charges that “the activism of the public interest clinics spreads a predisposition against private enterprise to students.” This hilariously misses the mark: at most schools more than three-fourths of new graduates begin work at private law firms and a tiny fraction, almost always less than three percent, go into public interest or poverty law careers. An ABA study in the mid-1980s found that the electives most often chosen by law students fell into the categories of Professional Skills, Taxation, International Law, Commercial Law, and Business and Finance. Indeed, a persistent justification for clinical legal education has been that it provides exposure to the legal needs of the disadvantaged when the dominant, traditional curriculum emphasizes the legal problems of the wealthy and of business.

It is fair to acknowledge that law school clinics do largely represent people and interests that often oppose dominant institutions like business and government. There are several explanations for this tendency that fall short of a conspiracy of fanatical law professors. First, an ABA model student practice rule and many state bar rules restrict students to representing indigents. Although such a rule has the benign purpose of increasing the supply of representation for the indigent, it also protects private lawyers from competition from law school clinics. Second, businesses and government already enjoy excellent professional legal representation; law students in fact cannot compete with experienced lawyers in most cases. Third, clinical education is expensive; accordingly, many clinics begin on seed money donated by foundations or individuals who have a charitable purpose, such as protecting the environment. Can one imagine a law school declining on political grounds a contribution to found a clinic that will advise fledgling businesses?

40. WLF Report, supra note 32, at 12.
41. Id. at 2.
46. The shape of clinical education still bears the stamp of the efforts of the Council on Legal Education for Professional Responsibility, a project of the Ford Foundation. CLEPR provided the funds for the beginnings of many legal clinics, beginning in 1969. Its priority was for “programs of legal services for those most in need and least able to afford them.” CLEPR
But after one has pruned away much of the hyperbole of the WLF report and suggested the real context in which the issues must be considered, the fact remains that there is a tilt to law school clinics. They do represent people and interests that cannot pay private lawyers. The point can be made concrete by examining the dispute about the Western Natural Resources Law Clinic at the University of Oregon School of Law.

The Oregon timber industry long had objected to the role of the clinic in bringing litigation to enforce and expand legal limitations against resource development. The intensity of emotion surrounding lawsuits seeking to prevent logging of old-growth forests increased industry objection, leading the university to establish a committee to determine whether the clinic was properly part of university legal education. The committee's report defended both the appropriateness of an advocacy clinic as part of a politically neutral university and the propriety of the conduct of the clinic. The conflict has unusual interest because both the timber industry's claims and the committee's report focus on the relation between clinical advocacy and institutional neutrality.

Neither the industry's charges, repeated substantially by WLF, nor the committee's report adequately applies appropriate principles. The clinic's critics assert that the clinic violated institutional neutrality both because a law school organization should not take sides on contentious issues and because it should represent the spectrum of environmental viewpoints. The university committee report responds by arguing that the clinic need not be neutral because the university as a whole is, and by denying that the advocacy by the clinic implies any ideological commitments. Although the timber industry's arguments are shallow and self-contradictory, the university's arguments


One might add that many of the early clinical professors came from legal services and other public interest positions. Barnhizer, supra note 51, at 87 & n.3. Whether this is cause or effect of the commitment of clinics to the underrepresented need not be resolved. Professor Barnhizer sees clinical faculty as pushing law schools toward commitments to more substantive and radical notions of justice. Id. at 106-10. Currently, clinical faculty seem more often to present an institutionally conservative influence, insisting on the worth of engagement with and mellioration of existing legal institutions, when many classroom faculty have flown to the higher branches of theory.

47. See Katherine Bishop, Oregon Law Clinic Battles the Timber Industry, N.Y. Times, Aug. 5, 1988, at B5; Kathleen Monje, UO to Probe Pro-Environment Charge Against Law Clinic, The Oregonian, Aug. 10, 1988, at 15.


49. Nor should we be surprised. The timber industry cannot be seen as acting out of concern for educational principles; it understandably wished to disable a formidable weapon frustrating its pursuit of perceived economic self-interest. It employed arguments as part of a pressure campaign upon university officials, the board of education, and the state legislature. The university, at the same time, needed to fend off this pressure in order to preserve overall institutional autonomy and prestige.

50. The timber industry arguments lack any coherent idea about the purposes and powers of a state university. The clinic is criticized sometimes for violating norms appropriate for a state agency and other times for exceeding the mission of a monastic scriptorium.
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seem lamed by its unwillingness to acknowledge that the clinic purposefully serves the interests of citizens who wish to use legal means to protect the environment.

The university sought to avoid addressing the propriety of clinical commitment by emphasizing the practical and ethical circumstances of clinical operation. The clinic selected cases from individuals and groups that requested representation, and business groups had not approached it; cases were chosen for their educational value; and ethical norms required the clinic to represent its clients zealously and to avoid conflicts of interest. All this is true and well-taken. Nonetheless, the incredible implications that the reader is invited to draw are that the clinic’s invariably pro-environment position is an accident occasioned by the fact that the first clients that happened to solicit help were pro-environment and that the faculty and students are indifferent to the political and social implications of their advocacy. Stated baldly, these suggestions ring with the timbre of an aluminum bell. Surely, most of the participants see the clinic as an opportunity to provide free representation to a worthwhile cause that can be represented only by charitable or public support. The clinic must be sustained by the enthusiasm of faculty and students for fighting legally for ecological values.

How can this degree of commitment to representing environmental protection groups be harmonized with academic freedom and institutional neutrality? Some commentators have argued that clinical professors’ choice of cases cannot be challenged because the choice itself is protected by the professor’s academic freedom:

[C]linical teachers are—first and foremost—teachers and should be recognized as such. Selection of individual cases to handle and methods of handling those cases, like the selection of casebooks and classroom teaching approaches, lies at the very heart of the educational function of clinical programs. So long as the decisions made by a clinical teacher reasonably serve that educational function, a judgment that only the law school faculty is capable of making, these decisions should be protected by academic freedom.51

This view slightsthe distinctively valuable character of clinical education and stretches the idea of academic freedom into an indefensible posture.

Of course, clinical professors make a host of educational judgments about the scope and methods of their classes that should be protected as fully as are analogous judgments made by classroom teachers. A clinical professor may choose to bring social security disability cases because they can be started and substantially completed within one semester, they present an appropriate degree of challenge to the student, and the student can represent the claimant at an administrative evidentiary hearing. But managing an environmental protection clinic or a sex discrimination clinic also consistently devotes resources toward changing the world in a particular direction through advocacy. Litigation seeks not so much clarification of the law, although that may be a

51. See Schneider, supra note 39, at 190.
byproduct, as victory. A scholar operates within the world of ideas, even if she hopes that her writing will lead to social change; a clinician directly participates in legal institutions to achieve outcomes desirable for her clients. Acting as she does upon society, a clinician cannot expect society to grant her autonomy on the same grounds it does the theoretician.

The clinical teacher does not seek primarily to expand knowledge but to shape practice into effective and responsible patterns. In the traditional understanding, the scholar's academic freedom in the classroom derives from his pursuit of knowledge through professional conventions; academic freedom has not comfortably embraced strictly pedagogical questions, such as teaching methodology. While the clinical professor's educational judgments about the structure and procedures of her clinical class should enjoy all the uncertain protection afforded the traditional law professor's classroom judgments, the decision about what positions to advocate is another step away from the validating center of scholarly knowledge. The ideological stance of a clinic may involve political commitments that cannot be justified by a strictly intellectual understanding of academic freedom.

Let us concede then, at least for purposes of argument, that the political stance of some law school clinics cannot be defended totally by the many educational goals and constraints of clinical education or by appeal to scholarly norms of academic freedom. But it does not follow that the political tendency of clinical education constitutes a reprehensible failure of political neutrality on the part of the law school. Earlier in the essay, I argued that the law school's role of preparing students for professional life justifies the school's departure from strictly intellectual commitments, such as by insisting that ethical issues always be raised in classroom teaching. The ideological shape of current clinical education seems amply justified by the legal profession's ethical commitment to representation of those who cannot secure paid representation in the marketplace. However far current practice of lawyers or

52. An example clarifies this point. The Oregon Committee Report responded to the timber industry's complaint that students receive one-sided impressions of environmental disputes by emphasizing that students are taught to appreciate the strength of industry arguments in order to prepare fully for litigation. Litigation and the classroom provide dramatically different contexts for discussion of competing ideas. Classroom discussion presupposes that powerful arguments may cause disputants to change their positions. Litigation preparation seeks to understand an opponent's argument in order to prepare the best strategies and tactics to maximize your client's advantage in the contest.

53. This distinction is analogous to the speech-conduct distinction within First Amendment law. See Thomas I. Emerson, The System of Freedom of Expression 79-90 (New York, 1970).

54. Clinical professors, like reflective practitioners, know things about the legal system that may not be perceptible to strict scholars. They may also convey this knowledge effectively to students. Law schools should cherish this knowledge, but professional lore lacks the degree of abstractness and clarity that permits rigorous debate and reformulation.


56. American Bar Association, Model Rules of Professional Conduct, Rule 6.1:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or
explicit disciplinary strictures fall short, there can be no doubt that represen-
tation without regard to wealth constitutes a bedrock of the profession’s view
of its obligations to society. The law school need not be neutral about this
value any more than the English Department need be neutral about the value
of reading poetry.

The law school clinic’s representation of those who cannot secure paid
lawyers substantiates this professional ethical norm in several ways. First, and
perhaps least important, it devotes the school’s own meager resources toward
expansion of representation, ameliorating fractionally the unequal distribu-
tion of representation in society. Second, the school thereby holds up the
value of free representation to the student and to the profession as a valid
commitment. Third, it permits the student to experience the reality of pro
bono representation, demystifying the practice and facilitating the student’s
performance of free representation as part of professional life. This effort
seems to me to be precisely the kind of responsible preparation for practice
that justifies the existence of university professional schools.

Someone might approach a law school faculty with a proposal to donate
funds to establish a clinic to advocate the interests of people with annual
incomes over $10 million, such as by defending spendthrift trusts or lobbying
for a reduction in the capital gains tax. Even if the proposal satisfied all stated
educational qualifications, most of us would reject the proposal with disgust,
even if we personally supported the specific positions the clinic would advo-
cate. The proposal mocks the public service aspirations of the bar, while
reinforcing the imbalance of legal resources devoted to protecting the rich
and established. Such a clinic would not broaden the student lawyer’s sympa-
thies or nurture ethical aspirations above the incentives of the marketplace.

Both opponents and defenders of clinics sometimes conceive of neutrality
as a balance of competing ideologies. The WLF urges that the current liberal
slant of clinics be cured by the institution of conservative clinics. Similarly, the
University of Oregon committee argued that any committed advocacy by the
clinic was offset by other points of view advanced by other committed pro-
grams and individuals within the university, creating a broad “freedom of both
students and professors to be non-neutral within the framework of overall
institutional neutrality.”57 While such political balance may be desirable edu-
cationally and necessary for both the internal and external political life of the
institution, it is different from institutional neutrality. The university is not
primarily a Keynesian manager of the marketplace of ideas. The university
must be neutral toward the speech of its members because the members are
presumed to know more about their subject than university administrators or
regents and to be generating political heat as a byproduct of scholarly light.
Committed advocacy does not partake of the scholarly detachment that insti-

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57. Committee Report, supra note 48, at 11.
tutional neutrality was conceived to protect. Social commitments by professional schools derogate from the premises of institutional autonomy, but can be justified by the obligation of the school to nourish the normative basis of the profession.

The law school's articulation and teaching of professional ideals stands on a different footing from illegitimate commitments by academic departments to rank political preferences. They arise directly from the structure of its educational mission, its anchor in the needs of the legal profession as a whole. These are ethical precepts that lawyers hold as lawyers, that are not controversial within the bar's internal conversations, and that may often have little resonance with the individual's personal political preferences. Moreover, as noted at the end of Part II, although these professional precepts should not be impugned lightly, they are always subject to serious criticism and revision. They are troublesome, but indispensable.

Having emphasized to this degree the domesticity of nonintellectual values within a law school, I wish to conclude by emphasizing the value of the intellectual standards of legal scholarship that pull it away from unbridled political advocacy. The worth of this enterprise can be manifested by noting the deplorable intellectual quality of the WLF report itself. This is not inappropriate, because the report is directed, at least formally, at legal educators and presumes to hold their performance to account. That there are several failings in the report rarely found within the standard discourses of legal scholarship may invite derision, but their nature may suggest the ways that even the weak disciplinary restraints of legal scholarship promote respect for the truth.

It would be tedious to detail the many failings of the WLF report as one might the first draft of a student paper. It repeatedly insults its subjects, it presents freestanding prejudices as conclusions based on survey evidence, it conflates categories, ignores the wider context of the issues it discusses, uses irrelevant evidence, invokes guilt by association, and consistently ignores evidence that contradicts its presuppositions. But the trouble goes much deeper. The report betrays no curiosity about the programs it criticizes; all is confident invocation of unquestioned predilection never exposed to examination. Rather than elucidate a problem, it erects a bogey at which it can sneer. The report does not invite discussion, but seeks to silence disagreement by rhetorical intimidation. Because it assumes that its readers are as mean-spirited as its authors, it makes no attempt to persuade their rational faculties, but rather seeks to excite the passions of those who already share its views by relentlessly belittling others. In short, the authors of the report have no belief in the efficacy of learning or discussion, but view words and numbers as weapons in a relentless struggle among competing interests.

The report is a pure specimen of political speech, against which the virtues of scholarship stand in relief. The conventions of scholarship exist to promote communal discussion of valuable questions, the presentation of evidence and argument in a form that invites response, clarification, and correction. However deep the political commitments of the individual writer, these conventions force disclosure and reconsideration. They bring participants to a more
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rounded understanding of an issue, its provenance and entanglements. This sharing of the relevant evidence and the range of arguments we accept as learning. However imperfect its philosophical foundations, however uncertain its transcendental value, however manipulable its products, abandoning its nurture and homage for the more visceral throb of political speech will deprive us of the hope that reason and reflection can lead us to a legal system and a society more just, efficient, and lovely.

IV. Conclusion

Political neutrality does not require the tower or the veil, but a commitment to honest discussion on the basis of reason and evidence, in which participants assume the risk of changing their minds. This commitment implies a commitment to truth beyond position or interest. Though law professors resist the equation of methodological criteria with the tests of truth, they do adhere to mores of discourse that signal their commitment. The absence of methodological consensus creates risks for prejudice and political persecution; awareness of these risks lessens them.

But our lack of method also frees us to acquaint ourselves with a world of learning. We act as intermediaries between thought and power, interpreting and applying several intellectual traditions to the dilemmas of the legal system and toward the edification of the intelligent and ambitious (but not intellectual). An account of academic freedom for law schools that ignores our professional obligations must become either a platitude or a denial of responsibility. We do not breach necessary political neutrality when we proclaim that lawyers are pests if they do not enhance the justice and well-being of the society that they serve.

Education that prepares people for useful action must be humanistic. Lawyers exercise fine judgment under stress in a world of uncertainty and paradox. We may lament that law is the least scientific of the social sciences or rejoice that we can offer the most humanistic of graduate educations, which joins the general study of social thought to training in the tools by which it can be used. We need to live up to our promise.