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Legal Scholarship and the Mission of a Law Faculty

By Charles Koch and Frederick Schauer

People who wish to comment pejoratively on the values that prevail in an academic institution often refer to the phenomenon of "Publish or Perish." By contrast, one never hears reference to "Teach or Perish" as a case of misplaced values. The clear implication is that scholarly publication is little more than an extra, and that academic institutions that consider it vitally important have in some way mislaid their priorities. Since this and other law schools of equivalent prominence require scholarly publication as well as excellence in teaching from their faculties, it seems that either much of the popular wisdom is wrong, or that all of the country's major law schools have in some way gone off the rails. Because we believe in the importance of scholarship and research by law faculties, we felt that it might be useful to explain the sources of this belief.

In a way it seems bizarre that two academics should have to defend the need for research and scholarship. If we worked in a physics department or a chemistry department we would find that the value of pure research or pure thinking was recognized instantly. Why then must law professors accept a challenge to defend what in almost any other discipline would be considered the backbone and the very currency of the academic environment? The answer, perhaps fortunately and perhaps unfortunately, is complex.

Some students, some practitioners, and, interestingly, some law professors often ridicule expansive and abstract thinking and writing by those who teach in law schools. Legal education, it seems to many, should produce mechanics, and thus legal educators should engage themselves entirely in diagramming the functioning of the machinery. No one doubts that transmitting the technicalities, the language, and occasionally the secrets of the guild is a legitimate part of legal education. The mistake comes in assuming that it is the only part.

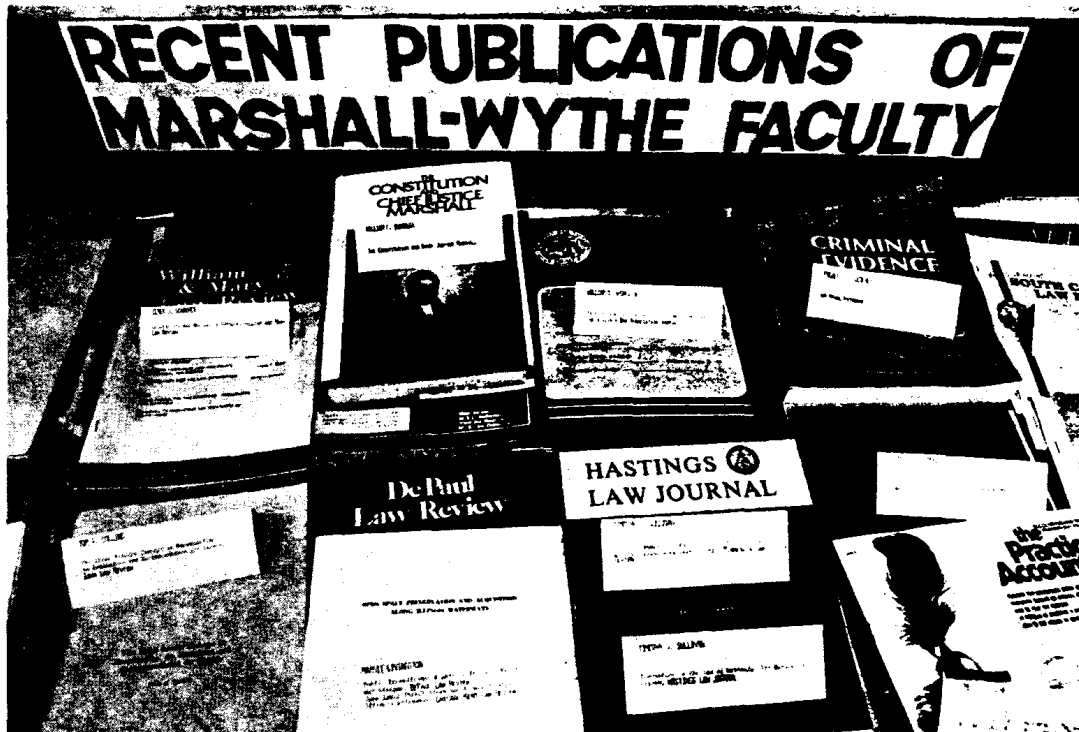
Though lawyering is not an art form in the same way that painting or sculpture is, some analogy to the visual arts may help us to explore the relationship between the trade school and the academy. Within the visual arts we can characterize two types of practitioners - craftsmen and artists. Often the artists are craftsmen, and sometimes craftsmen produce art, but the two operate at different levels on the production of a pleasurable visual experience. The craftsman performs with great technical skill and dexterity. What he produces may be valuable and indeed enjoyable to look at regardless of whether it displays any creativity or imagination. The value of the work produced by the craftsman thus varies directly with the extent of the craftsman's skill. An artist also provides visual

pleasure, but the pleasure is derived from a different source. It is a mental and emotional experience of a wholly different kind from that produced by the competent craftsman. Some artists, like Picasso and Magritte, have been highly competent technical craftsmen as well. For others, such as Van Gogh, the technical skill is almost totally absent; but the artistic experience and pleasure is still very much there. While the artist's ability to produce pleasure does not necessarily rely on mechanical gifts, mechanical aptitude often makes it easier for the artist to express his creative ideas. Conversely, although a craftsman relies foremost on his technical skill, he surpasses the boundaries of that skill when he adds to his product that which we call artistic. Thus even in teaching the craftsman one must nurture the artistic intuition. In expanding the level of technical skill, one must fold in new and different intuitive notions.

If we are to teach craftsmen we must concentrate on the skills that craftsmen need. But these skills are relatively easy to transmit, especially since we take pains to find those with particular aptitude for learning those skills. But it is the creative side of the law that is much more difficult to teach. Indeed, the creative aspect is often thought to be almost completely intuitive. Yet to a great extent the creative side of the law is passed on from generation to generation. Through this process the state of the art is advanced, the societal benefit from the law increases, and the advances in the art pass quickly into advances in the craft. These advances are important even to and perhaps especially to the individual craftsman because these advances allow the craftsman to reach beyond the boundaries of pure technical knowledge. Strong evidence exists for the proposition that the very best practical lawyers are those who are both highly skilled in their craft but who never ignore the potential for creativity.

A major problem for the law teacher is how to convey this creative element of the law; how to bring the creative craftsman in touch with the creative aspects of the craft. This educational goal is unfortunately resisted by some elements of the craft guild of lawyers today, yet it is an important facet of the training of those who will soon be members of that guild.

Since the creative aspect of the law is nurtured rather than transmitted in a simple fashion, the teacher must have a sense of it in order to be able to nurture it in others, particularly students. Legal scholarship, which at its highest form is the search for new and creative analyses of real problems, is the practice of legal creativity in its purest form. A legal educator who actively engages in creative scholarship is by definition



engaged in advancing beyond the frontiers of settled law. Engaging in legal scholarship therefore trains the legal educator to pass on the element of creativity to the next generation of lawyers. Furthermore, since creativity comes easiest when there is technical fluency, scholarship requires the teacher to develop technical skills in both teacher and student as the necessary foundation for creativity.

Faculty scholarship has other direct effects on the quality of the instruction that is offered to students. The faculty member who is a productive scholar in the areas in which he or she is teaching is best able to deal with and convey a sense of the most important contemporary problems in the field. Closely allied to this is the fact that scholarly necessity requires the scholar to be conversant with all of the relevant materials and sources. Thus, active scholarship produces the teacher who is best able to teach the issues of today and of the future, and therefore best able to prepare students to practice today and in the future. Moreover, the teacher who is engaged in active scholarship is inevitably enthusiastic about that area, and can therefore exhibit and impart that special enthusiasm for the subject that is essential for a successful learning experience. It is, for all of these reasons, a major mistake to view classroom teaching and important scholarship as mutually exclusive. In most cases the two activities are mutually supportive.

Although scholarship is therefore a fundamental part of successful teaching, it cannot be evaluated on this basis alone. Teaching is only part of the job of the academic, and for that reason society grants to us what

is mistakenly characterized as "free" time. This free time, however, is not really ours. Society gives us this time so that it can be devoted to advancing the law. Members of a law faculty, unlike most practicing attorneys, have the time as well as the experience and expertise to contemplate broader issues. In few other fields of scholarly endeavor do academics have as much influence on the development of the field. Treatises and law review articles are frequently relied upon and cited by the courts. Law professors are usually prominent on committees dealing with rule and statutory revision, restatements, and broader proposals for law reform. Academic criticism often exercises a significant influence on the development of case and statutory law. While historians rarely make history, it is clear that law professors quite often make law.

For these reasons, a reputation of a law school is highly correlated with the reputation of the scholarship produced by its faculty. Law schools that generate impressive scholarship also produce the complete law graduate: those who have been grounded not only in the technical skills, but who also have had nurtured that part of lawyering that parallels the creative aspects of the artistic intuition. It is far from a coincidence that students from the law schools best known for faculty scholarship go on to the best and most challenging legal positions. This is true even though some of these law schools do not concentrate on technical knowledge. As between technical skills and creative talents, any deficiency in the first is easily remedied in the early years of practice, but a deficiency in the

second is virtually beyond remedy throughout the course of legal practice. An increase in scholarship thus justifiably increases the marketability of the students that a law faculty sends out into the profession.

It is the duty of a law faculty to devote much of its time to activities that enhance the profession and that further the service the profession performs for society. This public duty is especially important in the law. Unlike the sciences, which set their own pace for development, the law must parallel society. It is inevitable that society will continually change, and law must change with society or it will fail to fulfill its societal function. A law faculty that fails to participate in this process of legal change has failed its public trust.

Scholarship is therefore important to any law school in enhancing the learning experience of its students, in aiding the students and alumni whose careers ride on the reputation of the school, and in performing the function assigned to the institution by society. It is also a crucial factor in the ability of this school to continue to attract a highly qualified faculty and to retain the highly qualified faculty it now has. Faculty visibility and reputation also attract highly qualified students, on which so much of the school depends. Consequently, it is in the best interests of the entire law school community and those it services that scholarship be encouraged and enthusiastically supported.

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