

1985

"Of Law and the River," and of Nihilism and Academic Freedom

Peter W. Martin

Robert W. Gordon

Paul D. Carrington
pdcc@law.duke.edu

Paul Brest

Phillip E. Johnson

See next page for additional authors

Repository Citation

Martin, Peter W.; Gordon, Robert W.; Carrington, Paul D.; Brest, Paul; Johnson, Phillip E.; Van Alstyne, William W.; Calabresi, Guido; and Fiss, Owen M., "'Of Law and the River,' and of Nihilism and Academic Freedom" (1985). *Faculty Publications*. 736.
<https://scholarship.law.wm.edu/facpubs/736>

Authors

Peter W. Martin, Robert W. Gordon, Paul D. Carrington, Paul Brest, Phillip E. Johnson, William W. Van Alstyne, Guido Calabresi, and Owen M. Fiss

“Of Law and the River,” and of Nihilism and Academic Freedom

I. Introduction

Peter W. Martin

Volume 34 of the *Journal of Legal Education* carried an article by Dean Paul D. Carrington that drew wide and intense response (“Of Law and the River,” 34 J. Legal Educ. 222 (1984)). The exchanges of correspondence it provoked dealt with important issues of academic freedom and the place of a law school and law faculty members within the university. As Dean Carrington was taken to be addressing the Critical Legal Studies movement, the ensuing discussion also concerned the views of those identifying with that movement.

Because this correspondence is both important and timely, it appears here essentially as written. These are letters exchanged among colleagues and friends or addressed to the Committee on Academic Freedom and Tenure of the American Association of University Professors, not articles or formal comments. Personal salutations and references have been removed, but neither the editor nor the authors have made substantial revisions.

II. Nihilism

Robert W. Gordon to Paul D. Carrington

I write in response to your article, “Of Law and the River,” in 34 J. Legal Educ. 222 (1984), which I began in appreciation, carried along by the graceful flow of its prose and the wonderful passages from Mark Twain, and finished in bafflement and growing alarm. As one who has been loosely connected to the Critical Legal Studies (CLS) movement, I take seriously enough the injunction that people like me have “an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy” (at 227) to be prompted both to ask you to elaborate your reasons for thinking so and to suggest why I think you may be mistaken.

I have no quarrel with your main point, that the practice of law like that of any other complex craft requires judgment and courage as well as technique, and that judgment and courage can be taught; though I think we might disagree on how best to teach them, and I might be inclined to emphasize more than you the need for constant critical reflection upon the platitudinous commonsense (“everybody knows that women are not aggres-

Peter W. Martin is Dean, Cornell Law School.

Robert W. Gordon is Professor, Stanford Law School.

© 1985 by the Association of American Law Schools. Cite as 35 J. Legal Educ. 1 (1985).

sive enough to be litigators") that sometimes passes as professional "judgment". But you then go on to insist that among the components of professional judgment and courage there are certain quite specific beliefs about law and its practice that lawyers ought to hold as a matter of unreasoning faith; and that law teachers who doubt this faith should migrate elsewhere lest they "dispirit" or "disable" their students from practice or even induce them to practice "bribery and intimidation"!

Like most people invited to take a loyalty oath, I want first to have a clear notion of its content; and find your account of the correct faith for a law teacher actually to be fairly obscure. You define it mostly by contrast to what it is not, the bad view of the "nihilists". I would like to set out three possible interpretations of your account of the issues dividing the True Professionals (TPs) from the Nihilists (Ns), and react to each as I think many people involved in CLS would react.

#1—(*Seem* the most likely interpretation of your position). "Ns claim that law is an empty shell, just a facade for the naked exercise of power. TPs believe that law has an autonomous content, and therefore influences, channels, and restrains the exercise of power."

If this is all the oath involves, CLS people can take it cheerfully. None of us thinks law has no content. In fact we are often accused (by legal sociologists, for instance) of taking its content much *too* seriously, of exaggerating the power of legal doctrines and principles to control social behavior! Of course law channels and restrains power. It also confers power, as it would upon you, for example, if you had a legal entitlement to specify what I had to believe to keep my job. There cannot be any "official power" for law to restrain without law to create the "office" in the first place.

CLS people do frequently say that law, or legal rights, are "indeterminate." What they mean by that is *not* that law fails to constrain social or official action at all, for it obviously does, but rather that because it is founded upon contradictory norms, its principles cannot constrain a single set of outcomes even if intelligently, honestly and conscientiously applied. In contract law, for example, there is *always* a legitimate argument for maintaining one party's freedom of action and a contrary argument for protecting the other party's security; for every argument for enforcing the deal in the name of "freedom of contract" there is a counter-argument for voiding the deal because of fraud, duress, overreaching, misunderstanding or changed circumstances. Indeterminacy, in this view, isn't the product of some official's "distortion" of the law's command, but inheres in the law itself: the law commands contradictory things.

I do not see why someone who took even the most extreme view of legal indeterminacy, i.e., that "you can always crank out a legal argument for any position," would resort to "bribery and intimidation." Wouldn't he simply crank out the argument?

On the other hand, if your N opponents here are people who reduce all law (and indeed all life) to the product of the self-interested preferences of officials or social groups, you should not pick on CLS but on the law-and-economics crowd. I think the confusion here results from a regrettably widespread false syllogism: "CLS=left=vulgar-materialist-Marxism." In fact,

the vulgar materialists of our times are on the right and tend to hang out in Chicago.

I do not know *any* law teacher these days who would take a caricature-Realist's position that legal outcomes represent nothing but the arbitrary whim or idiosyncratic psychology of decision-makers. This is really and truly a person of straw. If this is the bogey who scares you, you can relax: he is not out there.

#2—"Ns believe that law embodies the will of the socially or economically powerful, or of the officials who apply it; TPs believe that law restrains, though doubtless not as much as it should, the strong and the official."

The bad N position #1, *supra*, was that the law had no content; this bad N position is that law has a content, loaded in favor of the powerful. (You actually mention only officials, but imply other kinds of powerful groups too.)

Is there really a serious dispute here? Suppose you and I were interviewing candidates for law teaching jobs. One of them says: "Officials in America are not restrained by rules; they can do anything they want." Another says: "The rich and well-off control all the legal processes in this society; they can always get their way in the courts and in the legislature." A third asserts: "In a country like ours everyone is equal before the law: wealth confers no significant legal advantages." We would both, surely, have reason to doubt whether any of the three was adequately tuned in to reality.

Yet perhaps we *do* have a dispute about the extent to which the law curriculum should dwell on systemic, as opposed to aberrational inequities—whether, for example, somebody should be allowed to teach a course called "Law and the Class Structure," presenting material about the differential ability of classes or groups to pass legislation, influence the administrative process, wear out opponents with lawyers, etc. I think that would be a useful course, especially if taught in an inquiring and undogmatic spirit. Do you think it would be "unprofessional?" Would it be more likely to lead to "cynicism" or to moral outrage and the zeal to reform?

Supposing it did produce some cynicism, would the result be to encourage "bribery and intimidation"? Wouldn't a cynic who thought "law is just a tool of the bosses" usually work *for* the powerful, and therefore want to work *through* the mystifying medium of the law, manipulating the rules on behalf of his clients? Why would he *need* to resort to bribery and intimidation, with all that law on his side? Can the case that bothers you be that of the disaffected cynic out there who represents the powerless and thinks: "Law is just a tool of the bosses anyway; there is no hope in it for the little guys, so we might as well use bribery and intimidation."

I guess I would want some evidence that there are any such people, and that they constitute a real social problem. The radical lawyers I know personally or by reputation are rather non-Machiavellian and rule-abiding in their dealings with clients and opponents; they tend to be sticklers for proper form, and are outraged when their adversaries resort to sneaky tricks. All in all, I have rarely come across a more strikingly implausible proposition than yours to the effect that left-wing law teaching (assuming for the moment that that is what "nihilism" means) leads to corrupt practice.

In any case, this discussion has very little to do with CLS. On the whole, CLS people have declined to reduce law to the status simply of an instrument of class or state domination. They believe that the law does contain doctrines and processes that facilitate domination, but also that it contains rules that restrain, and utopian norms and possibilities for argument and action that can help liberate people from, domination (as, for example, 19th century law established slavery but also contained egalitarian principles that helped lead to slavery's abolition.) The article from Unger that—incredibly!—you cite as a source of supposedly “nihilistic” attitudes towards law is actually an extended argument for taking practical steps toward developing the utopian norms expressed *in* law (what Unger calls the method of doctrinal deviation).

Just as I cannot think of anyone in American law teaching who thinks law is nothing but official whim, I can't think of anyone either who preaches the revolutionary overthrow of legality. This seems to be another imaginary bogey-man.

#3—“A TP is someone who ‘believes in the law’, i.e., believes that the existing collection of rules, procedures, and professional practices, though flawed and imperfect, adds up to a tolerably just structure for a political and economic order; so that lawyers who work competently and honestly at their craft within this structure, without trying to inject their “own” political preferences into it, will contribute to the overall good of society in the long run. Anyone who questions all this is an N, or at least not a TP.”

The problem for me in this formulation, if it approaches what you want to say, is that it makes into a criterion of a good professional what is actually just a particular and highly disputable set of political and jurisprudential views. It says in effect that a lawyer ought to inhabit the moderate center of the political spectrum. She can believe in a little more regulation or a little less, a little more redistribution or a little less; but those are the appropriate limits of her range. Of course by and large our profession *is* a conservative-to-moderate-reformist one that has usually, though not always, resisted major structural change; but would you really want to establish loyalty to the majority politics of the bar as a qualification for membership? You could only do so, surely, if you adopted a jurisprudential position equating belief in “the rule of law” with adherence to the current majority politics, whatever it was: this would be a sort of customary-positivist position that what most of the bar believes effectively *is* the law. Or if you adopted a strong essentialist position that our current collection of legal practices optimally embodies, or at least comes very close to doing so, values required of our polity by some compelling necessity: The Tradition of Anglo-Saxon Liberties, the Original Understanding of the Constitution, Efficiency, the Realization of Individual Autonomy, etc. Under either theory a case could be made that disloyalty to the current consensus would be disloyalty to the idea of law itself.

[It occurs to me that I may have misunderstood you, and that you were making a more limited point than I thought you were. Your comparison of teaching professional judgment to teaching riverboat navigation perhaps implies a merely prudential rather than deeply normative professionalism:

you may be suggesting simply that if novices depart too far from the prevailing conventions and arguments in their legal practices, they will be *ineffective* lawyers. The good teacher will warn the novice when he strays dangerously out of the mainstream.

[I cannot argue with that. Teaching any craft involves teaching its current customs; and one of the main objects of law teaching has always been to familiarize students with the body of conventional rhetorics and practices. But I think it's bad teaching that encourages an unreflective acceptance of the current conventions. Teachers also ought to expand their students' minds beyond the current professional wisdom, to show them that the going ways of doing things (or some slightly amended version of them) are not the only possible ways; and to develop the skills of critical evaluation of the going ways and of alternatives to them. After all, the whole point of the university law school is supposed to be that people who are not caught up in the time and financial pressures of practice can obtain, to continue your metaphor, an aerial view of the river—can see that the pilots have only been using one channel and the river is actually much wider than they think, and has many branches and tributaries. Such teaching is not the same as, or a substitute for, teaching navigation skills, but it is awfully important all the same.

[In any case your argument seems to go well beyond this merely prudential view of current practices to enjoin the teaching of their validity as well as their actuality.]

Now suppose somebody comes along, let's say somebody who is interested in a job on your faculty, whose politics are out of the moderate-center range. This might be a right-winger who wants to dismantle most of the regulatory-welfare state or a left-winger who wants to work towards the replacement of centralized bureaucratic hierarchies in public and private life with participatory-democratic collectives; or it might be someone more interesting and original than either. We will assume the person is "competent" in standard terms, that is, facile in the rhetorics and analytic modes of current legal practice. The candidate listens politely to your loyalty test and the jurisprudential theories on which it is based; and *then starts to dispute the theories on their merits*.

—She might say (as for example David Luban does in his article in the same issue of the *Journal of Legal Education*) that the consensus of the bar on what constitutes good professional practice is not entitled to a whole lot of respect because much of it is based on self-serving prejudice or plainly mistaken empirical assumptions; and argue that the role of a law faculty should not be to acquiesce in, but critically to examine and to challenge the current professional wisdom.

—She might say that the present consensus does not effectively embody the society's basic values; that it departs in serious ways from the commands of the Constitution, Efficiency, or whatever, and therefore needs major restructuring to be brought into compliance.

—She might say that the appearance of a settled consensus is deceiving, because that appearance papers over a mass of conflicting and contradictory tendencies in the law; that the society and its members, including its lawyers,

are deeply divided within as well as among themselves; that to "believe in the law" thus does not entail the endorsement of any very determinate set of social arrangements; and that one can help point social change in radically different directions simply by emphasizing some sets of existing tendencies actually embodied in the law rather than others.

—She might, finally, assert that there is nothing inherent in the notion of professionalism that precludes lawyers from thinking about, and using law to help promote, major political change; that the lawyers who helped lead the Stamp Act riots, or the protests of abolitionists, or the sit-down strikes of the 1930s, or the New Deal's administrative innovations, or the civil rights marches of the 1960s, all actions contrary to the then-prevailing narrowly-professional consensus on legality, are people to be admired and emulated, not read out of the fraternity.

How do you deal with such a person, consistently with your expressed beliefs in the freedom of intellectual inquiry? You admit the possibility that the "nihilists" may hold their beliefs sincerely and honestly. But what if they are not only sincere, but actually *right* (at least, since none of us can claim *possession* of the truth, relatively right?) I mean, what of the possibility (let us allow it to be that) that their views rest on more plausible, rationally defensible, resonant-with-social-experience, grounds than your own do? Would it then be relevant that they were "disabling"? (If a team of medical researchers claims most mastectomies are unnecessary, and that is true, don't you *want* young surgeons to feel "disabled" from performing such operations?) Would you want professionalism to be founded on lies and errors, however noble?

Even if the "nihilists" cannot convince you that they are right, would the teaching of their views corrupt the morals of young lawyers? I cannot for the life of me see how. None of the positions I have mentioned "disables" lawyers from being able to "perform the world's work": they encourage lawyers rather to make reflective decisions about *how* to perform it; insist that all such decisions, *including the decision to acquiesce in what seems to be the current consensus*, involve political choice; and push people to recognize, justify and to *take responsibility* for the political choices that they make in their careers. You cannot surely, respond to such a person by playing Cardinal Bellarmine to Galileo: "Our Church has no room for your kind of truth."

I share your view that "cynicism" is widespread among law students, and sometimes has a "disabling" or "dispiriting" effect upon them. But my explanation for its prevalence differs greatly from yours. It does not take very long for law students to realize that few of the lawyers they come across in law school and summer jobs are much interested by the notion that law should be a means for the pursuit of justice. Students notice that concern for the social consequences or political or ethical justifications of legal rules, if not actively disparaged as sentimental, is treated as marginal and not amenable to "rigorous" analysis. They notice law firms increasingly

promoting business methods of production, routinizing work, hustling frantically for clients, putting heavy stress on billable hours and the bottom line. They notice the organized bar in solemn assembly voting down the most modest attempts to reform its ethical codes or disciplinary machinery and contemptuously refusing to respond to the widespread public criticism of its practices and prices. They see even the small gains that 1960s liberals made toward giving the poor and unorganized some legal leverage in dealing with the state through public-interest and legal-services practices eroded close to the vanishing point, and the private bar contributing little beyond tokenism to filling the gap. Above all, they notice a vast and pervasive indifference to reflection upon the social role of the bar. They are unlikely to come across many lawyers, in or out of school, who ever stop to think about what our profession actually accomplishes for the society or who wonder whether what it does it worth doing; or who have much to say on the subject beyond something about the value of preventing blood feuds or the virtues of a competitive market in adversary representation, views that would not hold up to a minute's "rigorous analysis" in a classroom. And they *are* very likely to find lawyers who will tell them that preoccupation with such questions is naive idealism or merely abstract and academic "theory", misplaced in and irrelevant to the "real world" of professional practice.

I mention these things not to indulge in futile moralizing but to point out that it is hardly the teaching of "nihilism" that makes cynics out of these students: it's just exposure to their chosen profession. The response of many students is complacent careerism. They think they are on the track to wealth and professional status, and any law teacher or lawyer who wants them to examine law and its practice critically is an obstruction—whatever this weird stuff he is teaching is, they know they cannot use it. Other students give in to a kind of numbing despair. You can actually see them deflate after the first-year summer: they narrow their focus to getting through, finding the alienating job and grinding their way through it, saving their passion and commitment for personal life after hours. They too want to think about what they are getting into as little as possible. (Parenthetically, don't you think that the mindless careerism and apathy of so many law students is a rather more serious problem than the symptom of it you oddly fix on, that they "pass" when called on in class?)

Careerism and apathy are perfectly adaptive responses to the collections of practices that students are persuaded to think of as constituting "the real world". The prevailing collection of rules, processes, ethical standards, negotiating strategies, allocations of power and wealth within the law firm or the corporation or the society at large, come to seem like natural and necessary facts about the world just because they exist. Some lawyers think the facts add up to a system that is functional and valuable, others that it is crazy and dumb, or an arbitrary jumble: but it is out there, no denying it, and that makes it all seem somehow inevitable and fixed, subject at best to glacially gradual change. The message is: "Like it or not, it has to be this way." Accepting that, the careerist sets out to grab as much as he can, the alienated to do whatever he has to do in order to get by.

Some law teachers, including many of the most conscientious ones, try to encourage their students toward a third way of dealing with the “real world”: this is your response, the counsel (and example) of professionalism. Professionalism as I understand it recommends a kind of minimalist stoic morality, to participants in a society whose basic structures and tasks are assumed to be unalterable givens. Your task is not to ask why you have been conscripted for these wars, or to question mysterious bureaucratic orders, it is to bear yourself like a soldier. You should strive to develop and live up to your own standards of quality for the practice of your craft, whether your superiors demand such standards or not; you should be candid and honest with clients and adversaries, and not stoop to cunning or underhanded tricks even if everyone else does; you should give your best attention to all your work, whether the client is a bigwig or a nobody; you should not try to grab credit for others’ work or to blame others for your mistakes; you should try to preserve independent judgment, even in the face of pressure from partners or clients; you should not treat your underlings badly or toady to your bosses, etc. If this is the sort of thing you mean by professionalism, I agree wholeheartedly that much of it can and should be imparted in law school classrooms (or even better, clinics) and personal dealings with students—though it will also need the example of respected successful lawyers to be sustained out in “the real world”—and that the world would undoubtedly be a better place if more lawyers lived by it. It is certainly a lot better than careerism and apathy. It gives students at least a minimal set of aspirations to *try* to live by and take pride in, while facing the “real world’s” moral hazards. (Many lawyers would of course consider even these minimal aspirations to be hopelessly naive utopianism.)

Yet professionalism, by and for itself, is not enough. It gives no guidance at all on what lawyers in this society ought actually to *do*, what they should strive to promote: it lacks a social vision. Indeed it supposes that trying to help students develop a vision of the social purposes of their practices would be illegitimate, since purposes already inhere in “the law”, i.e., the collection of current practices, and in the desires of clients. The attitude of professionalism thus ends up recommending submission to the status quo, because it cannot imagine alternatives and does not think it should. This is the real “cynicism” of the legal profession: that there is not much that anyone can do about the way things are, that we must accept “reality” as a soldier accepts his orders. I have often noticed that it is the law teachers with the *least* conviction that the current collection of practices adds up to anything particularly coherent or admirable who are *most* likely to adopt the counsels of professionalism. In a world without meaning, at least one should serve the status quo with style. Professionalism is thus not an alternative to cynicism: like careerism and apathy, it is a *product* of cynicism, even if a valuable product.

I think that if the law schools want to help counter the bad products of cynicism they are going to have to offer *substantive visions* of how lawyers can act to make this a better society. (David Luban and Richard Wasserstrom make this same point in this issue of the *Journal of Legal Education*.) Unless a single faction captures the law faculty, which would be unfortunate as well

as unlikely, there should be a whole bunch of different and competing visions. That means law teachers and their students will be engaging each other in basic political, economic and ethical argument about what lawyers and legal systems can and should be doing. It means trying to describe the current practices as they actually are, and to articulate and criticize their theoretical justifications; and to try to work out practical suggestions for experimentally realizing competing visions of the good. The Chicago Law and Economics people have had something to offer here, as have the Chicago Libertarians, Wisconsin-Buffalo Law and Society scholars, and the Coasian-Rawlsian Liberal Technocrats like Calabresi and Ackerman; and so, I would insist, have the people in Critical Legal Studies, whom you single out, completely arbitrarily as it seems to me, for excommunication. The colossal irony of your article is its labelling as “nihilists” the members of this group, who are actually among the most hopeful people around—people who think things really can change for the better and are committed to changing them! (You seem to be saying: “If you do not believe in what I believe in, you must not believe in anything at all.”) The students who seem to be attracted to our ideas are rarely the most cynical or despairing (those are more likely to fall into careerism or apathy), but rather the most idealistic and socially committed, those who are energetically seeking what Roberto Unger has called “transformative vocations”, ways of doing work that is useful to the world and at the same time helps to change the world. Sure, they get “dispirited” sometimes about how hard it is to change things, but who doesn’t!

Why have I written at such length? The real reason is that I started a very short letter and got carried away. A second reason is that as the country drifts rightwards, the sounds of Red-baiting are once more heard in the land. Though I am sure you have absolutely no wish to do so, you give encouragement to Red-baiters when you brand schools of thought originating with people on the left as too dangerously corrupting for professional students’ consumption. There is already a lot of unreasoning prejudice against CLS among practicing lawyers who have vaguely heard of it. If there are battles to come, the academic profession ought to be solidly on the side of the values of intellectual pluralism and the pursuit of uncomfortable truths. If we are to sink without a trace it should be because people have shown up our errors, not because of repression. Also: I happen to be an old admirer of yours. I read the “Carrington Report” when I first started teaching and thought it a terrifically acute diagnosis of much of what was wrong with law schools, enlightened in its recommendations, and written with stunning grace. You have too much class to be consorting with the rednecks of our profession.

Paul D. Carrington to Robert W. Gordon

Yours is only the second such full communication that I have received in over a quarter century of writing about law. The other came from Henry

Paul D. Carrington is Dean, Duke Law School.

Friendly, who, in commenting on a draft that I had sent him, started his ten pages of single-space commentary with the emphatic statement that my ideas were the worst he had ever read. At least, I thought at the time, I have not been ignored. So I can elate a bit, along with the politicians who ask only that their name be spelled correctly. On the other hand, I still hold most of the ideas proscribed by the good judge, and have made very few converts in the seventeen years since he proclaimed me a menace, so it is hard to take myself too seriously even when I evoke a serious response like yours.

It may be that the only real difference between us is in the reassurance that you know of no law teacher who holds that legal outcomes represent nothing but the arbitrary whim or political bias of decision-makers. If you are right about that, then my comments to which you take offense have little point. I am certainly aware that my concern is not appropriate with respect to all the persons having some sympathy or connection with CLS; it is for that reason that I tried to avoid referring to CLS as a corporate body, and chose to comment instead on Legal Nihilism, a phrase which I had thought likely to claim for their banner, but which may nevertheless apply to some.

I am assuredly oppsed to Red Hunts and Loyalty Oaths. I was asked to speak about academic ethics. I supposed, therefore, that my remarks were appropriately addressed to the consciences of law teachers, not to any regulatory bodies. In light of your comments, I could wish to have been more clear about that.

The point I sought to make is a limited one, that academic ethics may be somewhat more constraining in the environment of a professional school claiming a role in the professional development of its students. The obligation to contribute to professional development can conflict with the duty to profess truth if the truth which one is obliged to profess is a refutation of the premises on which the service of the profession is based. Thus, atheism is an eminently legitimate intellectual position which any university worthy of the name should be easily able to shelter; but a professor of divinity for whom atheism is the primary message to profess ought to recognize that he has a conflict of interest, of sorts; he should put in for a transfer to some other department, perhaps the religion department. This seems fairly obvious to me; in any case, my remarks were intended to suggest the possible applicability of that notion to law teaching.

I can tell you with assurance that the possibility is not altogether unreal. Autobiographically, there have been days, sometimes many of them in a row, when I have asked myself if perhaps I am or was not too cynical about law to be able to profess it. I am personally acquainted with two very able law teachers who did in fact decide that they were in the wrong pew, and who did elect to pursue their careers in academic settings in which they were liberated from their sense of responsibility for professional development of students. Those persons put their money where their mouths were, sacrificing the pay and status associated with professional teaching in order to secure the greater intellectual freedom of a purely academic environment. My present perception, which may be wrong, is that there are a number of persons now in professional law teaching who ought to make similar decisions, for the sake of their own moral and psychiatric well-being, as well as for the sakes of

their students and their students' clients.

I take no satisfaction in finding that there is this potential conflict between our duties as professionalizers and our obligations to profess truth. I have recently published a review of Bob Stevens' book in which I again tried to explore the costs and benefits of the isolation of professional education with the university. Professional law schools, I own there, may be a bad idea; in counting the costs, I certainly should have explicitly added this one to my list. My specific frame of mind about the social utility of professional law schools dates at least from the time of my work on the AALS Committee report to which you refer, and which reflected serious ambivalence on the matter. Uncertainty about the worth of our enterprise does not, however, in my view, entitle those in doubt to attack its essential premise while sharing fully in its benefits.

I cannot demonstrate empirically that lawyers who think that law seldom if ever matters are bad lawyers on that account. There may be a little support for my assertion in Jerome Carlin's work in the early sixties. You say you don't see why someone who believed that "you can always crank out a legal argument for any position" would resort to "bribery and intimidation" rather than simply cranking out arguments. The logical answer is that if you can always crank out an argument, the task of cranking is meaningless in the sense that neither judge nor advocate can regard the product of the effort as the basis for the application of the lash of official power. Your lawyer might go ahead and crank out a few arguments when he has nothing better to do, but he is not likely to think his effort to be effective, or even a worthy use of time and effort.

My own episodic observation is that many bad lawyers are in fact convinced that law does not matter. Indeed, for the slothful, (and who of us is not at least sometimes slothful?), it is a congenial rationalization of nonperformance that one's professional effort would have had no bearing on the outcome anyway. And if one has no effective professional tools with which to serve clients, what remain as means of service are bribery and intimidation, in all their manifold forms.

You are surely right that this has nothing to do with whether the lawyer is a leftist or a rightist. The idea that law does not matter can be equally congenial to professional slobs and crooks of all political persuasions. I do not think for a moment that the conversion of a generation of law students to Marxism would in itself have any bearing on their professional competence. But teachers who profess that class bias is the primary or exclusive motivation of judges are at serious risk of being influential on their students only to the degree that students perceive that principle is not a force in legal decisions.

Moral outrage and a zeal for reform are singularly difficult to generate in professional students. Although constrained by my belief that students are ends not means, I have been taking a stab at evoking moral outrage for 25 years. The bottom line of my course in civil procedure is that the system is broken, that it operates to grind the faces of the weak and poor, and needs radical reform. This could be a Marxist vision, except that it predates Marx, and descends more from Bentham and Brougham and other intellectual

ancestry. I am fairly confident that my students get the message that the system serves the interests of the strong, but if any have been filled with zeal by that revelation, I cannot confirm it. On this experience, I do not have a lot of hope for the course on "Law and Class Structure" you describe. If a colleague wants to teach such a course, I would certainly support it as an appropriate exercise in a professional school, but I would not be surprised if it drew a small crowd and, except insofar as it preached to the pre-believers, had a negative result.

An impression I have formed over the years is that almost everyone is a Marxist in the sense that they acknowledge the ubiquity of class bias. But most people, including most lawyers and law students, do not seem to regard it as more than a minor offense or blemish in the order of things. Indignant about it they rarely are. Even if they are themselves the disadvantaged. If this is right, your course will get a blase response. And if you are not a little bit careful, the only lesson effectively taught would be a perhaps unintended lesson that our game is essentially one of manipulation. Students could possibly be moved neither to the left nor right in their politics, but merely somewhat corrupted by the exposure. I have been conscious of this risk in my own teaching for many years; if you can persuade me not to worry, I will be very grateful.

I here plead *nolo contendere* to the alleged miscitation of Unger. I spent a week and a half in a hammock with that article, and this was what I got out of it. I do not think I am alone in so reading him; and, if I am wrong, he must have even less to say than I gave him credit for.

Since he adopts the affectation of non-citation, it is hard to be sure, but I thought that I could detect the influence on his work of what appears to be happening in the not unrelated field of literary criticism. As far as I know, there are no avowed adherents of literary nihilism in that discipline, either, but it does appear to me and to some other critics of the critics that there are those who practice it. There are those who do say that literary texts are what the reader chooses to make of them, and indeed that the creative process occurs in the minds of readers, not writers. I hope that it is not merely a revelation of a political bias when I confess sympathy for the view expressed that this is the sort of philosophy that has given bullshit a bad name. However that may be, I can certainly countenance the profession of this Literary Nihilism in the university, even as I question whether a person holding that view ought, on his own account as well as that of others, to aspire to teach creative writing to persons who want to write good literature. My point is that if this kind of intellectual annihilation is to be practiced in law, its practitioners ought at the very least to wonder what its secondary and tertiary effects may be.

Even if I recede from my citation of Unger, I do not recant my expression of concern. There is a problem. I have seen it in living color and in person. If I exaggerate the problem, I am happy to be corrected. And if some or all CLS folks can and will disavow the idea that legal texts do not much matter, I would be delighted.

Robert W. Gordon to Paul D. Carrington

Your letter helps considerably to clarify the issues between us, as well as revealing more agreement than I would first have suspected to exist. Without going on at too great length—I know that neither of us has the time to continue a correspondence in so leisurely an 18th century fashion—I would like to lay stress on the few points of difference that seem to be the crucial ones.

I wrote you in the first place because I—along with many colleagues at this and other law schools—was worried that your ideas, attractively gilded with your prestige and influence, might be turned to frightful purposes. The specific danger is that law faculties seeking to block appointments or promotions of teachers with unorthodox (especially left-wing) sympathies will be encouraged by your theory (that only people committed to certain “premises” of professional practice, specifically to the belief that “law matters”, ought to be teaching in professional schools) to think that you have given them a respectable pretext for bypassing the normal commitments to academic freedom and intellectual pluralism that might otherwise restrain them. I do not think this danger is a paranoid fantasy, given the many intense expressions of hostility towards left-wing legal studies, particularly Critical Legal Studies (CLS), I and others have heard from lawyers and law teachers in the last couple years, and the appointment-promotion-and-tenure troubles that some CLS-affiliated law teachers are now actually experiencing.

I am really glad to hear that you have no wish whatever to give aid or comfort to any institutional attempts to suppress unorthodox scholarship and teaching. There remains the matter, quite apart from the unpleasant political uses to which it might be put, of your basic proposition’s validity. And here I find I am still puzzled about what the proposition actually is. You oppose the belief that “law matters” to the belief that it does not (“nihilism”), and worry that nihilist teachings may corrupt or dispirit future professionals. Some problems:

1. When you speak of the professional as one who believes in the law, it is not clear how you are using “law.” You could mean: the body of current professional practices. Or: the utopian norms of fair process, restraint-of-power, equality, “dialogue” (as the Yale people say), or whatever, embodied in law but only imperfectly realized in the current professional practices. It makes a lot of difference. One position is: “A true professional complacently subscribes to the going system, whatever it is.” Another is: “A true professional should work to bring the practice of law into closer harmony with its utopian norms.” I should have thought that if law teachers had any ethical duty to teach either of these positions, it would be the second. The academic wing of the profession in particular is *supposed* to be reformist in its aspirations: if lawyers or judges or legislators are doing bad things, the professors should point that out and try to get them to change. This seems to be your own stance. It seems to me a good stance; and if law students and lawyers often respond to it with cynicism or indifference, that is no reason to abandon it.

More specifically: is it wrong for law teachers to try to discourage their students from doing what they plan to do? It depends, surely. I agree with you that if a law teacher starts thinking that all lawyers do more harm than good, believes nothing can be done to change that situation even slightly, and counsels all his students to abandon the law, he is in the wrong job and ought to get out. But what if he wants his students to change current practices, rather than abandon them? Felix Frankfurter used to warn all his students off corporate practice: he thought Wall Street lawyers had become the servile and corrupt employees of big corporations, were very limited in their social vision, and were wasting considerable talents, which could be turned to the development of public policy, on such trivial pursuits as proofreading the fine print on trust indentures. Derek Bok said similar things: there are a lot of urgent reforms to be made in the legal system and law graduates are simply staffing the system rather than changing it. I do not think for a moment that either of these positions is inappropriate for a law teacher; though I confess that I think it would be *more* valuable for law teachers to work on ways to help young associates think about how to reform the corporate-firm practices that they are probably going to enter anyway. If people in the law school do not engage in critical reflection on what lawyers do, who will?

2. When you speak of the belief that law *matters*, it is not clear in what sense you mean "matters". You could mean: (1) Law is more than just a mask for, or rationalization of, naked power and self-interest: its norms, rules, procedures, reasoning processes, etc. have an autonomous content, have an independent influence upon the actions of legal officials and ordinary persons in society. (Once again, CLS people would agree emphatically with this: they believe that legal ideas are immensely powerful influences in the formation of social purposes and in the ways such purposes are acted upon.) (2) Legal rules are not infinitely manipulable: they do constrain outcomes. (This is a complex assertion, which would obviously have to be considerably expanded and refined before anyone could evaluate it: it is too shorthand to constitute a *credo* for an intelligent professional.) (3) The current system of rules in force, and practices of the officials and lawyers who apply them, is basically a good one, if not close to the best attainable system in an imperfect world, at least on the whole more good than bad. (This is obviously a political judgment, which if made a criterion of a good professional arbitrarily excludes critical idealists who believe the system embodies many serious evils and could be made a good deal better than it is.)

Perhaps you do not mean any of these things, but something else entirely. The point is that you have been repeating the phrase "law matters" as if it has a transparent and accepted meaning to your audience; whereas it is really very indefinite.

3. What is "nihilism", anyway? That of course depends on how one understands its opposite, the belief that "law matters". To approach the issue in another way, whom is it realistic to call a nihilist? Surely not a romantic Christian Hegelian like Roberto Unger, who has just set off to spend several years of his life doing grass-roots political organizing in Brazil: there are few people anywhere in the world who have given more effort to

constructing a theory of social transformation and shown more courage in trying to carry it out in practice: in his case at least, the proper analogy is not the one you suggest to an atheist in a divinity school, but rather to a liberation theologian. (If one wants an example of a *true* nihilist, I cannot forbear to point out, it would be the presiding genius of your piece on "Law and the River," Mark Twain.) Your letter refers to some currents of literary theory as illustrating nihilist tendencies; but surely this is so only among users of such theory drawn to absurdly polar positions ("if we cannot say that a text has a single fixed and definite meaning, we must be saying that readers can interpret it any way they want"): there seems to me a perfectly sensible resolution of this polarity in the commonsense position that the intentions of authors cannot determine any fixed meanings of their texts, but that readers will have a range of plausible meanings set by the conventions of the historically and socially situated communities of interpretation to which they belong. This avoids the twin idiocies of saying the Constitution has only one meaning for all time and that it can mean anything a reader pleases at any time.

If one were to look around the law academies for people one could plausibly characterize as "nihilists", I think one would have to fix upon a very different group from the CLS-types. On many law faculties, perhaps even on most, there are teachers I would characterize as post-Realist burnt-out liberals. These are people who once gave a lot of energy to demolishing what they thought of as conservative objections to the active state's regulatory-welfare policies, objections dressed up in "formalist" legal reasoning; but who have since lost most of their former confidence either in building a coherent body of law on the ruins of the old or in the worth or effectiveness of the active state policies they once espoused. They know too much to believe in "formalism", but they do not believe in anything else, either. On the whole they are pretty cynical about the way the legal system works, think that powerful interests are likely to capture it no matter how it is tinkered with; and are resigned to the situation, complacently or bitterly according to their temperaments. As I read your letter, you yourself share at least some of the characteristics of this type, the liberal of eroded faith and vanished hope; and you wonder—is there any place for *this* temperament on a law faculty? You then go on to say, unless I misread you, that you think most *students* share this same cynicism about the system and resignation to it. You may well be right in your perceptions; but if you are I am absolutely flabbergasted that you should identify as the source of potential "corruption", in such an era of decadent sensibilities, the *only people around who have any hope that the situation can be changed and the commitment to changing it!* If you are looking for "romantic innocence", you should look to the party of social transformation.

4. Finally, the relationship of "nihilism" to "corruption". Quite honestly I would not expect to be able to find much of any correlation between a set of jurisprudential or political beliefs abstractly described (as contrasted with the inspiring or dispiriting force of a teacher's personal presence or example) and the behavior in practice of law graduates exposed to such beliefs. But if there are such correlations, my intuitions about them run

opposite to yours. Is it not somewhat more plausible that corruption in students will be promoted by that kind of resignation to current practices that so frequently passes as worldly wisdom—that is, by teachers who believe in nothing but the inevitability of the *status quo*?

When one tries to think of legal thinkers whom one could plausibly label “nihilists”, who comes to mind? On a short list: O. W. Holmes, Jr., Thurman Arnold, T. R. Powell, Grant Gilmore, and Arthur Leff. Is it seriously maintained that the law schools would have been better off without these men and the influence of their ideas? Or that they “disabled” the students they taught, or drove them into corrupt practices? To take just the two most recent instances: Gilmore taught his students a sensitivity to the aesthetics of legal doctrines, at the same time he remained convinced of their impermanence and essential meaninglessness. Leff was more clearly a “nihilist” than any of the others, but a man of such transparent moral seriousness that his brilliantly witty confrontations of the abyss could only have inspired in students a profound respect. I am not a traditional liberal in these matters; and I do think that there are people who should not be teaching law students; but I feel strongly that in your condemnation of “nihilists” you have used the wrong standard, and picked the wrong people to fall on the bad side of the line.

III. Academic Freedom

Paul Brest to Paul D. Carrington

I have sent letters similar to this to the AAUP Committee on Academic Freedom and Tenure, to the Society of American Law Teachers, and to a number of colleagues at other law schools.

Let me add—though I would not characterize this an issue of academic freedom as such—that I am astounded by the distinction you make between the law school and the university of which it is a part. One of the signal achievements of legal education in the past century has been to earn law schools a full and equal place in the university community. The view you take of legal education, and the intellectual capacity of law students, would relegate law schools to the status of vocational training schools.

Paul Brest to Phillip E. Johnson

Starting from the premise that a belief in their own professionalism is essential to the competence and integrity of lawyers, Dean Carrington argues that students must not be exposed to nihilist law teachers, because:

The nihilist teacher threatens to rob his or her students of the courage to act on such professional judgment as they may have acquired. Teaching cynicism may, and probably does, result in the learning of the skills of corruption: bribery and intimidation.

Carrington concludes that “the nihilist who must profess that legal principle does not matter *has an ethical duty to depart the law school*, perhaps to seek a place elsewhere in the academy.” (Emphasis added). By contrast, “For those university law teachers able to keep the faith of the secular religion, let there be no shame in the romantic innocence with which they approach the ultimate issue of their profession.”

Dean Carrington acknowledges that the traditions of a university ordinarily “favor the inclusion in house of all honestly held ideas, beliefs, and values.” But he asserts that when “the university accepted responsibility for training professionals, it also accepted a duty to constrain teaching that knowingly dispirits students or disables them from doing the work for which they are trained.”

Carrington’s remarks are obviously directed against members of the Critical Legal Studies movement. He cites Roberto Unger’s article on The Critical Legal Studies Movement, 96 Harv. L. Rev. 563 (1983) as the example of such nihilism. The reference to CLS is even more explicit in his Quinquennial Report for Duke Law School. There he says:

[I]n its virulent form, legal realism has passed into legal cynicism in the form of an intellectual movement which flies under the banner of “Critical Legal Studies.” . . . Duke is not presently served by anyone who can be regarded as a nihilist. From the perspective of the institutional obligation to inculcate appropriate standards of conduct, this is a significant advantage.

Carrington’s remarks are no less troubling because they exhort “nihilist” law teachers to resign rather than exhort law schools to get rid of them. His remarks suggest at least equally that a law school faculty or administration should act against such teachers in hiring, promotion, and tenure decisions. History is full of examples of purges in which the victims were first invited to leave voluntarily.

Our views about the quality and merits of particular works by those calling themselves Critical Legal scholars differ, and so may our views about whether certain theories or attitudes might be characterized as “nihilist” or “cynical.” But I am sure that we agree on this: To exclude from law schools teachers who espouse these views would violate the most fundamental principles of academic freedom—that disagreements are to be pursued by vigorous exchange of ideas and not by the suppression or exclusion of adherents to any view, and that institutional orthodoxy is inimical to the pursuit of truth.

I had always thought that professional competence and moral development were facilitated by the robust exchange of differing views about the law and legal profession rather than insulating students from any ideas about the law, however controversial. In any event, I do not think that principles of academic freedom apply with less breadth or force to professional schools than to other parts of the university. To be more blunt, I thought that the sort of Red-baiting that Carrington is engaging in had disappeared once and for all after the 1950s.

Phillip E. Johnson to Paul Brest

The first thing that strikes me about your letter is its pure liberalism, so incongruous coming from a prominent member of a movement dedicated to exposing the mystification and reification of liberal legalism. Your letter expressly or impliedly incorporates a variety of concepts that I thought critical legal scholars had consigned to the trash can—academic freedom, rights, the marketplace of ideas that produces professional competence and moral development as if by an invisible hand, and especially the vision of the university as a neutral palace of learning which allows no orthodoxy to interfere with the pursuit of truth. Are you not at least a little embarrassed to invoke these long-since-deconstructed concepts on behalf of CLS, especially on behalf of Roberto Unger, who explicitly warned you not to yield to this temptation? (See Unger, 96 Harv. L. Rev. at 616). Isn't this controversy just another example of the Madisonian conflict between majority rule and minority rights, to which (you have written) there is no solution?

If your letter represents your true sentiments, as I presume it does, then I am at a loss to understand why you choose to identify yourself publicly with the CLS movement. The impression is widespread that CLS members favor a political test in faculty appointments and promotions. This impression is based on what seem to be the obvious implications of CLS theory, and also on CLS practice at the Harvard Law School. Unless the many reports I have heard are entirely mistaken, CLS members at Harvard vote as a bloc on appointment matters, and a major concern is whether the candidate is perceived as a potential ally in future faculty battles. "Traditional" professors are quoted as regretful that radicals for whom they voted will not vote for non-radicals. What is your opinion of this situation?

The preceding points do not directly address the merits of your arguments. It is a liberal tradition to protect the civil rights and academic freedom of dissenters, including those who are themselves contemptuous of these "bourgeois freedoms." Let me therefore waive all objections of the "unclean hands" variety, and proceed to the merits of your appeal to liberal principles. The question now becomes: What limits, if any, would you set on the general principle that law schools should expose their students to the robust exchange of controversial views in the classroom? Are there any viewpoints so offensive (or just unworthy of serious consideration) that a school is justified in giving them negative weight in making faculty appointments?

Hypothetical examples come readily to mind. Suppose someone were to urge Stanford to appoint a constitutional or international law professor with views on racial equality and integration consistent with those of the South African government. Would you support the appointment on the theory that the pro-Apartheid viewpoint should be represented on the Stanford faculty as a counter to the pervasive liberalism that students hear on racial questions? What about a tax professor, adept at exploiting loopholes and shelters, who shamelessly coaches students on how to cheat the IRS by playing the "audit lottery?" What about a professor of any subject who

honestly believes that women do not belong in law school or the legal profession, and who loses no opportunity to express that view in class, with the result that women students are constantly infuriated and distracted? In any of these cases, would you consider casting a vote against appointment or promotion on the basis of the candidate's racism, sexism, or cynicism? Or would you in all three cases stick to your position that "disagreements are to be pursued by vigorous exchange of ideas and not by the suppression or exclusion of adherents to any view, and that institutional orthodoxy is inimical to the pursuit of truth"?

I think the argument in your letter is oversimplified because it does not acknowledge that law schools (and universities) have purposes that go beyond creating a "Hyde Park Corner"-style forum for public debate. Paul Carrington is arguing that one of those purposes at Duke is to encourage students to have a respect for the legal order, which requires that they regard law as something more than a tool for manipulation and deceit. A faculty of nihilists and cynics would be ill-suited to accomplish this mission. I recognize that there are dangers in applying this concept of institutional mission to faculty appointments, but I do not think that Carrington's position can be dismissed simply by waving the flag of academic freedom. I also do not think that you advanced the ball much by accusing Carrington of "Red-baiting."

All this is by way of preamble to addressing the main point of your letter. I am not in favor of running the Critical Legal Scholars out of academia. I do not believe that most CLS members are nihilists or cynics, although some of them may sound that way at times. CLS is not a totalitarian party, but a collection of individuals who have little in common except a desire to occupy the most leftward position in the academy. Even pure ACLU-style liberals like Paul Brest find a home there.

As for Roberto Unger, I would describe the man as an idealist rather than as a nihilist or a cynic. I wish his intellectual and political ambitions were more modest, and I regret that his writing is so often obscure or even evasive, but he is a formidable thinker and the academic world has been the richer for his presence. There may be a cynic or two in the CLS movement, but I do not think that Dean Carrington picked the best example.

Louis B. Schwartz to Paul Brest

I found Carrington's piece brilliant, civilized, and insightful even though I part company with him where he suggests near the end that "nihilists" get lost. As you may recall from my contribution to the Stanford symposium, I think on the contrary that every faculty should include at least one Duncan Kennedy, precisely so that the full spectrum of views may be presented. But then I did add that one Kennedy per faculty would be enough, which could

easily be misunderstood to mean that there should be a quota on appointment of "nihilists".

More precisely, I meant not that persons of a particular persuasion in philosophy, religion, or politics should be excluded on that ground, but that fantastic, anti-intellectual pyrotechnics should not replace, as qualifications for appointment, analytic ability, effective communication, judicious weighing of practical alternatives, dispassionate and honest interpretation of history, human purposes, institutions, etc. I need not tell you that many members of CLS fully meet those criteria. But when you reproach Carrington for his "exclusionary rule" you might well couple that with a repudiation of the view of some CLS members that the most important thing about a candidate for appointment to a law faculty is his or her political views, given that the first duty of the law professor is, according to Duncan and others, "to radicalize" (i.e., redirect towards neo-Marxism) the students. As far as I am concerned, that points even more clearly than Carrington towards the nonappointment, nonpromotion, and dismissal of people for "wrong-think".

Let me confess my susceptibility to the idea that somewhere, far out, it may be necessary to draw the line against "wrong-think". If one of Stanford's brightest graduates became enamored of spiritualism as the true path to legal wisdom and national welfare, wrote portentously on the subject, and applied for appointment to teach his insights, he would not have my vote. Yours?

**William W. Van Alstyne to the Committee on Academic Freedom and
Tenure of the American Association of University Professors**

[*For use in connection with agenda . . . re inquiry by Paul Brest*]

Suppose an interview of a prospective appointee to a university's sociology department, and the following question arises as conventionally it tends to do:

Q: What among the courses we currently offer, or those you think we should offer, would you most like to teach?

A: It really makes no difference to me.

Q: Oh, why is that?—You mean it's all so interesting. . . .?

A: No, I mean that it's all a lot of crap. "Sociology" is bullshit, bullshit on stilts.

Q: That's interesting. What do you mean, "it's all a lot of crap?"

A: I would have thought it obvious! I mean it's all *equally* just crap, and since "crap" is "crap," it won't make any difference to me what part of the crap I teach. Listen, didn't anyone ever teach you that things equal to the same thing are equal to each other?

Q: Yes, well, I guess I must have forgotten that. But tell me, if sociology is as you say all just "bullshit", then what on earth would you teach?

A: You really *are* a bit slow, aren't you?—It's obvious what I would teach

William W. Van Alstyne is Professor of Law, Duke Law School.

from what I've already said. I'd teach THE TRUTH! I'd teach that sociology* is crap and bullshit.

Q: Oh, well, *now* I think I understand. Incidentally, thanks so much for coming. . . .

[State the obvious "academic freedom" claim. What is its proper resolution?]

[Assuming one found it infeasible to resolve the question (because one thought the answer would depend upon certain assumptions), suppose the conversation had not ended so soon. Suppose instead it had continued. . . .]

A: Hey, what do you mean, "thanks so much for coming"? Don't you want to know that I mean when I say that the truth is that sociology is crap?

Q: Hmmm, well, I suppose you may have a point. I'm sorry. Well, what did you mean?

A: Well, I don't just mean that it affects a pseudo-scientific vocabulary. And I don't just mean that its critical methodologies are flawed. And I don't just mean that the ordinary academic sociology departments is hagridden with duplicative course offerings overwhelmingly of a trivial character. What I mean is not any of these lesser truths, but the more fundamental one. My thesis is that "sociology" is a process of mystification quite as worthless as astrology. Essentially, it purveys lies. . . .

Q: Now I'm thoroughly confused.

A: Oh, how so?

Q: Well, as to astrology, I feel much the same way as you do. But feeling that way, supposing there were still some college or university that actually still had an "Astrology Department," or even an entire university dedicated to astrology, given my own sense that the enterprise is ludicrous, why would I consider applying for a position in such a department? . . . Isn't it a bit like a Humean sceptic applying for a post as Assistant Professor at a Baptist Seminary? . . . What am I *doing* in identifying myself as an "Assistant Professor of Astrology" at all, in the first place, if in fact I regard it with the same contempt as Henry Ford once peremptorily dismissed history, as "bunk"?

Moreover, shouldn't I find it remarkable (indeed, a confirmation of my own opinion of the place), if even *after* I told the Astrology Department of my utter contempt for their work and my rejection of their discipline, they greeted me with enthusiasm, declared "you're just what this place needs," and offered me an appointment on the spot?

A: [Well, what is the answer.]

Q (cont.): But perhaps I've missed your point. . . .

A: You certainly have! "Astrology" isn't where the action is. "Sociology"* is. Astrology doesn't need me. Sociology needs me. Sociology *needs* to be exposed as a sham, as astrology no longer needs to be. Sociology's fetishes for multiple regression analyses need to be unmasked for what they are—multiple regression dyalysiṣ. Its suppositions are not merely naive. Rather, they are frequently pernicious. They not only make no contribution at all to

* For "Sociology," substitute any of the following in a like conversation: "philosophy," "economics," "art," "history," "English" or "law."

* (substitute "philosophy," "economics," "art," or "law.")

human welfare. Rather, they make a negative contribution. My interests are serious interests. They require a place where they can do the most good, inside a sociology department itself, where they can be most effective.

I'm not applying here from shabby motives of seeking a salary without working hard. I intend to work at my job *very* hard, I dare say harder than you. But I *care* about people, about this perishable world, in ways you withered, dessicated, complacent right-wing mandarins do not and, indeed, in ways your professional discipline impedes. . . .

Q: I think I'm beginning to understand. It helped a little when you spoke of "my job." You mean your *real* job is not to teach sociology or otherwise to work within it, e.g., in research, etc., but. . . .

A: Exactly! My job is building a better world. That world isn't possible unless the illusions systematically perpetrated in this one are first surmounted, dismantled, deconstructed. My business here will be to attack the motives, the modus operandi, the ways *you* purport to "study" social phenomena, the suppositions of the textbooks *you* use, and the very idea of "sociology" itself.

Astrology may at worst still drain off what ought to be the pent-up rage of bamboozled and exploited people, diverting them with fairytales or consoling prophecies; it's not much more damaging than reading tarot cards. But "sociology," well, sociology is more like religion, like the religion of "law." It stands for. . . .

Q: Yes, but I think you need not go on. Really, I think I see your point. But tell me how that will affect your teaching here?

A: What do you mean by that?

Q: What I mean is, for instance, if appointed and if asked to teach, say, the course (or "a" course) on "Twentieth Century Demographic Trends in South America," just what is it you would *do*? Would you first spend an introductory hour or so laying out why you believe the subject you will be addressing is essentially worse than a waste of time and ought not be taken by serious students—and then "teach" it anyway? Would you, rather, simply "trash" the materials you yourself may assign the students, doing your best each day to impress upon them the inanity of what they have read? Would you use the course instead as an example of how, in your view, the methods and premises of conventional sociology (as reflected in the assigned materials) are "actually" either conscious or subconscious exercises in political or philosophical indoctrination?

If this latter approach would be your approach (such that the course is thus in fact *not* a course in twentieth century demographic trends in South America, but rather a course in "The Deep Texture or Political Structure of Conventional Courses in Sociology as Exemplified by The Conventional Course in Twentieth Century Demographic Trends in South America"), what then about other courses you may also teach?

Does each of these then become but a repetition of the first course, i.e., the very same course or meta course. In brief, is *every* course you might present here to be essentially mere variations of one mega-course to be described more accurately as "Another Course Illustrating the Fallacies and Class Biases of 'Sociology,' " (This, Time as Shown by a Critical Look at the

Conventional Course on Sociological Statistics, as Last Time Shown by the Same Analysis Applied to a Conventional Course in Twentieth Century Demographic Trends)?

A: Well, I might do any or all of those things, or none of those things. Obviously, it will depend upon what *I* think will be most pedagogically effective. But most likely, I'll do something more like the last approach. But even that doesn't quite catch it. . . .

Q: But do I have it right that roughly what you want to do is, more or less, to be our resident "anti-sociologist?" I mean you would do here roughly what your counterpart would presumably do, say, in the law school?—Belittle the very idea of "law," puncture it as essentially nonsense, ridicule its pretensions, deride its aspirations. . . .

A: Maybe, maybe not. I haven't thought about "the law" all that much. But I have thought about Sociology, and as to sociology, you've got it about right. Think about it, and remember this: I'm in touch with Paul Brest, and AAUP, and E. F. Hutton. And E. F. Hutton says. . . . (*And what does the AAUP say?*)

IV. Professional Schools

Guido Calabresi to Paul D. Carrington

I just received, from Paul Brest, copies of your article "Of Law and the River" and of your Quinquennial Perspective of Duke Law School, and confess to being quite troubled by them. The role of the scholar is to look in dark places and to shed light on what he or she sees there. When that light is shed, people of the world can decide whether the vision is true or distorted and, even if it is true, whether to pay attention to what they see or to continue to live with their illusions. Often such illusions (even if dangerous) are well worth preserving and the scholar whose iconoclasm has been rejected is foolish to feel that he or she has been rejected or has not performed a worthy task, nonetheless. It is not, of course, the job of a scholar to distort what he or she sees or to describe as false, as myth or subterfuge, what is not. Yet if in all honesty what the scholar sees seems false, then the scholar must declare it to be false even if that opens him or her up to the charge of nihilism.

It is that *honesty* in the pursuit of what others do not see that is the calling card of the scholar. It *cannot* be the requirement that as scholar or teacher he or she call true what seems to him or her to be false, for that surely is what creates or fosters corruption in his or her students. I do not, when I look into dark corners, see the falsehoods that most members of the Critical Legal Studies school profess to see. I also do not see the voids my late great colleagues Arthur Leff and Grant Gilmore saw—but I know that they reported honestly what they saw and that their willingness to do so made them truly great scholars and teachers—of ethics as well as law. I cannot say—because I cannot know—that their teachings disheartened anyone. I do know it enlightened and gave confidence to many.

Guido Calabresi is Sterling Professor of Law and Dean Designate, Yale Law School.

I also cannot say—because I know few of them well, and do not know them all—that all members of the CLS are honest in their nihilism as Leff and Gilmore were. But if they are—and the burden must be on those who claim they are not to show it—then they are as worthy of being teachers of law as those of us who do not, in all honesty, share their vision.

Owen M. Fiss to Paul D. Carrington

I am a romantic and an innocent. I believe the river exists.

Roberto Unger is neither an innocent nor a romantic, but I think he too believes the river exists—not as a natural phenomenon, but as a social construct twisted to serve quite discrete purposes. He does not deny that law exists but invites us to imagine law in new and unfamiliar forms—hence his idea of deviationist or expanded doctrine.

There are people in the movement who deny that law exists or is even possible. I would put Duncan Kennedy or maybe even Mark Kelman in that category. But I believe that they too have an important role to play in legal education, and thus take some exception to your recent invitation for them to leave. They have not shaken my beliefs or my faith, but rather sharpened my understanding of all that is entailed in the law. The cubs might be more vulnerable, or uncertain in their beliefs, but I believe that they will come to see what you and I and others of their teachers have come to see. People learn by opposition. There is, however, an even more fundamental point: Kennedy might be right.

Law schools are professional schools, inasmuch as they train people for a profession. But they are also academic institutions, and by that I mean they seek to discover the truth. We cannot shut off an avenue of inquiry, for fear that it would render the professional training pointless—if the river does not exist, people should not be trained for river piloting, at least not in the way that they have been. Every law school should confront the question whether law exists, and it is of the essence of academic freedom to allow all sides to speak, even those who would answer that question in the negative and thus recommend that our doors be closed and resources be used for other purposes.

Lawyering requires courage, as you say. So does academic leadership—it requires the courage to listen to those who deny the very point of the exercise and then to explain, through the power of word and reason, why they are wrong.

Paul D. Carrington to Owen M. Fiss

In an earlier letter to Bob Gordon, I pleaded *nolo contendere* to his allegation that I miscited Unger. With a re-reading and a bit of time, I think I can demonstrate its fairness. For now, all I can say is that it did seem to me

that Unger regards legal texts expressing the understandings, agreements, and assents of others as having no proper consequence; perhaps I should have sharpened my diction, but this is what I meant by my term, Legal Nihilism. I, too, think that Unger is a romantic, but not about law: I do not perceive a grain of regard for law, for our hope that officials will abide principle in applying the lash of power. Indeed, his description of disestablishment "rights" strikes me as a jurisprudence for Brown Shirts and Red Guards. But who can be sure what he is saying?

I acknowledge that the issue of our moral responsibility as professional school teachers in relation to the search for truth is far more complicated than my brief words suggested. I am quick to acknowledge that Duncan Kennedy's view may be right. If the question were simply whether such views should be expressed in a university environment, I am equally quick to say that they should be. Indeed, I have no argument with your assertion that law students may be helped to encounter those who doubt that law exists or who doubt that the legal profession has a morally defensible role in our polity. When the issue arises in the context of invitations to guest lecturers, there is no argument: Duncan Kennedy, Jerold Auerbach or Fred Rodell are surely welcome.

Still, there is a substantial moral problem for such persons if they accept responsibility for training lawyers, as law professors having power over professional students. For better or for worse, law schools are not pure in their academic obligations. Even your Yale Law School Bulletin asserts categorically that it is *the* function of the institution to train lawyers. How can a member of such an institution honorably claim to perform that mission when he imposes on his students his view that their discipline is a whole-cloth fraud, and that their very reason for honoring him with their attendance and their tuition is a snare? The most important things we teach, and what we teach most effectively, may well be the values which underlie our conduct as teachers. What is the meaning of the example provided by a teacher who, however, truthfully in his own lights, repudiates the stated purpose of the institution which sustains him and the life goals of virtually every student that he ostensibly serves? Is a love of truth or anything else of value shared by such a teacher? Is he not by example teaching self-aggrandizement at the cost of those to whom he has a fiduciary duty? With such examples to guide them, what relations are his students likely to form with their professional clients: will they not be likely to regard their clients as means not ends?

Consider that Unger proclaimed that my altar is cold, that I preach without belief. He does not explicitly state that I should quit preaching at that altar (i.e., resign), but does he not imply as much? What is to be said for the morality of modern Elmer Ganttrys who preach what they do not believe? Should they not, for their own sake as well as ours, seek out a parish in which their lives and beliefs can be harmonized to at least some degree? Or failing that, if I can find no faith that I can preach with conviction, should I not seek employment pumping gas? That is far more honorable work than preaching falsehood, or than insulting the faith of those who trusted me to express theirs.

Academic freedom is precious, but no more absolute than other freedoms. Those who profess the truths they perceive should nevertheless bear the moral consequences of their professions, even as they cannot escape intellectual judgment of their peers. Indeed, in law it seems, moral and intellectual judgment are rarely completely separable. It may be this perhaps unfortunate characteristic of our discipline which invites the present controversy.

I bridle a bit at your suggestion that I do not like to listen. I did read the Unger article three times through; that's listening!! There then remains the task of passing judgment on what one has heard or read. I did, and professed the truth that I perceive. Was that the wrong thing to do? Would you have a different view of my conduct if I pronounced the article an intellectual disaster? What effect would such a pronouncement have on Unger's academic freedom, or that of his adherents?

Owen M. Fiss to Paul D. Carrington

I appreciate your reply and the openness that it exemplifies. I do not mean to impose on you further, but I thought I would add one more word, because I think I now have a better sense of the issue that divides us: It goes to the idea of the *university* law school.

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