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Defining, Measuring, and Judging Scholarly Productivity: Working Toward a Rigorous and Flexible Approach

Larry Catá Backer

The purpose of this essay is to explore, briefly and preliminarily, the possibilities for a realistic working definition of scholarship within a law school. The springboard for that exploration was a series of discussions at my home institution, the law school of Pennsylvania State University. We approached the issue of scholarship in a context in which we perceived the school's core mission to be evolving from one that stressed teaching and service to one embracing scholarship as equally significant. The approach suggested here had its genesis as part of my contribution to that discussion. It is based on the notion that flexibility with respect to the *form* of production within a rigorous and transparent system serves the institution better than the traditional more rigid and narrow approach. A successful approach to defining scholarship within a functioning law school, a school with a history, requires a sensitivity to the past and present as well as to the future. It must be grounded on the separation of considerations of scholarship's goals or purposes from an understanding of scholarship in its own right. I will suggest that a successful approach ought to foster flexibility within rigorously self-defined parameters. These ought to create a space within which people optimize their individual performance without imposing on others rules or modes of production that inhibit the movement toward realistic yet rigorous scholarly goals.

This essay is divided into three sections. The first presents a context in which discussions of scholarship within a law school may occur. The second examines the subtext of such discussion, a subtext dominated by issues of scholarship's purpose or goals. It is not clear to me that we can rid ourselves completely of the goals-and-purpose baggage with which scholarship is burdened. Yet scholarship should be defined as something *other than a fetish,* a

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Many thanks to my colleagues at Penn State for their willingness to honestly discuss these issues. Special thanks to Peter Alexander, Carla Pratt, Bill Keating, Jay Mootz, Beth Farmer, Martin Belsky, Melissa Tatum, and Larry Dessem for sensitive comments on earlier versions of this essay. Emily Atwood ('03) and Stephen Smith ('04) provided superb research assistance.

thing of particular form, and *other than a marker of process,* the objectification of specific goals. The third section sets forth my suggestion—the text as opposed to subtext—for an approach to scholarship, substituting for that traditional term the concept of *meaningful contributions to the scholarly enterprise.* This change reflects my sense that our focus ought to be on the faculty member, as a self-conscious contributor to learning, rather than on the production of a narrowly and rigidly defined object. I conclude with the briefest nod to implementation issues.

Context: How Scholarship Issues Can Arise

Few issues can cause as much pain within a law faculty as that of scholarship. It can provoke a variety of gut reactions and raise a host of fears. Some may see any discussion of scholarship as a disguised personal attack on their productivity, the sort of work they do, or where their work appears. Others view discussions of scholarship with fear and distrust. Discussion may mean the rewriting of expectations for all faculty. For people hired and performing under one model—the your-job-is-primarily-teaching model—any discussion implies a movement away from that model to one in which expectations in areas previously marginal to one's professional function now become more important. Sometimes fear may be justified. A change of standards or models of the job description always evokes the fear that the change will allow some to exact revenge for perceived (or misperceived) wrongs, or to alter the mechanisms for awarding salary or other resources. That is why most discussion of scholarship goes on at the highest level of generality. This is painfully obvious when the issues raised concern the role of faculty scholarship in relation to the teaching and overall mission of a law school, especially where the underlying purpose may be to alter the faculty's collective engagement with scholarship, however defined.

Yet scholarship, or at least the scholarly enterprise, evidently matters very much. Elite institutions have embraced it for years. Scholarship, or a faculty's perceived engagement in scholarship, has become a critical component of a school's reputation among its peers. Those elements of the popular press that evaluate law schools tend to rely heavily on measures of scholarly reputation. For example, in the 2002 *U.S. News and World Report* rankings, the average rating of a law school by academics accounted for a quarter of its overall score.[1] Even if the figures derived by the popular press are questionable, no

1. Although a law school's reputation among its peers constitutes about a quarter of its overall score, reputation among lawyers and judges constitutes another important element of measuring. *U.S.News* explains:

> The rankings of 175 accredited law schools are based on a weighted average of the 12 measures of quality described here. Specialty rankings are based on nomination by legal educators at peer institutions.
>
> **Quality Assessment** (weighted by .40): Measured by two surveys conducted in fall 2001. The dean and three faculty members at each school were asked to rate schools from 'marginal' (1) to 'outstanding' (5); 71 percent voted. Their average rating for a school counts for a quarter of its overall score. Lawyers and judges also rated schools; 24 percent and 30 percent voted. Their rating is weighted by .15.

Available at <http://www.usnews.com/usnews/edu/grad/rankings/about/03law_meth.htm> (last visited Sept. 30, 2002).

one has suggested that the reputation of a law school among its peers is not based on some shared assumption that scholarly production is necessary, that scholarship (however defined) is an important ingredient in a school's reputation, and that its reputation will have important collateral effects on student and faculty recruitment and retention.

Like most other things, however, what counts for scholarship and the nature of a school's engagement in the scholarly enterprise change over time.[2] What might have been adequate even in the elite schools a generation ago is barely sufficient at the lowest-rated law schools today. Scholarly activities have also changed, as both the profession that law schools serve and the consensus about what contributes to the scholarly enterprise have shifted over the years. For law schools generally considered to be "industry leaders"—primarily the elite schools whose actions usually set the fashion for such things, irrespective of what they do—the changes do little more than reinforce their role.[3] Other institutions, especially those with much less control over the evolution of what counts as important within the law school culture, are left to discern trends and choose to follow or not. Where changes in scholarship fashion affect reputation, the effects of modulation can be significant, especially if a law school is slow to change with the times.

The recent engagement with this issue by Pennsylvania State University's Dickinson School of Law provides a splendid example of what happens when such discussions become necessary. That engagement provides, as well, a good example of the way discussion can be productive rather than destructive for a faculty exploring change in a sensitive and inclusive manner.

As a consequence of the merger of the formerly independent Dickinson School of Law with Pennsylvania State University, it became apparent to the law faculty that the core missions of the law school might bear reexamination. Before the merger the school had concentrated on teaching and service. Both were directed toward the population and the region from which most of our students were drawn. The system worked well. Dickinson produced many generations of fine lawyers, legislators, and judges serving primarily Pennsylvania and the surrounding states.[4]

2. I should make clear at this point that I am not a scholarship absolutist. I do not believe that there exists in some Platonic sense a singular form of "scholarship" as perfection. See, e.g., Richard A. Posner, Legal Scholarship Today, 45 Stan. L. Rev. 1647 (1993). Scholarship and the methods of its evaluation change.

3. As Pierre Bourdieu explained in connection with a study of French higher education:

> Nothing resembles a religious war more than "academic squabbles" or debates on cultural matters. If it can easier to reform social security than spelling conventions or literary history curricula, this is because, in defending even the most arbitrary aspect of a cultural arbitrary, the holders of cultural capital—and undoubtedly more than any others the holders of petty portfolios, who are a bit like the "poor white trash" of culture—are defending not only their assets but also something like their mental integrity.

The State of Nobility: Elite Schools and the Field of Power, trans. Lauretta C. Clough, 6 (Stanford, 1996) (1989).

4. The Dickinson School of Law was founded in 1834 and existed as an independent law school until 1997, when it entered into a merger agreement with Pennsylvania State University. The merger became final in 1999. Since then Dickinson has worked to become integrated with the rest of Penn State. For a history, see Penn State-Dickinson, Dickinson at a Glance, at <http://www.dsl.psu.edu/glance.html> (last visited Nov. 10, 2001).

With the merger into Penn State, Dickinson became part of an institution whose mission was clearly quite different in emphasis and application. Its mission statement says: "Penn State is a multi-campus public land-grant university that improves the lives of people in Pennsylvania, the nation, and the world through integrated, high-quality programs in teaching, *research,* and outreach."[5] Penn State's vision statement expands upon that triad:

> Excellence in each of our missions is supported greatly by the integration of teaching, research, and outreach. Faculty research and scholarship keeps instruction in all of its forms at the leading edge of a field and affords special learning opportunities for students. Teaching responsibilities help to orient knowledge-generating activities toward the users of knowledge. Outreach both extends the forum for teaching and creates opportunities for scholarship and research.[6]

Now that the school was part of a large university, the law faculty began discussing the ways in which the merger required a reevaluation of the school's mission. "Scholarship" was necessarily a topic. If our mission was to be consonant with the rest of the university's, we would have to put more emphasis on that function. Ultimately discussion raised a number of issues and led to some suggestions that other law faculties might find useful in evaluating the fairness of their own approaches to scholarship.

Subtext: What Underlies Some Discussion of Scholarship

Much discussion of scholarship in this or related contexts might necessarily focus on issues of concern to those faculty who will consider themselves to be most affected by a change of mission. Some of them might feel like shareholders of a closely held corporation who after years of diligent service are frozen out by a new majority. They might feel that any fundamental change in their school's mission could deny them the benefit of a bargain made with the school early in their careers. This would not be fair.[7] But fairness to those faculty can result in unfairness to others among the same faculty on whom expectations and requirements of a different character might have been applied. For these faculty, a different analogy from the law of the closely held corporation might be more appropriate.[8]

5. Available at <http://www.psu.edu/ur/about/mission.html> (last visited Feb. 15, 2002) (emphasis added).

6. Available at <http://www.psu.edu/ur/about/mission.html> (last visited Feb. 15, 2002).

7. For the classic cases, see Wilkes v. Springside Nursing Home, Inc., 353 N.E. 2d 657 (Mass. 1976); Donahue v. Rodd Electrotype Co., 328 N.E. 505 (Mass. 1975). It might follow from an application fo this analogy that unfair impositions should not be given effect. In this case, of course, that might mean that faculty can find protection in their past.

8. The analogy here is to the approach followed in Delaware, in which all participants are treated alike, based on norms imposed through the ordinary operation of corporate governance mechanisms, absent specific and explicit arrangements to the contrary. See Nixon v. Blackwell, 626 A.2d 1366 (Del. 1993). Here the absence of some uniformity of expectation, the de facto multiple tracking, may appear unfair. As a consequence, this perspective might characterize the fairness principles of *Donahue* as an unfair privileging of particular actors in the enterprise based on criteria that damage good institutional governance practice.

Similar conflicts can arise even among those institutions that draw comfort, and derive status and reputation among peers, from a scholarly mission that seems both eternal and self-evident. In these cases, changes in scholarly fashion can have as much effect on the perception of fairness, among faculty in different camps, as might changes in mission.[9] Those working in emerging forms of intellectual endeavor and those "left behind" develop very different views of the fairness of valuing and rewarding their work as well as that of their colleagues. Within an institution, history always matters. And history insures that the approach to scholarship, at a certain level of specificity, will be unique, even as it may change over time as personnel or institutional fashion changes. What appears as a constant, however, is conflict that results from the emergence of disjunctions of expectations. The more narrow or contextually based the set of institutional expectations, the more likely the emergence of disjunctions.

A disjunction of expectations may shift discussion from scholarship, as such, to the consequences of scholarship. That can be a danger in any discussion of a school's scholarship mission. The danger lies in conflating a number of distinct discussions in a way that makes it difficult to move on any one front. Even worse is the blurring of clarity and focus if the discussions mask other, very real concerns. It is easy enough for scholarship issues to become mixed with issues of general reputation among the law school's peers, of marketing the school to peer and other groups, and of the effect of a scholarship mission on the school's core traditions. It is also easy to confuse issues of scholarship as an institutional mission with the manipulation of potential consequences or benefits of a more focused scholarly mission: reputation, faculty mobility, student recruitment and retention, and collateral effects on other components of the school's mission.

For example, we might agree that a discussion of scholarship necessarily involves the rankings. Much of that necessity springs I think from the more fundamental question people tend to avoid: if scholarship is a "product" or a "good" like any other, then for whom or to what end is this good produced? Certainly if the goal of our scholarship is solely—or primarily—to increase reputation score within the academy, discussion about it ought to concentrate on how each member of the faculty can contribute to a "good" that has maximum reputation-enhancing value, and how they can generate the sort of scholarship that might induce their counterparts in other schools to tick 3, 4, or 5 rather than 1 or 2 on the ranking form.[10]

Similar discussions, but with potentially different results, would be required if the market (i.e., the goal) for the goods (i.e., scholarship) were different.

9. Harold Hongju Koh, in making a case for the timeliness of scholarly fashion within the field of international law, reminds us that "[w]ithin the American legal academy, we are all familiar with the evolution of domestic legal scholarship from Christopher Columbus Langdell to Catherine MacKinnon. In this century alone, we have moved through a series of well-charted intellectual eras." Transnational Legal Process, 75 Neb. L. Rev. 181, 187 (1996).

10. *U.S. News and World Report* sends forms for its rankings of academic reputation to the dean and three faculty members of each law school. They are asked to indicate the reputation—as they see it—of each listed law school by ticking a number from 1 ("marginal") to 5 ("outstanding").

For example, if the market for scholarship were the judiciary, then the measure of the successful penetration of the market might be the frequency of judicial use of the goods, i.e., the number of times they are cited in judicial opinions. In that case, the value-maximizing good would be scholarship delivered in the sort of form, and containing the sort of content, that the judicial market values.

Even if one does not take as a goal the need to enhance a school's reputation among persons outside it, academic institutions usually profess *some* goal or object for scholarship. There are a number of possibilities, some more tongue-in-cheek (and not for publication) than others. In a frolicsome mood one might say that the goal is personal self-expression; or persuasion toward some social, political, or legal-technical change; or creation of income differentials among otherwise similarly situated colleagues; or punishment; or enough production for tenure; or enough production for posttenure review. The usual expressions of goals in mission statements (and related academic statements of goals or purposes) tend to be as bland as they are unhelpful.[11] It has thus become an easy habit in legal academia to focus debate about scholarship on the construction of the hierarchy of goals to which the school ought to bend its scholarly efforts, instead of engaging in a more substantive discussion about "scholarship" within the school. In this sense, the object of or market for "scholarship" determines the "definition" of scholarship.[12] Put another way, the object becomes the defining characteristic of the good.

The problem with conflation of this sort is simple enough: it jumbles cause and effect. In a business in which, to some extent, the ends provide the sole justification for the means,[13] the signification scholarship becomes confused, or perhaps better put fused, with its object. With meaning a function of effect, the possibilities for conceiving scholarship are severely narrowed. Thus narrowed, scholarship becomes distorted; the pursuit of knowledge is transformed into a figure whose form is designed for and limited to the pleasure of those willing to pay for its use. Scholarship, thus reconceived, takes on whatever character the pleasure of the market demands. As law schools began to serve a variety of markets with potentially inconsistent needs, arguments about scholarship became better understood as disagreements over the appropriate

11. See, e.g., Gordon T. Butler, The Law School Mission Statement: A Survival Guide for the Twenty-first Century, 50 J. Legal Educ. 240 (2000).

12. Some have argued that discussions of scholarship must be grounded on some normative baseline, on something "that speaks to the simple question, 'What is legal scholarship *for*?'" Jack Goldsmith & Adrian Vermeule, Empirical Methodology and Legal Scholarship, 69 U. Chi. L. Rev. 153, 154 (2002).

13. For a discussion of an analogous problem in the so-called hard science—the tension between pure research (research without a specific purpose other than to advance knowledge) and applied research (research directed towards a specific goal, for example an AIDS vaccine), see Donald E. Stokes, Pasteur's Quadrant: Basic Science and Technological Innovation (Washington, 1997); Gerald Holton and Gerhard Sonnert, A Vision of Jeffersonian Science, Issues in Science and Technology, Fall 1999.

market to serve, or the appropriate ordering of hierarchies of markets to serve.[14]

The literature about scholarship provides many examples of the way in which this sort of conflation has become naturalized within the academy. Deborah L. Rhode's analysis of scholarship is grounded on her belief that it is reaching the wrong market—other members of the legal academy.[15] She would prefer that scholarship be directed to decision-makers elsewhere. Satisfying that market requires changing what is accepted as high-quality scholarship—an overlong, overfootnoted written analysis of legal doctrine—in favor of shorter empirical work.[16] Edward L. Rubin starts from a similar position: he defines scholarship as prescriptions or recommendations addressed to decision-makers such as judges, legislators, or administrators. This premise tends to narrow, perhaps unnecessarily, the general criteria he develops to target the market he identifies.[17] David P. Bryden shares Rhode's view that legal scholarship is misdirected to other members of the legal academy. As a result, the problems of legal scholarship he describes—overemphasis on glamorous subjects, not enough empirical research, not enough history, not enough innovative teaching materials, awful prose style, and too much political conformity—are merely the expressions of profit-maximizing behavior by scholars conscious of their market. Since the behavior is based on rational choices, Bryden says "perhaps we should accept it as a fact of life, just as we do when considering, say, the deviousness of politicians or the materialism of people in general."[18] Mary I. Coombs suggests special problems for fields of scholarship that have not been generally accepted within the legal academic community, focusing on outsider scholarship, principally critical race theory and feminist writings. Coombs is sensitive to the multiple audiences to which

14. For examples of the progression of thought in this form, contrast Symposium on Legal Scholarship: Its Nature and Purposes, 90 Yale L.J. 970 (1981) and Symposium: American Legal Scholarship: Directions and Dilemmas, 33 J. Legal Educ. 424 (1983) with Symposium on Legal Scholarship, 63 U. Colo. L. Rev. 521 (1992) and Symposium: Law, Knowledge and the Academy, 115 Harv. L. Rev. 1278 (2002).

15. Legal Scholarship, 115 Harv. L. Rev. 1327, 1342 (2002). But contrast the view of Sanford Levinson: "In most of my work, I write as a self-conscious legal academic to and for other similarly self-conscious legal academics." The Audience for Constitutional Meta-Theory (Or, Why, and to Whom, Do I Write the Things I Do?), 63 U. Colo. L. Rev. 389, 393 (1992).

    The introduction to the recent symposium on legal scholarship of which Rhode's work is a part provides a nice example of the way in which purpose and method tend to be joined as a matter of course in discussions about scholarship. It summarizes the arguments of the conference participants in terms of objectives and methods for meeting goals. Todd D. Rakoff, Law, Knowledge, and the Academy: Introduction, 115 Harv. L. Rev. 1278 (2002).

16. Rhode, *supra* note 15, at 1343. Rhode does not suggest that everyone produce empirical work, but she does suggest that all work target the market of people with authority outside of law schools. See *id.*

17. On Beyond Truth: A Theory for Evaluating Legal Scholarship, 80 Cal. L. Rev. 889 (1992). Rubin looks, in part, to the work of Jurgen Habermas and Hans-Georg Gadamer, influential European theorists, for criteria on which to judge scholarship within one's own subdiscipline: normative clarity, persuasiveness, significance, and applicability.

18. Scholarship About Scholarship, 63 U. Colo. L. Rev. 641, 650 (1992). Bryden does suggest that academic behavior could be changed by altering the incentive structure for scholarship. But "[t]here isn't enough money, and there isn't enough consensus about what changes are necessary," to make such changes likely. *Id.*

scholarship may be directed and the way in which the direction may change the focus of the work produced, yet shares others' unease with what may appear as inconsistencies in the resulting works, taken as a whole. But she remains most concerned about the needs of the critical race theorists and feminists within the most important market for their scholarly product—the community of scholars. Thus, though she offers criteria based on producer differentiation, her criteria are still based on a particularized set of goals for scholarship, tied to the professional aspirations of an emerging subconstituency of the law professoriate.[19] For Richard Posner, utility is the touchstone for determining the value of any scholarship, especially in the new interdisciplinary fields of law. And not just any old utility will do: relevance, practical impact, is the measure Posner would use.[20] Posner suggests that the new forms of scholarship with value untested by his criteria can flourish only because these new forms have found a market: law teachers consume what they produce. But Posner discounts *that* market, perhaps on the theory that eating what one produces should not count in measuring demand. Instead, Posner asserts that this "circulating-pump interdisciplinary research" will require a larger or different market to sustain its production.[21]

Even this brief foray into the traditional scholarship about scholarship shows how arguments over the legitimacy of serving a particular market can become the means by which the nature of scholarship is explored. The distortions that may result are illustrated by George L. Priest, who suggests that the "demand for law review articles is dominated, not by consumption by readers or subscribers, but by consumption by student editors."[22] Thus, the problem may not be the production of inadequate scholarship, but rather the inability of producers to judge scholarship by its success in the market to which it is directed, or by differences between the tastes of those who produce scholarship and those who publish it. To the extent that this market produces dissatisfaction within the ranks of the producers, alternative scholarly venues have appeared—the symposium and the specialty journal.[23] In addition, recent years have seen the rise of alternative prestige hierarchies for law schools with reputations for producing certain forms of scholarship.[24]

19. Outsider Scholarship: The Law Review Stories, 63 U. Colo. L. Rev. 683 (1992). Coombs posits that the assessment of scholarship must be tied to two significant goals internal to the labor market for law teachers. The first is the need of criteria to serve as a tool of communal definition, of creating a specialty within the academic community to which these scholarly works may speak. *Id.* at 703. The second is the need for criteria that serve as sorting devices for the distribution of benefits to the writers. *Id.* at 704.

20. Richard A. Posner, Legal Scholarship Today, 115 Harv. L. Rev. 1314, 1326 (2002) (identifying as appropriate measures of scholarship value "significant changes in legal doctrine and institutions, in the way law is practiced in certain fields, and in the teaching of those fields in law school").

21. *Id.*

22. Triumphs or Failings of Modern Legal Scholarship and the Conditions of Its Production, 63 U. Colo. L. Rev. 725, 726 (1992).

23. *Id.* at 728–29.

24. Thus, for example, the *U.S. News and World Report* rankings have begun to include lists of the top ten law schools in a number of fields: clinical training, dispute resolution, environmental law, healthcare law, intellectual property law, international law, trial advocacy, and tax law. Available at <http://www.usnews.com/usnews/edu/grad/rankings/law/lawindex.htm>. *U.S.*

My sense is that defining scholarship is not the same thing as understanding the effects of scholarship, or insisting that some markets for scholarly output are more legitimate than others. Exploring the appropriate goals or objects of scholarship instead of understanding scholarship does a great disservice to the institution, even an institution whose primary purpose is to achieve a certain object from scholarship. Scholarship with a mission is not a bad thing and ought to be encouraged. But limiting scholarship to a particular goal or set of objects unnecessarily and arbitrarily narrows its legitimate possibilities. In a field like law, with multiple, changing, and potentially incompatible markets, reducing the meaning of scholarship to any one or more of its objects severely reduces the utility and responsiveness of the "products" offered by the legal academy, even to its markets.

I believe that by focusing on the definition of scholarship—rather than on the object or goals of scholarship—individuals and institutions can better understand the nature of what is produced. The clearer understanding will make it easier to use scholarship more efficiently to attain whatever objects are deemed important at the time. More significant, perhaps, it avoids the contortions inherent in choosing an institutional goal first, and then defining scholarship as a product for that one market among many. With no such limitation, individual faculty are free to satisfy any number of existing or emerging markets for their scholarly work, each fashioning her scholarship to suit the needs of her "clients" without incurring institutional regulatory costs. And so I turn to the definition of scholarship.

Legal scholarship can be defined most simply by reference to the techniques of its creation. In this form scholarship might be defined most narrowly as a particular sort of product, a writing of some kind appearing in some sort of publication or book. This understanding of scholarship is common.[25] Such a definition provides a simple means of evaluating production quantitatively, but not qualitatively: I can determine how many writings have been produced, but not necessarily use the definition to determine the "value" of this production other than by reference to its quantity.

This simple definition has been refined, and perhaps made more useful, by adding a qualitative element. The simplest forms of qualitative elements rely on sorting devices. These are useful means of substituting "signs" for thought or judgment, and current popularity for long-term value.[26] The most common sorting devices are based on the reputations of the publications in which

News describes the process it uses to obtain these rankings: "Legal educators nominated up to 15 schools in each field. Those voted the top 10 appear." Available at <http://www.usnews.com/usnews/edu/grad/rankings/about/03law_meth.htm> (last visited Sept. 30, 2002).

25. See, e.g., Philip Kissam, Evaluation of Legal Scholarship, 63 Wash. L. Rev. 221, 222 (1988); Posner, *supra* note 2.

26. One of the more popular alternatives to the *U.S. News* rankings ranks faculty quality on the basis of a number of commonly valued sorting devices: "(1) articles in the ten most frequently cited student-edited law reviews . . . (2) articles in ten leading peer-edited law journals . . . (3) books from the three leading law publishers . . . and (4) books from the six leading academic presses in law. Brian Leiter, New Educational Quality Rankings of U.S. Law Schools, 2000–2002, The Criteria, available at <http://www.utexas.edu/law/faculty/bleiter/rankings/criteria.html> (last visited October 11, 2002).

scholarship is produced. These sorting devices tend to shift attention from individual contributions within a journal to the publication itself. Situating publications within the matrix of reputation requires another attention shift—from the publication to the institution supporting the publication. The quality of a piece becomes a function of the publication in which it appears, and the reputation of a publication is dependent on the reputation of the law school supporting the publication.[27]

The circularity encouraged by these sorting devices creates efficiency within a fairly closed system. But efficiency in this case may be more focused on preserving the status quo of institutional hierarchy than on a close judgment of individual production. That imperfection can be troublesome; for some, the politics of placement can put them at a disadvantage.[28] Moreover, sorting devices can fail, especially when an elite finds its criteria for academic excellence challenged by members adept at producing scholarly objects that satisfy the formal requirements of traditional production and sorting mechanisms, but not their spirit.

And so another layer can be added to the definition. Scholarship can be defined as a more particular sort of product—a writing exhibiting certain characteristics. At this level, issues of quality meet those of ideology and the imperatives of categorization with bitterly divisive effect. Still fresh in many minds are the great debates in the 1980s and early 1990s revolving around whether one could attach the label "scholarship" to products that looked like scholarship (a writing appearing in a publication), and might even appear to be of high quality, if only because of publication in elite journals; but which could be unworthy of the label "scholarship" because these products were classified as critical legal studies and its offshoots—critical race theory, LatCrit theory, queer theory, critical or "radical" feminist theory, and law and literature, to name a few. Application of these rules of definition could have significant effect on a career in law schools. As Posner put it, "Competent lawyers lured by the siren song of Theory have wrecked their academic careers."[29]

Moreover, the *form* of the written product itself could add another layer of definition. For example, writings in the style of narrative, especially personal narrative, have been attacked as unscholarly and unworthy of the definition, and may still be considered unworthy of the characterization as scholarship in some quarters. Other forms, among them those drawing on the insights of literary criticism, could be excluded from the canon of legal scholarship

27. On journal ranking see, e.g., Russell Korobkin, Ranking Journals: Some Thoughts on Theory and Methodology, 26 Fla. St. U. L. Rev. 851 (1999).

28. For a glimpse at the political economy of scholarship placement, and the informal incentive system it has produced, see, e.g., William J. Turnier, Tax (And Lots of Other) Scholars Need Not Apply: The Changing Venue for Scholarship, 50 J. Legal Educ. 189 (2000).

29. Posner, however, continues on a more positive note: "But a few have had careers that could not have been envisaged when academic legal scholarship was at once a solid professional service and a competent academic backwater." Posner, *supra* note 2, at 1658. See also Geoffrey R. Stone, Controversial Scholarship and Faculty Appointments: A Dean's View, 77 Iowa L. Rev. 73 (1991).

because they are deemed to be decadent—"intricate, subtle, ornate, self-indulgent, and disdainful of utility."[30] Thus, the *shape* and *form* of scholarship have become the obsessive focus of those who wish to protect a narrow and unitary definition of a fetish object—the written word exhibiting certain indicia of quality by proxy and produced by law teachers in law schools.

Because simplicity is easy—and because simple global requirements are easy to police—we have been tempted to insist on a unitary definition of scholarship based on one or another of the characteristics described above. And indeed such a definition may be agreeable at a certain level of generality. But we tend to avoid the uselessly general in these sorts of context. A unitary specific definition of scholarship is perhaps most useful for purposes of comparison and perhaps, if targeted well, for reputation enhancement. This would be especially the case where uniformity reflects a necessary adherence to certain political or sociocultural norms. This sort of narrow uniformity was certainly the model for elite universities in the 1970s and 1980s. Now simplified and idealized as some sort of golden age, it remains dear to many of us who were the product of that model and who found a certain success within it.

But it's not the 1970s any more. Though many law schools may have missed the recent twenty-year battle over what sort of writings qualify as scholarship, it is too late in the day to fight these battles again. In an age when law schools are moving toward flexibility and inclusion, when law itself, for good or ill, has lost its autonomy as a discipline, it would seem odd to move collectively in the opposite direction.[31] Perhaps, to be useful, any new approach must abandon the too narrow and meaning-encrusted word *scholarship* and substitute for it a different, process-focusing term.

Text: A Process-Focused Approach to Scholarship

With this background I come to this paper's proposal: substitute process for product, flexibility for fetish. Specifically, I would abandon the attempt to define scholarship as a particular and narrow "thing" and instead focus on *meaningful contributions to the scholarly enterprise* as evidence of a specific product termed "scholarship." My premise is that any work that can be classified as a scholarly contribution—whether traditional doctrinal legal analysis or nondoctrinal work in emerging disciplines, whether produced for judges, the bar, our colleagues, or any other viable market—deserves to be recognized as scholarship. I do not mean to propose a new way of renewing the scholarship

30. Richard A. Posner, What Has Modern Literary Theory to Offer Law? 53 Stan. L. Rev. 1509, 1516 (2001). Posner, though, is quick to add that there "is nothing wrong with decadent writing."

31. On the notion that law is losing its autonomy as a discipline, see, e.g., Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at Century's End (New York, 1995); Richard A. Posner, The Decline of Law as an Autonomous Discipline: 1962–1987, 100 Harv. L. Rev. 761 (1987). Cf. Stephen M. Feldman, American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage 150–52 (New York, 2000). Not everyone will agree, of course. Some might argue that what appears to be a movement away from autonomy is merely a recognition that the field of law is broader, and more complicated, than it used to seem. There is an element of this assumption in Pierre Schlag's recent attempt to create something like a unifying theory of the major currents of modern legal thought. See The Aesthetics of American Law, 115 Harv. L. Rev. 1047 (2002).

wars of the last generation. Nor do I mean to cement the petty snobberies represented by the short-form sorting hierarchies of placement. I mean to rise beyond that to concentrate on the work itself and its value, rather than its form and the value of its market.

With those assumptions in mind, one can begin to give content to my phrase *meaningful contribution to the scholarly enterprise.* Here is a start. To be meaningful, contributions to the scholarly enterprise

(1) must be consciously directed, and their anticipated value must be articulable with some specificity.

(2) must be measurable in some acceptable articulable way.

(3) must be part of an effort that is transparent in the sense that all of the school's faculty and administration are aware of the contribution.

(4) must demonstrate substantial personal effort either on one's own projects or in connection with the work of colleagues, above and beyond the ordinary responsibility to colleagues.

(5) must be directed outward from the particular law school to the academy, legislature, bar, or other constituency as well as inward for the benefit of the school.

(6) must in some clearly articulable way also help to fulfill the obligations of teaching and service.

(7) must not strive for a monopoly of knowledge within the institution or for "places" or "territory" to which others have no access.

(8) must serve as the basis for a consistently applied system of review.

These criteria reflect certain overarching principles. First, there ought to be a separation between scholarship and its objects. Judging scholarship on the basis of the need to satisfy certain markets for scholarly production, and not others, imposes a conservative discipline on scholarly production which gives too little value to scholarship that seeks to break through convention or conventional thinking. Second, scholarship should not be constituted as a fetish object. While conventions of communication are indeed important, exalting form over substance always runs the risk of ossifying intellectual inquiry. At a certain point, ossification creates closed systems and can lead to irrelevance. Third, the sole purpose of scholarship should not be to provide a means of engaging in the creation and maintenance of power or reputation hierarchies. I understand the importance of both; humans have never been able to shed their attachment to hierarchy. But the value of an endeavor should not necessarily or always be based on its potential as a power totem. Fourth, fairness should be a paramount principle in the judging of scholarship. Fairness demands flexibility—the encouragement of creative, meaningful, well-articulated contributions to an institution's scholarly enterprise (that is, to its development of knowledge) whatever their form. But fairness also requires an individualized judgment and does not shrink from measurement. As applied to individuals, fairness also eschews institutionally sanctioned free riding—the appearance of institutional progress on the basis of a uniform set of criteria selectively applied to some but not all members of that institutional

community. Sharing, inclusion, openness, curiosity, and a commitment to maximizing personal and institutional value ought to form the basis from which one's contribution are made to a law school—and rewarded.

I can most usefully elaborate on these ideas by looking at each of the requirements I have suggested as essential to a meaningful contribution to the scholarly enterprise.

1. Every individual faculty member must demonstrate a consciously directed contribution of which the anticipated value is articulable with some specificity.

Serendipity is hardly the most effective means to develop a conscious and well-thought-through plan for scholarly activity. No effort to contribute to a school's scholarly enterprise can start without a consciousness of the contribution's nature and scope. For the individual as for the institution, it is a useful exercise to think about what one is doing, how it fits into the overall scope of prior activity, and how it will be related to future work. The exercise of articulation sharpens the thrust of one's scholarly activity and puts the work more clearly into focus. It helps one to maintain direction in work (if that seems desirable) or to glimpse promising new directions. It is harder to lose one's way when one must keep an eye on the map. Explaining one's interests and activities to colleagues also produces collateral benefits—collaboration, information sharing, and the like. For example, people can let certain of their colleagues know about conferences or articles that might interest them.

None of these benefits is any great surprise; most of us know that such communication among colleagues is desirable. I suggest that moving beyond desire not only is beneficial but is essential to any program of contribution to the scholarly enterprise. A complete annual written report on the specific work one is putting forward as meeting the law school's scholarly requirements, shared among the faculty, itself contributes significantly to that enterprise.

2. The contribution must be measurable in some acceptable, articulable way.

Articulating the relevance of any proffered contribution provides valuable focus. But effort without measure accomplishes little for the institution. So the question of measurement is central to any institutional system offering incentives for scholarly activity. I suggest that, in place of an institutionally imposed one-size-fits-all measure, the person putting forward some contribution to the scholarly enterprise should bear the burden of articulating, *in a specific way,* the means or methods by which it can be measured. This is only fair: people taking advantage of the flexibility of the meaningful-contribution standard ought to be able to do that. This also lessens the problem of standards that ossify.[32] The large majority of our colleagues who contribute—and will con-

32. By shifting the burden of showing measurability to the person proffering the work, an institution might avoid the rigidity and built-in obsolescence of standards of measure imposed from above. Either of these imposed measurement systems will tend to fail over time because they reflect, at best, the views of a majority of the faculty at one moment, based on the information and the assumptions of that point in time. In this way one avoids the sort of problems that give rise to the "crises" of scholarship that Richard Posner, for example, has written about. See Posner, *supra* note 2. These crises only detract from the production of useful work.

tinue to contribute—written analysis of doctrine in books or articles will hardly notice the burden imposed. The more original the contribution, in form or substance, the greater the burden to demonstrate how to measure it.

All faculty, then, ought to be free to advocate a means of measuring their efforts. The specifics of the measurement ought to encourage the sort of experimentation and risk taking that moves knowledge forward. Whatever the type of measurement, the standard against which the measure is taken remains the same: meaningful contribution to the scholarly enterprise of the institution. In order to work, though, the system requires good faith on the part of faculty and administrators—good faith furthered by transparency and disclosure within an inclusive culture. In particular it requires good faith on the part of those who put something forward as scholarship. *Flexibility* is not meant to be code for irresponsibility, shoddiness, or slips into the borderlands of ethics. All work product can be measured, but must be measured fairly and on its own terms. Measurability is meant to set bounds on the sorts of activities that can be proffered as meaningful participation in the scholarly enterprise. In a sense, measurability stands as a proxy for meaningfulness.

It is possible to find a measure even for new forms of contributions to the scholarly enterprise, though some have argued that "new" forms of scholarship will make measure or evaluation impossible—to the detriment of a law school.[33] The "commensurability" problem is minimized when one gives up the unsupportable premise that nondoctrinal legal scholarship constitutes a single field to be distinguished from that other field of law, "doctrinal" legal scholarship. We should be well past the point now of seeing our profession as limited to the servicing of one particular market in one particular way. Law is much bigger than that. Certainly the literature about scholarship attests to diverse fields under the umbrella of law.

Once we accept the idea that law can serve multiple markets and legal scholarship can explore multiple fields, the solution to the problem of measurability becomes clearer. The critical step is to move away from systems of measurement based only on raw-data comparisons of one person's contribution to the scholarly enterprise against the efforts of others on the faculty.[34] Instead, a *two-step* system of measurement makes more sense.

The first step requires that each person's product be measured against the standards, within and without the institution, of the particular field in which

33. Richard Posner, for example, has written:

> The problem of evaluating the new legal scholarship is made more acute by a problem of commensurability. The methods and objectives in the different fields of nondoctrinal legal scholarship are very different. How then to compare the practitioners in the different fields? How to say that a critical race theorist's narratives of discrimination are superior or inferior, as scholarship, to an economist's rational model of discrimination?

Posner, *supra* note 2, at 1656. Similarly, Kenneth Lasson identifies subjective criteria as the problem with evaluation of scholarship today. See Scholarship Amok: Excesses in the Pursuit of Truth and Tenure, 103 Harv. L. Rev. 926, 935 (1990).

34. Systems like this made sense when all were expected to produce variations on the same product. But law teachers are no longer like so many brands of cereal produced for the cereal-consuming market. We have moved to a model in which we can serve different markets.

the work is done.[35] For traditional doctrinal analysis of law, the standard is obvious. For emerging fields the task is harder but certainly not impossible.[36]

Ironically, while many insist on the right to include nontraditional, nondoctrinal scholarship within the canon, some legal academics resist conforming to generally recognized standards—where such exist—in fields outside doctrinal analysis. The recent debate about the assessment of empirical research presents an excellent example. On the one hand, Deborah Rhode, Lee Epstein, and Gary King suggest that the failure of legal academics to conform to generally recognized standards of empirical research results in work that others in the field consider poor.[37] On that basis such a product could seem less than useful to its nonacademic consumers.[38] On the other

35. This approach avoids a problem noted recently by David Luban: "namely, an unspoken agreement to suspend disbelief in each other's discipline and establish a modus vivendi—a way of getting along. . . . [T]he 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." Legal Scholarship as a Vocation, 51 J. Legal Educ. 167, 170 (2001).

    Looking outside one's particular law school is increasingly recognized as necessary, for example in the outside review of scholarly work as part of the promotion and tenure process. Usually the outside scholar is in the same field as the person whose work is reviewed. If the field is defined by category of law, a scholar in law and economics might be asked to review work grounded in cultural studies because both areas involve corporations. But probably a tenure committee would look for an outside reviewer also in cultural studies, or at least would evaluate the review by a law-and-economics person in light of the differences in scholarly approach. It follows that I reject any notion that some fields of legal scholarship are necessarily inferior to others. One should always avoid judging one field of law by the standards adopted by those working in other fields. Lastly, I do not think that historical practice, or tradition, ought to hard-wire any conception of the nature and scope of legal scholarship. I prefer to avoid the sort of judgments, and the politics of judgments, that one sometimes suspects is being made.

36. Reconsider, in this light, Coombs's suggestion for a standard of measure based on conformity to expectations of the communities, even internal communities of legal academics, for whom the work is produced. Coombs, *supra* note 19, at 705–08.

37. See Lee Epstein & Gary King, The Rules of Inference, 69 U. Chi. L. Rev. 1 (2002); Rhode, *supra* note 15. Epstein and King criticize empirical research in legal academia for having "little awareness of, much less compliance with, the rules of inference that guide empirical research in the social and natural sciences." Epstein & King, *supra*, at 6. They criticize legal scholars for, among other things, not clearly defining the hypothesis for the study, *id.* at 74, not controlling for rival hypotheses, *id.* at 76, and not describing the methods and measurements used so that the study can be replicated by others, *id.* at 83. Rhode laments the paucity of empirical studies produced and the quality of those actually being published ("[s]loppy survey techniques, skewed samples, and sweeping generalizations"). Rhode, *supra* note 15, at 1343. Rhode believes the explanation for poor quality is that legal empirical research is produced on a limited budget (since few law schools are willing to give generous support to studies that will take years to produce), and that empirical research is produced too quickly (since the academy's focus is on quantity instead of quality). *Id.* at 1353.

38. There is evidence for this proposition in some recent exchanges between academic authors and Judge Harry T. Edwards. In the late 1990s two empirical studies examined the effects of ideology in the D.C. Circuit. See Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717 (1997); Frank B. Cross & Emerson H. Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 Yale L.J. 2155 (1998). Responding to those articles, Edwards said the authors' failure was in not conforming to standards. See Collegiality and Decision Making on the D.C. Circuit, 84 Va. L. Rev. 1335 (1998). He attacked the "so-called 'empirical studies'" as inaccurate. *Id.* at 1335. He criticized their "narrow focus" and "broadly-phrased conclusions," *id.* at 1336, and characterized them as "flawed in their quantitative and qualitative analyses, and also in their interpretation of data," *id.* at 1339, because each omitted certain data, omitted certain variables, and selectively ignored conflicting data that would have produced

hand, Jack Goldsmith and Adrian Vermeule suggest that legal empirical research must be judged on its own terms because it is meant to serve purposes and clients that are distinct from those served by academics in other fields producing similar work.[39]

I tend to side with Epstein, King, and Rhode, with two caveats.[40] The first is that the person putting forward work ought to have the prerogative to identify the work's field. The second, especially but not exclusively in emerging fields where standards are in flux, is that one ought to be free to articulate how the quality of one's work should be measured, irrespective of the existence of arguably applicable standards.[41]

Only after individual efforts are measured against others in their field, does it become possible to take the second step and, moving beyond raw output, compare the performance of people on the same faculty who are working in different fields.[42] This approach makes for realistic flexibility that permits measurement and reduces the "problems" of subjectivity and incommensurability.

different conclusions from those the authors hoped to find. For a response to Edwards's assertions, see Richard L. Revesz, Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards, 85 Va. L. Rev. 805 (1999). For a more general argument that legal academics are indeed capable of empirical work, see Richard L. Revesz, A Defense of Empirical Legal Scholarship, 69 U. Chi. L. Rev. 169 (2002).

39. See Goldsmith & Vermeule, *supra* note 12. They argue that because the goal of persuasion is fundamental to legal scholarship, *id.* at 154–56, such work (even when it has a substantial empirical component) ought not to be bound by standards that legal empiricists generally do not accept, *id.* at 159, or standards that ignore the pragmatic considerations underlying the production of legal scholarship, *id.* at 160–63.

40. I am uneasy with a standard based in some part on the "simple question, 'What is legal scholarship *for*?'" *Id.* at 154. At the same time, I would resist the temptation to see in all legal analysis an empirical problem, which a careless reading of Epstein & King, *supra* note 37, at 31–34, might suggest. I have no objection in general to the use of scholarship to persuade, even where standards are bent for that purpose. But I am uneasy if an author deviates from standards without explaining the deviation to readers who may expect this piece of scholarship to conform to the generally accepted standards associated with the work's label. That might well mislead a reader. I do not mean to suggest, of course, that adherence to generally accepted standards invariably produces great work, or that adherence should invariably be the touchstone for judgments about quality.

41. I share Delgado's unease with imposed standards, especially if someone is exploring or experimenting in new territory. See Richard Delgado, Legal Scholarship: Insiders, Outsiders, Editors, 63 U. Colo. L. Rev. 717, 723 (1992). But a scholar not bound by conventional standards ought to be able to articulate rigorous standards by which her work can be judged, standards that she certainly should have been applying to herself as she worked. Though I want to avoid the tyranny of standards imposed from above, I do not embrace anarchy as a substitute. I prefer an articulated self-conscious personal responsibility. Rubin's criteria for the evaluation of scholarship—clarity, persuasiveness, significance, and applicability—may provide a starting point. See Rubin, *supra* note 17, at 912–40.

42. In a sense, then, I suggest a double measure. First one measures the quality and quantity of scholarly production in accordance with the standards of the field in which the work is produced (usually by reference to a non-institution-specific standard). One can then compare those results with similar assessments calculated for every other member of the particular faculty (usually by reference to an institutionally specific standard). The common standard for this later evaluation can be objective. For example, it can be based on comparisons of "effort size" (quantity of productivity weighted by evaluation of quality within the field).

3. Scholarship and the proffered means of its measure must be part of an effort that is transparent in the sense that all faculty and administration are aware of the contribution.

All members of the faculty should report to the school's entire scholarly community both the form and the measure of what they are putting forth as their scholarly contribution. People who are proud of their efforts, and have faith in the means they offer as measure of their work, should want to share this information with their colleagues as well as with the dean.[43] Put another way, disclosure serves the healthy function of disciplining a faculty with respect to its responsibilities.[44] It liberates us from the fear that our colleagues are not treated the way we are.

Transparency is a virtue that we teach to our students and expect from our political representatives. Disclosure is as liberating a habit within an educational institution as it is within a political one. We have little to hide and much to share. Through sharing, we each can practice the beneficial art of inclusion in our work and in our relationships with our colleagues. Transparency not only promotes a sense of fairness—of decisions made on the basis of open and generally available disclosure—but also increases the possibilities for cross-fertilization.

4. Contributions to the scholarly enterprise must demonstrate personal effort either as individual projects or as enhancements of colleagues' contributions to that enterprise.

I do not contest the generally held belief that the production of scholarship lies at the center of any institution's scholarly enterprise. But attempts to define scholarship tend toward the rigid and the conventional. I understand the allure of rigidity and conventionality: both are easy, and require little thought to apply. Rigidity, especially in adherence to convention, is also useful. It provides an efficient means of disciplining members of an academic community in a manner that frees the disciplining institution and its members from any responsibility for the fairness of the conventions thus enforced. Rigidity and convention permit the institution and its members to play the passive role, more the enforcer than the legislator; the fairness or utility of the standard enforced is the responsibility of "someone" else. But scholarship so rigidly defined and so conventionally applied unnecessarily narrows the utility of scholarship as a means for increasing knowledge. My effort here is to

43. Indeed, many institutions have instituted posttenure review in which one's scholarship, teaching, and service, along with self-analysis of one's own efforts, are made available to peers. This sort of transparency makes any reticence about disclosure less compelling. It has been estimated that "approximately fifty percent[] of the colleges and universities that grant tenure have adopted some form of post-tenure review that subjects tenured professors to a systematic assessment of performance, usually by peers." Neil W. Hamilton, The Ethics of Peer Review in the Academic and Legal Professions, 42 S. Tex. L. Rev. 227, 240 (2001).

44. Transparency, of course, goes deeper than faculty self-evaluation. It has been suggested that "[i]f law schools wish to maintain and improve their rankings, [then it may be important to expose] their reward systems so that legal scholarship, a major component of law school rankings, plays a much larger part of the compensation scheme than it presently does." Bruce D. Fisher & Paul Bowen, The Law School Compensation Systems at Three Top Quartile State Law Schools: Factors Correlating with Law Professors' Salaries and Suggestions, 19 N. Ill. U. L. Rev. 671, 702 (1999) (opaque compensation systems may hide the relationship between scholarship and salary).

suggest the possibility of a broader notion of scholarship, one beyond the boundaries of convention rigidly applied. Scholarship is no mere object—a fetish of a particular sort to be exhibited in grand ceremonials and used as a power totem in tribal gatherings.[45] The advancement of knowledge is an act which should not be reduced to the container in which it appears.

Scholarship, of course, must at its core include the conventional: substantial research or original thought finding expression in some written form—article, chapter, book. And those who engage in such will easily articulate their scholarly mission and the means to measure it. The top law schools (and universities) still rely, for the advancement of knowledge and the maintenance of their reputations as elite research institutions, on the production of scholarship in conventional form. There is nothing in the standards proposed here that would complicate matters for those who find the production of legal scholarship as traditionally understood their most efficient way to contribute.

The approach outlined here differs from the conventional not in avoiding rigor or measurability, but in providing some flexibility. Contributions to the scholarly enterprise might well be capable of production by means other than the traditional, rigidly defined object—the published writing. This is certainly the case for a faculty with differing strengths, interests, and desires, all of whom are committed to advancing the knowledge base of the profession, but some of whom may find unhelpful the traditional narrow definition of what constitutes advancement. To the extent that a measurable and articulable advancement of knowledge is produced through individual effort, scholarship has been produced.

In the peculiar context of changes in institutional character, other considerations might be important as well. But even in this case the promotion of advances in knowledge can be made. For example, people should not be denied the benefit of a bargain, made earlier with their school, which they have amply fulfilled thus far. When a law school's mission is changing in its emphasis, some people may have been hired with an understanding of the mission different from the emerging one.[46] It is fair to require faculty to contribute to their law school in ways that fulfill its current mission, including a scholarly mission. But it does not naturally or inevitably follow that their effort must be channeled into one particular set of behaviors. Indeed, from an institutional perspective, maximizing the scholarly product may require allocating resources to those most efficient, with the "cost" to be borne by those

45. Thanks to my colleague, F. Jay Mootz, for the imagery of the fetish object in connection with the typically narrow measure of scholarship as pages produced in some sort of conventionally recognizable form. Legal academics, like other communities, have a fondness for such grand ceremonials and tribal gatherings. Our many gatherings are a testament to a lively tradition of convention-reinforcing behavior.

46. An institution that merges with another or simply decides to adopt a new mission may fall into this category. On the other hand, one might argue that a faculty member's benefit of the bargain means no more than a right to participate in any decisions about the mission and the requirements it imposes. If a law school's mission changes as a result of faculty decisions, including the decision to merge with an institution whose mission is different, every member of the faculty has received the benefit of his original bargain with the law school and effectively agrees to accept the new mission.

less willing to make the same sort of contribution. Such an allocation might preserve the benefit of the bargain made by certain faculty.[47]

My definition of the scholarly enterprise aims to create incentives for and to reward flexibility. Any substantial work that contributes to the advancement of knowledge ought to be rewarded, even if it is not produced in standard form. The scholarly enterprise can be roughly divided into three broad areas: (1) analysis that focuses on legal interpretation and accepts the basic premises from which the legal issues explored arise; (2) analysis that focuses on the basic premises on which legal analysis proceeds (including the "new" and "unconventional" and "multidisciplinary" forms of analysis[48]); and (3) communication, transmission, or implementation of either sort of analysis. That division should make it easier to understand how work other than the traditional reputably published narrow legal analysis can be a legitimate contribution.

Conventional scholarship focuses on research and a creative process leading to some sort of writing. Transmission—usually publication—is a given. Increasingly, however, we are recognizing the benefits of concentrating on transmission. At many law schools conferences, letters and announcements, and other methods of distributing the ideas developed in a writing have become objects of significant resource investment.[49] Moreover, many schools have begun to focus more narrowly on the research component of the scholarly enterprise. The "centers" and "institutes" multiplying across the country are one way some major research and teaching institutions are trying to focus research.

It should follow that faculty ought to have flexibility in choosing their personal focus in ways that parallel institutional approaches to the production of scholarship. Any significant participation in any of the components of scholarship advances the school's mission. Specialization within scholarship is as viable a means of fulfilling one's scholarly obligations as is the sort of conventional specialization resulting in the creation and transmission of new learning within a particular field of law. For example, the sort of flexibility I suggest here should permit members of a faculty (consistent with the obligation, described above, to clearly articulate the focus, goal, and means of measurement) to contribute to the scholarly enterprise by organizing or taking part in conferences or other outlets for professional expression in ways that advance knowledge, or by extensive counseling of colleagues above and beyond the ordinary collegial responsibility (including discussing or editing

47. One method sometimes used either to ensure the benefit of the bargain or to maximize institutional productivity in the aggregate consists of a series of individual agreements under which those who do not produce scholarship are given additional teaching or administrative responsibilities. That lightens the teaching and administrative burden on the productive scholars (who may be expected to become even more productive) and on the assistant professors just starting their careers. From an institutional perspective, such bargains are inevitable if the school means to maximize its aggregate output of teaching, scholarship, and service.

48. I include here legal sociology, the philosophy of law, the political science of law, law and economics, and many other of the "law ands."

49. Travel and conference budgets thus become a key component in the scholarly enterprise.

colleagues' conventional work and helping to distribute it to others in the field) in a way that materially contributes to the production of knowledge.[50]

At this point the classically trained academic reader may shudder. It sounds as if I am suggesting the sort of approach that would make it easy for nonproductive colleagues to justify their behavior. But stop a moment and consider. My proposal is not served up as some sort of disguised carte blanche for those seeking a way out of their institutional obligations. If properly implemented, my proposal contains sufficient safeguards against use of the system to advance any old thing as "scholarship." First, the transparency requirement will make it difficult, without collusion, for anyone to pass off questionable work as scholarship without being challenged. Second, the proposed standard builds in formidable barriers to mediocre or inappropriate work. Chief among them is the requirement that, for each work put forward as scholarship, one must demonstrate both the way in which the work is a consciously directed contribution to the school's scholarly enterprise and the way it can be evaluated against some specific set of standards. Third, a prohibition against double-counting any activity as a contribution to scholarship as well as service or teaching should reduce a temptation to disguise service or teaching as a form of advancement of knowledge. It is fair to object to the sort of flexibility I am proposing on the ground that it may open the way for treating as scholarly what might be as well—or better—characterized as service or teaching. The means to minimize this abuse is transparency—it is hard to get away with chicanery if everyone is watching—along with supervision by the dean pursuant to an appropriately worded ABA Standard 404.[51]

50. Many other forms of transmission, usually rejected because they cannot, by their very form, constitute scholarly activity, might now be reassessed—for example, otherwise unpublished briefs, materials delivered at continuing legal education programs, Internet journal publications, personal Web publishing. I am not suggesting that every one of these ought to count. The burden is still on the person who wishes to put forward a product in these or other forms to convince faculty peers that the work is a meaningful contribution to scholarship.

51. I understand that the usual Standard 404 statement is an often ignored hodgepodge of banalities. But the mere fact that the institutions tend to ignore the Standard 404 statement does not mean that it can't be more effectively used. Consider, for example, a more useful version of a Standard 404 statement on scholarship that might be as follows.

> (2) Research
>
> (i) Every faculty member shall make a meaningful contribution to the scholarly enterprise of the law school. Substantial research or original thought finding expression in writing—article, chapter, book—forms the core of every member's contribution to the scholarly enterprise. Research contributions in such conventional form shall be the primary means, but not the sole means, of evidencing a contribution to the scholarly enterprise.
>
> (ii) The evaluation of contributions to the scholarly enterprise shall be based on every faculty member's research contributions in conventional form. The evaluation of contributions offered in other than conventional form shall be based on the following factors:
>
> - the anticipated value of the contribution as articulated in the first instance, with specificity, by the person offering it
> - the measurability of the contribution, in some acceptable way, to the scholarly (rather than the teaching or outreach) mission of the law school

5. One must show how one's contribution to the scholarly enterprise is directed outward to the academy, the legislature, the bar, or other constituency, as well as inward for the benefit of the school.

Scholarship acquires its greatest value when communicated, and when the communication provides benefits to others. It behooves a law school to cultivate among its faculty the habit of thinking of scholarship in these terms. Faculty significantly contribute to their school through transmission of research and the creative product derived from research, whatever its form. But they need a commitment from the institution. It is easy enough for an administration to preach scholarship, defining it as an individual and personal effort of faculty, and then withhold the resources necessary for transmission.[52]

The faculty's transmission obligation is both internal and external. The external obligation is clear enough; it forms part of the traditional core understanding of academic creative efforts. That it builds one's personal reputation is generally incentive enough for faculty to put their efforts into it. But the internal transmission is perhaps even more important. Internal shar-

- the extent to which the person contributed to others' production of scholarship substantively and measurably though not at the level of coauthorship
- the extent to which the scholarly contribution, though not in conventional written form, serves essentially the same function directed outward to the academy, legislature, the bar, or other identified constituency
- the extent to which the person's substantive scholarly contribution complements that person's teaching and outreach
- the extent to which the contribution furthers colleagues' access to knowledge through activity that complements conventional scholarship, for example by creating the foundation for research opportunities

A contribution offered in fulfillment of the teaching or service obligations should generally not be counted as simultaneously fulfilling the scholarly obligations.

(iii) Every faculty member shall ensure the integrity of his or her scholarly work product. Every member shall fairly acknowledge the contribution of student research assistants and others who participated in the production of the member's scholarship.

(iv) Every faculty member shall endeavor to share contributions to the scholarly enterprise with other faculty and the administration. Every member shall share opportunities for research with colleagues as appropriate.

52. There is some limit, of course, on every law school's resources. But the way a school spends its resources says something about its commitment to the scholarly project vis-à-vis its other commitments. A school that insists on scholarly production but denies the financial support necessary to maximize the value of the faculty's work makes a mockery of the enterprise or at least reveals a disjunction between what it tells its faculty and what it really means. Perhaps, in extreme cases, institutional expressions of commitment to scholarship are meant for audiences other than the faculty. In any case, every law school must make hard decisions about its real priorities and allocate resources accordingly. Then it should conform its rhetoric to the realities.

Then too, as some have taken pains to remind us, there are always creative ways to promote scholarly activity within an institution at nominal expense. See, e.g., James Lindgren, Fifty Ways to Promote Scholarship, 49 J. Legal Educ. 126 (1999).

ing makes institutional synergy possible. What one person produces may help another, or may be important in a related field and find there an additional audience. Internal sharing makes it easier to match transmission opportunities (which some of the faculty know about) with objects of transmission (the produced work).

Of course, all of this is well known. What is missing is a connection between things that are known as discrete propositions (like those I have been stating) and any system that logically connects the propositions in a way that benefits a school's scholarly enterprise. Such an integrated program would increase the synergy potential and transmit scholarship more efficiently.

6. One must be able to clearly articulate how one's contributions to the scholarly enterprise also have bearing on the obligations of teaching and service.

Aha (you may say at this point)—the other shoe drops. And drop it should. It is easy enough to research, create, and transmit in a world whose only actors are other academics and entities that might profit from the scholarship (and, with luck, enhance the reputation of the producer). And this is a good thing. But it is not enough. Just as teaching and service ought to be more directly connected with a school's scholarly enterprise, so too should the scholarly enterprise promote the teaching and service missions.

Yet it is not enough simply to say this should be so. A well-integrated program of scholarship ought to create incentives for members of the faculty to articulate clearly, directly, and specifically, how their scholarly efforts also contribute to their teaching and service obligations. Articulation serves two purposes. First, it serves a disciplinary purpose, a means of giving colleagues some understanding of one's accomplishments. Second, articulation focuses the faculty on the necessary connection between scholarly work and other, related obligations. Moreover, from an institutional perspective, articulation helps make clear which of the several markets for academic scholarly work have been adequately serviced, and which may need greater attention.[53]

Sharing this culture of knowledge ought to benefit students as well. Many faculty make a point of sharing their work with the student-run journals of their own schools. More ought to do so. Such contributions extend one's classroom teaching and can add to the students' educational experiences; in some cases they can also increase the reputation of the school's publications.[54] I understand the politics of placement for personal and institutional reputation. But that doesn't operate the same way for everyone. Those who are more

53. Such information may be important for purposes of hiring, evaluatimg institutional performance, and counseling faculty who are looking for a market for their products (especially younger academics who may know little about the markets for their writing). Indeed, the lack of articulation has led to complaints from some of the sectors served by academic work that they are being ignored or underserviced. In this light, we might reconsider Edwards's now-near-classic statements. See Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34 (1992).

54. George Priest is right: "A law review represents a continuing reputational investment for a law school's students and for its alumni. . . . [A] law review to a serious law school resembles a winning football team to a major (non–Ivy League) university." Priest, *supra* note 22, at 727.

prolific are in the best position to consider contributing some of their work to a homegrown publication.[55] Tenured faculty should cultivate an obligation to contribute something substantial, from time to time, to their school's journals. Deans can encourage that practice by giving appropriate support or tangible recognition, especially if the author actively engages the students editing his work. The political realities of the tenure process suggest that the untenured be exempted, especially untenured faculty at law schools whose journals do not have the highest reputation and the resultant exposure.

7. The scholarly enterprise should entail no monopoly of knowledge within the institution nor any territory with barred access.

The creative process leading to the production of new knowledge may or may not be a solitary process. But research and transmittal are most effective in a collaborative atmosphere. And knowledge has little utility unless it is shared. A school that wants to encourage its faculty's engagement with the scholarly enterprise should make a significant effort to avoid the cult of the fief and the monopolizing of any field—a nice way of saying that every school ought to eliminate the power of selfish faculty to masquerade as its only purveyors of certain sorts of scholarly activity. Within the law school no one ought to own a particular field of law—with respect to scholarship, teaching, or service. The knowledge waiting to be discovered and applied is unlimited. A culture of scholarly productivity can be nurtured only in the absence of any one-person one-field rule.

But law schools should also be sensitive to the reality that cultures of knowledge hoarding can extend beyond monopolistic or field-of-law-as-fief behavior among faculty. Besides seeing to it that there are no walls around any field, a school must be sure that faculty make available to their colleagues opportunities for research, production, and, most important, transmission. Someone who organizes a conference or a symposium and excludes a faculty colleague who might benefit from participating is not advancing the scholarly mission. Anyone who does not share information with colleagues who might profit from it does the school a disservice. The scholarly enterprise demands that a school reward conduct that results in the provision of opportunities for others.

8. Law schools should provide a formal vehicle for all faculty to articulate, annually, their own contribution to the scholarly enterprise and their measurement of its significance.

Communication within a law school is essential to maximize the internal collective value of the scholarly enterprise. Law schools should try to create easy formal means for reporting individual contributions to the scholarly enterprise. The emphasis is on formal rather than informal mechanisms.

55. At schools whose publications already suffer from an excess of reputation, this problem hardly arises. Usually it's the opposite problem: how do the student editors tactfully reject their teacher's submission. For many other faculty whose home publications are solid but have a reputation less well endowed, the obligation should be that much stronger.

Informal mechanisms for sharing information—announcements of achievements at faculty meetings and the like—are good things. But these forms of sharing tend to be impermanent, and thus usually of limited availability. More formal mechanisms ensure access to information at times more convenient to those seeking access. The possibilities are limited only by an institution's creativity. I will describe a simple approach.

A formal annual report to the dean and the rest of the faculty is an excellent way to share information within the institution. Many schools already have in place some formal or informal system for faculty self-reporting on activities for the preceding year in connection with their annual review (though these reports do not usually circulate among the faculty). The form of the report is less important than the requirement that some sort of writing be prepared. While a standard form makes it easier to judge one report against others, the need for flexibility may militate against uniformity in reporting. Still, it might be useful to require that all reports include the categories described above as a means of assuring an appropriate level of generality across the board. Consider the following set of instructions.

> Your report may be in narrative form. It ought to discuss all of the following in appropriate detail. Where useful, please include abstracts or summaries of the materials offered as evidence of your contribution to our scholarly enterprise.
>
> 1. Describe your current scholarly activity and explain its anticipated value as specifically as you can.
>
> 2. Specify the standard for measuring your scholarly activity and explain how it should be applied.
>
> 3. List and describe the specific activities that make up your contribution to the scholarly enterprise.
>
> 4. Describe the specific efforts you have made to further the scholarly work of others on the faculty.
>
> 5. Explain how your scholarly activity has been directed outward to the academy, the legislature, the bar, etc. How exactly have your scholarly efforts benefited the school and your colleagues?
>
> 6. How has your scholarly activity contributed to your obligations of teaching and service?
>
> 7. Describe your plans for scholarly activities in the coming year.
>
> 8. How can the law school help you achieve your scholarly goals? Be specific.[56]

The results of this formal reporting to the dean might be made available to other faculty by various means. All reports could be circulated, or be accessible in the library or the dean's office, or be posted online. Of course the dean should remove confidential information from the reports available to faculty, including the answer to item 8.

56. In addition to the usual—more money for summer research or research assistants—one might think about how changes to the teaching package might advance one's scholarship. Or one might ask for help in securing invitations to be a conference panelist, or in arranging for informal and discreet reading of works in progress. The dean, of course, should make it a point to read as much of a faculty's output as possible. That would be helpful in guiding appropriate aid to individual faculty.

Implementation

The program I have outlined is not an easy exercise. Flexibility requires a leap of faith and a certain amount of discipline. Law teachers and the schools that support them must cultivate the habit of looking forward rather than seeking comfort from the past. Faculty must trust each other if they are to develop good-faith independent formulations of meaningful contributions to the shared enterprise. My proposed program requires sacrifice of the comfort of rigid standards, imposed from without, in favor of flexible standards emerging from the actual efforts of an engaged faculty focused on the actual production of knowledge. It requires ripping the veil of secrecy from the scholarly effort in favor of transparency and communal investment in each other's activities. It requires faith that a community of scholars and a sensitive dean can work together to enforce a standard of commitment to the scholarly enterprise which leaves no one behind and requires no greater effort by some faculty for the benefit of others.

Scholarship, as I have defined it, requires the same level of devotion and attention that faculty have traditionally given to other areas of obligation. It cannot be marginalized or subordinated to other goals and then expected somehow to produce substantial results, or to right itself in some undefinable way. Meaningful contributions to the scholarly enterprise ought to constitute a source of personal and professional growth and satisfaction. Such contributions to knowledge should augment the school's intellectual capital, by contributing to the continuing education of all of us by each of us. They ought, finally, to enrich the communities in which we involve ourselves outside the law school—the community of scholars, the political community, the bench, the bar, and so on. Embracing a flexible approach to the advancement of knowledge can lead to the sort of recognition that, as a necessary byproduct, will increase the collective reputation of the institution in the eyes of colleagues in other law schools.

At Penn State the dialog about scholarship—its meaning, its purpose, and its improvement—will continue, as it should in every institution that values the scholarly enterprise. Our law school has been making great strides, intellectually, in the direction of flexibility and inclusion within a rigorous, transparent system for collective scholarly production. Every honest striving for clarity and equality of effort in connection with scholarship, as with teaching and service, is something to be encouraged.