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The dramatic image of the university under siege from taxpayers, politicians, or even occasional alumni is a vivid but not the most difficult aspect of the pressures which tend to erode academic freedom. The more subtle condition of academic freedom is that faculty members, once they have proved their potential during a period of junior probation, should not feel beholden to anyone... In strong universities assuring freedom from intellectual conformity coerced within the institution is even more of a concern than is the protection of freedom from external interference.

—Kingman Brewster, Jr.1

No one can follow the history of academic freedom in this country without wondering at the fact that any society, interested in the immediate goals of solidarity and self-preservation, should possess the vision to subsidize free criticism and inquiry, and without feeling that the academic freedom we still possess is one of the remarkable achievements of man. At the same time, one cannot but be appalled at the slender thread by which it hangs, at the wide discrepancies that exist among institutions with respect to its honoring and preservation; and one cannot but be disheartened by the cowardice and self-deception that frail men use who want to be both safe and free.

—Walter P. Metzger2

With respect to job security, tenured professors of law are usually exempt from the threat of publish or perish.3 It would be easy, and it would seem candid, to offer a cynical explanation. However, at the risk of embodying a quixotic or a self-serving idealism, I confess disbelief that the exemption results primarily from excessive professorial power, decanal cowardice, or even institutional inertia. Instead, I believe that except in clear cases of sloth the exemption is an essential component of postprobationary academic freedom, properly understood. One task of this article is to try to support that uninspiring thesis.

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I. Background

The idea of academic freedom is at least as old as its early martyr, Socrates. Yet even its tentative realization is at least as new as the emergence of secularity, science, and, in this country, the American Association of University Professors. Its history having been well told elsewhere, only a few generalizations need be made here.

First, the developers of academic freedom's modern ideology drew upon a number of diverse but compatible ideas. Two examples from Richard Hofstadter make the point:

From commerce they have taken the concept of a free competition among ideas—hence the suggestive metaphor of a free market in thought. From the politics of the liberal state they have taken the ideas of free speech and a free press and an appreciation of the multitude of perspectives in a pluralistic society.

Second, granted its initial and ongoing dependence upon religious toleration and liberty, the modern idea of academic freedom found its chief rationale in the assumptions of science. If "all beliefs are tentatively true or tentatively false, and only verifiable through a continuous process of inquiry," then "all seeming errors must be tolerated, for what is truth is never fully known and never finally knowable."

Third, science also gave us, with major input from the German model, an expanded concept of the university. No longer existing merely to transmit acquired knowledge, the university equally exists to seek new knowledge. It becomes, in Robert MacIver's words, "[t]he institution distinctly dedicated to" its new function, "the open search for truth."

Accordingly:

From this [truthseeking] function the claim to academic freedom derives. This freedom is . . . inherently bound up with the performance of the university's task, something as necessary for that performance as pen and paper, as classrooms and students, as laboratories and libraries.

The fourth generality is that academic freedom has been extended beyond science. Not only does it (imperfectly) protect physicists and

4. See Hofstadter & Metzger, supra note 2.
5. See id. and works cited therein. See also Walter P. Metzger, Academic Tenure in America, in Faculty Tenure: A Report and Recommendations by the Commission on Academic Tenure in Higher Education 93–159 (San Francisco, 1973) [hereinafter Faculty Tenure]; Symposium on Academic Freedom, 66 Tex. L. Rev. 1247 (1988). Space constraints and the extent of the literature will often prevent my citing work despite its excellence.
7. See id. at 61–62. "Academic freedom and religious freedom have one root in common: both are based upon the freedom of conscience, hence neither can flourish in a community that has no respect for human individuality." Id. at 62.
8. Indeed, says Metzger, "[w]ithout the canons of evolutionary science . . . the modern rationale of academic freedom would not exist." Hofstadter & Metzger, supra note 2, at 363.
9. Both quotations from id. at 364.
10. See id. at 369–83.
biochemists: it also, at institutions where it "and" tenure exist, usually affords comparable protection to historians, moralists, political theorists, philosophers, literary critics, poets, and other scholar-artists—no matter how intuitive and nonrigorous their claims to truth.\textsuperscript{13} Even economists.

Accordingly, the truth claims protected by modern U.S. academic freedom have, at least for tenured faculty, usually encompassed asserted wisdom and moral insight as well as asserted knowledge. And, of supreme benefit to legal writers, the protection of asserted wisdom and goodness also protects evil folly.\textsuperscript{14}

II. An Emerging New Era?

As an outcome of the "campus unrest" of the 1960s, two prestigious commissions asked whether poor teaching and (thus?) tenure were part of

\textsuperscript{13} Thus even as early as 1869, Charles W. Eliot was saying that "[a]n atmosphere of intellectual freedom is the native air of \textit{literature and science}." Inaugural Address as President of Harvard College, in Charles William Eliot, Educational Reform: Essays and Addresses 1, 31 (New York, 1898) (emphasis added).

\textsuperscript{14} By fate, chance, or whatever, faculty academic freedom American-style was to acquire considerably broader scope, especially as to extrauniversity activities, than the German Leerfreiheit and research traditions that were part of its inspiration. See Ralph F. Fuchs, Academic Freedom—Its Basic Philosophy, Function, and History, 28 Law & Contemp. Probs. 431, 435–36 (1963) and sources cited therein. However, our broadness has not been infinite. See id. at 436–38. We have been, and are, unduly subservient to the short-run desires of government, commerce, and other bases of power, both popular and elite. And we have given scant serious attention to the possibilities and the probable limits of student academic freedom.


Even so, the avocational truth-seeker, who has both freedoms and burdens we paid academics lack, may well discover, create, and disseminate all the humane wisdom society needs. Or paid nonacademics—journalists, TV commentators, novelists, poets, dramatists, cartoonists, et al.—may do the job, despite awesomely strong commercial pressures to the contrary. The purpose of a free academy is merely to increase, we hope, the chances of success from somewhere—anywhere.
the problem. One "urge[d]" academia to "reexamine existing [tenure] policies." The other "urge[d] reconsideration of the practice of tenure." In response to such urgings, the AAUP and the Association of American Colleges in 1971 created the Commission on Academic Tenure "as a separate, autonomous unit," whose eleven-person membership included professors, university and other educational administrators, nonacademics, and a law student. Although the Commission's report, *Faculty Tenure*, offered many recommendations to correct deficiencies in the diverse tenure status quo, the report reaffirmed the validity of the tenure concept. Perhaps its most important remedial proposal was to recommend that "each institution develop methods of evaluating [with 'explicit and formal' student input] the teaching effectiveness of both its nontenured and its tenured faculty, and procedures for reflecting these evaluations in pertinent personnel actions." Given that proposal and more than forty others, the report's failure to recommend periodic evaluations of tenured faculty's scholarship or service is striking.

But the will to manage is not easily satisfied. Seeing that "[a]cademic tenure is too prevalent a practice to disappear," a number of authorities—often of academic-administrative background—have in effect suggested that the tenure dragon can be tamed if not slayed by redefinition. The principal proposed means of pacification, prescribed by, among others, Olswang and Fantel in 1980-81, the National Commission on Higher Education Issues in 1982, Chait and Ford in their aptly titled 1982 book,

17. *Faculty Tenure,* supra note 5, at xi, xvii-xviii.
18. See id. at 21.
19. Id. at 38.
20. Id. at 36.
21. That failure is all the more pointed in that the report also dealt with formal evaluation of scholarship and service. But its recommendations for improved evaluation in those areas said nothing about extending the procedures to senior faculty members. Instead, the discussion was unmistakably directed at tenure and promotion decisions. See id. at 39-41.
23. Penn State Associate Provost Chait and Allegheny College Dean Ford (both accomplished scholars) are commendably candid as to their perspective: "[W]e treat tenure as a personnel policy and not as dogma; we concentrate on the pragmatic, day-to-day aspects of tenure policy and policy execution." Id. at xi.
Beyond Traditional Tenure, and Bennett and Charter in (the perfect year?) 1984, is formal, periodic, post-tenure performance evaluation, probably conducted by peers but perhaps also by others.

The proposals for post-tenure evaluation tend not to be paragons of clarity. Yet clearly something more is contemplated than the typically low-key and usually more or less informal annual evaluations done by deans, department heads, and/or committees at most institutions mainly for salary decisions. Whatever that added something might prove to be in practice, proponents of "systematic" performance review do not appear to regard themselves as bravely proposing the status quo.

Proposals for post-tenure review have shown little if any appreciation that there are two critically different types of faculty tasks:

1. those faculty tasks, namely, teaching and institutional service, that necessarily involve a major compromise between individual freedom and specific institutional counterneeds (curriculum, student rights, etc.) and

2. those faculty tasks, namely, scholarship and outside service, that are widely understood as requiring—at least as respects postprobationary job security—essentially full individual autonomy.

26. Supra note 22.
28. Michael I. Swygert & Nathaniel E. Gozansky, The Desirability of Post-Tenure Performance Reviews of Law Professors, 15 Stetson L. Rev. 355 (1986), should be added to the list of post-tenure review proposers. But the authors also say, "Although periodic performance reviews have many advantages for encouraging faculty productivity, they may not be workable at all schools. . . . It might even be said that law faculties collectively do not possess the needed skills and temperaments for peer review." Id. at 367-68.
29. Thus Chait & Ford, supra note 22, at 181, fault a university study group for rejecting the view that "the performance of tenured faculty members should be periodically reviewed in the same intense and comprehensive manner in which the performance of a nontenured faculty member is reviewed on the occasion of deciding whether to award tenure" (emphasis added). And they suggest that, among other goals, "to separate superior, satisfactory, and unsatisfactory performers" and (eight lines prior) "to provide data for decisions on . . . employment status" would be appropriate evaluation goals. Id. at 173. See also Olswang & Fantel, supra note 24, at 2.
30. "Systematic" is a favorite adjective. See Olswang & Fantel, supra note 24, at 1, 26, 30; Bennett & Chater, supra note 27, at 38, 39, 41; Chait & Ford, supra note 22, at 183.
31. No, such autonomy does not authorize deceit or defamation. And yes, there are societal limits on research that threatens physical harm or "national security" or that violates privacy or property rights; but those limits usually apply (with equally frequent ineffectiveness) to all human behavior. And, as Lon Fuller feared, external funding of research does infringe upon the researcher's freedom; but that is infringement by seduction. See generally Russell Kirk, Massive Subsidies and Academic Freedom, 28
The failure to recognize that distinction\textsuperscript{32} is troubling in that the proponents of post-tenure peer review envision the review as a management tool\textsuperscript{33} that encompasses all of one's duties.

There may be a sound basis for serious post-tenure peer review of "type one" duties, teaching and institutional service—provided that individual freedom "and" diversity are exuberantly honored. However, with respect to such a review of scholarship and outside service, which by modern tradition have been deemed fundamentally autonomous,\textsuperscript{34} one should have the gravest of doubts. At very least, before we presume to review the scholarly performance of our tenured colleagues with eventual dismissal being even a remote and indirect possible consequence, we are obliged to confront and resolve a host of issues concerning "legal scholarship,"\textsuperscript{35} academic freedom, and tenure.


Rebecca Eisenberg argues that the extent of outside funding and the consequent threat to academic values justifies university regulation of the individual faculty member's dealings with funding sources (regulation that already often exists, albeit in various degrees and forms at different schools). Rebecca Eisenberg, Academic Freedom and Academic Values in Sponsored Research, 66 Tex. L. Rev. 1363 (1988). That argued justification neither makes a case against the individual scholar's traditional autonomy in other spheres nor justifies unnecessary limits upon autonomy as to outside funding of research. Responding to Professor Eisenberg, David Rabban argues that traditional academic freedom theory accommodates appropriate university regulation of outside funding because autonomy does not protect unprofessional conduct. David M. Rabban, Does Academic Freedom Limit Faculty Autonomy? 66 Tex. L. Rev. 1405 (1988). But cf. Rebecca S. Eisenberg, Defining the Terms of Academic Freedom: A Reply to Professor Rabban, 66 Tex. L. Rev. 1431 (1988).

At a serious college or university, the faculty member is afforded a good amount of time and at least minimal support for scholarship without special outside funding. If expensive apparatus or procedures are required, practical limits will sorely restrict. Time and money scarcities help make all freedom finite. But that metaphysical truth makes the presence or absence of unnecessary infringements more, not less, critical.

\textsuperscript{32} Professors Swygert and Gozansky rightly acknowledge the above distinction when they say, "A tenured faculty member should not be placed in jeopardy because his or her colleagues disagree with the substance, direction, form, or thoroughness of scholarly activity." Swygert & Gozansky, supra note 28, at 365 (footnote omitted). How much autonomy their approach would actually allow would depend in part upon how broadly they define "scholarly activity" and the "professionally and institutionally worthwhile projects beyond teaching" they suggest could suffice "[e]ven if a senior member has no publications." Id. at 366. Although they say, "What is expected is activity itself," id. at 365 n.76, one doubts the authors mean for any kind of activity to satisfy. For they also speak of "lack of productivity," which they suggest under proper conditions would be "inexcusable," and "continued ability and proclivity to teach and research effectively" (emphasis added), which they seemingly deem conditions for retention. See id. at 366, 362-63.

\textsuperscript{33} E.g., Bennett & Chater, supra note 27, at 39 ("an important instrument . . . in the prudent management of fiscal and intellectual resources").

\textsuperscript{34} This article's focus upon scholarship should not be read to discount the law faculty member's comparable need for genuine autonomy in defining and performing her nonuniversity service mission. That need exists in part because any "line" between public service and legal-political-ethical scholarship is inherently vague and perhaps illusory. For other reasons, see Emerson & Haber, supra note 14, especially at 544-52 and 557-61.

\textsuperscript{35} I put it in quotes because I don't know what it means and fear that no one else does either. That is possibly embarrassing, for I still believe scholarship by law teachers is usually worthwhile, often important, and not the enemy of a sound professional
III. The “Project”

A. Questioning AALS Deans

In late May of 1985 I sent a questionnaire to the listed dean or acting dean at each of the 150 AALS schools. It asked questions concerning the school’s policies and practices with respect to the scholarly responsibilities of tenured full professors of law (henceforth, TFPs). It also asked, with respect to the review or nonreview of TFPs’ scholarship, whether the school’s status quo was being, or was apt to be, seriously reconsidered in the at-all-near future. And it invited prescriptions for wise institutional policies concerning senior faculty’s scholarly opportunities and responsibilities.

Either the dean personally (the more frequent case) or his or her unlucky designee at 49 schools answered most or all of the questions, and three answered some of them. If it is permissible for journal articles to have heroes, the persons who answered a nine-page questionnaire are the heroes of this one. I am deeply grateful to all of them.

The possibility of nonresponse bias exists with respect to all the data. If the relevant responses from 52 AALS schools are representative, however, they suggest that a TFP’s scholarship is in some sense reviewed, meaning it receives at least cursory notice, by somebody at fairly regular intervals at virtually all AALS law schools. At most responding schools, the reviews occur annually and the reviewer is the dean. Some schools use a faculty committee to assist, or (less often) as a substitute for, the dean’s review. Although the responses do not explicitly delineate the permissible uses of the reviews, other questions yielded answers reported in this article that support the following proposition. Except perhaps at a few schools, as of 1985 TFPs’ scholarship at AALS law schools was being “reviewed” (in a personnel management sense) merely (1) to aid in determining salary, and (2), much less widespread, as an aid in apportioning research support and/or in adjusting teaching loads and committee work. At few if any schools did the review of TFPs’ scholarship appear to be intended as a search-and-possibly-destroy mission.

But, as Bob Dylan used to say, the situation is in flux. A few schools reported either recently having instituted or being about to institute a new system of peer review for senior faculty. And respondents from no fewer than 16 of the 48 schools replying to the question said “yes or probably yes” when asked, “Is your school’s status quo regarding institutional review or nonreview of TFPs’ scholarship apt to be seriously reconsidered in the at-all-near future (or is it now being reconsidered)?” More recently, the number of universities either adopting or considering a campus-wide mandate of formal reviews of tenured faculty’s teaching and scholarship


36. Like the author, the data have aged. This article was first submitted to the Journal of Legal Education in Spring 1987.
was deemed substantial enough to merit a session on the topic at the AALS 1990 Annual Meeting.\textsuperscript{37}

There is no knowing whether or to what extent new systems of review will erode academic freedom "and" tenure. However, the following data might affect one's guess. Of 46 deans and deans' designees who disclosed their own policy preferences concerning senior faculty scholarship, nine favored the abolition or the substantial modification of tenure as then understood or practiced at their schools.\textsuperscript{38}

All of the foregoing data underscore the importance of identifying and thinking through the critical issues apt to arise in institutional reviews of law TFPs' scholarship. The questionnaire's main strategy for encouraging the needed forethought was to do what few law teachers can resist doing: to pose hypothetical cases. Most of the fifteen cases posed were extreme ones rather than being about professors apt to grace most halls of legal learning.\textsuperscript{39} That choice was made because extreme cases seemed likelier to help us delineate, if we can, the permissible.

Each case involved a fictional law professor whose scholarship deviated markedly from what I surmised most law deans and law faculties would wish in a colleague. Respondents were asked to predict the worst or ultimate sanction(s), if any, that probably would befall each such professor—assuming that any and all other attempted remedies had failed—at the respondent's own school. Partly because I cannot clearly distinguish between the two, sanctions were defined as including deprivations of rewards as well as impositions of affirmative punishments.

Most of what follows is a report and commentary on the respondents' predicted treatment of ten of the fifteen professors. In each case the stated facts are recited in full, the responses are summarized in tabular form, selected responses or excerpts are quoted, and my own comments are offered.

\textbf{B. Confessing Nonobjectivity}

Concerning my comments, the reader deserves prior disclosure of some probably incurable biases. To the extent one can believe in earthly icons, I

\textsuperscript{37} The session was addressed by George Schatzki and Paul Carrington. Its cassette, AALS 9001, Tape 9, "Post Tenure Evaluation," is available from AALS Recorded Resources.

\textsuperscript{38} Examples, some of which are excerpts:

"Eliminate tenure."

"I believe the need for tenure as a protection of 'academic freedom' no longer exists."

"[I favor] the abolition of tenure and its replacement by renewable seven-year employment contracts."

"I favor a formal review of all TFPs every five years, in a manner much like that employed for the granting of tenure, with possible sanctions to include demotion, detenuring, and censure."

"The tenure system should be abolished. Faculty members should be employed on long-term contracts of five to ten years."

"[I favor] serious peer review of the scholarship of TFPs every five years, tied to periodic contract renewal decision."

\textsuperscript{39} One dean reported, "I thank the Almighty that all of these cases . . . are not on the same faculty at the same time. In fact, two or three of them . . . [would be] enough to drive a dean to distraction."
believe in academic freedom, expansively defined, and in the underlying values of intellectual freedom and, its essential partner, free discourse.\textsuperscript{40} Those underlying freedoms—for everyone, not just or primarily for academics—ought to yield only to a “clear and present danger” of either physical injury or other manifestly serious secular harm.\textsuperscript{41} An equivalent latitude should describe a faculty member’s scholarly academic freedom in dealing with ideas. But, to be real, the latter freedom must also include the opportunity to devote a substantial portion of one’s working time to self-selected and self-directed intellectual activity.\textsuperscript{42}

I also believe that a strong tenure system is essential for meaningful academic freedom.\textsuperscript{43} Although saying so risks committing the post hoc


The case for intellectual, discursive, and academic freedoms need not assume that any kind of objective truth is accessible to us. Post-Hume, and “even” post-Kant, such an optimistic assumption is difficult at best. But so is a categorical denial. Epistemological humility hardly weakens the case for intellectual-academic liberty. There may be knowable speculative or moral truth (or more of such truth) whose knowledge could in some sense save us or serve us. Who therefore has the right to preclude the search? And, as with the possible or further discovery of objective truth, the invention of “human-made truth” is apt to flourish humanely only if freedom prevails.

For a modern (and thus?) sceptical view of law-related truthfinding, but one that nonetheless affirms academic freedom, see Sanford Levinson, \textit{Professing Law: Commitment of Faith or Detached Analysis?} 31 St. Louis U.L.J. 3 (1986).

\textsuperscript{41} Yes, the waters are inherently murky. See generally Laurence H. Tribe, \textit{Rights of Communication and Expression}, in \textit{American Constitutional Law}, 785–1061, 2d ed. (Mineola, N.Y., 1988), and sources cited therein.

Marxist and other critiques of the freedom of ideas ideology-mythology usually contain some truth. See, e.g., Herbert Marcuse, \textit{Repressive Tolerance}, in Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse, \textit{A Critique of Pure Tolerance} 81 (Boston, 1969), and \textit{Postscript 1968}, in \textit{supra} at 117. But I do not see enough truth in them to think intellectual freedom less precious or more exchangeable for some form of tyranny, which is what any alternative is.

\textsuperscript{42} But see Robert P. Ladenson, \textit{Is Academic Freedom Necessary?} 5 Law & Phil. 59, 69–87 (1986), which argues that an adequate regime of rights for all employees would render any special freedom for academics unnecessary. Unfortunately, Ladenson’s essay does not confront the probably stubborn reality that most economic endeavors large or complex enough to need employees are in hopeless conflict with the radical individual autonomy of goals and means that free scholarship requires.

Although the scholar’s freedom to self-direct much of her worktime is a scandal to those who would control everything, her genuine autonomy is a wise social investment. If a civilization is to maximize its already slim enough chances for survival and for humaneness, it needs a cadre of persons each of whom is fundamentally free from direction by others in his pursuit and advocacy of whatever truth there may or may not be.

Decreeing freedom for the scholar is of course no guarantee that society-at-large will prosper or even survive. We academics may be unwilling or psychologically unable to do anything but co-operate with a self-destructive status quo. We may (continue to?) sell out. Even if we do not, we still may well fail. And others may or may not do what we would not or could not do. Nonetheless, the prospects for a society afraid to allow its scholars genuine freedom are substantially more dismal than would otherwise be the case.

\textsuperscript{43} So let me accept my Nisbet Award in advance:

The literature on tenure in America must set a record for bad writing. No one can write well when the motivation behind it is bogus or hypocritical. The same
fallacy, the historical evidence is strong: until there was tenure, nothing like the present degree of academic freedom appears to have existed. More to the point, no known alternative to tenure appears capable of protecting academic freedom in any but an Orwellian sense.

C. Concerning Format, Cases, and Sanctions

The respondents' predicted treatment of each hypothetical professor is reported by two actual types of respondents and by two contrived "types" of AALS schools, thus yielding four response groups. The two types of respondents are deans themselves and "deans' designees," persons, usually an associate dean, designated by their dean to answer the questionnaire.

The two contrived "types" of schools need explaining. Oblivious to other attempts to rate or rank law schools, I sent an alphabetical list of all AALS schools to fifteen legal educators scattered about the United States. Promised anonymity, they were asked to identify the thirty AALS schools they thought enjoyed the best overall reputation among persons knowledgeable about U.S. legal education. Nine responded. Listed here, in alphabetical order, are 25 of the 30 schools they most often selected: California at Berkeley, UCLA, Chicago, Columbia, Cornell, Duke, Georgetown, George Washington, Harvard, Illinois, Iowa, Michigan, Minnesota, NYU, North Carolina, Northwestern, Ohio State, Pennsylvania, Southern California, Stanford, Texas, Vanderbilt, Virginia, Wisconsin, and Yale.

While refusing to describe the winners as "the top thirty" or "the best thirty," I shall, with trepidation, refer to them as possibly the 30 AALS schools with the most enviable reputations—"MER schools" or "MERS."
The dean or dean's designee from 18 of the 30 MER schools answered all or most of the questionnaire. Responding MER schools were quite evenly distributed among what the relative number of votes suggested, and what I strongly suspect, are the different prestige levels among the thirty.

The foregoing dubious division of schools into “MER schools” and “other AALS schools” thus constitutes the second grouping by which the predicted treatment of each professor is presented. Despite the subjectivity of that division, I thought it might be useful to see if the expected treatment of scholarly deviance at the more prestigious responding schools would differ from that at arguably less adored responding schools.

Concerning the cases themselves, each had the following stated facts in common: The professor is a TFP (tenured full professor of law) whose teaching and other institutional service, exclusive of “scholarship,” at least meets the respondent's school's minimum performance requirements in those areas for one who is already a TFP. He or she carries a substantially normal teaching and committee workload for full-time nondecanal faculty, subject to any adjustment to that load due to scholarly nonfeasance or misfeasance. Finally, respondents were asked to assume that each professor would steadfastly refuse the most generous “early retirement” offer the institution might make.

Concerning the predicted ultimate sanctions at any school, they are but one person's assessment of what would probably happen at that school. However, because the person was in most instances the dean, the guesses may sometimes be more than mere Holmesian predictions of what other decisionmakers would do.

**D. The Individual Cases**

1. The Case of Professor N. Toto

**Facts.** Professor N. Toto's primary field is comparative law. Shortly after being promoted to TFP, he becomes convinced that humanity's only hope is the writing of a new and truly universal “law of nations” that adequately

48. A proportionately higher number of MER schools (18 of 30) wholly or substantially answered the questionnaire than did the other AALS schools (31 of 120) because, noting the small initial MER response in absolute numbers, I made a second plea to MER school deans. In retrospect, I wish I had made that plea to all nonresponding deans.

49. Of the seventeen schools who were unanimously selected as MER schools by the nine judges, ten responded. Of the thirteen MER schools receiving fewer than nine votes, eight responded. To help protect the anonymity desired by most respondents for their schools, responding schools are not listed by name.

50. The questionnaire read, “In each case, please state, as your best guess, the ultimate, most severe sanction that—after any and all lesser positive and negative inducements to rehabilitation fail—would probably befall that professor at your institution. That ultimate sanction could of course be mere nonreceipt of one or more (please specify them) ‘rewards’ or no sanction of that or any kind. If the latter, simply say ‘no sanction’ “ (emphasis in original). The questionnaire also stated that the ultimate sanction could be a “package of things.”

51. In the questionnaire the fifteen fictional professors were only designated as Professors A, B, C, etc. The ten included in this article have been both renamed and given a revised sequence of appearance.
embodies the values of all major traditions. Scornful of collaborative effort, he believes that the needed formulations must be the work of one person. He also believes that said person can only think universally if he knows all major traditions in each's own language. Hoping to become that person, he is devoting all his scholarly time and energy to learning, and then studying relevant materials in, the world's 30 major languages—thus having no time to publish anything during this process. Because he is a tireless and very fast study, this data-gathering stage will probably be completed 30 years hence, at age 65. Professor Toto plans to devote his retirement years to writing the proposed law of nations that, he hopes, his efforts will yield.

**Some predicted worst sanctions from OS deans** (meaning deans of other schools—schools other than the 30 MERS):

"Refuse him merit raises."

"No yield. Minimal salary increases."

"A dire warning from the dean; the scorn and derision of his colleagues."

"No 'rewards'—frozen salary."

"No raises, no sabbatical leave or research assistant help ever."

"Gradually reduce salary increments in an attempt to persuade a more balanced approach. We are too small to be able to afford this type of scholar. We need a different kind of participation now!"

"If he declines consultation with a shrink of choice that results in his coming closer into the main stream, abrogation of tenure and termination of appointment. Good riddance."

**From OS deans' designees:** "[S]maller salary increases . . . not able to get release time or a reduced teaching schedule . . . difficult time getting research assistant."

"Termination."

**From MERS deans:** "Give low salary increases."

"Withhold salary increases so long as no production is forthcoming."

"Salary increase will be minimal. . . . Peers would, I suspect, not treat him as a true equal."

"Counseling towards more productive scholarship. If that failed, no sanction."

"Have his colleagues ignore him if he has nothing interesting to say; if on the other hand, he does have useful things to say from time to time, he would be treated as a valued colleague and encouraged."

"He would receive standard salary increases at the university rate. Whether or not he would be subject to peer pressure depends on individual judgments on whether he really was planning to do his work. Corbin's great treatise on contracts was written after he retired."

**From MERS individual faculty members:** "Discourage him."

52. I capriciously mailed a copy of the questionnaire to several nondecanal faculty members around the country and invited each's response. As it happened, all of the responses were from individuals at MER schools. Their answers are not included in the tables.
"Urge him to reconsider whether he has a messianic complex and ought to consult a shrink."

**Comments**

Table 1 shows the probable ultimate sanctions for Professor Toto predicted by responding deans and deans' designees. Both Table 1 and the quoted responses suggest that there likely would be at least some unhappiness with Professor Toto at most AALS schools.

There are two likely bases for the unhappiness. First, the validity, indeed the sanity, of his project depends upon several dubious assumptions: that his project is both needed and feasible; that, despite its enormity, it must be accomplished by one individual; that in all other respects it should (must) be done in the way he envisions; and that Professor Toto may well be the person to do it.

The second cause for unhappiness is of course that, whether his assumptions of substance and method are right or wrong, there would be no publication during his remaining thirty years of employment.

**a. Termination?**

Although predicted at no "MER" school and at only three other AALS schools, the above two bases could be converted into a possible case for Toto's termination. The case is apt to look something like this:

1. Professor Toto's project is a manifest absurdity. His obsession with it shows a total lack of judgment amounting to professional incompetence. The facts may even show mental illness.
2. Professor Toto has a duty to the institution to produce scholarship at reasonable intervals. Since starting his absurd project, he has been violating that duty, and he has made clear his intent to persist in that violation.

If postprobationary academic freedom is properly understood and applied, is the case for termination meritorious? In view of the growing desire to dilute if not abolish the efficacy of tenure, that question deserves more attention than the results in Table 1 might suggest.

Let us start with the least serious by considering the psychiatric part of allegation one. If, contrary to Thomas Szasz, one concedes (as do I) that mental illness is real, one must agree: Professor Toto may need treatment. But that is also true of his colleagues, wherever he may teach. If Professor Toto is neither civilly committable nor actionably uncivil towards others, and is performing his teaching and institutional service duties acceptably, Professor Toto's mental health ought not to be an issue. That is so even if he refuses all benevolent suggestions that he seek help.

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53. When asked to predict the worst probable sanction or package at their school for each professor, respondents were given full leeway to answer in their own words. Because these unstructured answers varied greatly, a set of rules was developed for tallying the responses for each table. Interested readers may obtain a copy from the author.

54. In order not to lengthen an already unconscionably lengthy questionnaire, I did not ask respondents to explain why each professor would receive the sanction predicted. Occasionally reasons were volunteered.

TABLE 1
Predicted Probable Worst Sanctions of Professor Toto
in AALS Schools Divided into Four Survey Groups

<table>
<thead>
<tr>
<th>Ultimate Sanction*</th>
<th>Deans' Designees</th>
<th>Deans</th>
<th>Total (Percent)</th>
<th>Deans' Designees</th>
<th>Deans</th>
<th>Total (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No sanction</td>
<td>0</td>
<td>2</td>
<td>(11)</td>
<td>0</td>
<td>2</td>
<td>(6)</td>
</tr>
<tr>
<td>Informal sanctions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discuss with dean</td>
<td>3</td>
<td>4</td>
<td>(39)</td>
<td>1</td>
<td>2</td>
<td>(10)</td>
</tr>
<tr>
<td>Peer pressure</td>
<td>2</td>
<td>1 [or 3b]</td>
<td></td>
<td>0</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Denial of distinguished professorship</td>
<td>1</td>
<td>0</td>
<td>(6)</td>
<td>0</td>
<td>0</td>
<td>(0)</td>
</tr>
<tr>
<td>Support sanctions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Limit/deny research assistance</td>
<td>1</td>
<td>1</td>
<td>(11)</td>
<td>5</td>
<td>2</td>
<td>(23)</td>
</tr>
<tr>
<td>Limit travel funds</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Limit secretarial assistance</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time sanctions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No sabbatical or low priority</td>
<td>2</td>
<td>2</td>
<td>(22)</td>
<td>3</td>
<td>3</td>
<td>(19)</td>
</tr>
<tr>
<td>Greater or no reduced teaching load</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Increased committee work</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Monetary sanctions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Withhold bonus</td>
<td>6</td>
<td>8</td>
<td>(78)</td>
<td>8</td>
<td>15</td>
<td>(74)</td>
</tr>
<tr>
<td>Below average salary increases</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Negligible salary increases</td>
<td>3</td>
<td>2</td>
<td>4</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>COLA only</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Salary freeze</td>
<td>2</td>
<td>5</td>
<td>2</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Termination</td>
<td>0</td>
<td>0</td>
<td>(0)</td>
<td>2</td>
<td>1</td>
<td>(10)</td>
</tr>
<tr>
<td>Schools apt to sanction (other than only informal sanctions)c</td>
<td>6</td>
<td>8</td>
<td>(78)</td>
<td>11</td>
<td>16</td>
<td>(87)</td>
</tr>
<tr>
<td>Number of schools responding</td>
<td>6</td>
<td>12</td>
<td></td>
<td>12</td>
<td>19</td>
<td></td>
</tr>
</tbody>
</table>

*The term "sanction" or "sanctions" in the tables includes all predicted withholdings of rewards as well as sanctions more commonly thought of as affirmative punishments.

bSee quoted comments. Thanks to conditional or otherwise ambiguous responses, bracketed alternative amounts appear in a few other tables also.

cBecause multiple sanctions were predicted (conjunctively or disjunctively) at some schools, one or more amounts on this line in the tables can be less than the sum of amounts in component response categories. And, because both informal and formal sanctions were predicted at some schools, the sum of schools apt to sanction formally plus "informal sanctions" and "no sanction" responses in any group can exceed the total number of schools responding in that group.

Likewise, predicted multiple sanctions (or a respondent's failure to specify a subcategory) within a category of sanctions (e.g., support sanctions) can also cause the number of responses in that category to differ from the sum of responses in its subcategories.

The "Reasonable" Scholar. The crux of allegation one was "total lack of judgment amounting to professional incompetence." If we adopt that view as a basis for his termination we are not merely saying, "We think it extremely unlikely that Professor Toto's project has any merit," or, "One or more of his basic assumptions almost certainly are wrong." Rather, we are saying, "We are so sure he is wrong that we (1) hereby officially decree it
and (2) coercively deny him his place at this institution unless he amends his scholarly mission in obedience to our wisdom.” Such a position cannot be squared with the free search for truth.

Professor Toto’s case points to an unnerving but unavoidable conclusion: at least with respect to threat of termination, academic freedom necessitates that the tenured professor be free of a professional reasonableness requirement as to her scholarship. No matter how lax, liberal, or otherwise “reasonable” any such reasonableness requirement might be, it would perpetually indenture the individual to a coercive consensus whose endless tyranny cannot be justified. The value and the meaning of tenure is that, in John Bauman’s words, “it allows independence—indeed from one’s colleagues and from institutional coercion.”

If, in pursuing our scholarly calling, you and I are not free to be wrong, foolish, crazy, absurd, ridiculous, and all other things bearers of new or unwanted ideas and methods have been called, we have little if any of what can credibly be called academic freedom. The free search for truth has been essentially cancelled for the sake of such inferior and often illusory values as perceived efficiency, respectability, and “prestige.”

Does the radical freedom due Professor Toto suggest a double standard between tenured and untenured, and even between full and not-so-full, professors? Clearly it does. In superficial theory, all faculty members are entitled to academic freedom in equal measure. Such ought to be the case to every possible extent. But reality intrudes. Faculty members seeking

56. I do not, however, contend that the scholar’s need for freedom revokes longstanding constraints against fraudulent reporting of research data, culpable plagiarism, or the sometimes murky area of torts and crimes involving “moral turpitude.” The first two of these do not restrict the search for truth. The third does, but, in a free society, should only occur when there is a bona fide threat of real harm to others. Thanks in part to often uncertain empirical bases, outside restrictions to protect national security, privacy values, patent rights, and the like pose special dangers of overkill. They should be applied with extreme caution.

A much more difficult case exists with respect to scientific experiments that pose indeterminable but possibly serious health or safety risks to individuals or to the environment. Arguably, however, controls over those activities are much less deleterious to ideological freedom than are controls over less physical forms of truthseeking.


In David Riesman’s phrase teachers and scholars should, insofar as possible, be truly “inner directed”—guided by their own intellectual curiosity, insight, and conscience. In the development of their ideas they should not be looking over their shoulders either in hope of favor or in fear of disfavor from anyone other than the judgment of an informed and critical posterity.

Brewster, supra note 1, at 16. “Tenure, as we know it today, does not simply build battlements against external dangers; it also fortifies the individual against menacing forces from within.” Metzger, supra note 5, at 101.

58. Thus the AAUP’s 1940 Statement of Principles on Academic Freedom and Tenure prescribes that “[d]uring the probationary period a teacher should have the academic freedom that all other members of the faculty have.” Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments, in American Association of University Professors, Policy Documents and Reports 3, 4 (Washington, D.C., 1984) [hereinafter AAUP]. But the Statement also contends, id. at 3, that “[f]reedom and economic security, hence, tenure, are indispensable to the success of an institution” (emphasis added) and that “[t]enure is a means to certain ends . . . [the first of which
permanent appointment or promotion must prove themselves worthy in the eyes of others. That requirement must reduce and may destroy the actual academic freedom of persons whose retention or promotion depends upon being judged favorably.59 We tolerate those assaults upon a young scholar's freedom for, I hope, only one reason: The infringements are a temporary necessity. The defensible though paradoxical purpose of subjecting a probationary or nonsenior scholar to our fallible definitions, requirements, and judgments is to try to determine if that person is growing, and to try to help him or her to grow, into a scholar who will self-define and self-regulate his or her own mission.60

Is the view of academic freedom as virtual autonomy too extreme? One way to attack it is to point out its infeasibility if applied to teaching duties. Although academic freedom in the classroom should be defined very liberally, it must accommodate some need for professional reasonableness in

is [freedom of teaching and research and of extramural activities," a clear rejection of the idea that the hyperfragile "academic freedom" of the probationary period would somehow also suffice for one's professional lifetime. In a phone interview on October 2, 1985, Jordan Kurland, Associate General Secretary of the AAUP, emphatically agreed with my interpretation of the Statement, i.e., that the limits on academic freedom that are inherent in the probationary and promotion years must not continue thereafter.

"It is, in fact, very difficult adequately to protect the academic freedom of nontenured faculty members, a truth that one wishes could be driven home to those persons who assert their support of academic freedom while at the same time attacking the concept of tenure." Bertram H. Davis, Academic Freedom, Academic Neutrality, and the Social System, in Pincoffs, supra note 12, at 27, 29.

59. There is little effective protection against subtle biases and most other subjectivities in the judges' conscious and unconscious minds. Cf. David L. Shapiro, After Reading Too Many Tenure Files, 37 J. Legal Educ. 203 (1987).

In order to give the victims of the process some notion of how they will be judged, and in hope of lessening the subjectivity, relatively specific criteria are sometimes devised, e.g., x number of articles published in journals regarded as scholarly. Although such criteria may reduce the implicit subjectivity factor, they so do at the price of adding a significant degree of arbitrariness.

Unhappily, both the arbitrariness of criteria and the inherent threat of adverse subjective judgments postpone meaningful freedom.

We already pay a terrible cost for the three-to-five-year waiting period before a tenure decision is reached. This is a time when the thought and character of many scholars deteriorate badly: they take on fashionable projects with predictable outcomes; they become competitive instead of cooperative; they suffer all the damages of anxiety.

Amélie Oksenberg Rorty, Some Comments on Sartorius's Paper on Tenure, in Pincoffs, supra note 12, at 180, 181. "Assistant professors . . . end up in tense competition for the prize of tenure, trying to accommodate themselves to standards and expectations that are, typically, too vague to master except by a commitment to please at any cost."


60. "A certain kind of character is no less important [than raw intelligence]—one that permits a person to . . . carry through a scholarly project that, . . . because it asks new questions, will sometimes seem of doubtful value during the long years required for its completion. . . . There is a great need, if you will, for creative pigheadedness." Bruce A. Ackerman, The Marketplace of Ideas, 90 Yale L.J. 1131, 1142 (1981).

It is paradox but not contradiction to say that probation can be used to encourage and fallibly to assess someone's potential for, and growth toward, self-directed scholarship. Although the status quo often resembles a Lewis Carroll world, the alternatives, automatic tenure, permanent probation, or some combination of both, could only be worse.
order to protect students' right to learn. That need, however, compels no conclusion about the scholar's academic freedom—unless one totally confuses the university's teaching and scholarly missions. The teaching mission, which hopes both to transmit past knowledge and to facilitate the student's self-enabling skills, is conducive to a mix of opposites: group standards and personal idiosyncrasy. Because those opposites will probably remain in mysterious tension, the limits of academic freedom in the classroom are apt to remain a conundrum.

But there is no need for such bemusement when we speak of the scholar's academic freedom. The difference is basic. An institution that claims to instruct students cannot afford teachers who persistently fail in the classroom. But it can afford scholars who fail. Indeed it must do so if it would adhere to its truth-seeking function.

Send in the Widgets: There Ought to be Widgets. The second arguable ground for Professor Toto's termination is his failure, and his promised continued failure, to publish at reasonably close intervals. Alas, Professor Toto violates the "productive scholar" norm. In this view, productivity and frequent publication are synonymous. Indeed, in this view, scholarship and frequent publication are synonymous. It might aptly be called the Widgets Producer view of the scholarly calling. It is the perfect Odd Couple marriage of the philosopher and the Industrial Revolution. It is, with no close second, the prevailing model of scholarship in American legal education and, I fear, in American higher education generally.

61. Of course the two missions are and should be "confused" in practice. That happy outcome is no reason unnecessarily to confuse them in theory.

62. However, in part because we know so little concerning what should be learned and what "successful" learning is, we should of course err most decidedly on the side of protecting teaching freedom. Still, or thus, the conundrum remains.

63. Thus the 1940 AAUP Statement of Principles, in paragraph (a) of the section describing academic freedom, affirms that "[t]he teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties . . ." (emphasis added). AAUP, supra note 58, at 3. But paragraph (b) more modestly prescribes that "[t]he teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject . . ." Id. The adjective "full" is noticeably absent.

64. The widgets production metaphor need not imply product uniformity (although a fair amount of same does exist). As used here, it merely connotes the virtual certainty of continual tangible short-run output.

65. However wide or limited be its applicability elsewhere, few legal academics will be puzzled by Robert Abrams' prudential advice to most new law teachers: Most people work more efficiently if they have a timetable. . . . Completing and submitting for publication at least one item per year is a good pace. If a scholar can maintain this pace, he or she will soon appear to be a prolific author. It is a realistic and manageable rate, especially if the novice scholar avoids overambitious articles in the early years of his or her writing career.

. . . . Consider how two otherwise equal tenure candidates X and Y will fare if X has published several creditable works and Y has but a single, somewhat more ambitious, piece published at the end of four or five years. . . . Even if Y's lone article is felt to be somewhat more profound or "better" than any one of X's articles, X is in a far stronger position to receive tenure. X's demonstrated ability
Accordingly, allegation two is by far the more probable impetus for Professor Toto's termination and is the likeliest reason he would have salary difficulties. Were his ongoing work to be serially published in law reviews, I doubt that many of us would care how wrong or preposterous his ideas were—as long as our school escaped acute embarrassment. It is the lack of "yield," as one dean put it, that constitutes the problem.

Was dominance of the Widgets Producer model of legal scholarship disproved by Professors Swygert and Gozansky's classic study of senior faculty publication, aptly titled in part, "Comparisons of Law School Productivity"? The authors found that, during the 1980-82 three-year period as to law review articles, book reviews, and the like, and during the 1980-83 four-year period as to books or "other major works," about fifty-six percent of the nations' senior law faculty tallied at least one "publication event." Although that is not a performance report to send stockholders or deans into ecstasy, the authors themselves noted factors likely to exist in at least some cases (heavy teaching loads, excessive committee work, or other institutional duties, especially at small-senior-faculty schools, and the likelihood of heavy consulting and public service in "large urban and governmental centers") that may have precluded or reduced publication. At any rate, the findings hardly deny the model's dominance—certainly not as Prevailing Ideal.

With respect to the dominance of the Widgets Producer model as the ideal, the event of Swygert and Gozansky's article itself provides strong confirmation. Not only have two very able law scholars conducted an exhaustive data search and an elaborate quantitative study of 2,992 publication items; so far as I can tell anecdotally, the authors' findings seem to have been deferentially noticed by more deans and other law to "get work out" makes the grant of tenure to X a low-risk proposition. At worst, X is likely to be productive, if not profound. . . . Y's future is far more problematic.


68. See id. at 381 and its Table 1, Composite Publication Data for 169 Law School Senior Faculties. Choosing to describe the glass as half empty, the authors wrote that "over 44 percent [44.21%] of the entire population of senior law faculty members had zero publications [of the type counted]." Id. at 381. (To be counted an item had to be at least five pages and, regardless of length, could not be a bibliography, report of proceedings, or other excluded type. See id. at 378.) The term "publication events" appears id. at 374 and 375.

69. Id. at 393-94.

70. The study included, among other things, the computation and ranking of senior faculty "average productivity" by AALS schools, the computation and comparison of the senior faculty "productivity factor" at AALS schools, the computation and ranking of "a composite of average productivity and productivity factor" for AALS schools, "outlier" analysis comparisons, correlation coefficients by senior faculty size, plus standard deviation analysis for each school. See Swygert & Gozansky, supra note 3, at 378-93. The study also included ABA-approved non-AALS schools.
teachers than has any empirical study since Langdell distracted us with cases.\textsuperscript{71} And apparently no one is at all amazed that any of this would happen.\textsuperscript{72} Nor should anyone be. The model prevails.\textsuperscript{73}

The quantitative study under discussion does not, however, purport to equate publication and scholarship. Indeed, the authors say that “the study consists of an inventory and analysis of publication events; it is not an assessment of scholarship.”\textsuperscript{74} But, like the rest of us, they do adopt the Widgets Producer model. Thus they used a four-year search period for Online Computer Library Center data “on the assumption that books or other major works . . . may take several years [i.e., no more than four years?] to research and publish, while [as to the Legal Resource Index] three years was deemed sufficient time for publishing articles and book reviews.”\textsuperscript{75} Applying those assumptions to the data, the authors are able to say, without qualification, “Our empirical study, we believe, validates the statements of Stevens and Reed,” which were that the published scholarly output in American legal education has been small.\textsuperscript{76} And, referring to the “nearly 50 percent” (i.e., 44 percent) of senior law faculty who did not publish the type of items counted during their three to four-year study

\textsuperscript{71} The study also promptly incited a rigorous and erudite critical response, published only two JLE issues later: David H. Kaye & Ira Mark Ellman, The Pitfalls of Empirical Research: Studying Faculty Publication Studies, 36 J. Legal Educ. 24 (1986). Professors Kaye and Ellman’s critique essentially concerned research design and other matters of empirical method (e.g., and purposely I pick the easiest, that “[o]ne can count pages as well as items,” id. at 30). It did not attempt to evaluate the Widgets Producer model of legal scholarship.

One wishes that schools would be more concerned with Christopher Stone’s observation that current legal scholarship seems “overwhelmingly risk averse,” meaning that “clear and not-being-wrong dominate imagination.” Christopher D. Stone, From a Language Perspective, 90 Yale L.J. 1149, 1153 (1981). An increased concern with quantity of publication (as frequency, length, or whatever) will hardly address, and is apt to aggravate, the malaise Stone rightly sensed.

\textsuperscript{72} One possibly amazing thing was the extensive but not terribly accurate coverage given the study in the press: e.g., Law Professors Faulted for Lack of Publishing, N.Y. Times, Dec. 22, 1985, § 1, at 40, col. 2; Not to publish is not to perish, Chicago Tribune, Dec. 10, 1985, § 3, at 1, col. 1; John C. Metaxas, No Pressure on Senior Professors to Publish, New Study Confirms, Nat’l L.J., Dec. 30, 1985-Jan. 6, 1986, at 4, col. 3. The study even received a “Short Take” in the International Herald Tribune—“The Global Newspaper,” Dec. 28-29, 1985, at 3, col. 5:

Professors at the 169 law schools in the United States publish scholarly papers up to a point, two law professors report, and that is the point at which they receive tenure and cannot be dismissed without serious cause. . . . [O]f 1,950 professors surveyed beginning in 1980, 862 had published nothing within three or four years of receiving tenure, and 404 had work published only once.

\textsuperscript{73} Wanting a five-minute diversion from writing this article, I chanced to browse through a then recent Harvard Law School Bulletin. And what did I meet? Research by HLS Faculty is Rated Tops, Harv. L. Sch. Bull. [no pun intended], Spring 1986, at 35, based on guess what productivity study and on the most-cited-articles study by HLS graduate Fred R. Shapiro, supra note 66.

\textsuperscript{74} Swygert & Gozansky, supra note 3, at 375.

\textsuperscript{75} Id. at 378–79.

\textsuperscript{76} Stevens has also said, albeit with confessedly mixed emotions, “The fact that the law school, above all other units of the university, is committed to teaching is no doubt heavily attributable to the low level of scholarly activity in our law schools.” Robert Stevens, American Legal Scholarship: Structural Constraints and Intellectual Conceptualism, 33 J. Legal Educ. 442, 446 (1983).
period, the authors unequivocally conclude: “Whatever the reasons, this figure represents an underutilization of intellectual resources.”

Whatever the reasons? In other words, the Widgets Producer model is the only acceptable model of legal scholarship. But what if, unlike the senior hares, who briskly cross the finish line at least once every three to four years, there are a fair number of senior tortoises whose more tortuous endeavors take them an average of six to eight years? In any three to four years, half would tally zero. And what if there were some others, who in hope of enhancing their perspective were “merely studying” one or more of the natural or social sciences or relevant humanities? And, heaven forbid, what if some others were long working on high-risk projects they finally judged a failure, throwing their notes and drafts into the trash?

That there is “an underutilization of intellectual resources” among senior faculty (and elsewhere) is, like entropy, almost surely true. But, juxtaposed with Swygert and Gozansky’s quantitative findings, the statement is a total non sequitur. Reading many if not most of the 2,992 “publication events” counted in the study could, and probably would, have allowed the same conclusion.

Nonetheless, would it not be reasonable to require Professor Toto to try to publish tentative findings of his multi-decade study, say, every three to five years? The obvious problem with any such requirement is the scarcity of time. In the case of Professor Toto’s tentative timetable, attempting interim articles would delay completion of his data-gathering stage until well past age 65. Were his project “only” a ten or fifteen-year undertaking, he would still be paying a substantial penalty for engaging in a long-term effort. By being forced to attempt interim publication in addition to the final product he was hoping to write, his opportunity to proceed to another desired project is delayed.

And, as in the original Professor Toto hypothetical, his chances of not completing his current project because of death or other disability are increased. Those are not trivial deprivations.

Requiring periodic “tangible results” would restrict Professor Toto’s freedom in a way even more fundamental than loss of time. The requirement virtually forces him to understand in at least some tentative way discrete parts of his subject area before comprehending the big picture.

77. Swygert & Gozansky, supra note 3, at 393.
78. I do not claim that many of us were or are doing any of the above things. I only hope so.
79. Which does not necessarily mean that many or most of the counted published items were of other than high quality. The work of Richard A. Posner, the undisputed winner of the 1980–84 Productivity Sweepstakes, with twenty-two items, Swygert & Gozansky, supra note 3, at 382, is hardly idle reading. Likewise as to the work of Thomas L. Shaffer, the runner-up, who scored a mere sixteen. As to the very great majority of the 2,992 items, I plead total ignorance.
80. Having to report his in-process findings and thoughts on a periodic basis may of course reduce the time required to write the final product upon completion. However, unless he is miraculously fortunate, his total project time will still be substantially greater, and may be enormously greater, than would otherwise have been the case.
Although, in theory, at the end of the project he might be able to shed his prior fragmentary perceptions and attain the comprehensive synthesis he desires, fatigue, inertia, and other aspects of human finitude suggest that this will not occur. Unless Toto is truly superhuman, his thinking will fall prey to the Widgets Producer model.

That model assumes that a big project is essentially a mere composite of little projects that can at least tentatively be dealt with seriatim. The model also makes the related assumption that all projects can be carried out seriatim about as fruitfully as by any other method. Those assumptions about method may be correct. But it is still indefensible to make the serial approach a lifelong requirement or nearly so. The obvious reason is that by so greatly restricting one's method of inquiry we gravely risk restricting or otherwise affecting the truth she will ever perceive.

But (the controllers are seldom daunted) there is a counterargument:

Despite its subjective oppressiveness in some cases, to require reasonably frequent publication would enhance actual scholarly freedom in most cases. That is so because one cannot test his ideas unless he puts them in readable form. Even though his is a lifetime project, the discipline of committing his tentative ideas to paper is apt to yield Professor Toto more freedom than it destroys.

Professor Toto could justifiably respond to the think-on-paper prescription by saying something like the following:

Thank you for your thoughtful suggestion. I shall follow it to the extent I deem appropriate. Indeed, for me to act contrary to my own judgment in the matter would be a gross abdication of my duty as a "senior" scholar. Isn't it wonderful that, after an extended period of adolescence, one finally enters scholarly adulthood? One finally wins the freedom to self-direct his scholarly endeavors, both as to method and as to content. Though all types of adulthood are fearful, aren't we glad to risk it?

It may well be that Professor Toto's work would profit from the input from others that periodic publication might foster. But it also is possible that such input would impede rather than aid his efforts. With respect to this and other issues of method, the point is that, because no one knows which approach is best, we had best let Professor Toto decide for himself. Individual autonomy and the diversity of method it allows are our least worst hope of obtaining obtainable truth.

Argument: The institution awards tenure in the reasonable expectation that the person will remain a "productive" scholar in the sense of continuing to publish with some frequency. Toto's persistent violation of that understanding is therefore a breach of faith warranting dismissal. Response: If the above expectation is fundamental, why so strong a tradition against enforcing it? Enter chorus of evil reasons. One good reason has been demonstrated in Toto's case and will reappear in the ensuing case of Professor Quest. A lifetime recurrent publication requirement cannot be squared with the university's authentic scholarly mission, the free search for truth. It thus wholly begs the question to say that, contrary to both tradition 81.

81. The preference for frequent output (see Table 1 as to salary sanctions) is but one more way in which the deck is virtually stacked against the occurrence of genuinely radical scholarship—scholarship that apprehends root causes and constructs imaginative solutions.
and freedom, mandatory periodic publication is a "reasonable expectation" of tenured scholarship.82

Because a perpetual publish-or-perish requirement would forever postpone free scholarship, other justifications must be invented. One such attempt has to do with the need to advance the institution's reputation. Another has to do with the utility of assessing scholarly performance. Those rationales are dealt with in the next two sections.83

Another rationale is the contention that reasonably frequent publication is essential for excellence in the classroom. It is indeed true that continued intellectual growth is essential for teaching excellence (a truth that in part explains why providing adequate time for faculty scholarship also benefits the student). But it is an implausible as well as an unproved extension of that truth to claim that one must publish in order to maximize one's potential in the classroom.84

Therefore another argument is sometimes added. It says that regular publication is the only practicable way that we can assess key aspects of teaching excellence, namely, that a professor is current with the literature and still thinking creatively in his fields. That argument seems highly contrived. There are other ways immensely less costly in time and freedom to ascertain that Professor Toto is keeping abreast and otherwise using his mind. Visit his classes, take him to lunch, chat in his office, and/or corner him in the halls or parking lot. None of those means need be very effective in order to equal or exceed the dubious-at-best effectiveness of regular publication as a measure of any aspect of teaching excellence.

b. Support and Time Sanctions?

Prior discussion has attempted to show that termination of Professor Toto would be unjustified because it would subordinate scholarly freedom to lesser values. Should we, however, employ lesser sanctions against him? Consider the following case for affording Professor Toto less or even no scholarly support, meaning such things as research assistance, books and travel allowances, and even secretarial help:

Maintenance and enhancement of the law school's and the university's scholarly reputation is a vital goal. Therefore, it makes sense to use the school's limited research monies to best advantage. Professors X, Y, and Z, who are producing quality articles with happy frequency, could make far more efficient use of most or all of Professor Toto's support funds. Such a reallocation would merely reflect sound management.

In evaluating the just stated position, perhaps one ought first to ask what kind of a scholarly reputation the institution is seeking. Does the school

82. But what if Professor Toto's unbalanced approach were to become the norm? The answer is that it will not become the norm—not in a thousand years. Balance is a legitimate concern regarding the faculty as a whole, not a justification for imposing uniformity upon individuals. If School X ever senses the prospect of too many Professor Totos on the scene, it can favor widget producers in its future hiring. There is apt to be no shortage.

83. The latter rationale is also discussed infra in the text dealing with Professor Quest.

84. The claim is apt to fare especially badly when applied to Professor Toto. His comparative law and international law classes would likely be a delight. And they would likely get better each year.
mainly wish higher scores for the next quantitative study on "faculty productivity"? Or does the school wish to be known as an exciting place for scholarship, where freedom is encouraged?

It is much healthier if enhanced scholarly reputation is thought of as a welcome by-product rather than as a direct goal.\textsuperscript{85} After all, the primary goal is not a reputation for virtue but rather virtue itself—in this case, the advancement of truth. And if we must lust after prestige, the best way for any school to enhance its scholarly reputation is to create a more fertile climate for scholarship to occur, meaning such things as adequate support, rewards, and, at least as essential, freedom as to substance “and” method.\textsuperscript{86}

The AALS Bylaws explicitly affirm member schools’ duty to support faculty scholarship.\textsuperscript{87} They also of course mandate academic freedom.\textsuperscript{88} It is thus no innovation to say that all unslothful faculty members should be accorded at least putatively adequate support for scholarship throughout their employment. With respect to the duty of “adequate” support (admittedly a vague idea, but not a meaningless one), an institution’s withholding or reducing such support as a means of manipulating the method or substance of anyone’s scholarship should never be permitted. Otherwise, the university subverts itself. It attempts to exclude or coercively to impede certain modes of thought.

With respect to time sanctions, such as heavier teaching loads, increased committee work, and denial or delay of sabbatical or even unpaid leave, the above conclusions apply even more emphatically. Except for termination and starvation, substantial time sanctions are the most drastic. They can preclude or make virtually impossible disfavored major research and writing efforts.\textsuperscript{89} Except in a clear case of practiced indolence, which hardly describes Professor Toto, time sanctions, like support sanctions, cannot be justified. Their use to manipulate the type of scholarship attempted would be destructive of academic freedom.

c. Salary Sanctions?

To what extent could salary determinations be used to encourage more frequent publication from Professor Toto? If I could define or even recognize economic justice in general, I should feel less foolish in confronting this question. But fools rush in—and oversimplify.

85. Cheers for Banks McDowell’s advice “to take scholarship seriously in its own right, as an end in itself, not as a means to prestige.” Banks McDowell, The Audiences for Legal Scholarship, 40 J. Legal Educ. 261, 272 (1990). Scholarship \textit{for the purpose of} enhancing a school’s or an individual’s reputation is an undertaking at odds with itself. Preoccupation with reputation improvement is apt to deter the most needed scholarship, which is scholarship that freely risks violating today’s expert wisdom and thus tosses respectability to the winds. And, as a lifetime enterprise, the psychology is dismal: “Dear, I’ll be at the library trying to improve the school’s and my image.”


88. § 6-8, d: “A faculty member shall have academic freedom and tenure in accordance with the principles of the American Association of University Professors.” Id. at 24.

89. Thus, in § 6-8, b, the bylaws mandate teaching responsibilities “that are compatible with a climate of research in which each faculty member may find opportunity to undertake investigations of her or his own choice.” Id. (emphasis added).
Arguably, law professors' salaries are a combination of market considerations and other equity considerations. By market considerations, I mainly mean asking, What is Professor X's economic worth to this institution and what must we pay Professor X to keep him here? As long as the latter figure does not exceed the former, and replacing Professor X with someone or something else would not yield a net economic gain, it makes economic sense to pay Professor X enough, but not more than enough, to keep him.

It is highly unlikely that reality is so hardnosed. Not only does the market falter for lack of knowledge; most probably for better, but perhaps sometimes for worse, nonmarket equity considerations (meaning any and all nonmarket factors) also come into play. Uniform cost-of-living adjustments are probably mainly a reflection of the latter. The idea of "merit increases" is apt to include, and conveniently to confuse, substantial amounts of both market and nonmarket considerations.

At least to the extent of preventing selective salary cuts without due process, tenure is apt to require a nonmarket equity component. Tenure (or a term contract) should also be understood as protecting a faculty member who has not neglected her duties against a selective salary reduction merely because her market value is deemed to have declined. Except for the foregoing two statements, plus a belief that nonmarket equity considerations should play a very substantial role in determining salary increases, I shall not attempt to prescribe the weight of that role.

Despite my ignorance-inspired cowardice and the probable impossibility of clear delineation between them in actual cases, the above abstract distinction between market and nonmarket considerations seems essential even to deal superficially with the question of salary rewards for scholarship. Hence its use in what follows.

To the extent that salary increases may be dictated by market considerations, frequency of publication may be taken into account. Thus, to the

90. Unless farce is to prevail, the above idea requires honestly taking into account the real income effects of raging or persistent inflation. One doubts, however, that such careful candor pervades.

The question of how much process is due before one's salary can be selectively reduced has yet to receive adequate attention. See Faculty Tenure, supra note 5, at 75–76. Cf. the AAUP's 1982 Recommended Institutional Regulations on Academic Freedom and Tenure in AAUP, supra note 58, at 21, 27. Procedural protection due tenured faculty should also apply to untenured teachers at least for the duration of any term contract in which salary reduction or other sanction is at all possible.

91. Otherwise, we forever work under the stick, not merely the carrot, demanding we eternally cater to prevailing tastes. Cf. William Van Alstyne, The Specific Theory of Academic Freedom and the General Issue of Civil Liberty, in Pincoffs, supra note 12, at 59, 71 (emphasis added):

To condition the employment or personal freedom of the teacher-scholar upon the institutional or societal approval of his academic investigations or utterances, or to qualify either even by the immediate impact of his professional endeavors upon the economic well-being or good will of the very institution that employs him, is to abridge his academic freedom.

92. Van Alstyne's words, quoted in the preceding note, provide ample reason.

93. Thus this article partly abstains on the most critical relevant question: to what if any extent should the individual law professor's salary be determined by market preferences (or, more realistically, by someone's perception thereof)? And it wholly ignores the more general economic justice questions arguably essential to answering that one.
extent that the nature, apparent quality, and frequency of Professor X's past and expected publications may reasonably be thought to increase her market value over that of Professor Toto, the "market-determined" component of her salary may be increased over Professor Toto's.

What about nonmarket equity considerations? Should the nonmarket component of merit pay increases reflect accomplishment, effort, or some combination of both? Granted that the market much prefers success, does frequent success (usually defined as frequent publication) also have a superior nonmarket salary claim over infrequent success and abject failure (the latter being usually defined as nonpublication)? From a perspective of scholarly freedom, which certainly includes the freedom to fail, the answer has to be no. And the answer seems strange: at least as to scholarship, nonmarket equity may reward effort but not accomplishment. (The market component of salary is the arguably permissible place to reflect a scholar's generally perceived qualitative as well as quantitative success.) From a perspective of freedom, scholar Toto is doing everything his school has a right to ask of him. He is working earnestly, in complete good faith, at his self-chosen task. In a nonmarket sense, his merit as scholar is unsurpassable.94

Even so, one may argue that it is not practical to measure a scholar's effort save by tangible results.95 That argument can withstand anything except examination. It is at least as impractical to assess the nonmarket merit of results as it is to assess actual effort. Although one may attempt to transcend the market's multiple subjective judgments of quality, his qualitative judgment is essentially subjective. The true heuristic value of a person's work can never be known in the short-run and indeed may never be known. So shall we, for practicality, merely measure quantity? Do we pay by the page or by the article? Do some journals have more nonmarket value than others? And what of Professor Toto? If his treatise is completed at age 75 and finally published, would not he or his estate be entitled to a large if belated merit payment with accrued interest? Likewise as to the seven-year-project scholar, vis-à-vis the annual publisher. Besides leading to Wonderland, such practicality is its own illusion.

d. Informal Sanctions?

Should the dean "counsel" Professor Toto? There seems little if anything wrong, and much that could be right, in a dean's showing genuine interest in each faculty member's scholarship and discussing it with her. But the question goes further. Should the dean counsel Professor Toto in the

94. Could not a dean plausibly, and in more or less good faith, attribute any desired salary favoritism to guesstimated differences in market values? If so, this entire discussion may seem pointless. But its purpose is not to draw a foolproof or abuseproof blueprint of salary justice. The discussion hopes only to offer some nonutopian possible help to the dean who (typically, I think) seeks both to respect freedom and to do salary justice beyond merely sensing the market.

95. Stated differently, frequent publication is itself meritorious because (a) there is utility or other justice in assessing scholarly effort and/or other aspects of scholarly merit and (b) frequent publication aids in that assessment. That position is also discussed infra in the case of Professor Quest.
sense of encouraging him to rethink his approach? If the dean perceives that Professor Toto's scholarship is a misuse of talent, the answer is probably yes, subject to three qualifications. First, absent sloth or other bad faith, evils that do not describe Professor Toto, any counselling should be unequivocally permissive. The dean should candidly express her views, but always should make clear that the captain of Professor Toto's scholarship is Professor Toto alone. Second, the counselling should be genuinely a two-way street. Just as counselee may learn from counselor, the converse may also occur. Third, the dean should take great care not to allow her own ego to become involved in the goal of converting Professor Toto's possibly lost soul. An intractable Professor Toto could surprise us all and write a truly civil *Corpus Juris* for the twenty-first century.

What about "peer pressure"? If that means a frank and constructive dialogue between and among colleagues, an enthusiastic yes—whether or not Professor Toto is perceived as a problem. If it means shunning him or scorning him behind his back, an equally emphatic no.

2. The Case of Professor Quest

*Facts.* Professor Quest devotes 35 to 40 hours weekly to keeping well abreast of her teaching fields and reasonably abreast of law and society in general, to class preparation, teaching and individual help to students, and to committee work and the like. Additionally, she intuitively believes that the legal system—indeed civilization itself—is failing to enable a humane existence for some overriding but unknown reason. She is obsessed with discovering that hidden reason. The quest takes 15 to 20 hours per week during the school year and takes most of each summer. She candidly acknowledges that devotion to this all-important task, and her resultant 50 to 60 hour work week, leaves no time for "conventional" scholarly endeavor.

Professor Quest's office is full of reading material and her notes therefrom. The material and the notes range from philosophy to cartoon drawings. None of the notes appears "publishable" in any plausible sense. And Professor Quest, feeling that they thus far represent no progress whatsoever toward her current all-consuming scholarly(?) goal, adamantly refuses to attempt to publish any of them. This situation has persisted for the 15 years since Professor Quest became a tenured full professor. Now 45 years old, she vows to continue the search until success or death.

*Some predicted worst sanctions from OS deans:* "Death [will precede success]. Average salary increases."

"She is on our faculty. No raises beyond cost of living."

"Refuse her merit raises."

"Lower than average pay raises."

"No rewards—frozen salary."

"Average salary increase."

"Low salary increase, no sabbatical."

"Tremendous peer pressure and a salary freeze."
“Abrogation of tenure and termination of appointment.”

*OS deans’ designees:* “Withhold bonuses.”

“Strong peer pressure; limited salary increments; limited travel funds.”

“Nurtured, with adequate research assistance; ridiculed by colleagues behind her back.”

“Increased teaching load; reduced percentage of salary increases.”

“Encouragement to leave; no salary increase.”

*From MERS deans:* “Thought of as a little off-beat, but accepted as long as she communicated with her colleagues about her search.”

“Withhold salary increases after effort has clearly reached the point of not leading to written scholarship that can be disseminated within the academy.”

“Peer pressure; low salary increases; pressure to leave teaching.”

“Standard faculty increases; considerable informal peer pressure; but if colleagues believed there was something in the notes, they would be more sympathetic.”

“No salary increases, no chair.”

*From individual MER faculty member:* “Would probably be regarded as simply wasting time.”

**Comments**

Table 2 and the quoted responses suggest that at most law schools Professor Quest would be causing and suffering about the same degree of unhappiness as would Professor Toto. As were Professor Toto’s, Professor Quest’s scholarly method and assumptions are questionable. But, because the method and assumptions of all scholarship are questionable, let us instead describe her method and assumptions as highly unusual.

Perhaps we should more fully name this faculty member Professor U. D. Quest. The initials of course stand for Unknown Duration, a noticeable feature of her current scholarly project. Perhaps tomorrow she will be dancing through the law school halls shouting an exuberant “Eureka!” Or, as one dean volunteered, death may well precede discovery—even with the intervention of technologically berserk health care.

Akin to Professor Toto’s case, salary appears to be the most expected manifestation of dissatisfaction with Professor Quest. Considering that searching for knowledge or understanding is in traditional theory the essence of the scholarly calling, any institutional unhappiness at her seems strange at first glance. But only at first glance. Most law schools seem not to want their legal scholars to devote vast amounts of time in searches for the truly unknown—truths that may or may not be there. We want the “researcher” (a less frightening term) to “research” in a manner that virtually guarantees an answer or at least an article.
TABLE 2
Predicted Probable Worst Sanctions of Professor Quest in AALS Schools Divided into Four Survey Groups

<table>
<thead>
<tr>
<th>Ultimate Sanction</th>
<th>Number of Schools by Group and (in parentheses) Percentage of the Responding Schools by Two Combined Groups</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>MER Schools</td>
</tr>
<tr>
<td>No sanction</td>
<td>0 [or 2]</td>
</tr>
<tr>
<td>Informal sanctions</td>
<td>4 [or 2]</td>
</tr>
<tr>
<td>Discuss with dean</td>
<td>2 [or 2]</td>
</tr>
<tr>
<td>Peer pressure</td>
<td>2 [or 2]</td>
</tr>
<tr>
<td>Denial of distinguished professorship</td>
<td>1</td>
</tr>
<tr>
<td>Support sanctions</td>
<td>1 [or 2]</td>
</tr>
<tr>
<td>Limited/deny research assistance</td>
<td>0</td>
</tr>
<tr>
<td>No new equipment</td>
<td>0 [or 2]</td>
</tr>
<tr>
<td>Limit secretarial assistance</td>
<td>0</td>
</tr>
<tr>
<td>Time sanctions</td>
<td>2 [or 2]</td>
</tr>
<tr>
<td>No sabbatical or low priority</td>
<td>2</td>
</tr>
<tr>
<td>Greater or no reduced teaching load</td>
<td>0</td>
</tr>
<tr>
<td>Increased committee work</td>
<td>0</td>
</tr>
<tr>
<td>Monetary sanctions</td>
<td>6 [or 2]</td>
</tr>
<tr>
<td>Withhold bonus</td>
<td>0 [or 2]</td>
</tr>
<tr>
<td>Below average salary increases</td>
<td>3</td>
</tr>
<tr>
<td>Negligible salary increases</td>
<td>0</td>
</tr>
<tr>
<td>COLA only</td>
<td>1 [or 2]</td>
</tr>
<tr>
<td>Salary freeze</td>
<td>2 [or 2]</td>
</tr>
<tr>
<td>Termination</td>
<td>0 [or 2]</td>
</tr>
<tr>
<td>Schools apt to sanction (other than only informal sanctions)</td>
<td>6</td>
</tr>
<tr>
<td>Number of schools responding</td>
<td>6</td>
</tr>
</tbody>
</table>

How silly of us. The probability of "research" or other scholarly thought's yielding a publishable work is a glorious continuum. With each case depending upon such factors as subject matter and the scholar's own temperament and inclinations, many projects offer virtual if not total prior assurance of publishability, some offer moderate assurance, and others are very unsure. Should one or both of the latter two situations be verboten even for experienced faculty? It is of course true that scholarship is for sharing with others. Therefore the scholar should have a good faith hope of finding or creating something worth sharing with others, and she should have a good faith intent to share any truth she deems significant.96 But it would be both foolish and evil to

96. Thus it would be nice if Professor Quest would do what most of us do when our substantial efforts yield no answer: attempt to write an answerless (though often worthwhile) article. But senior Professor Quest is and should be entitled to make a good faith judgment as to when her work is ripe for, and indeed whether it is ever worthy of, sharing. That freedom, like all others, has its downside. Some writers are much too
require any probability of publication or of any other gauge of success as a component of competent senior scholarship. It would be foolish because we have no infallible assessor of such probabilities and because, at least in the case of nonnovices, the individual professor is apt to be the best guesser on how to maximize her individual scholarly potential. A publication or other success probability requirement imposed upon even postprobationary scholarship would be evil because it would tend to postpone forever the most basic, speculative, “far-out” questioning—the projects most apt to “fail.”

Notice the facts in Professor Quest’s case. Her strange and ultra-high-risk method is closely tied to her aim: discovery of some hidden basic flaw in the status quo. Without radical freedom of method, one’s chances of finding or creating new moral-political-social-legal truth are diminished. To deny Professor Quest the right to pursue her quest is to make of her (like us?) a compliant fine-tuner of the established technocracy.

The data in Table 2 suggests that despite the case for freedom a number of schools would use time and/or support sanctions as well as salary sanctions against Professor Quest. Most likely, their justification would be that Professor Quest’s approach virtually promises nonproductivity for the rest of her career. That degree of risk or cost is, they might say, too extreme to subsidize.

They would be trading genuine freedom for perceived efficiency. All other things being equal, the more creative the attempted scholarship, the greater is apt to be the risk of an unpublishable or an acutely embarrassing published outcome. Granted, Professor Quest does seem like the extreme case. But that is because we, or most of us, are viewing her from the opposite extreme. Most of us do not spend a great deal of time on a project unless we are confident of some pay-out. We trade immense amounts of creativity and risk-taking for academic, commercial, and/or other acceptability. We need more legal scholarship that is closer to Professor

97. No one, no matter how meddlesome, cares as much about Professor Quest’s scholarship as does Professor Quest. It is mostly her life, her reputation, her dignity, that she is betting. What dean or committee is as competent, or as motivated, to place her bet wisely as is she?

98. A success probability requirement may of course be stated in a superficially more respectable way. E.g., “Competent scholarship includes the ability to define and focus upon a manageable problem for inquiry.” The effect of any such requirement upon freedom is of course at least as pernicious as a more candidly worded version.

99. “Ninety percent of what is printed in law reviews is little more than the invocation of a semi-mechanistic process guaranteed to produce a law review article if the professor is
Quest's hyperrisk extreme, and we could perhaps do with less that is at our own hypersafe extreme.

For the foregoing reasons and for reasons discussed in Professor Toto's case, adequate postprobationary academic freedom requires that Professor Quest be free of the "freedom-assaulting sanctions," namely, termination, time sanctions, and scholarly support sanctions. Assuming that the facts described a sufficiently long work week, Professor Quest is fulfilling all her duties meritoriously. Thus, if the analysis in Professor Toto's case is correct, Professor Quest should also suffer no disadvantage in the nonmarket component of her salary.

With respect to the latter conclusion, an objection voiced against Professor Toto applies even more strikingly to Professor Quest. If there are no frequent articles, how can we know that she is working earnestly at scholarship? In Professor Quest's case the answer is not difficult. Visit her and her reams of notes and other materials. Or request brief, unburden-some reports from her.

What if she objects? Or the reports or other evidence you request do not satisfy? If you must, within the limits of the laws of privacy "spy" on her to the extent needed to allay your reasonable suspicions. In the unprivate world called academia, you need not be much of a spy.

Of course the spying should not be necessary. Its occurrence would disgrace the school rather than the individual victim. But, were I Professor Quest, I should rather suffer that indignity of institutional mistrust than to have my method of scholarship dictated by someone's idea of managerial utility. The latter outcome is the greater indignity, the more basic mistrust, the tighter set of chains.

Perhaps even spy tactics would not give some reader sufficient assurance of Quest's industry. For such a manager, I have a suggestion. Construct a fence around the law school and define scholarship as painting and repainting the fence. Then it will be easy to measure diligence with high assurance. True, you likely will not see much creative scholarship, but that probability also describes an enforced Widgets Production regime. And if you sufficiently discount the values of freedom and potential truth, the trade-off is a sensible one.

There is an added advantage in opting for an overt fence-painting regime. That school would be vividly demonstrating a truth that at least only sufficiently well organized and diligent. Ninety percent of legal scholarship is formula writing... The idea content... is extremely thin." Robert L. Bard, Scholarship, 31 J. Legal Educ. 242, 244 (1981). If true, is that the fault of student editors? See Elyce H. Zenoff, I Have Seen the Enemy and They Are Us, 36 J. Legal Educ. 21 (1986).

100. Of course I oversimplify. Even were any given sanction apt to engender a similar reaction in all individuals, there still would be no bright line between corrosive-to-freedom and not-so-corrosive-to-freedom sanctions. To the extent that the individual professor can buy time and scholarly support for herself, time and scholarly support sanctions may not be much worse than salary sanctions of similar amounts. But one cannot always purchase full or even near equivalents. And even when one can, there are transaction costs. Also, if the loss of once or now customary scholarly time and support must be thought of as essentially a salary adjustment, the correct metaphor is salary cut rather than salary freeze.
some of us seem bent upon obscuring or forgetting: concepts of industrial efficiency have no appropriate coercive domain over scholarship called free or creative.

Concerning any market component, if there must be one, of hoped for salary increases, Professor Quest is clearly at risk. She is probably well aware that the market values Don Quixote only as entertainment fiction.

As for genuine two-way dialogue with dean and other colleagues, such are privileges and compliments—not sanctions. Permissive caring, not indifference, is the opposite of coercion and pressure. Unless their advice is so repetitive as to become nagging, she owes her dean and colleagues serious but unservile attention. Her singlemindedness will, I suspect, withstand the views of others. If not, let it be true that she freely changed her mind.

3. The Case of Professor Manual

Facts. Professor Manual believes that the salvation of the legal profession is better post-degree education. Thus she devotes all of her scholarly(?) effort at authoring practitioner's manuals, which are selling fairly well. She scorns the idea of writing for law journals because, in her words, "nobody reads that junk anyhow."

Some predicted worst sanctions from OS deans: "No sanction."
“No sanction, but lessened salary increases."
“Minimal salary increases."
From OS deans' designees: "No sanction. Might encourage."
“Regarded as a valued member of the faculty. No sanction. However, she would pay for her deviation . . . by being expected to donate her time to . . . our . . . CLE program.”
From MERS deans: "No sanction."
“No raises, no chair."
“Minimum salary increases, perhaps more money if quality of writing is extraordinarily high.”
“If the manuals show perceptive understanding of practice, they would be highly regarded. If they are the usual stuff, no one would take them seriously.”
From MERS dean's designee: "Probably lower than average salary increases (but how good are the manuals?)"

Comments
Table 3 and the responses themselves suggest that Professor Manual is less apt to incur institutional displeasure than are Toto and Quest. They also suggest that she would not be well regarded at a good number of law schools.
### TABLE 3
**Predicted Probable Worst Sanctions of Professor Manual in AALS Schools Divided into Four Survey Groups**

<table>
<thead>
<tr>
<th>Sanctions</th>
<th>Deans' Designees</th>
<th>Deans (Percent)</th>
<th>Total</th>
<th>Deans' Designees</th>
<th>Deans (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No sanction</td>
<td>1</td>
<td>8 (53)</td>
<td>9</td>
<td>12</td>
<td>(70)</td>
</tr>
<tr>
<td>Informal sanctions</td>
<td>2</td>
<td>1 (18)</td>
<td>0</td>
<td>0</td>
<td>(0)</td>
</tr>
<tr>
<td>Peer pressure</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Denial of distinguished professorship</td>
<td>0</td>
<td>1 (6)</td>
<td>0</td>
<td>0</td>
<td>(0)</td>
</tr>
<tr>
<td>Support sanctions</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>(3)</td>
</tr>
<tr>
<td>Limit/deny research assistance</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>(3)</td>
</tr>
<tr>
<td>Time sanctions</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>(10)</td>
</tr>
<tr>
<td>No sabbatical or low priority</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>(10)</td>
</tr>
<tr>
<td>Greater or no reduced</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>teaching load</td>
<td>5</td>
<td>2 (41)</td>
<td>2</td>
<td>6</td>
<td>(27)</td>
</tr>
<tr>
<td>Monetary sanctions</td>
<td>3</td>
<td>0 (0)</td>
<td>0</td>
<td>1</td>
<td>(0)</td>
</tr>
<tr>
<td>Withhold bonus</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Below average salary increases</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Negligible salary increases</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>(1)</td>
</tr>
<tr>
<td>COLA only</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>(1)</td>
</tr>
<tr>
<td>Salary freeze</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Termination</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Schools apt to sanction (other than only informal sanctions)</td>
<td>5</td>
<td>2 (41)</td>
<td>3</td>
<td>6</td>
<td>(30)</td>
</tr>
<tr>
<td>Number of schools responding</td>
<td>6</td>
<td>11</td>
<td>12</td>
<td>18</td>
<td>18</td>
</tr>
</tbody>
</table>

Some of us are apt to fault Professor Manual by arguing that legal scholarship, like all or most other scholarship, must "by definition" be written primarily for other scholars. Some might even argue that it requires writing in refereed journals as is normally done in various other disciplines. In stark opposition to those views stands, of course, the student law review tradition.\(^\text{101}\) Not only are most American law reviews edited solely or primarily by students;\(^\text{102}\) many are written more for practitioners, judges, et al. than for legal academics.

But the student-edited law review is under renewed attack.\(^\text{103}\) And faculty-edited law journals (or "law and" journals) are on the increase. The birth of a good number of faculty-edited journals seems a healthy thing, if they are understood as a complement to, rather than as a replacement of, the student-edited, practitioner-friendly law review. Law and society can

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103. See Cramton, supra note 101.
use a variety of student-edited, faculty-edited, and practitioner-edited, materials.\textsuperscript{104}

However, if the above trend is a prelude to our making faculty-edited or faculty-refereed journals the obligatory forum for our scholarship, it portends a state of health little better than the plague. That is so for various reasons. To name one, a \textit{general} requirement of prepublication peer scrutiny would be an exercise in extremely questionable expertise. A plausible though ultimately unpersuasive case for such prior censorship might exist were all of us agreed on the criteria of legal scholarship. It is hardly news to say that in fact we are not. (Indeed, if we were, it could mean that the tasks of legal scholarship are substantially accomplished.) Because the agreed criteria do not yet exist, a requirement of expert editing and prepublication certification offers little beyond a self-enhancing elitism among legal academics.

One argument for pervasive faculty screening is that it might reduce the number of unworthy published articles. Even without reading John F. T. Murray's "Publish and Perish—By Suffocation,"\textsuperscript{105} anyone should be sympathetic to that goal. But I prefer the means Murray recommends in that essay to awarding law faculties a Legal Scholarship Prior Censorship Monopoly. And despite its frequent waste of paper, I even prefer the status quo to pervasive professor-assured quality control.

Paul Carrington does not exaggerate the dangers of the aforementioned potential monopoly when he writes:

\begin{quote}
Also a concern is the . . . ineffable effect of a system of specialist-jurors on the quality of academic freedom in law schools. It is well in considering this matter to recognize the highly political nature of almost everything in which law professors are rightly concerned. Even those matters that do not engage traditional political dichotomies are laden with debatable assumptions about the nature of law, the appropriate fashion in legal scholarship, and the role of intellect in professional life. . . . [T]here is at least a risk that, over time, a system of juried journals will rigidify by imposing generally accepted standards of scholarship that will exclude some divergent views or fashions. Most at risk . . . are those who would be inclined to write for professional audiences or on current issues of law reform, but there is no reason to suppose that the risk is limited to such groups.\textsuperscript{106}
\end{quote}

The extent of that risk is suggested by these words from Daniel Boorstin:

\begin{quote}
The obstacles to discovery—the illusions of knowledge—are also part of our story. Only against the forgotten backdrop of the received common sense and myths of their time can we begin to sense the courage, the rashness, the heroic and imaginative thrusts of the great discoverers. They had to battle against the current “facts” and dogmas of the learned.\textsuperscript{107}
\end{quote}

But the Monopoly would bend over backward to be tolerant. Yet even as enthusiastic a proponent of refereed journals or other prior scrutiny as

\textsuperscript{104} And, in a democratic society, why not a good supply of layperson-edited, user-friendly law reviews? Compare the later discussion on Professor Pop.

\textsuperscript{105} 27 J. Legal Educ. 566 (1975).

\textsuperscript{106} Paul D. Carrington, The Dangers of the Graduate School Model, 36 J. Legal Educ. 11, 12 (1986).

\textsuperscript{107} A Personal Note to the Reader, \textit{in} Daniel J. Boorstin, The Discoverers at xv (New York, 1983). “The first step toward realizing anything resembling academic freedom in America, as we know it, is to accept the fact that academics themselves are as guilty as anyone of violating academic freedom.” Richard Schmitt, Academic Freedom: The Future of a Confusion, \textit{in} Pincoffs, \textit{supra} note 12, at 111, 123.
Richard Posner\textsuperscript{108} has observed, as to philosophical writing, that "the lack of a single paradigm of philosophical analysis makes it difficult to distinguish bad analysis from merely unorthodox analysis."\textsuperscript{109} To say that a similar difficulty describes the rainbow yet often myopic world of legal scholarship would be a major understatement.

Perhaps peer screening works acceptably in other disciplines. (Or perhaps it does not. Chilling effect and lost freedom are difficult things to measure.) Nonetheless, in a democratic society, the individual legal scholar needs to be able to publish her scholarship whether or not it meets the minimum requirements of prevailing expertise.\textsuperscript{110} And because any type of editor or referee—student, faculty, practitioner, or other—poses censorship risks, freedom's best protection is to maximize the diversity of type forums in which the scholar may publish without being ruled out of bounds.\textsuperscript{111}

However, Professor Manual may incur the objections that practitioner manuals are not scholarship because they do not critically evaluate the law and/or because they present no "new truth." As for not critically evaluating the law, the same can be said for many a law review article, save a concluding paragraph or two. More importantly, unless we are willing to outlaw "pure" legal positivism, we are hardly in a position to decree that all legal truth must include or be augmented by the observer's evaluation.

The "no new truth" argument is confronted in the next case, namely, Professor Pony. Subject to that deferred issue, we should conclude that Professor Manual may continue to write her manuals without censure. She should receive a normal share of research time and research support. She should be free of any nonmarket salary discrimination unless her substantial earnings from the manuals are thought to reduce or cancel her claim to nonmarket salary increases. That controversial issue is deferred until the case of Professor Rich.

\textsuperscript{108} See Richard A. Posner, The Present Situation in Legal Scholarship, 90 Yale L.J. 1113, 1123–24 (1981). A laudable purpose of all prior peer scrutiny is of course that the finally published scholarship is apt to profit from others' suggestions. But that is at least as true when the decision to seek prior input is wholly the author's. I think such input occurs much more often than Posner seems to imply. Cf. Julius Getman, The Internal Scholarly Jury, 39 J. Legal Educ. 337 (1989).

\textsuperscript{109} Posner, supra note 108, at 1127 (footnote omitted).

\textsuperscript{110} Why should legal scholarship in a democratic society be freed of censorship and chilling effect risks that other disciplines may find acceptable? Because law scholars, more than most others, deal with society's power to coerce human beings—deal with the authorized taking of persons' property, freedom, and life. In such an enterprise, it is essential that individuals be able to devote substantial parts of their lives to evaluating the coercive system in complete freedom and be able freely to express their findings.

\textsuperscript{111} Even apart from censorship concerns, it seems a shame that, as Stevens and others have noted, pages written explicitly for the practitioner are often not considered one of many perfectly acceptable forms of legal scholarship.
4. The Case of Professor Pony

Facts. Professor Pony believes that the true calling of a legal scholar is to help law students learn. His (myriad) scholarly (?) hours are wholly devoted to authoring (for the entire curriculum) course review guides that are now outselling Gilbert and everyone else.

Some predicted worst sanctions from OS deans: “Refusal of merit raises.”
“Very low salary increases.”
“No sanction.”
“He will move to Los Angeles.”

From OS deans’ designees: “No merit raises. Present case to faculty for its recommendation as to his future. Faculty should be incensed over his activity.”
“Withhold bonuses.”
“No sanctions.”
“Hanging, drowning, and quartering by his enraged faculty colleagues.”
“Termination.”

From MERS deans: “No sanction.”
“Low salary increases.”
“Given the eclectic nature of our teaching and courses, such a person would have unusual range; that aside, the activity would not be highly regarded.”
“No raises, no chair, ostracism.”

Comments

Compared with Professor Pony, Professor Manual was a favorite. Professor Pony gets one to three termination predictions, Professor Manual having gotten none, and perhaps twice as many schools would sanction Professor Pony as would sanction Professor Manual.

The discussion concerning Professor Manual generally applies to Professor Pony. Unfortunately for Professor Pony, however, his readers—law students—enjoy even less prestige in the academy than do Professor Manual’s readers. Thus the question becomes more pointed. How can Professor Pony’s work be evaluated by fellow scholars if he refuses to write for them? The answer is that they can buy or get complimentary examination copies of his ponies, read them, and, if displeased, rake their author over the coals in print.

Are law students an insufficiently learned target group for the legal scholar? It would seem somewhat strange to say that they are.112 Thus a principle may be emerging. It is the work’s content, not the status of its intended audience, that should determine whether that work can be called scholarship.

112. “Although . . . most professors would deny it, much law review writing, including lead articles by professors, appears to be addressed to law students.” McDowell, supra note 85, at 268.
TABLE 4
Predicted Probable Worst Sanctions of Professor Pony
in AALS Schools Divided into Four Survey Groups

<table>
<thead>
<tr>
<th>Ultimate Sanction</th>
<th>MER Schools</th>
<th>Other AALS Schools</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Deans' Designees</td>
<td>Deans</td>
</tr>
<tr>
<td>No sanction</td>
<td>0</td>
<td>4 (22)</td>
</tr>
<tr>
<td>Informal sanctions</td>
<td>2</td>
<td>4 (33)</td>
</tr>
<tr>
<td>Peer pressure</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>No honors</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Denial of distinguished professorship</td>
<td>1</td>
<td>1 (11)</td>
</tr>
<tr>
<td>Support sanctions</td>
<td>0</td>
<td>1 (6)</td>
</tr>
<tr>
<td>Limit/deny research assistance</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Time sanctions</td>
<td>0</td>
<td>0 (0)</td>
</tr>
<tr>
<td>No sabbatical or low priority</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Greater or no reduced</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>teaching load</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Monetary sanctions</td>
<td>5</td>
<td>7 (67)</td>
</tr>
<tr>
<td>Withhold bonus</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Below average salary increases</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Negligible salary increases</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>COLA only</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Salary freeze</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Salary Reduction</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Termination</td>
<td>0</td>
<td>0 (0)</td>
</tr>
<tr>
<td>Present for faculty recommendation</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Schools apt to sanction (other than only informal sanctions)</td>
<td>6</td>
<td>7 (72)</td>
</tr>
<tr>
<td>Number of schools responding</td>
<td>6</td>
<td>12</td>
</tr>
</tbody>
</table>

*One of the two said "perhaps." The present-for-faculty-recommendation response is the possible third.

Concerning content, the probable attack on Professor Pony is as follows: Pony's work is mass-market teaching, not scholarship, because it contains no New Truth. Merely being Prosser's phonograph or parrot does not qualify.

The above position deserves careful scrutiny. If by "new truth" we mean new knowledge in the sense of new empirical data, we must admit the undeniable: such new truth is a rarity in what generally passes as legal scholarship. Although it is fine to argue that such new truth should appear often in our work, it is not fine to require that appearance. Legal scholarship does and should also encompass forms of enlightenment beyond the discovery and analysis of new data. Unless a rigid legal epistemology is to pervade, legal truthfinding must include such things as thinking through a problem, cataloguing the questions, clarifying concepts, broadening or deepening understanding, ordering of "known" truths, and, in sympathy with the perennial student question, even constructing a
tentative hierarchy of importance. And doesn’t any new way of perceiving an old possible truth convey new possible truth? Then textbooks, casebooks, course review guides, and other student aids—as well as the more revered category of “treatises”—are not merely attempts at mass-market teaching. They are also attempts at scholarship.

Of course some teaching materials will contain more new possible truth than others, but that is also true of law review articles. Unless the author is guilty of total plagiarism, some disclosure of new possible truth, broadly conceived, is almost inevitable. Should we try to identify and punish totally nonnovel exceptions? Our attempt would give new meaning to the concept of wasting time.

The foregoing thoughts lead to a seemingly strange but probably correct conclusion. It is that teaching and scholarship are often indistinguishable from each other. Because scholarship involves sharing and thus explaining one’s discoveries or insights to others, scholarship is teaching. And teaching with any originality, which is almost inevitable, itself involves some sort of discovery of some sort of possible truth. If so, the earlier noted difference between classroom teaching freedom and scholarly freedom has a basis other than a teaching versus scholarship distinction. Classroom teaching lacks the virtually total freedom of scholarship not because teaching and scholarship are so different, but because the classroom contains vitally important customers (sometimes called students) who have special legal and moral rights strong enough to negate total teaching freedom.

Still wishing for some tenable demarcation, we might say that scholarship is enlightenment primarily directed at scholars in the field and teaching is enlightenment primarily directed at others. There are serious problems with that notion. The distinction describes both a nebulous continuum and a personnel administration swampland. How and where would we delineate the marginal cases—scholarship-teaching that seems about equally directed at the learned and the nonlearned? And what to do with such cases once we found them? More fundamentally, notice the hierarchy of legal knowledge accessibility that the attempted demarcation

113. Cf. Philip C. Kissam, The Evaluation of Legal Scholarship, 63 Wash. L. Rev. 221, esp. 230–33, 236 (1988). “If an article merely offers a simplified explanation of a time worn concept like the Rule Against Perpetuities it would be a tremendous asset. A professor who is floundering in an explanation of a complicated legal principle is often rescued by an article on the topic which causes the pieces of the once hopeless puzzle to fall into place.” Dennis J. Turner, Publish or Be Damned, 31 J. Legal Educ. 550, 553 (1981).

[T]here is another kind of scholarship . . . that is just as vital, every bit as vital . . . . That is the type of scholarship that seeks to reduce a difficult matter to a deep but simple presentation, the kind of thing a student needs (1) to introduce him to the subject; (2) to help him, while he is studying the subject, and (3) to solidify everything when he reviews the subject. Or to save him from the need of taking a course in the subject. And the same text can do all four.


114. The question of how good they must be in order to permit their tenured authors’ continued law faculty employment is confronted infra with Professor Hack.

115. And because any novelty’s heuristic and other value is apt to be essentially unmeasurable, even the seemingly smallest new truth should not be disdained.
assumes and helps perpetuate. Such elitism may be justified for some forms of legal knowledge. But to contend that it is both necessary and desirable for all forms of legal knowledge, would, in a democratic society, be dubious at best. And to convert that position into coercive personnel policy, thus forcing all legal scholars to adhere to the hierarchy, would, in a democratic society, be outrageous.

Accordingly, although we may disdain Professor Pony's version of scholarship, we cannot, for personnel management purposes, judge him derelict in his scholarly duties without violating what are, I hope, our own principles of free scholarship.

An inevitable objection is to say that my view of scholarship is too permissive and freewheeling. An excellent antidote to that objection is to recall the grand diversity of views contained in the Yale Law Journal of April 1981, whose articles were written by an all-star cast for a symposium on the nature and purposes of legal scholarship. Unless I have misread 341 pages from an eminent array of legal scholars, the only widespread agreement on the subject is that there is no agreement. Christopher Stone alluded wistfully to "field-defining principles" that give a field "coherence and distinction as a unique medium or worldview." But, he noted, "There is, in law, no agreement on what these . . . principles are," and so "law scholarship, lacking any unifying sense of place and purpose, is fragmented and drifting." Or, as George Fletcher put it, "We have no jurisprudence of legal scholarship." One must agree with Stone, Fletcher, and others who recognize the need to think seriously about the nature and purposes of legal scholarship. But in a discipline like law, which combines controvertible value preferences with the justification of coercion, the aforementioned lack of theoretical unity does not seem so bad. Perhaps the disarray and an awareness of it are a healthy and fertile state of affairs. Both are conducive to tolerance, diversity, and freedom.

117. Nor do we all seem to agree even with Arthur Leff's indisputable truth that law—the USA Trial—is not a game but "is not a game either." Arthur A. Leff, Law and, 87 Yale L.J. 989, 1005 (1978).
118. Stone, supra note 71, at 1160.
119. Id.
120. Id. at 1149. The quest for place and purpose of course continues. For recent examples, see Colloquium on Legal Scholarship, 13 Nova L. Rev. 1–105 (1988); Edward L. Rubin, The Practice and Discourse of Legal Scholarship, 86 Mich. L. Rev. 1835 (1988).
121. George P. Fletcher, Two Modes of Legal Thought, 90 Yale L.J. 970, 970 (1981). And, as Stevens almost predicts, "law may well continue to be the only discipline that does not seem to claim a general theory." Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s, at 279 (Chapel Hill, N.C., 1983).
122. See generally Leff, supra note 117, esp. at 1005–11.
123. Thus Stone found that "[c]urrent scholarship obviously has a breadth, richness, and volume that defy any summary judgment." Stone, supra note 71, at 1153. Fletcher observed that "legal scholarship expresses itself in a variety of verbal forms" and that one's choice of form is apt to depend upon his "implicit assumptions about the nature of law." Fletcher, supra note 121, at 970. Despite his bent and talent for unconventional scholarship, Richard Posner kindly advised that "[t]he belittlement of conventional legal scholarship . . . should cease." Posner, supra note 108, at 1129. And though he may have disdained most of the branches and sub-branches of legal (non?)scholarship he
In such an exciting climate, which I usually hope will last forever, it is fine, wonderful, for each of us to champion his or her own view of the nature and purposes of the enterprise and to attack everyone else's. But to the extent we can prevent it (and with tenure that extent is substantial), let the battle not yield coercive personnel management spoils.\(^{124}\)

Options concerning Professor Pony's salary should be the same as those concerning Professor Rich, discussed later. Even without salary, they could likely start their own law school.

5. The Case of Professor Pop

**Facts.** Professor Pop believes in a truly democratic society. In such a society, she believes, knowledge of the law must be the province of every person. Pursuant to this deep conviction (which she acquired shortly after becoming a full professor of law), she devotes the entire scholarly(?) portion of her 60-hour law school work week to writing on law and society in language the people can readily understand, aimed at publications the people are apt to read. (She continues to teach law students but urges her school to embrace a totally open admissions policy.) So radical is her commitment to People's Law that she only submits her (appropriately simple and brief) articles to such journals as *The Reader's Digest* and *The National Enquirer*—media that, as she [inaccurately] puts it, "anyone can read." Perhaps because the competition is intense, her submissions are only occasionally accepted. She remains undaunted.

*Some predicted worst sanctions from OS deans:* "No sanction."

"Limited salary increases."

"Salary stagnation."

"Some salary pressure, and a lot of peer derision."

*From OS deans' designees:* "No sanction."

"She would do better than those who publish nothing. We would not hold it against a professor who wants to publish in such a lowbrow publication. But we think she ought to be able to do this in addition to the more conventional forms of legal scholarship."

"Encouragement to leave. No salary increases."

"Termination."

*From MERS deans:* "Salary freeze."

"No raises, no chair, possible dismissal but unlikely."

"Modest salary increases."

"Difficult to tell whether she is serious or not; if she is serious, she would be respected by the majority of the faculty."

catalogued, Mark Tushnet also was kind: "[Or] they can continue to do conventional legal scholarship, knowing that its premises are unsupported and indeed unsupportable, precisely because it makes no less sense than anything else in the world." Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 Yale L.J. 1205, 1223 (1981).

124. Besides sometimes protecting freedom, our wonderfully confused status quo is apt also to protect and even disguise scoundrels and nincompoops. I like to think I like it not only for those side effects.

Is intellectual freedom worth such irksome risks and costs? Yes.
"Depending on the quality of [her] writings, she might be treated very well or . . . [face] considerable informal peer pressure. It all depends on whether the peers would think her work serious and innovative regardless of where published."

Comments

The responses suggest that at most schools Professor Pop's popularism would not be highly valued. Alas, her intended audience is even more common than Professor Pony's. It includes everyone. Were her ideas to prevail, there might not be a legal profession. At least there would be no legal expertise. The power of personal legal knowledge would be readily available to all.

### TABLE 5

Predicted Probable Worst Sanctions of Professor Pop in AALS Schools Divided into Four Survey Groups

<table>
<thead>
<tr>
<th>Ultimate Sanction</th>
<th>MER Schools Deans' Designees</th>
<th>Deans</th>
<th>Total (Percent)</th>
<th>Total Deans' Designees</th>
<th>Deans</th>
<th>Total (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No sanction</td>
<td>0</td>
<td>4</td>
<td>(22)</td>
<td>4</td>
<td>5</td>
<td>(30)</td>
</tr>
<tr>
<td>Informal sanctions</td>
<td>1</td>
<td>3</td>
<td>(22)</td>
<td>2</td>
<td>1</td>
<td>(10)</td>
</tr>
<tr>
<td>Peer pressure</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Encourage to leave</td>
<td>0</td>
<td>0</td>
<td></td>
<td>1</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Denial of distinguished professorship</td>
<td>1</td>
<td>1</td>
<td>(11)</td>
<td>0</td>
<td>0</td>
<td>(0)</td>
</tr>
<tr>
<td>Support sanctions</td>
<td>0</td>
<td>1</td>
<td>(6)</td>
<td>2</td>
<td>1</td>
<td>(10)</td>
</tr>
<tr>
<td>Limit/deny research assistance</td>
<td>0</td>
<td>0</td>
<td></td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Time sanctions</td>
<td>0</td>
<td>0</td>
<td>(0)</td>
<td>2</td>
<td>2</td>
<td>(13)</td>
</tr>
<tr>
<td>No sabbatical or low priority</td>
<td>0</td>
<td>0</td>
<td></td>
<td>0</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Greater or no reduced teaching load</td>
<td>0</td>
<td>0</td>
<td></td>
<td>2</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Increased committee work</td>
<td>0</td>
<td>0</td>
<td></td>
<td>1</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Monetary sanctions</td>
<td>5</td>
<td>7</td>
<td>(67)</td>
<td>6</td>
<td>13</td>
<td>(63)</td>
</tr>
<tr>
<td>Withhold bonus</td>
<td>0</td>
<td>0</td>
<td></td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Below average salary increases</td>
<td>1</td>
<td>2</td>
<td></td>
<td>2</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>Negligible salary increases</td>
<td>0</td>
<td>0</td>
<td></td>
<td>1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>COLA only</td>
<td>1</td>
<td>0</td>
<td></td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Salary freeze</td>
<td>3</td>
<td>4</td>
<td></td>
<td>2</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Termination</td>
<td>0</td>
<td>0*</td>
<td>(0)</td>
<td>1</td>
<td>0</td>
<td>(3)</td>
</tr>
<tr>
<td>Schools apt to sanction (other than only informal sanctions)</td>
<td>6</td>
<td>7</td>
<td>(72)</td>
<td>7</td>
<td>13</td>
<td>(67)</td>
</tr>
<tr>
<td>Number of schools responding</td>
<td>6</td>
<td>12</td>
<td></td>
<td>12</td>
<td>18</td>
<td></td>
</tr>
</tbody>
</table>

*And see selected MER deans' comments.

In our complex society, Professor Pop's ideology is apt to seem quixotic at best. But that is not the question. The question is whether she may attempt to be faithful to her beliefs and remain a tenured law professor. In a society that both claims to be democratic and promises professors at least
eventual academic freedom, the answer should be yes. Possibly excepting some salary increase matters discussed in other cases, she should be retained without censure or other discrimination of any kind. Thus no time sanctions, and no scholarly support sanctions. And she does not have a moral duty to leave law teaching.

Even if she lacks Professor Pop's pure democratic ideology, a law professor ought to be able to direct her scholarship to the whole citizenry whenever she thinks it appropriate to do so. At least in the case of a tenured faculty member, that could mean forgoing all esoteric and elite forums for an indefinitely extended period. Writing only for everyone would make perfect sense if she thought society was gravely endangered by a threat or threats against which a sufficient response required an informed citizenry. If a post probationary law professor cannot therefore deem it her duty to devote all of her scholarly and outside service time to formulating and disseminating to the citizenry the arguable truths she thinks needed, what is she? The answer would not be a free scholar.

Some would argue that though Professor Pop may write for the public as often as she likes, she must also fulfill her duty to produce law review articles or to write in other forums generally acknowledged as scholarly. Despite its kindly tone, the just stated position is lifetime tyranny disguised, both to itself and to others, as sweet reasonableness. It would be an acceptable tyranny were a person's time infinite. But, given the scarcity of time, what it in effect says is, "First do our kind of scholarship on a recurrent basis. And if you can sandwich it in, you may do yours. Be sure to do what does not now make sense to you, and perhaps you can also do what does."

There are those who write law review articles or other semi-esoteric works and then "spin off" in "almost no time" their brand of Op Ed pieces or other quickies for the common folk. But, unless she can produce worthwhile law review articles in almost "almost no time," the foregoing practice is irrelevant to Professor Pop. For numerous reasons beyond the two earlier mentioned, Professor Pop and imaginable others are apt to be so involved in writing their kind of Op Ed or other popular pieces that they

125. The continuing world population explosion is a likely example. Even in the supposedly literate democracies, ours included, there is little if any popular comprehension of the increasingly massive dimensions of the problem and its potential for tragedy. Thus there is little if any popular demand for governmental policies that could enable a humane future.

126. The questions of whether such an effort is politics "or" law and whether it is scholarship or service (or both) are given their due with Professor Kurt. Likewise as to the more serious question of whether "advocacy" is scholarship.

127. Thus, at least as to post probationary scholarship, the American law school should attempt clearly to refute rather than confirm this damning accusation: "[T]he right to academic freedom is a right to publish and teach with impunity as long as there is general conformity to professional standards. But these standards of professional activity are fashioned by the tendency of the functionary class to perpetuate the order in which the interests of the ruling class are realized. The right does not extend beyond these social limits." Milton Fisk, Academic Freedom in a Class Society, in Pincoffs, supra note 12, at 5, 19.

128. The Widgets Producer model does tend to ignore or belittle the investment in time and thought—and blood and sweat—that a law journal article worth reading requires of most authors.
do not have time for the traditional tomes—unless they renounce eating, sleeping, and the like. And they also may actually care so much about what they say to the general reader that their time researching, writing, rewriting, and rewriting even a short essay may approach that of a conventional scholarly article.

Should one say that Professor Pop's writings are not legal scholarship because they are too simple, or too short, or perhaps both? Too short? Compare the viewpoint of a bit of legal history capsuled in *The Green Bag*:

An ordinance of Charles VI of France in 1413 says that—"Advocates as well as attorneys in all the courts of the kingdom are accustomed to extort from our poor subjects too great fees and profits which they have not earned, in the matter of written proceedings, which they make longer and more prolix than necessity requires, and we forbid the aforesaid advocates and attorneys, on the oaths they have sworn, and under pain of exemplary punishment, to take any other fees than such as are moderate, or to use prolixity in their writings; but they must make them as short as the case will allow. And if it is found that they do the contrary, we strictly enjoin upon the members of our present and future parliaments, and upon all to whom it may appertain, to punish and correct the aforesaid persons rigorously, and in such a manner that it may serve as a warning to all others."¹²⁹

Or too simple? Granted that oversimplification is a sin. But so is overcomplication. One could argue that in a democratic society all legal theory as well as all law must be simple enough for virtually everyone to understand. Though not yet taking that permissible position, I do hope we shall yet heed Derek Bok's complaint that the law is often needlessly complex. The same could be said of at least some of our scholarship.¹³⁰ So let Prof Pop write as simply as she wishes. Think of the verbose and complex prose we can write to rebut her.

But here too is the double standard. The academic freedom I am positing for tenured Professor Pop hardly exists for the neophyte. Her popular writings would not win tenure at most law schools. As was suggested concerning Professor Toto, I believe that such differences in freedom can be defended. At least on Mondays, Wednesdays, and Fridays. It is probably justifiable to ask one who is seeking tenure to prove himself capable of doing what is fairly widely regarded as legal scholarship—thus temporarily subjecting that person to limits that should not apply later. The danger of course is that the person will be brainwashed for life by the assumptions and mindsets of what is deemed generally acceptable.¹³¹ Because of that danger, I do not join those who would stretch the

¹²⁹. Legal Antiquities, 2 Green Bag 42 (1890). The present article must seem a felony.
¹³⁰. Compare Paul Brest's observation that the scholarly debate over the legitimacy of judicial review to protect fundamental rights in a democratic polity "address[es] neither legislatures nor the citizenry." Paul Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063, 1105 (1981). He further contends: "[T]he scholars on both sides of the fundamental rights controversy share a profound skepticism about the possibility of public discourse about issues of principle, and ultimately, therefore, about the possibility of shared, reflectively held public values." id. at 1107 (footnote omitted).
¹³¹. The more discontented among us are apt to say that irrevocable brainwashing of law professors (and then of their students) is a pervasive reality rather than a mere danger. It may be a prevalent reality. But one meets too many in-some-way-eccentric tenured professors to believe that probationary unfreedom inevitably stifles for life.
probationary period to high middle age.\footnote{132} And the inherent lack of pre-tenure academic freedom is a ground for eroding post-tenure academic freedom only if one cares about neither.

The disparity between pre-tenure and post-tenure scholarly freedom subjects Prof Pop to a moral argument similar to that directed at Prof Toto. It says that in receiving tenure and then devoting herself to pop scholarship, which would have been unacceptable for tenure-granting purposes, Professor Pop is breaching faith with her university's reasonable expectations as to her post-tenure scholarship. In evaluating that argument, one must ask what those "reasonable expectations" are. That she cease to grow? Or that she grow only in ways sure to please? A tenured professor promises, or at least ought to promise, the university something like this:

I realize that the only sane purpose of law is to attempt to help create a humane future. I therefore promise to interpret and carry out my scholarly calling so as to attempt to maximize the contribution I think I can make toward that goal. I promise to do this even if it takes me far outside the bounds of what now or ever is generally regarded as legal scholarship.

In order to penalize the likes of tenured Professor Pop, we must coercively decree for her professional lifetime the following controvertible truths: "At least a substantial portion of law and legal theory must be a matter of expertise. And every law professor must, until retirement, periodically be doing aimed-at-experts scholarship in that expertise-imbued portion."

Could we credibly promulgate such decrees? In a free and democratic society legal expertise will always be problematic, even basically suspect. And so legal experts will, let us hope, never be secure. Perhaps law professors who cannot tolerate such insecurity, and who would attempt to bolster their oh-yes-we-are-experts self-image by perpetually coercing a populist colleague, have a faint moral duty to switch into some other field (astrophysics?) where the expertise is less at issue.

If, as is extremely unlikely, Prof Pop's pop art is earning her significant dollars, that aspect of her case belongs with poor Professor Rich. Otherwise, there is no basis for at all disfavoring her in nonmarket salary increase decisions.

6. The Case of Professor York

\textit{Facts.} Professor York fully shares Professor Pop's total devotion to People's Law and emulates her 60-hour law school work schedule. However, Professor York believes that the only hope for People's Law and a democratic society is a consummately literate lay public. Accordingly, he writes only for such rags as \textit{The New Yorker} and \textit{The New York Times}. Perhaps because the competition is even a bit keener(?), his submissions are accepted a bit more rarely than Professor Pop's.

\textit{Some predicted worst sanctions from OS deans:} "No sanction."

"Minimal salary increases."

\footnote{132} One may, however, agree that the path to law school tenure is too easy. See Ackerman, supra note 60, at 1133-34, 1141-44.
"Average salary increases."
"He might even be a scholar. Less than average salary increases."
From OS deans' designees: "No sanction. Might encourage."
"Termination."
From MERS deans: "Targets of publication could indicate greater likelihood of seriousness."
"No sanction."
"Probably no sanctions."
"Modest salary increases."
"No raises, no chair."

Comments

The data suggests that Professor York's chances of avoiding institutional displeasure might be slightly better than Professor Pop's. If such a difference exists, I am not sure whether to be glad or sorry. One is inclined to be glad that a little more freedom is ringing, whatever the reasons.

**TABLE 6**

Predicted Probable Worst Sanctions of Professor York in AALS Schools Divided into Four Survey Groups

<table>
<thead>
<tr>
<th>Ultimate Sanction</th>
<th>MER Schools</th>
<th>Other AALS Schools</th>
<th>Total</th>
<th>Deans' Designees</th>
<th>Deans</th>
<th>Total (Percent)</th>
<th>Deans' Designees</th>
<th>Deans</th>
<th>Total (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No sanction</td>
<td>1</td>
<td>5</td>
<td>6</td>
<td>5</td>
<td>5</td>
<td>10</td>
<td>5</td>
<td>5</td>
<td>10</td>
</tr>
<tr>
<td>Informal sanctions</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>10</td>
<td>1</td>
<td>1</td>
<td>10</td>
</tr>
<tr>
<td>Denial of distinguished professorship</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Support sanctions</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>10</td>
<td>1</td>
<td>1</td>
<td>10</td>
</tr>
<tr>
<td>Time sanctions</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>13</td>
<td>2</td>
<td>2</td>
<td>13</td>
</tr>
<tr>
<td>Monetary sanctions</td>
<td>4</td>
<td>6</td>
<td>5</td>
<td>13</td>
<td>13</td>
<td>60</td>
<td>5</td>
<td>13</td>
<td>60</td>
</tr>
<tr>
<td>Termination</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Schools apt to sanction (other than only informal sanctions)</td>
<td>5</td>
<td>6</td>
<td>6</td>
<td>13</td>
<td>13</td>
<td>63</td>
<td>6</td>
<td>13</td>
<td>63</td>
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<tr>
<td>Number of schools responding</td>
<td>6</td>
<td>12</td>
<td>12</td>
<td>18</td>
<td>18</td>
<td>100</td>
<td>12</td>
<td>18</td>
<td>100</td>
</tr>
</tbody>
</table>
Perhaps Professor York's writings would be validly perceived as being of higher quality than Professor Pop's. Or, considering the high national prestige of Professor York's forums, we may be a bit more apt to say or sing, "If he can make it there, he'll make it anywhere." Or perhaps any perceived qualitative difference would be merely or mostly a matter of social class. In any event, the freedom-protecting conclusions concerning Professor Pop apply to Professor York. Freedom to pursue his literate populism ought to be readily accorded, even if one wants to worry about whether his writings are "really law." The latter concern is confronted with our next beloved infidel, Professor Kurt.

7. The Case of Professor Kurt

_Facts._ Professor Kurt thinks bad law is purely the result of a value-distorted society. She believes that a society as depraved as ours might perceive moral truth only if it were "smuggled in" through popular fiction. Her scholarly(?) summers and the scholarly(?) portion of her 60-hour law school week are wholly devoted to writing novels in the genre of, say, Kurt Vonnegut. Her novels are successfully published by Harper and Row.

_Some predicted worst sanctions from OS deans:_ "Probably no sanction. She will probably be perceived as rendering a service to the institution unrelated to scholarship."

"No salary increase."
"Low salary increase."
"None, but some peer criticism."
"Salary reduction. Possible dismissal."
"Same depraved society. Average salary increases."

_From OS deans' designees:_ "No sanction. Might even get encouragement since her work is being read."

"Peer pressure, limited salary increments."
"Termination—she should become a journalist-philosopher, not a law professor."

_From MERS deans:_ "No sanction."

"Little or no salary movement and no 'support' funds, etc. Her royalties reward her as a novelist."

"Highly regarded by most of her colleagues."

_From MERS individual faculty members:_ "A welcome relief—if she is good in the classroom—we'll have no trouble at all."

"Royalties would be seen as her reward. Not a contribution to legal scholarship. Salary freeze, deny summer stipends."

_From James R. Elkins:_ "Law is a compendium of stories . . . . "133

Comments

Table 7 and the written responses suggest that Professor Kurt would receive widely diverse reviews. She is susceptible to two main lines of attack. The first is that her work is not really scholarship. The second is that even if it is scholarship, it is not legal (and thus for us is illegal?) scholarship. Let us look at the But-it-isn’t-Law line of attack first.

### TABLE 7

**Predicted Probable Worst Sanctions of Professor Kurt in AALS Schools Divided into Four Survey Groups**

<table>
<thead>
<tr>
<th>Ultimate Sanction</th>
<th>MER Schools</th>
<th>Other AALS Schools</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Deans' Designees</td>
<td>Deans</td>
</tr>
<tr>
<td>No sanction</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Informal sanctions</td>
<td>4</td>
<td>2</td>
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<td>Discuss with dean</td>
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<td>0</td>
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<tr>
<td>Peer pressure</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Denial of distinguished professorship</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Support sanctions</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Limit/deny research assistance</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Time sanctions</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>No sabbatical or low priority</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Greater or no reduced teaching load</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Increased committee work</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Monetary sanctions</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>Withhold bonus</td>
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<td>0</td>
</tr>
<tr>
<td>Below average salary increases</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Negligible salary increases</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>COLA only</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Salary freeze</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Salary reduction</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Termination</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Schools apt to sanction (other than only informal sanctions)</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>Number of schools responding</td>
<td>6</td>
<td>12</td>
</tr>
</tbody>
</table>

*Qualified by “possible.”

We may say that Professor Kurt is derelict in her duties because her work is clearly outside the bounds of law. In doing so, we coercively decree the victory of Austin’s, Kelsen’s, and others’ attempts conceptually to separate positive law from ethics and mores. That is an indefensible position for us to take whether or not we believe the positivists succeeded. To rule Professor Kurt out of bounds, we must outlaw, not merely ignore, the entire natural law tradition from Aristotle to Cicero to Aquinas to Fuller—forswearing whatever insights about the radical dependence of law upon ethics (justice) that the tradition may or may not offer secular modern society. And we must outlaw, not merely ignore, Eugen Ehrlich, Max Weber, indeed the entire sociology of law enterprise, legal realism, and
such offspring of both as Lasswell, McDougal, Reisman, and Chen, one of whom has written, "In the desperate drive to develop an autonomous discipline or specialization, many theorists purport to find a distinction between law and politics. I do not find this distinction realistic, cogent or useful." 134 We must proscribe feminist legal theory and all future boundary-sceptical perspectives. Or at least we must outlaw, not merely reject, the basic sociological and realist critique: that law is essentially empowered interests and values.

It is possible that all who would adulterate the purity of positive law with ethics, social norms, politics, and who-knows-what-next are as wrong as they are annoying. But it is not quite yet time to decree it. When that time comes, the positive law of fair disclosure will require that each of our employers forthrightly rename itself the X School or College of Only Positive Law.

Yes, I am being too glib. There is an understandable desire to find and nurture what Stone calls a "sense of our own specialness in the intellectual and social order." 135 The continuation of that search is a valid task. But if it ever translates into guarded walls that limit or impede the form "or" content of normative expression even after one has established her professional-academic credentials, it becomes a crippler rather than a facilitator of the (yes, I still say it) legal scholarship enterprise.

Nonetheless, even as to senior scholarship, is not the lack of intellectual boundaries an unworkable or at least a grossly inefficient chaos? How can we function without them? The answer is suggested by Gunnar Myrdal's confessed "growing disrespect for the traditionally rigid boundary lines between separate disciplines of social science as they have developed pragmatically to fit teaching purposes and to meet the need for specialization." Economist-sociologist Myrdal explains:

The rationale for this disrespect was my growing recognition of the fact that in reality there are not economic, sociological, or psychological problems, but simply problems, and that as a rule they are complex. The one and only type of concept that it is permissible to keep vague is the meaning of terms such as economics, sociology, psychology, or history since no scientific inference can ever depend on their definitions. 136

One had best add law to the list. "What is Law?" is going to remain a wonderfully perplexing question. Law and legal scholarship are going to remain disorderly enterprises. Legal scholarship will often overlap greatly with, often collide with, and often be indistinguishable from, other disciplines and undisciplines. If we are allowed to do so, we shall probably "Law and," and at times just "and," with almost everything—until time runs out. Our forays will usually be foolish, will often be incompetent, and may sometimes be of small or great help.


135. Stone, supra note 71, at 1149.

But are Prof Kurt’s novels scholarship at all? Besides those already offered against other professors, there would seem to be three main arguments that they are not. First, her work is purely or mainly descriptive. It merely tells a story. It is not sufficiently analytical to qualify as scholarship. One response to that argument is to note that substantial "analysis," whatever that term means, may well be implicitly present in the novelist’s descriptions. But, for purposes of argument, let us assume there is no “analysis,” however defined. The no-analysis attack remains unpersuasive because it gratuitously assumes that the discovery and sharing of all truths require analysis. Though we can say that the assumption may well be valid, we should not be so arrogant as to say that it must be.

A second main line of attack is to urge that Professor Kurt’s novels are not scholarship because, despite their subtlety, they are really nothing more than propaganda, advocacy, polemics. That is an interesting argument, considering the nature of so much conventional legal scholarship. Although he hardly seems happy at the fact, Mark Tushnet describes “[m]ost of the articles published as legal scholarship” as “traditional legal advocacy.” Paul Brest agrees. George Fletcher posits “two modes of legal thought,” one of which he calls “detached observation” and the other, “committed argument,” and concludes that “[w]e have no choice but to

138. Perhaps no thought process and communication is so purely descriptive that it does not involve at least some “analysis” in the sense of ordering content to the extent needed to perceive (or intuit), and then report, anything. If that is so, then the argument must be that Professor Kurt’s work lacks enough analysis to be scholarly and/or that it lacks the requisite type(s) of analysis. The argument is starting to seem silly. Basically, it is.
139. A related line of attack is to say that Kurt’s novels are not scholarship because a scholarly work must deal with the prior scholarship relevant to her present effort. Even assuming she has not implicitly done so, that argument too is invalid. Remember, we are not advising or judging a Ph.D. or J.S.D. dissertation. And we are not now evaluating the quality of her work (a matter waiting for Professor Hack). We are asking, for personnel management purposes, whether her work is scholarship.

To force a senior scholar to deal with the work of others is foolishly to convert good advice into perpetual tyranny. For example, Kurt may conclude that there is no relevant prior work, a judgment call. Or she may think the work of others so corrupt that it would be dysfunctional for her to dignify it with mention. She is probably wrong (for one can learn much from corruption), but she might be right. The risk of censoring her possibly essential mode of expressing possible new truth is far greater than any gain our coercion is apt to yield. After all, right or wrong, she could superficially meet our demands sufficiently to avoid serious sanction. We’d have traded freedom for banality—thus only proving what poor traders we can be.

140. Tushnet, supra note 123, at 1208. He reports that “[i]n [his] survey, between 60% and 70% of the articles were of this form.” Id. at 1208 n.15. Plus he reported finding a second form of adversarial legal scholarship, “advocacy augmented with concepts from other fields.” Id. at 1210.
141. “[M]ost of our writings are . . . amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good. In one or another form this has been the staple of legal scholarship . . . .” Brest, supra note 130, at 1109.
142. Fletcher, supra note 121, at 970.
mediate between the indifference of neutrality and the distortion of argument.”

Even were traditional legal scholarship devoid of rather than brimming with it, advocacy ought to be recognized as a valid form of legal, and most probably of other, scholarship. Advocacy attempts to claim moral (as in Professor Kurt’s case) or other truth. And if the advocacy is at all original, we must concede that its author may be discovering truth. In legal advocacy that truth might be such things as “moral,” “political,” “pragmatic,” and/or(?) “historical.” In offering new reasons or newly formulated reasons for the position(s) being advocated, the author is necessarily also learning more about why her prescriptions arguably are true or good. That is scholarship.

A third main line of attack argues that though Professor Kurt may implicitly have done everything necessary for scholarship, her habit of “smuggling in” moral or other truth keeps her work from being scholarship. Scholarship, it argues, requires that relevant truths be stated explicitly to enable the reader to assess them.

The must-be-explicit argument deserves an answer on its own ground, namely, the duty of the scholar to share her truth. Professor Kurt’s belief is that we are so depraved that we cannot perceive moral truth were it sent to us in explicit, direct form. In order to fulfill her duty of sharing the truth, she may express it in whatever form she thinks most promising. Indeed, were she to disregard the perceptual impediments she believes exist in her potential readers or hearers, she would be derelict in her duty to share perceived truth.

The arguments against Professor Kurt’s brand of legal scholarship fail. Apart from the question of what relevance her high royalties might have to salary justice, an issue still awaiting Professor Rich, Professor Kurt deserves no penalty.

The conclusion that Professors Manual, Pony, Pop, York, and Kurt are all doing legal scholarship is vulnerable to the criticism that, if they are, almost anything would qualify. A first response to that criticism is to say that the lack of a lifelong coercive personnel management definition of scholarship or legal scholarship is less tragic than having one that is too

143. *Id.* at 1003.
144. The Federalist papers are not a bad example. And Professors Pop and York take comfort: they were written for the newspaper.
146. When a scholar believes that the scholarly and/or any larger community is not adequately perceiving important truth she thinks she perceives, she is morally justified in continuing her efforts to share such truth effectively. And, at least in the case of scholars who have finished the probationary course, the question of how much of one’s scholarly and outside service time should be devoted to repeated attempts at truthshar- ing is best left to the one person apt to be least incompetent to answer it.
However, with the caveat that they may be too narrow, let me try to suggest first a tentative definition of scholarship and then a tentative definition of legal scholarship apt to suffice for those who survived the probationary and promotion process.

Any search for possibly nontrivial truth, or any possibly nontrivial and arguably unplagiarized truth-claiming expression of thought, whether emotive or rational-intellectual, is, I believe, scholarship. It may be terrible or essentially unoriginal scholarship, but it is still scholarship. And if the truth sought or expressed has to do with prescribing behavior, we have legal (though it may also be some other) scholarship. And the form and forum may be anything, from cartoons to poetry to songs to skywriting—even law reviews.

The above definition of legal scholarship is narrow enough to exclude practiced indolence. But it is broad enough to include political action or the practice of law. Both can be means of truthfinding and truthtelling with possible significance beyond the case at hand. I thus cannot see why a senior faculty member should not be allowed to opt for either or both as his entire nonclassroom scholarly calling for any indefinite period. As will later be discussed, that option does not necessarily entitle the professor to the resulting income. And, as with all forms of scholarship, other institutional duties must not be neglected.

It is apt to be argued that, even for “senior professors,” political action and at least pro bono practice are “service.” They do not fulfill one’s scholarly duty. In evaluating that position, recall Gunner Myrdal’s earlier quoted thinking concerning needless divisions. What is the utility of dividing our work into “outside service” and “scholarship”? Considering that any demar-


148. That narrower definitions are sure to be used for junior faculty is a discrimination that we may deem invidious, hypocritical, and otherwise intolerable. But the problem with a uniform approach is that its definitions of scholarship and legal scholarship would be one of three things. They would be too broad to allow a plausibly satisfactory appraisal of the neophyte’s ability and potential. Or they would be too narrow to impose upon everyone as a life sentence. Or, as the perfect compromise, they would offer a dreary combination of both evils.

Thus, despite its seeming unfairness, a “double standard” between junior and senior faculty does good double duty: it offers the institution considerable quality control, and it offers the scholar meaningful freedom for most, rather than none, of her career.

149. Yes, “has to do with” is a very slippery phrase. So was “possibly” nontrivial, which probably could mean almost(?) anything. More precision would reduce, but not eliminate, the gray area(s). There is a cartoon I cannot locate that shows two umpires, with one saying to the other something like, “I may be getting old, but I could swear I saw one today that wasn’t a ball and wasn’t a strike.”

Recommendation: err on freedom’s side.

150. At least in the case of disciplines that, like law, arguably have a substantial normative component, academic freedom mandates that truth claims be defined broadly enough to include asserted wisdom, “good policy,” and such even when the asserter purports only to be seeking or expressing her subjective preferences. Otherwise, recognition and support of prescriptive scholarship might only be afforded to faculty who profess belief in objective moral or political truth.

cation between legal scholarship and public service is tenuous, why insist on such a division? If we say, “Everyone should do some scholarship (as we have defined it),” and, “Everyone must do some outside service (as we have defined it),” we thereby may test and perhaps help the neophyte in both supposed areas. But why impose such rules throughout one’s professional adulthood? Doing so would perpetually make everyone’s work more uniform—thus perpetually making everyone more uniform. But that is compulsive tyranny for no purpose.

I therefore suspect there is more. Might an unconscious motive for dividing our tasks (scholarship is this, service is that, and you should or must do each throughout your career) be to divide the person: to reduce the individual’s power, to render him or her permanently harmless? Keep the tasks multiple, and you will keep them inconsequential. Intended or not, it is exquisite social control.152

A more appropriate regime is to treat supposedly mature faculty like mature persons.153 Let us have the most expansive definitions of “legal” and of “scholarship” we can possibly justify. Allowing each of us to earn that much freedom is our best chance of finding, telling, and doing whatever truths—legal, moral, social, political—there may be. Such enlightened personnel management would make the best use of each individual’s unique potential. It would maximize each law faculty member’s lifetime potential for contributing to the new ideas, big and small, needed to help create a humane society and world.

8. The Case of Professor Reject

Facts. Same as Professor Kurt, except that Professor Reject’s novels cannot find a willing nonvanity press.

Some predicted worst sanctions from OS deans: “No raises.”
“Low salary increases, no sabbatical.”
“Salary reduction. Possible dismissal.”
“Maybe he will stop writing. No salary increases.”
From OS deans’ designees: “No sanction.”
“Nonreceipt of rewards—lower salary increases.”
“No salary increases.”
From MERS deans: “Low salary increases.”

152. We may even like such control applied to our own self. It protects each of us from making enormous mistakes—except fundamental ones.
At any rate, Nevitt Sanford has lamented:
In my more despairing moments it seems to me that the modern university has succeeded in separating almost everything that belongs together. Not only have fields of inquiry been subdivided until they have become almost meaningless, but research has been separated from teaching, teaching and research from action, and, worst of all, thought from humane feeling.


“Very low salary increases.”
“No raises, no chair.”
“Standard salary increases. Considerable informal peer pressure.”
“Less highly regarded, but it would depend on what good critics would say. Some very good writers do not find publishers.”

Comments
Unsurprisingly, Professor Reject fares worse than Professor Kurt. Not only is Reject’s scholarship deviant; it is also unsalable.154

<table>
<thead>
<tr>
<th>Ultimate Sanction</th>
<th>MER Schools Deans' Designees</th>
<th>MER Schools Deans</th>
<th>Total (Percent)</th>
<th>Other AALS Schools Deans' Designees</th>
<th>Other AALS Schools Deans</th>
<th>Total (Percent)</th>
</tr>
</thead>
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<td>Below average salary increases</td>
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<td>3</td>
<td>5</td>
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<td>5</td>
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<tr>
<td>Negligible salary increases</td>
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<td>0</td>
<td>1</td>
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<td>1</td>
</tr>
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<td>COLA only</td>
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<td>0</td>
<td>3</td>
<td>3</td>
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<td>Salary freeze</td>
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<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Termination</td>
<td>0</td>
<td>0</td>
<td>(0)</td>
<td>1</td>
<td>1*</td>
<td>(7)</td>
</tr>
<tr>
<td>Schools apt to sanction (other than only informal sanctions)</td>
<td>6</td>
<td>10</td>
<td>(89)</td>
<td>11</td>
<td>18</td>
<td>(97)</td>
</tr>
<tr>
<td>Number of schools responding</td>
<td>6</td>
<td>12</td>
<td>12</td>
<td>18</td>
<td>18</td>
<td>18</td>
</tr>
</tbody>
</table>
*Qualified by “possible.”

What should be the consequences of a tenured scholar’s persistent failure to win a publisher’s yes? To the extent we want law scholars throughout their careers to seek apparent short-term success (publication)
over dire risktaking (here, projects that may yield nothing editors want), we
should threaten, and if need be impose, severe sanctions. If, at least for the
postnovice years, we are able to value the high-risk search for truth over
apparent success *qua* publication, then Prof Reject would receive no
sanction or none beyond his failures’ effects on the arguably market-
determined part of salary raises.

The above value choice is an important one. Even were publishers’
refusal to publish everything and their decisions on what to publish never
influenced by economic considerations, a law school’s continually placing
apparent scholarly success (publication) above high-risk-of-rejection truth-
seeking and truthspeaking asks its faculty to make a career of pleasing
others. In saying that, I hardly mean to deny that publication is better than
nonpublication. Nor do I propose that we try to be unpublishable. But we
must not require that a tenured scholar’s choice of or approach to projects
be dictated or seriously affected by publication prospects. Else how can her
search for truth become even half free of the preferences of others?

Some would argue that there must be a point at which continued editors’
rejection of even an experienced scholar’s work would allow the school to
demand, “Change your strategy (or your style or whatever), or else change
your job.” In other words, what do we do with the senior scholar who will
not change what seems a hopeless losing game? The advantage of forcing
or pressuring a change is obvious. We could prevent further, probably
wasted effort. But we also could do great, yet forever immeasurable, harm.
Everyone has heard of writers and other artists whose more innovative
work was in some sense rejected throughout most or all of their life before
eventually being acclaimed. And, even if sometimes read or seen, not all
such rejects were appreciated even by the best “authorities” during the
discouragement years. The danger of permanently squelching innovative
work of value is reason enough to think tenured Professor Reject should
only be advised—without coercion or pressure.

There is another consideration that tips the scales even further in
freedom’s favor. The number of Professor Rejects will remain small. The
rest of us do not love rejection that much. In contrast to Reject’s rarity,
perpetual subjection to even the most liberal and patient limits on the right
to fail creates a permanent chilling effect for everyone. To suggest to
supposedly full-fledged scholars that winning publication should eventu-
ally, and thus ultimately, take precedence over come-what-may truthseek-
ing and truthsaying casts an endless shadow over the entire scholarly
enterprise.155

But does not the scholar’s duty to share truth require him to make any
“procedural” modification needed to accomplish that goal? The answer is
yes, of course, if it can be done without distorting the message. Remem-

155. No matter how liberal or patient the limits, everyone would be constantly on lifetime
notice that, in the event of a persistent conflict, expediency was eventually to be favored
over devotion to truth. Even though one master—expediency—would normally be
relegated to the back (which may well be the most critical part) of the mind, there always
would be at least two masters to serve. And that, as has long been known, is what no one
can do.
bering that form is substance, we should continue to believe that all postnovice decisions as to whether it can or cannot belong with the individual truthteller.

9. The Case of Professor Rich

_Facts._ Same as Professor Kurt, but his novels are in the genre of, say, Harold Robbins. They get published and read, by everyone except scholars.

_Some predicted worst sanctions from OS deans:_ "Salary reduction. Demand a percentage of his royalties."

"Minimal to no raises. Ultimate dismissal perhaps should non-scholarly work detract from, as opposed to having no effect on, his teaching."

"Students love him. Maybe an attempt to dismiss for cause, resulting from alumni pressure."

_From OS deans' designees:_ "No sanction."

"Some ridicule tempered by success of work in terms of popularity and money."

"Increased teaching load. Significant reduction in salary increases."

"No salary increases."

_From MERS deans:_ "Not to be taken seriously by colleagues."

"No salary increases (none needed)."

"No sanction."

"All these novelists would be treated with some scorn because this would be viewed as 'outside work.'"

"No raises, no chair."

_From Samuel Johnson:_ "No man but a blockhead ever wrote except for money."

_Comments_

All of the it’s-not-scholarly-it’s-not-law arguments against Professor Kurt apply against Professor Rich. Only if one believes, as I do, that in Kurt’s case those arguments failed, need one consider the strange view that Professor Rich too may be doing legal scholarship.

Like Professor Kurt, Professor Rich is claiming to be “smuggling in” moral truth through popular fiction. If he is willing to make that claim, we cannot reject it on the basis that his moral truth may be or is immoral. Rich may be a hedonist who somehow thinks that modern Western society is not yet nearly hedonistic enough. Or he may be trying to redeem us through reverse psychology. (He will not succeed.) Or he may be attempting to show Laurence Tribe that the first amendment should not protect sexual or violent expression for profit. (Doomed again.) Whatever be his moral and thus always possibly immoral point of view, we cannot deny claimed scholarly intent because of the morality or immorality of his writing. Our inability to do that is the fair price we pay for intellectual freedom.
TABLE 9
Predicted Probable Worst Sanctions of Professor Rich in AALS Schools Divided into Four Survey Groups

<table>
<thead>
<tr>
<th>Ultimate Sanction</th>
<th>Number of Schools by Group and (in parentheses) Percentage of the Responding Schools by Two Combined Groups</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>MER Schools</td>
</tr>
<tr>
<td></td>
<td>Deans' Designees (Percent) Deans Designees (Percent)</td>
</tr>
<tr>
<td>No sanction</td>
<td>1 3 (24)</td>
</tr>
<tr>
<td>Informal sanctions</td>
<td>4 3 (41)</td>
</tr>
<tr>
<td>Discuss with dean</td>
<td>2 0</td>
</tr>
<tr>
<td>Peer pressure</td>
<td>2 3 (24)</td>
</tr>
<tr>
<td>Denial of distinguished professorship</td>
<td>1 1 (12)</td>
</tr>
<tr>
<td>Support sanctions</td>
<td>1 1 (12)</td>
</tr>
<tr>
<td>Limit/deny research assistance</td>
<td>0 0</td>
</tr>
<tr>
<td>Time sanctions</td>
<td>1 1 (12)</td>
</tr>
<tr>
<td>No sabbatical or low priority</td>
<td>1 0</td>
</tr>
<tr>
<td>Greater or no reduced teaching load</td>
<td>0 1</td>
</tr>
<tr>
<td>Increased committee work</td>
<td>0 1</td>
</tr>
<tr>
<td>Monetary sanctions</td>
<td>5 6 (66)</td>
</tr>
<tr>
<td>Withhold bonus</td>
<td>0 0</td>
</tr>
<tr>
<td>Below average salary increases</td>
<td>1 1</td>
</tr>
<tr>
<td>Negligible salary increases</td>
<td>0 1</td>
</tr>
<tr>
<td>COLA only</td>
<td>1 0</td>
</tr>
<tr>
<td>Salary freeze</td>
<td>3 3</td>
</tr>
<tr>
<td>Salary reduction</td>
<td>0 0</td>
</tr>
<tr>
<td>Termination</td>
<td>0 0 (0)</td>
</tr>
<tr>
<td>Schools apt to sanction (other than only informal sanctions)</td>
<td>5 6 (66)</td>
</tr>
<tr>
<td>Number of schools responding</td>
<td>6 11</td>
</tr>
</tbody>
</table>

| Other AALS Schools                              |                                                                                                         |
|                                                | Deans Designees (Percent) Deans Designees (Percent)                                                   |
| No sanction                                    | 3 1 (13)                                                                                               |
| Informal sanctions                             | 1 0 (3)                                                                                               |
| Denial of distinguished professorship          | 0 0                                                                                                    |
| Support sanctions                              | 2 1 (10)                                                                                               |
| Limit/deny research assistance                 | 1 1                                                                                                    |
| Time sanctions                                 | 3 2 (17)                                                                                               |
| No sabbatical or low priority                  | 0 2                                                                                                    |
| Increased committee work                       | 1 0                                                                                                    |
| Monetary sanctions                             | 7 15 (73)                                                                                              |
| Withhold bonus                                  | 0 1                                                                                                    |
| Below average salary increases                 | 3 4                                                                                                    |
| Negligible salary increases                    | 1 1                                                                                                    |
| COLA only                                       | 0 2                                                                                                    |
| Salary freeze                                  | 2 5                                                                                                    |
| Salary reduction                               | 0 1                                                                                                    |
| Termination                                    | 1 2* (10)                                                                                              |
| Schools apt to sanction (other than only informal sanctions) | 8 17 (83)                                                                                              |

*Both predictions were ambiguous and are quoted in the selected comments.

I concede that the result I am urging in Rich's case may seem especially ridiculous. But if our definitions do not stretch broadly enough to include even Professor Rich, where are the bounds? Are they somewhere (Where?) between moral Professor Kurt and immoral Professor Rich? Or shall we exclude both Kurt and Rich and retreat to a coerced unreality prison of legal positivism, walled off from Ehrlich's "living law" and everything else people care about?

Assuming we are willing to respect even Rich's scholarly freedom, thus preserving our own, let us now, with due greed and envy, consider some money questions. First, what should be the effect, if any, of Prof Rich's enormous royalties on his law school salary? As to market-oriented salary increases, Rich takes his chances. His work may or may not increase his perceived market value in the law school world and elsewhere. Further, he could properly be denied increases in the nonmarket equity portion of his salary attributable to scholarship. That conclusion, however, should in no

156. The discussion will also apply, mutatis mutandis, to Professors Manual, Pony, Kurt, and others who may be earning substantial income beyond their law school salary.
sense stem from the fact that Rich's writing deviates from what is generally regarded as scholarship. Rather, the conclusion in question can only stem from the following debatable judgment: scholarship that earns little or no outside money probably merits nonmarket salary reward that lucrative scholarship (of whatever kind) does not.  

The just stated overgeneralization assumes the widely prevailing custom, namely, that each faculty member's royalties belong solely to the author. But what about full-time faculty members' income from consulting and law practice? Should schools treat that income less favorably than they treat publications income? The basis for different treatment should not be that "real world" activities cannot be scholarship. As already suggested, they can be scholarship, and I do not favor attempting to prohibit them. The basis for treating them differently is that when the law teacher consults or practices law, there is an immense potential conflict of interest: a client whose interests may play havoc with the scholar's come-what-may duty to find and share truth. The conflict, and thus the prescription that follows, of course also applies to Bruce Ackerman's worst case, in which clients "pay lawyer-professors to publish articles in law journals in the hope that a 'scholarly' article will seem more persuasive to courts than the same material submitted in a brief." The prescription is not to forbid anyone's practice and consulting but rather to eliminate, or at least greatly to reduce, the economic incentive for full-time faculty members' choosing those time uses. Thus, let the university share in client-generated revenues to an extent "that induces each professor to take into account the external costs imposed on the scholarly community generated by excessive consulting" and practice.

Could such a plan be applied to present faculty? That would or should depend upon what may be said were the faculty member's fair expectations at the time of employment concerning his or her job description. Despite

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157. Or should law schools simply grant all faculty standard salary increases? Or, yes Duncan Kennedy, a standard salary for everyone? Justice? Only this is clear: we seem greatly to want some tangible way to reward and punish faculty members. Provided that dispensers take inflation into account, individualized salary increases are perhaps the least freedom-eroding tangible means of affirming institutional dominion, spurring performance, and (fallibly) recognizing special merit and/or market value.

158. Ackerman, supra note 60, at 1136. Full disclosure of funding should always accompany scholarly publication, so that the reader is put on notice of possible greater-than-usual conscious or unconscious bias.

159. Quoted words from id. at 1144. I subscribe to Ackerman's proposals and discussion in the "2. Consulting" portion of id. at 1144-47. Or was he too gentle? Unsalaried summers and leaves excepted, why should any consulting or law practice by a full-time law professor be other than pro bono?

Even in cases of no or university-siphoned fees, the client would still pose a potential conflict of interest. But, as to the professor, it would lack substantial pecuniary consequences. (That prognosis blithely assumes that Professor X's propensity to earn the university Y dollars of consulting or practice income could somehow be kept from substantially affecting his salary.)

It is of course true that Professor Rich and most other well-selling scholars are not writing purely pro bono, no matter how pure their souls and motives. But their outside pay comes from readers, not from parties to whom their duty is so greatly apt to collide with full-scope, self-critical scrutiny of fundamental premises.

And it is certainly also true that conflicts of interest inhere in our work. Part of a scholar's task is to try to see beyond his own economic, class, and other interests.
much deviation at some schools, is the contention, “The very great majority of one’s work time belongs elsewhere than in serving clients for pay,” likely to puzzle or surprise most full-time faculty?

10. The Case of Professor Hack

**Facts.** With the diligent help of tireless research assistants, Professor Hack cranks out law review articles almost as often and as easily as most people drive a car. These articles, his only scholarly endeavor, are a totally unimaginative but superficially competent exposition of statutory, case, and administrative law, replete with citations thereto. Concerned only with “stating the law as it is,” Professor Hack’s articles are devoid of evaluation and prescription unless the editor insists. Even then, the most an editor can squeeze out of him is a brief, shallow, essentially thoughtless “evaluative” paragraph at the end of an article. With his work never approaching the quality of student comments in the better law reviews, Professor Hack publishes where he can: His articles only appear in the (assume) half dozen law reviews generally viewed as being at the very bottom of the U.S. law school heap. And sometimes even all of them say no. As, remember, is the case with all of these hypothetical professors, he proves steadfastly immune to every attempt at help.

*Some predicted worst sanctions from OS deans:* “I do not know.”

“Average salary increase.”

“Limited salary increases.”

“At best, he will receive cost of living increases, more committee assignments to slow down ‘productivity’.”

*From OS deans’ desigees:* “No sanction.”

“None except mild peer pressure.”

“Nurtured with adequate research assistance. Ridiculed by colleagues behind his back.”

“No salary increases.”

*From MERS deans:* “Below average salary increases, but probably could get research leave and sabbatical.”

“Somewhat more favorable treatment—at least there is some hope here and I am not as confident in assessing quality as I am quantity. The articles may turn out to be something of use.”

“Low salary increases.”

“Considerable informal peer pressure. He would be treated quite badly by his peers.”

“Treated as a joke by colleagues and students.”

**Comments**

It is a strange state of affairs that Professor Hack should receive no predictions of termination, while Professors Quest, Pop, and York each received one, Professor Kurt received one or two, and long-term-scholar
Toto received three.\textsuperscript{160} Despite those predicted inequities, nontermination of Professor Hack\textsuperscript{161} is the proper outcome. But, because we are apt to doubt that it is, let us consider the converse position. The best case for Professor Hack's termination would be based on a literal interpretation (which may be a misinterpretation) of William Van Alstyne's 1971 article on the meaning of tenure. He states:

\[\text{T}enure\text{ means that the institution, after . . . a probationary period . . . , has rendered a favorable judgment establishing a rebuttable presumption of the individual's professional excellence. . . . The presumption of the tenured faculty member's professional excellence thus remains rebuttable, exactly to the extent that when it can be shown that the individual . . . has nonetheless fallen short or has otherwise misconducted himself as determined according to full academic due process, the presumption is lost and the individual is subject to dismissal.}\textsuperscript{162}

Interpreted literally, the above words mean that a tenured professor could be dismissed if his institution can demonstrate that he is no longer an excellent teacher or scholar.\textsuperscript{163} Although some may find that view attractive, it is the prevailing view neither in practice\textsuperscript{164} nor in explicit theory. Olswang and Fantel report:

Based on a review of the literature, cases involved, and statutes which have established tenure as a statutory right in colleges and universities, the following are the normally accepted general categories of adequate cause which would permit termination of a tenured faculty member:

1. Incompetence (mental incompetence as well as incompetence in subject matter areas.)
2. Immorality or moral turpitude.
3. Neglect of duty.
4. Violation of institutional rules.
5. Insubordination.\textsuperscript{165}

\textsuperscript{160} Those more deviant but more imaginative professors received no termination predictions at MER schools, however.
\textsuperscript{161} I am assuming that Hack's use of research assistance is not so pervasive as to constitute plagiarism and/or sloth.
\textsuperscript{163} I doubt that the above is what Van Alstyne really meant partly because he also would require for dismissal "that the degree of demonstrated professional irresponsibility warrants outright termination of the individual's appointment rather than some lesser sanction, even after taking into account the balance of his entire service and the personal consequences of dismissal." \textit{Id.} at 328. Whether or not the interpretation being considered in the text is accurate, its inevitable managerial appeal mandates its receiving careful scrutiny.
\textsuperscript{164} Professor Hack's receipt of zero dismissal predictions provides striking evidence.
\textsuperscript{165} Olswang & Fantel, \textit{supra} note 24, at 11–12 (footnote omitted). For illustrative cases, see \textit{id.} at 12–16; Timothy Lovain, Grounds for Dismissing Tenured Postsecondary Faculty for Cause, 10 J.C.U.L. 419 (1983–84). "[C]ourts have generally upheld the right of colleges and universities to dismiss \textit{incompetent} tenured faculty if the allegations are supported by substantial evidence." \textit{Id.} at 422 (emphasis supplied). The factfindings, e.g., "This court finds . . . that plaintiff was a poor teacher . . . ," \textit{Jawa v. Fayetteville State Univ.}, 426 F. Supp. 218, 224 (E.D.N.C. 1976), go well beyond mere nonexcellence.

Rolf Sartorius would have a tenured faculty member be dismissable if his performance, though "minimally" competent, is deemed to fall below some agreed higher standard applied also to most untenured faculty members. See Rolf Sartorius, Tenure, Academic Freedom, and the Nature of the University, in Pincoffs, \textit{supra} note 12, at 184, 185–86 [hereinafter Sartorius, Reply]. However, he rightly regards his proposal (and his reading of Van Alstyne) as a major redefinition if not the abolition,
TABLE 10
Predicted Probable Worst Sanctions of Professor Hack in AALS Schools Divided into Four Survey Groups

<table>
<thead>
<tr>
<th>Ultimate Sanction</th>
<th>Deans' Designees</th>
<th>Deans (Percent)</th>
<th>Total Deans' Designees</th>
<th>Deans (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No sanction</td>
<td>1</td>
<td>3 (22)</td>
<td>2</td>
<td>4 (21)</td>
</tr>
<tr>
<td>Informal sanctions</td>
<td>2</td>
<td>3 (28)</td>
<td>2</td>
<td>1 (10)</td>
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<td>Peer pressure</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>0</td>
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<tr>
<td>No honors</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Denial of distinguished professorship</td>
<td>1</td>
<td>1 (11)</td>
<td>0</td>
<td>0 (0)</td>
</tr>
<tr>
<td>Support sanctions</td>
<td>1</td>
<td>1 (11)</td>
<td>2</td>
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</tr>
<tr>
<td>Limit/deny research assistance</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Time sanctions</td>
<td>1</td>
<td>1 (11)</td>
<td>2</td>
<td>1 (10)</td>
</tr>
<tr>
<td>No sabbatical or low priority</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Greater or no reduced teaching load</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Increased committee work</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Monetary sanctions</td>
<td>4</td>
<td>7 (61)</td>
<td>8</td>
<td>13 (72)</td>
</tr>
<tr>
<td>Withhold bonus</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Below average salary increases</td>
<td>2</td>
<td>3</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Negligible salary increases</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>4</td>
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<tr>
<td>COLA only</td>
<td>1</td>
<td>0</td>
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<td>2</td>
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<td>Salary freeze</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Termination</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Schools apt to sanction (other than only informal sanctions)</td>
<td>5</td>
<td>7 (67)</td>
<td>8</td>
<td>13 (72)</td>
</tr>
</tbody>
</table>

Although the AAUP has generally left to the individual educational institution the task of specifying "adequate cause" for dismissal, its 1940 Statement of Principles on Academic Freedom and Tenure does say, "In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions." 166 Olswang and Fantel are thus correct in saying that "the 1940 Statement inferentially establishes 'incompetence' as a basis for . . . termination." 167 I think it equally correct to say that, for tenured
faculties or during any term contract, the document thus rejects mere nonexcellence as adequate cause. Likewise, the Commission on Academic Tenure in Higher Education recommends:

"[A]dequate cause" in faculty dismissal proceedings should be restricted to (a) demonstrated incompetence or dishonesty in teaching or research, (b) substantial and manifest neglect of duty, and (c) personal conduct which substantially impairs the individual's fulfillment of his institutional responsibilities. The burden of proof in establishing cause for dismissal rests on the institution.\(^\text{168}\)

Nonetheless, someone is bound to make the following self-congratulatory argument: Being that excellence is the standard for law professors at our institution, the lack of excellence constitutes incompetence and thus constitutes "adequate cause" for a tenured law professor's dismissal. In other words, at our school if nowhere else the excellence found or hoped for at the granting of tenure is the performance standard required for retaining one's tenured status, the only difference being a burden-of-proof shift from employee to employer.

One thing wrong with the "lack of excellence is incompetence" position is its assault on the ordinary use of language. Were it adopted, most universities would be facing some perplexing questions. If we have all along been using nonexcellence and incompetence as synonyms, why have we and our press releases and other documents not been saying things like, "We reserve tenure at this institution for those exceptional individuals who show competence," or, "Professor X richly deserves tenure because after much effort he has overcome his incompetence," or "We are most pleased to announce that Professor Y has been voted tenure, and we think he has demonstrated great promise of continued competence"? And why have most authorities and the relevant statutory and/or university documents not previously proclaimed, "lack of excellence is grounds for a tenured faculty member's termination"?\(^\text{169}\)

Not only would the nonexcellence-is-incompetence verbal sleight of hand work a fraud on the tenured faculty member; it would make a mockery of the institution's scholarly mission. If anyone does not see why, let him or her try the following analogy. Imagine that you and your faculty colleagues are required to attend a meeting of several to many hours. And imagine that each faculty member, you included, is required to contribute at least fifteen minutes to the discussion. Imagine also that your colleagues will be asked to evaluate your contribution, and that if a majority of them are willing to attest that on balance your contribution was less than excellent, you will lose your job.

How much freedom would you feel concerning what you would say, be it prepared or spontaneous? But the analogy is incomplete. Also assume

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168. Faculty Tenure, supra note 5, at 75.
169. But if we are willing to assault the Queen's English and almost everyone's prior understanding, our equating nonexcellence with incompetence would yield some amazing outcomes. For example:

As was found in his previous quadrennial reviews, we the Review Committee find that, once again, tenured Professor B's teaching, scholarship, etc., is very, very good indeed. Because, based on the evidence, we are convinced that, despite the advice and help we have previously offered him, he is unwilling or unable to do better than that, we have no choice but to recommend his dismissal.
that the meeting is public and that your colleagues are deeply concerned if not obsessed with the relative standing of your school and its actual or coveted reputation for excellence. Please also assume (1) that their fair evaluation of your excellence or nonexcellence is supposedly not to be affected by the position(s) you take,\textsuperscript{170} and (2) that the beliefs you hold on the matters to be discussed pervasively threaten the professional and personal self-image of most or all of your colleagues.\textsuperscript{171} How free do you feel?\textsuperscript{172} But the analogy is not quite correct. The imagined "meeting" will not last merely for hours. It will continue for the duration, however long or short, of your employment at that institution.

Although the following statement will win us no medals, we must be willing to say it—and without too much embarrassment. The genuine academic freedom that tenure tries to protect requires that the level of performance meriting a tenured faculty member's dismissal be so depressingly low that it will be far below any standard apt to be used in granting tenure. That seemingly perverse disparity reflects two valid concerns. First, with tenure being such an institutional gamble, which rides on a finite group of persons, we want that group to be the most talented and dedicated we can obtain. Hence entry standards are, or should be, very high. Second, those high entry standards, of which "excellence" is our favorite example, are so laden with subjective, qualitative judgments that their periodic or continuous use as a requirement over one's professional lifetime would defer meaningful intellectual-academic freedom until retirement.\textsuperscript{173} Thus, despite its public relations appeal, "excellence" and the like cannot genuinely be \textit{required} of tenured faculty in scholarship, teaching, service, or anything else where freedom counts.\textsuperscript{174}

But those who cannot abide Professor Hack may refuse to be daunted, saying:

170. In other words, you have in full measure all the "academic freedom" given probationary faculty and all that some would afford to tenured faculty.

171. Or assume that your views merely make your colleagues consciously, or even only unconsciously, uncomfortable. Because the pressures upon you would be much more subtle, much less provable, and perhaps even hidden from your own conscious awareness, that nonextreme, nonrare case may well be most corrosive to freedom.

172. How can you not feel free? Does note 170, supra, not reassure you? Or lower the retention standard to "effective." Free enough? To tell the whole truth freely? Or wouldn't "the mutual backscratching factor" restore your objective and subjective freedom? Perhaps, but not even perhaps unless you "join the club" and in all things play by club rules. Strange freedom.

So use outside judges? Then you must please, just in case, the entire \textit{Directory of Law Teachers}—or at least those in your fields.

173. We could of course avoid subjectivity of application (but not of choice of criteria) by arbitrarily defining "excellent" or "effective" performance in some mechanical way, e.g., publishing at least \(x\) number of articles or pages per time period. But, as Professor Toto's and others' cases illustrate, any such quantification imposed for life is the destruction of scholarly freedom, a freedom that in this century has become the traditional and expected norm. And such mindless quantifications are also a destroyer of excellence.

174. Otherwise tenure cannot do what Van Alstyne rightly wants it to do: "maximize the freedom of the professional scholar and teacher to benefit society through the innovation and dissemination of perspectives and discoveries aided by his investigations, without fear that he must accommodate his honest perspectives to the conventional wisdom." Van Alstyne, \textit{supra} note 162, at 330. "Conventional wisdom" should include that of colleagues as well as that of the larger society.
We concede that incompetence, not the absence of excellence, is the performance standard for dismissal. Compared with the requirements of legal scholarship in the modern world, Prof Hack's work is indeed incompetent. It lacks any breadth of perspective, creativity, social realism, or conversance with nonlegal disciplines.

The above criticisms of Prof Hack's work are probably justified. But their use as a case for dismissing a tenured faculty member would have a chilling effect of arctic severity. The threat of dismissal for "incompetent scholarship" cannot be reconciled with the genuine intellectual freedom tenure seeks to protect—at least unless the following principle is both promulgated and scrupulously honored: any possibility of dismissal for scholarly incompetence must be limited to matters about which there are clear and precise standards of competence acknowledged throughout the profession, which have been set forth beforehand. 175 Otherwise, freedom is not much better protected than under an "excellence" standard. Inherently unpredictable and controvertible subjective judgments would play far too great a role.

For what aspects of legal scholarship are clear and sufficiently precise standards of competence acknowledged throughout the law-teaching profession? The answer suggested by the Yale symposium discussed in Prof Pony's case is, "For no aspect or for very few." Whatever agreement there may be has to do with matters so pedestrian it is embarrassing to think of them. Perhaps one would be to use sentences with a subject and a verb. But not always. Or perhaps all would agree that often misreading cases to the degree of thinking that Judge Cardozo was awarding Mrs. Palsgraf all the damages she sought, plus a Mercedes-Benz, would be incompetent legal scholarship. 177 But take one step above such nuts-and-bolts basics, and you have an infinite faculty nonmeeting of opinionated minds. 178


176. Witness the charges against Hack's competence made in the text's preceding paragraph. Probable desiderata have become criteria of competence, with no gain in precision, no loss in controvertibility. Professor Hack's case also illustrates the inevitability that our criteria of competent legal scholarship will be heavily influenced by our jurisprudence. Professor Hack may well be the pure mechanical jurisprude whom Ronald Dworkin had heretofore thought a fiction. No wonder if Hack, the Perfect Legal Positivist, is thought incompetent by those who think his jurisprudence a bad joke.

177. Anyone, yes, anyone, can make such mistakes sometimes. We are all entitled to try.

178. That is in part why Professor Sartorius's proposal, supra note 165, to allow dismissal of tenured faculty even if their performance cannot be deemed below "minimalistic" competence would be so destructive of postprobationary academic freedom. Cf. Graham Hughes, Tenure and Academic Freedom, in Pincoffs, supra note 12, at 170, and Rorty, supra note 59, at 180–83. Even as to teaching (and surely as to scholarship) the lifetime unfreedom implicit in Sartorius's proposal and others' attempts to make dismissal easier is, on balance, unjustified. The protection of students from truly incompetent tenured faculty does not require using higher-than-competent performance standards in determining whom among the latter is dismissable. And more vigorous police work is hardly the best stimulus to excellent teaching.

Sartorius's laudable wish to afford somewhat greater academic freedom to probationary faculty in no way requires the dilution of tenured faculty freedom that inheres in his approach. One of his basic errors is the unrealistic demand that people still seeking to establish their qualifications be afforded autonomy essentially equivalent to those who have already done so. One cannot satisfy that demand without either making full
Writing a value-free, apolitical, noncontroversial "Standards of Competent Legal Scholarship" would be such a dreary and demoralizing enterprise that we could prudently and responsibly do a seemingly strange thing. We could recognize that scholarly incompetence is not, and need not be, a ground for dismissing tenured law faculty. It is not needed as a ground for dismissal because anyone who would be an incompetent scholar under the standards we could agree upon would also be a manifestly incompetent teacher. Even his most forgiving students would be demanding that the dean replace him.179

Because the requirement serves no useful purpose, any danger in a lifetime "scholarly competence" requirement is unacceptable. I believe that such a danger does exist, even with competence meaning nothing more than a minimalist list of noncontroversial ground rules. (And we know such a danger exists if anything more is added.) The danger of adjudicating even the minimal scholarly competence of senior law faculty other than one's own self is this: making scholarly competence a lifelong personnel matter is apt to distort the perceived nature of the scholarly enterprise in a possibly crippling way. That enterprise is not an orderly construction of correctness built upon correctness. Rather, a large error is likely, in a climate of freedom, to contribute far more to truth than is a small accuracy.180 We are certification virtually automatic or subjecting the already certified to lifetime probation. He in effect opts for the latter.

Sartorius's other basic error is his untenably narrow definition of academic freedom as "the freedom of a member of the academic profession to engage in research, teaching, publication, and other such pursuits without fear of reprisals for the expression of unpopular opinions." Sartorius, Essay, supra note 165, at 135. The scholar's freedom to choose and to carry out her projects with near total autonomy is forgotten both in the above definition and throughout his essay and in Sartorius, Reply, supra note 165.

179. Does anyone know of an accredited university's ever bringing dismissal proceedings on the ground of scholarly incompetence (or scholarly unproductivity) against a tenured regular teaching faculty member in law or indeed in any academic discipline whose classroom teaching and other duties were being performed satisfactorily? There must be at least one such case. But I have yet to find any. And the—all extremely knowledgeable—authorities (William Van Alstyne, past AAUP General Counsel and former chairperson, AAUP's Committee A on Academic Freedom and Tenure, telephone conversation, Sept. 20, 1985; Jordan Kurland, AAUP Associate General Secretary, telephone conversation, Oct. 2, 1985; oft-cited authority and strong advocate of full post-tenure review, Steven Olswang, telephone conversation, May 29, 1986) whom I asked also knew of none. Perhaps that only means that competent-teacher-but-incompetent-scholar tenured faculty members are informally induced to retire early. But, considering that provably incompetent classroom teachers are, if all else fails, eventually proceeded against, the apparent dearth or extreme paucity of explicit only-the-scholarship-is-lacking cases suggests that, as to teaching faculty throughout the university, "incompetent scholarship" both is not and need not be ground for dismissal.

180. Argument. But someone's taking an erroneous position and the kind of incompetence we'd be concerned with in reviewing senior faculty are two entirely distinct things. We can readily distinguish between someone's being wrong, even badly wrong, and their lacking minimum ability. Our periodically adjudicating the latter on a lifetime basis need not increase anyone's fear of erring or otherwise inhibit the truthseeking and truth-sharing process. Response. To be persuasive the argument must imply that the reviewers will infallibly distinguish between error and inability and that even the most unconventional reviewee will feel confident of their ability and propensity to do so. Both implied assertions are false.
already too concerned with competence, correctness, and the like, and too little concerned with the churning, chaotic, and often laughable process of advancing truth.

Something else is wrong with the idea of a university "certifying," via peer review or otherwise, the continued scholarly competence of its senior faculty. The institution would be passing upon the scholarship of those it had deemed able to make entirely their own judgments—even if they defy present fallible standards of supposed competence, even if they risk and make numerous mistakes, small and great, substantive "and" procedural—in the untidy search for new truth, new law, new wisdom, new policy, and new values.

As the discussion of his and other professors' cases suggest, there is no valid case for Professor Hack's termination or for applying time or support sanctions. But, like most of his more deviant colleagues considered earlier, his hope for raises would likely not be based on an increase in his market value.

IV. Looking at the Forest

A. What the "Data" May Tell Us

This article is not an empirical study except perhaps in the loosest, most anecdotal sense. As to the ten just discussed cases, all that we have are

181. "[A]ll too often, the fear of error immobilizes the law professor and if it doesn't preclude all writing, it imprisons her into minimum risk enterprises." Bard, supra note 99, at 243. Even with their privileges and immunities our academic communities are often too timid in their explorations. The fear of failure in the eyes of the peerage inhibits some of our colleagues, even when they do have tenure. Too many seek the safe road of detailed elaboration of accepted truth rather than the riskier paths of true exploration, which might defy conventional assumptions. Boldness would suffer if the research and scholarship of a mature faculty were to be a subject to periodic scorekeeping, on pain of dismissal if they did not score well. Then what should be a venture in creative discovery would for almost everyone degenerate into a safe-sided devotion to riskless footnote gathering. Authentication would replace discovery as the goal. The results might not startle the world, but they would be impressive in quantitative terms and invulnerable to devastating attack.

182. Thus there is one requirement of competency one is almost tempted to propose. Any law professor who does not err greatly shall, if after due warning he persists in his correctness, be dismissed for playing it much too safe.

183. Part of the problem with an institution's certifying scholars' competence is that its doing so inherently tends to "certify" their scholarship. We can partly avoid such a silly outcome quite easily in tenure and other pre-senior decisions by saying that his work "shows great promise," or "shows the potential for sustained excellence," or "is highly regarded by his peers." Mercifully, we tend to know better than to say his work is correct. So why not use an "is highly regarded by her peers" standard for senior review? It is an arguably appropriate standard for anyone seeking to establish his credentials. Converted into an ongoing imperative, it is—no matter who the peers—slavery for life.

184. Would one dare use the trees-and-forest metaphor in speaking of tenure without also paying homage to almost everyone's favorite botanical metaphor, the "dead wood"? Walter Metzger thinks of the latter as part of "the warehouse metaphor, which conceives of the university as a lumber yard, collecting and sorting finished products." Metzger, supra note 5, at 159. "The trouble with [that metaphor]," he says, "is that it ignores the ways the university functions as a society that shapes the very material it holds." Id. Also troubling is how carelessly we use the word "dead," which, in this context at least, means devoid of possibilities.
deans' or other knowledgeable persons' guesses as to probable outcomes at their respective schools. And we only have such guesses at roughly a third of AALS law schools. Thus one must jump to conclusions with caution.

But the "data" are interesting. Surely the most notable component is the infrequency of predicted dismissals. At the 18 responding MER schools, none of the above ten professors received a probable dismissal prediction. At the 31 other responding AALS schools, there were only three predicted dismissals for Professor Toto, only one or two for Professors Kurt and Reject, one to three for Professors Rich and Pony, only one for Quest, Pop, and York, and none for Professors Manual and Hack.

In light of the extreme nature of most of the cases posed, those results are striking. They will be viewed by some as showing irresponsible laxity and timidity in schools' failure to police tenured faculty.

Is the cynical explanation as correct as it is easy and salable? Incurably incompetent teaching or habitual neglect of teaching and administrative duties are not generally tolerated, whether or not the individual has tenure. Albeit sometimes much too slowly, the institution will rid itself of that teacher, whether by medical disability, negotiated early retirement, or, if need be, formal dismissal. But the ten hypothetical professors were performing acceptably in the classroom and in their "nonscholarly" duties. Accordingly, I think that the paucity of dismissal predictions of those faculty members shows more than frailty and inertia. I believe it also shows a prevailing awareness that, at least as affects postprobationary job security, the noncriminal, nontortious, unslothful, nondeceitful scholar should be free to self-define and self-regulate her scholarly mission. At the risk of being Dr. Pangloss, I think said paucity also shows an (not always conscious) understanding that to impose dismissal-sanctioned permanent limits upon that freedom necessarily requires an epistemological and/or ideological arrogance that cannot be squared with the university's commitment to free inquiry and expression.

The second most notable aspect of the data is the high frequency of predicted salary sanctions. Their predicted use in some form at MER and at other AALS schools is summarized in a portion of Table 11. That table and all preceding tables combine to indicate that denial of a full or partial share of the salary increase pie is by far the most-used tangible means to

185. The uncertain tallies reflect ambiguous predictions.
186. Those who express shock or dismay at the rarity of such outcomes perhaps reveal more about their own views of how an "academic ship" should be run and their own perceptions of faculty (non)quality than about anything else. Why would one expect a nonrare incidence of provable incompetence or dereliction among highly intelligent people who were motivated, studious, energetic, and otherwise talented enough to be selected for, and successfully to complete, a multi-year probationary process? In thirty-five nonutopian years as a student and/or teacher in "higher" education, I have met very few even possibly provable tenured failures. All went away, or were sent away, prior to normal retirement.

187. That interpretation of the data is supported by the absence of termination predictions for the ten cases at all responding MER schools. Those are generally schools with a long-established commitment to scholarship. That commitment appears to include freedom for scholars whose approach is apt to do nothing for, or is apt to detract from, the school's prestige.
deter tenured law faculty from institutionally perceived waywardness. The cumulative clout of salary sanctioning is suggested by a letter from a dean who did not answer the questionnaire but who instead wrote that "a few tenured professors who have been here for lengthy periods (18–25 years) receive lower salaries than some who have been here 5–7 years."

**TABLE 11**

<table>
<thead>
<tr>
<th>Professor</th>
<th>Monetary Sanctions</th>
<th>Time Sanctions</th>
<th>Support Sanctions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>MER Schools</td>
<td>Other AALS Schools</td>
<td>MER Schools</td>
</tr>
<tr>
<td>Toto</td>
<td>14 (78)</td>
<td>23 (74)</td>
<td>4 (22)</td>
</tr>
<tr>
<td>Quest</td>
<td>16 (89)</td>
<td>16 (77)</td>
<td>5 (28)</td>
</tr>
<tr>
<td>Manual</td>
<td>7 (41)</td>
<td>8 (27)</td>
<td>0 (0)</td>
</tr>
<tr>
<td>Pony</td>
<td>12 (67)</td>
<td>21 (70)</td>
<td>0 (0)</td>
</tr>
<tr>
<td>Pop</td>
<td>12 (67)</td>
<td>19 (63)</td>
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<tr>
<td>York</td>
<td>10 (56)</td>
<td>18 (60)</td>
<td>0 (0)</td>
</tr>
<tr>
<td>Kurt</td>
<td>10 (56)</td>
<td>19 (63)</td>
<td>1 (6)</td>
</tr>
<tr>
<td>Reject</td>
<td>16 (89)</td>
<td>27 (90)</td>
<td>3 (17)</td>
</tr>
<tr>
<td>Rich</td>
<td>11 (65)</td>
<td>22 (73)</td>
<td>2 (12)</td>
</tr>
<tr>
<td>Hack</td>
<td>11 (61)</td>
<td>21 (72)</td>
<td>2 (11)</td>
</tr>
</tbody>
</table>

*Given the small sample sizes' susceptibility to sampling error, one cannot make much if anything of the above differences in percentages between MER and "other" schools. Also, the confinement of predicted dismissals to "other" schools meant, for the affected professors, more likelihood of the above sanctions being deemed "ultimate" at MER schools as compared with other schools.*

Although the frequency and substantiality of salary sanctions may not make national or international news, their importance in the "management" of senior law scholars can, absent strong contrary evidence, be reasonably believed. And, despite the dangers and other harms in their use and misuse, in nonutopian schools reflecting a nonutopian world and salary market, selective salary increases seem a usually tolerable reality. If freedom must be attenuated, inducement is much better than assault.

In contrast to the expected wide use of salary sanctions, time sanctions and nonsalary support sanctions were, as Table 11 shows, predicted as or to be part of the ultimate outcome at only a minority, often a small minority, of responding schools. That is healthy, though a total lack of those predictions would be healthier.188

The apparently much greater willingness to use salary sanctions than other formal sanctions does not necessarily mean that salary punishments and rewards constitute the greatest actual extrinsic inducement to scholarly effort. Although outside the scope of this article, answers to other submitted questions suggested that peer esteem as a "natural" reward of scholarly

188. Extra duties are of course appropriate for a professor who clearly appears to need them in order to exert effort comparable to his colleagues. Possibly some respondents failed to include time and support sanctions in their prediction of a professor's ultimate sanction because they deemed them less severe than salary sanctions. However, the questionnaire stated that the ultimate sanction could be a combination of measures.
accomplishment may well be as important an actual inducement as individualized salary increases—and indeed that at MER schools it may well be a significantly greater inducement.

B. Official-Formal Review of Senior Law Faculty Scholarship: A Choice of Perspectives

What implications do the ten "case commentaries" have for the continuation or the possible inauguration of a system of peer review or other formal review of senior law faculty's scholarly performance? One justifiable answer would be to conclude that no such system belongs in legal education. The AAUP's Council and the Association's Committee A on Academic Freedom and Tenure have taken the position that "periodic formal institutional evaluation of each postprobationary faculty member would bring scant benefit, would incur unacceptable costs, not only in money and time but also in a dampening of creativity and of collegial relationships, and would threaten academic freedom." Without at all discounting the just stated prognosis, assume that, for

189. Granted, there is no bright line between a "formal" and an "informal" review. Likewise as to such attempted distinctions as "official" versus "unofficial," "serious" versus "casual," and "threatening" versus "supportive." More importantly, the imperative of scholarly freedom does not depend upon whether a school uses formal or informal review, decanal or peer (or decanal and peer) review, or no review at all. The text now focuses somewhat on "formal" peer or combined review in part because such may be the coming thing. Also, greater formality and the use of more people as reviewers tend to instill more importance and authority into the review process. The emergence of new or more bureaucracy is a good time to be especially concerned for freedom.

190. November 1983 statement in Academe, November-December 1983, at 14a [hereinafter 1983 Statement]. The statement from which the quoted words were taken appears just below a consensus statement of those attending the Wingspread Conference on Evaluation of Tenured Faculty, August 24-26, 1983. Individual statements by conference participants are in id. at 1a-13a.

Proponents of post-tenure review may well believe that its main purpose is or should be to help and support, not to coerce or punish. But how open to help is the typical postneophyte helpee when the helpers are known to possess, or to cooperate with, back-up police powers? If help and support are the goals, there are much better ways.

Or why not make peer review more helpful and less threatening by granting the reviewee full "use immunity" as to the review's findings? Or perhaps George Schatzki and Paul Carrington, supra note 37, have devised the most heavenly compromise: conduct post-tenure review after the reviewee dies.

191. A formal system of post-tenure evaluation of scholarship is apt to be one of two things. (a) a minor waste of valuable time whose only unsuperficial effect is to frighten the faculty maverick(s) or (b) both a major waste of time and so great a success that it engenders something like the independence, the courage, and the long-range statesmanship that biennial and sexennial "review systems" regularly afford the United States Congress.

Kingman Brewster is more tentative in his prediction:

I have not been able to devise, nor have I heard of, any regime of periodic review with the sanction of dismissal which would not have disastrous effect. It would both dampen the willingness to take long-term intellectual risks and inhibit if not corrupt the free and spirited exchanges upon which the vitality of a community of scholars depends.

Brewster, supra note 1, at 17.

Concerning the presence or absence of disastrous consequences, it would not be very illuminating for Law School X to say, "We have systematic post-tenure review, and the
whatever expected institutional gain, a given law school has adopted (as indeed some have) or is adopting a formal system of post-tenure faculty evaluation that includes evaluation of scholarship and outside service as well as teaching and in-house service. If one prefers that the system not "weaken or undermine the principles of academic freedom and tenure," how much scholarly freedom must such a system honor?

For reasons stated in the "case commentaries," a law school's freedom-respecting system of post-tenure review would have to accord full deference to the scholarship of Professors Toto, Quest, Manual, Pony, Pop, York, Kurt, Reject, Rich, and Hack. That conclusion will seem extreme—if one views it from a position far from, or fearful of, genuine freedom. Those who would do so must answer some questions. If Toto's project is unacceptably large and long-term, how small and short-term must legal scholarship be? If Quest's project is too uncertain, how much certainty of success is required? If Manual is too practitioner-oriented, how ivory tower must she be?

If Pony is too close to students' perceived needs, how aloof must Pony-as-scholar be? If Pop is too popular, how elite must she be? If York and Kurt are too extralegal or moralistic, how positivistic must they be? Would we also excommunicate Thomas Aquinas? If Reject is too inner-directed and determined, how flexible and other-directed must he and we be? (That question goes to the heart of the matter.) If Rich's carnality warrants his firing, how righteous must he and we be? No fair to skip that one either. If Hack is incompetent . . . ?

faculty seems quite happy with it." In the first place, the effects upon freedom are apt to be subtle rather than abrupt, latent rather than apparent, more unconscious than conscious. The major risk is insidious chilling effect, not public crucifixion. Second, unless the laws of politics are repealed, the review system is hardly going to operate in a way that even subliminally threatens prevailing job-related proclivities. Thus the overwhelming majority of the faculty will indeed perceive no infringement of their freedom.


The AAUP's Council and Committee A in effect spoke to such a situation, albeit not particularly as to law schools, in the next and final paragraph following the words already quoted in the main text. That paragraph states:

The Association emphasizes that no procedure for evaluation of faculty should be used to weaken or undermine the principles of academic freedom and tenure. The Association cautions particularly against allowing any general system of evaluation to be used as grounds for dismissal or other disciplinary sanctions. The imposition of such sanctions is governed by other established procedures, enunciated in the 1940 Statement of Principles on Academic Freedom and Tenure and the 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings, that provide the necessary safeguards of academic due process.


193. Id.
Considering the enormous pressures for social conformity and the basic homogeneity of the law faculty population, the issue is not whether there will soon or ever be a law faculty composed of the above amalgam of professors. The easiest proof of that outcome's nonlikelihood is the reality that, as the data attest, the "extreme" freedom of legal scholarship I have advocated describes, sans social and salary pressure, the strongly prevailing status quo. It appears that the nation's tenured law professors generally have the freedom to be Prof Toto, or Quest, or Pop, etc., and keep their jobs, if they are willing to pay the price.

Given our usually cautious use of existing freedom, the issue rather is this: do we really wish to add to the already heavy social and economic pressures toward imitation, superficiality, respectability, esotericism, and risk averseness in legal scholarship? Do we really want to become even more timid, tidy, insular, and innocuous scholars than we already are?

A law school's regime of post-tenure peer review that even indirectly threatens possible dismissal proceedings, other job loss vulnerability, selective salary reductions, or substantial time or nonsalary support sanctions and yet fails to acknowledge and protect as much scholarly freedom as is posited in this article violates tenure and academic freedom. Such a regime should therefore be understood as violating the contractual rights of present faculty members who expected their institution's commitment to tenure and academic freedom to be genuine and unequivocal.

Accordingly, a school should not begin or continue a system of post-tenure peer review that might possibly have any bearing, however indirect, upon job security, salary reductions, or upon anyone's opportunity to engage in any form of scholarship, without enacting a substantive provision at least as strong as the following:

Provided that sloth is not thereby to be protected, the traditional freedom of each tenured professor to self-define and self-regulate his or her own scholarly and nonuniversity service missions shall not be abridged with respect to job security, protection against selective salary cuts, receipt of self-directed time or nonsalary support, or protection against other nonsalary sanctions.

194. Alas, our basic homogeneity will still exist long after affirmative action has expired from success. Gender, race, and ethnicity are hardly our deepest prejudices.

195. Some aspects of that "traditional freedom" are described in the case commentaries. One such aspect is a definition of legal scholarship at least as broad as that suggested in Professor Kurt's commentary.

Ideally, for reasons stated with Professor Hack's case, assessment of "scholarly competence" should be explicitly excluded from any post-tenure review that could possibly affect job security, attained salary level, or customary receipt of nonsalary support and self-directed time. For all duties there should be explicit protection against dismissal, other reduced job security (e.g., loss of seniority), selective salary reduction, and time and nonsalary support sanctions, at all based upon a "higher" competence standard, or at all based upon less precise or more controvertible criteria, than advised in the commentary on Hack.

Along with some "ninth amendment" type language, a general proviso, such as, "The meaning of tenure and academic freedom shall in all respects be preserved," should also be adopted or officially reaffirmed. The latter proviso tries to make clear that the post-tenure evaluation process must not, among other things, reduce classroom teaching freedom or foster types of salary discrimination that violate tenure or academic freedom. One wishes that such a general proviso could make a special provision for scholarship and outside service unnecessary. But the extraordinary autonomy to which
It may be argued that the just stated scholar-servants' "first amendment" (or any better-worded version of it) is too vague, too potentially expansive, too slanted toward unbridled liberty, too susceptible to irresponsible and even dangerous abuse. How sad that those who would find those arguments determinative could not also have been present in the late 18th century. Had their thinking prevailed, there would have been no free expression clauses in the U.S. Constitution.

There should also be an explicit understanding from the start that the concept of postprobationary "scholarly mission" is broad enough to encompass at least as wide a scope of options as is suggested by this article's ten (or other at least as atypical) nonexhaustive examples. Without some concrete indications of the vast scope of mission-defining freedom, peer review is too apt to daunt the dauntable.

A system of at-all-serious post-tenure review that is unwilling to give explicit prior assurance of its intent to honor the scholar's traditional autonomy is, at best, profoundly suspect. By its unwillingness to attempt to dispel the inherent chilling effect of performance evaluation, the system proclaims itself delighted to abet whatever modes and degrees of conformity the majority (or whoever rules) may at any time desire. And it implicitly threatens the use of overt pressure, and finally coercion, whenever friendly and subtle controls fail.

No supposedly "full" professor should submit to such an outrageous travesty. One should not submit even if one feels totally unthreatened. One's conscious I-have-nothing-to-fear machismo may be masking an unconscious submission to group pressure that is already controlling one's scholarship. And the subjective and objective freedom of others is also at stake.

C. Some Arguments Against My Orthodoxy and a Reply to Each

1.

A potential antidote to the views in this article is to reject what has become the traditional concept of a senior scholar, namely, a person who supposedly has proved his or her scholarly ability during the probationary and promotion periods and who therefore has earned the right to unfettered scholarly freedom. One may argue, in contrast to that idea, that all should be required continually to prove their current scholarly ability throughout their university employment.

Because judgments of one's work must be made by other human beings (or else be mindlessly quantitative), an ongoing burden of worthiness proof the latter tasks are entitled is too much at odds with the managerial mind in all of us. We should therefore also need something like the explicit special reminder proposed in the text.

Concerning the import of full extramural service autonomy, see supra note 34.

Though outside the scope of this article, adequate procedural protections would of course also be essential.
Post-Tenure Scholarship

Post-Tenure Scholarship can only be described as a proposal for "permanent probation." Fearing that no one is worthy of genuine scholarly freedom (or that trustworthy recipients will not be selected), the proposal rejects the free scholarship enterprise. It converts the quest for truth into a lifetime contest for approval ratings, and it permanently converts scholars into what Walter Metzger has called "cadres of bureaucratized white-collar workers."

If intelligent assessments of legal scholarship could be value free, meaning that they could be ethically and ideologically neutral, one might be able to view the above proposed conversion with only mild horror. Given that no such neutrality is possible, mild horror is an underreaction. The lifelong trading away of scholarly freedom for Recurrent Objective Assurance of Scholarly Legal Competence or Excellence may not be the selling of anyone's birthright. But it is a woefully overpriced purchase of an elusive mess of pottage.

2.

A second argument against the radically autonomous senior scholar idea is the claim that it violates another idea, namely, the community of scholars. That latter idea, we are told, requires that the individual scholar's work be wholly subject, as to both content and method, to the judgment of fellow scholars.

The validity of that argument depends upon the proper meaning of "being wholly subject to" peer judgment. Such subjection does mean that any scholar's published work, in any forum, popular or esoteric, is in all respects a proper target for unrelenting criticism. However, except for clear breaches of academic discipline (e.g., deceit in research) or grave civil or criminal wrongs, being subject to post-tenure peer judgment does not and should not mean being explicitly or implicitly threatened with dismissal or other institutional censure as a device for controlling choice of method, form, forum, or content.

Accordingly, we may well say, "Professor Pop's and Professor Kurt's works are not legal scholarship," if we are merely contending that their works do not further the scholarly goals we envision. But when that viewpoint is translated into a serious personnel management judgment of senior Prof Kurt or Pop, it is not only the freedom-violated individual who

196. Irwin H. Polishook, Professor of History at Herbert Lehman College, has called a regime of peer review that can be used to strip faculty members of tenure a "permanent condition of probation," quoted in Suzanne Perry, Formal Reviews for Tenured Professors: Useful Spur or Orwellian Mistake? Chron. Higher Educ., Sept. 21, 1983, at 25, 27. Walter Metzger calls it "term tenure," which he deems an oxymoron. Quoted in id.

197. Again quoted in id.

198. The view that competence is permanently adjudged at the tenure decision has been attacked as "illogical." E.g., Swygert & Gozansky, supra note 28, at 362. Surely, however, the view in question connotes no belief that actual competence cannot diminish or die. Rather, the view's basis is the belief that the continual career-long adjudication of faculty members' competence by peers or by other fallible human beings will likely cost more in intellectual freedom "and" truthfinding than it will yield in quality assurance. One is of course free to accept or reject that belief. (I fervently accept it as to scholarship and very weakly reject it as to classroom teaching.) Neither choice is illogical.
suffers. If scholarly criticisms are to have potentially grave job status consequences throughout people’s careers, the community of scholars itself is apt to suffer greatly in either or both of two ways. First, the level of hostility increases. In discussing the present situation in legal scholarship, Richard Posner has noted the “well-known hostility of scholars to types of scholarship different from their own, a hostility captured in the adage, ‘what I do not know is not knowledge.’”199 But if the contest between different approaches to law becomes an endless question of the combatants’ own survival, the contest for truth is lost in personal war.

Despite the horrors of war, it is the second probable effect that would be most destructive of the community of scholars, most devastating to the search for truth. Kingman Brewster, Jr., identifies that second danger:

If a university is alive and productive it is a place where colleagues are in constant dispute; defending their latest intellectual enthusiasm, attacking the contrary views of others. From this trial by intellectual combat emerges a sharper insight, later to be blunted by other, sharper minds. It is vital that this contest be uninhibited by fear of reprisal. Sides must be taken only on the basis of the merits of a proposition. Jockeying for favor by trimming the argument because some colleague or some group will have the power of academic life or death in some later process of review would falsify and subvert the whole exercise.200

If senior scholars are going to need to stand clear of unsettling, disturbing, or otherwise deviant modes of scholarship a fraction as much as probationary scholars must, then, with minor adaptation, The Prince becomes Our Lifelong Manual:

So a scholar need not have all the aforementioned good qualities, but it is most essential that he appear to have them. Indeed, I should go so far as to say that having them and always practising them is harmful, while seeming to have them is useful. It is good to appear as an unfettered seeker-advocate of legal-moral-political truth, and also to be so, but always with the mind so disposed that, when the occasion arises not to be so, you can become the opposite. It must be understood that a scholar and particularly a new scholar cannot practise all the virtues for which law faculties are accounted good, for the necessity of self-preservation or of preserving or improving the school’s image often compels him to take actions which are opposed to his own self-defined mission. Hence he must have a spirit ready to adapt itself as the varying winds of performance review command him. As I have said, so far as he is able, a scholar should stick to the purely self-directed path to truth, but, if the necessity arises, he should know how to go with the flow.201

A third argument against the idea of the autonomous scholar is that it is an illusion anyhow. So great is the imprint of status quo thinking on most minds, and so great is peer and other social pressure, augmented by the perhaps conveniently imprecise law school salary market and by other economic incentives, that the autonomous scholar simply does not exist. Therefore it does not matter whether our personnel management defini-

200. Brewster, supra note 1, at 16–17. “Trimming the argument” would of course also occur if “outside scholars” aid in the “review” of one’s work for personnel management purposes. One had best not offend anyone, anywhere.
tion of legal scholarship is broad enough to include the likes of Professors Toto, Quest, Pop, and Kurt. They are, as was earlier admitted, fictional characters anyhow.

The foregoing argument is a two-thirds truth. What keeps it from being more truthful is its forgetting that one's willingness to resist social and economic pressure is apt to increase greatly if one is sufficiently committed to contrary views or to the chance to explore them freely. No matter how cruel the peer pressure, the senior fanatic can and will resist. But even the senior fanatic cannot overturn a legally valid termination decision.\textsuperscript{202} Nor can he recapture time stolen by discriminatory sabbatical or work assignment policies designed to cramp his style. Thus, at least to the nonsuicidal fanatic, official freedom matters. It also should matter to the rest of us. The extreme deviant's freedom from official sanction is apt to increase the chances that not-so-extreme others will sense and exercise some measure of genuine freedom.\textsuperscript{203}

4.

A fourth argument against the autonomous senior scholar idea alleges a practical inconsistency between that idea and the possibility of retrenchment. If retrenchment occurs, says the argument, a university will try to retain those faculty members deemed most suited to its continuing missions. Therefore, if it now takes a completely nondirective stance toward senior faculty scholarship, an institution is being dishonest. It is instilling a false sense of security in the senior's mind, making her oblivious to how the perceived worth of her scholarship may affect her chances in any reduction of tenured faculty.\textsuperscript{204}

A key feature of the above argument is that it begs the question. It assumes that scholarly performance ratings are both an apt-to-be-used and a permissible factor in selecting competent tenured faculty for dismissal in retrenchment situations. In fact, those matters are far from settled. Many

\textsuperscript{202} Thus, as Galileo could attest, Robert Bard, supra note 99, at 245, was not entirely correct in thinking that “[n]o one can stop a real scholar.”

\textsuperscript{203} And so, in that and other settings, those who, having discovered the awesome power of social and economic forces, deride legal or conventional protections of liberty, are fooling themselves profoundly; if freedom be their goal. Likewise, that the status quo's protection of academic freedom is badly flawed or is even, as some believe, a substantial farce hardly commends the surrender of however much or little freedom we now possess. A different jaded perspective promises that The Mutual Backscratching Factor will make a paper tiger of any system of peer review. But see supra note 172 and remember that law faculties “are intensely preoccupied with the status rankings of their schools.” Kennedy, supra note 59, at 54.

\textsuperscript{204} I am letting the argument at least assume that, “The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result.” 1982 Recommended Institutional Regulations on Academic Freedom and Tenure, Reg. 4(c)(3), in AAUP, supra note 58, at 21, 24. “[N]umerous alternative strategies can be attempted prior to retrenchment. The dismissal of tenured faculty should remain 'the court of last resort.'” Kenneth P. Mortimer, Procedures and Criteria for Faculty Retrenchment, in Mingle, supra note 44, 153, 169–70. But cf. Brenna v. S. Colo. State College, 589 F.2d 475, 476 (10th Cir. 1978).
schools prefer to use seniority. In view of seniority's advantages, that is hardly surprising; nor should it be wholly distressing.

When "nonblind" criteria are used by schools and upheld by the courts, they tend to emphasize relative fitness for specific instructional programs—i.e., teaching qualifications. That tendency is understandable. The usual retrenchment process is essentially a matter of eliminating, paring down, and/or otherwise modifying instructional programs to meet budget constraints or other changing needs. Subject to the thorny issues and too

205. Licata, supra note 16, at 14. "Common criteria are employee status—part-timers are normally retrenched before full-timers; seniority (last in, first out); and program need, cost, and quality." Mortimer, supra note 204, at 167. For discussion of a broad range of retrenchment issues and problems, see the collection of essays in Mingle, supra note 44. For a look at the unclear legal picture, see Gray, supra note 44, and Robert Charles Ludolph, Termination of Faculty Tenure Rights Due to Financial Exigency and Program Discontinuance, 63 U. Det. L. Rev. 609 (1986). For a consideration of the potential for abuse, see Note, Economically Necessitated Faculty Dismissals as a Limitation on Academic Freedom, 52 Den. L.J. 911 (1975) (authored by Charles P. Leder).

206. Because of its well-established albeit not wholly revered tradition in labor relations generally, and because of its relatively mechanical, judgment-free mode of individual selection, seniority is relatively unencouraging to hyperacrimony or protracted litigation—at least as to the accuracy of its application.

207. Arguably, seniority minimizes unfairness and personal havoc. The person who has invested the most years in a given job arguably has the greatest moral claim to retention. And, especially if age is included in the measure of seniority, he or she is apt to be the person least able to start anew in an unretrenching industry.

However, "minority and women faculty are likely to be among those most recently recruited and therefore most subject to being retrenched. Therefore, institutions may need to consider the extent to which retrenchment based strictly on seniority will damage the diversity—both racial and sexual—of the faculty." Mortimer, supra note 204, at 167. But cf. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (as to equal protection); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (as to Title VII). For an undaunting reading of both cases, see Johnny C. Parker & Linda C. Parker, Affirmative Action: Protecting the Untenured Minority Professor During Extreme Financial Exigency, 17 N.C. Cent. L. Rev. 119 (1988).

A "merit" retention approach to retrenchment is not apt to be a panacea for protecting recent progress toward faculty diversity. Because of their substantially greater experience, the senior faculty would generally have a heavy advantage in a defendably "neutral" assessment of qualifications. But of course not always. Against however much diversity protection a "merit" approach might offer must be weighed its fecundity for error and other abuses, for individualized bitterness, and for almost certain litigation, plus its much more continuous harms soon to be mentioned in the text.

With respect to nonadjunct faculty, an across-the-board reduction in pay and teaching load seems fairer and less havoc-causing than does someone's termination. (That is so even if the reduction must be drastic. Better half a load than no load at all.) Such reductions could and should also be used as a much less attackable means of salvaging affirmative action gains. There might even be more time for scholarship.

208. An example is Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978) (in financial exigency, discontinuance of German language studies except service program for other majors needing German in research led to retention of tenured teacher who taught chiefly introductory language courses over plaintiff who, also tenured, taught mostly advanced literature courses). A more dubious example is Bignall v. N. Idaho College, 538 F.2d 243, 250 (9th Cir. 1976): "[A]ll testified that she was the least well qualified academically; that because she directed her instruction to the most gifted among her students, she alienated the less bright so that students regularly transferred out of her classes or tried to avoid her courses."

209. Modifications may occur without financial exigency. See 1982 Recommended Institutional Regulations on Academic Freedom and Tenure, Reg. 4(d), in AAUP, supra note 58, at 21, 24–25.
often neglected possibilities of retrainability, recognition of major "semiobjective" differences in teaching qualifications (meaning people's fields of study and experience, not their performance ratings) makes fair sense. It constitutes, I believe, the defensible exception to an approach based on length of service, age, uniform teaching-load-and-pay reductions, permissible affirmative action criteria, and/or other such factors that do not try to divine individual worth.

But why not use, to the unclear extent courts may allow, bona fide retrenchment as a "quality enhancement" field day? Or, more accurately, why not a field day for perceived quality enhancement? Why not base termination selections on the candidates' relative performance ratings in teaching, scholarship, and other pertinent duties? Even were scholarship excluded, that approach, especially if presaged long in advance, would turn any but the strongest institution into a total suffocation chamber of puppet-perfect subservience, fawning sycophancy, cutthroat competitiveness, paranoid defensiveness, and byzantine palace intrigue. In any school where retrenchment is a conceivable possibility, job-protecting rationality would mean henceforth letting everything one says, writes, and does be dictated by one criterion: what will maximize my chances of surviving any termination selection process? For all who have been wanting "tenure" to be permanent other-directed probation, here is a dream come true. For anyone who cherishes academic freedom and collegiality, here is a nightmare to frighten even the bravest.

And if scholarship or outside service performance evaluations are added to the termination selection criteria, absurdity has joined with atrocity. For the tenured targets of those evaluations are as to those areas supposed to be genuinely autonomous and thus genuinely free from threat of evaluation-influenced dismissal, absent mortal sin. We cannot coherently say, "Senior scholar, be self-directed, but always aim to please so as to survive any retrenchment beauty contest." Such Doublespeak would tell us that free scholarship and free public service are total illusions.

210. Such appears to have happened to some extent in Levitt v. Bd. of Trustees of Neb. State Colleges, 376 F. Supp. 945, 949 (D. Neb. 1974). See also Bignall, 538 F.2d at 243, 250. It is thus possible that, absent explicit prior contractual specification of the precise criteria for retrenchment-caused dismissal, most courts will have so little understanding of tenure's autonomy-protecting contractual implications that they will merely ask whether the institution acted arbitrarily and capriciously. Despite that possibility, "[a]t this time, it seems improbable that institutions under financial duress will use the performance of tenured faculty and their viability to specific programmatic needs as indices to be weighed in any decisions about removal." Quoted portion from Licata, supra note 16, at 15.

211. Albeit sometimes reluctantly, even community college administrations have generally shied away from that dismal scenario:

When the need for reduction in force loomed, many administrators felt it would allow them to strengthen the faculty by eliminating weak instructors. With rare exception this has not happened. To attempt to do through RIF what should have been done through more direct means is hardly a demonstration of good management. . . . [And] it is easier to apply seniority and tenure, the time-honored and court-approved criteria.

John Lombardi, Community Colleges—When Faculties are Reduced, Change, Dec.—Jan. 1974–75, at 55, 56.
A fifth argument against the autonomous scholar idea is the claim that in the New Age of Educational Accountability, the public, the legislature, private benefactors, the legal profession, the alumni, and/or the trustees will not tolerate it. Thus, to avoid oppressive and incompetent external regulation, we had best regulate ourselves more stringently—even at the cost of some academic freedom.

Applied to scholarship, that is a contrived argument. The accountability the public wants is as to teaching competence. Even there the public is no stranger to what bureaucracy can do to individual creativity. And the public and its representatives are more than able to understand, first, that free scholarship helps constitute a free and viable society, and, second, that free scholarship requires genuine freedom for the individual scholar. Our various publics are more likely to appreciate such truths if we academics and our leaders publicly communicate an adequate understanding of and a deep commitment to the rationale and the requirements of academic freedom. However, if persons in positions of leadership and influence are nebulous in their own commitment to freedom and almost eager to bow to competing values, then “We Must Compromise Everything” will become self-fulfilling prophecy.

V. Conclusion

From a personnel management perspective, the root issue of this article is easily stated. With respect to scholarship, what does the university-employer have a right to expect of its postneophyte scholar-employee? My unoriginal but still possibly scandalous answer has been, “Except for self-regulated scholarly diligence and the more serious demands of the criminal and civil law, absolutely nothing.” Indeed, the university must not ask for anything more, or else it is asking for something less. The university-employer should merely say to its senior scholar-employee, “I command you to seek and share nothing but truth ‘and’ goodness. Were I, the University of Such-and-Such, omniscient and infallible and incorruptible, I should monitor and coerce your obedience to that command forever. But, because I, like you, am none of those things, I must, as to your scholarship, reluctantly appoint you henceforth as your own self-monitor.”

No wonder, besides other good reasons, that we academics engender such curiosity, bemusement, amusement, ridicule, envy, chagrin, and even contempt! Who else allows their employees the above kind of freedom? Even the business corporation rich and wise enough to pay someone to think “freely” will sooner or later ask, “Are the thoughts worth the expense?” But, in part because all the askers are themselves fallible, such a

212. *Argument.* The university's and the scholar's mutual fallibility and corruptibility suggest the need for a system of checks and balances between the two parties even, or especially, as to scholarship. *Reply.* The system of checks and balances is the community of free scholars, whose credo is relentlessly to evaluate each other's ideas. But coercive standards are no more a true check and balance than is coercive censorship generally.
question must not recurrently be asked for personnel management purposes of the scholar whose employer claims a disinterested commitment to the ongoing search for truth "and" goodness. The diligent, good-faith senior scholar-employee must, as to her scholarship, not be accountable in a personnel management sense to any human entity. With respect to that strangest of all species of employee, the employer-university can claim only a right to hope:

[C]ontributions to human knowledge and understanding which add something significant to what has gone before involve a very high risk and a very long-term intellectual investment.

... If scholarship is to question assumptions and to take the risk of testing new hypotheses, then it cannot be held to a timetable which demands proof of pay-out to satisfy some review committee.

... At its best the university expects a person literally to make a lifetime investment in his special way of looking at the human and natural experience, in the hope that he will contribute something of permanence to the understanding of some corner of the universe.213

Because the idea of autonomy so assaults society's and our own concept of employee-to-employer accountability, one can understand and almost forgive the mighty urge to make the scholar answerable to some body more earthly than truth and goodness.214 But it cannot uncorruptly be done.

213. Brewster, supra note 1, at 14–15. One dean wrote that traditional tenure is not needed for legal scholarship because the latter no longer includes high-risk, long-term quests for new truth. Even were his assumed facts totally correct, they ought not to convince us to do anything that would reduce the chances that such needed quests will occur.

Robert Nisbet argues that Kingman Brewster's defense of tenure is invalid because its traditional view of the university no longer fits reality. Nisbet sees the inner-directed scholar “elbowed aside by the other-directed, those who find greater inspiration in federal grant than in natural curiosity[,] . . . those who move with practiced ease from professorship to assistant secretaryship in Washington and then back again and whose management of institute, bureau and center has its nearest counterpart in Washington or Detroit[,] . . . [and] those who convert curriculum and classroom into lay clinic, calling it relevance.” Nisbet, supra note 43, at 30–31, quoted portions at 31. In short, most of us have become such uncloistered wheeler-dealers that we need and deserve tenure no more than does any other entrepreneur. However, because candor requires Nisbet to admit that the modern university somehow still manages to house some "genuine scholars and scientists," id. at 31, his claimed exposé of the majority's hucksterism unwittingly supports Brewster's pro-tenure position. For if, as Russell Kirk has alleged, “[o]nly here and there does one encounter a department or even a university that cannot be bought [by outside grants, etc.] for a price,” the independent-minded scholar's need for protection against administrative and/or peer consensus is all the greater. Quoted words from Kirk, supra note 31, at 609.

214. For example, without in any way excepting or qualifying the applicability of their general position to scholarship or to outside service, Olswang and Fantel have contended:

Comparisons can be drawn to other professions with similarities to tenure. Attorneys and judges are licensed by the Bar and deemed to be able to perform their duties throughout their lives or until challenged through professional disciplinary action [or through other listed means] . . . . There is growing movement within the Bar to require periodic recertification examinations of some kind to assure continuing competence, and to certify competence in a given specialty. The principle of recertification of competence for faculty through periodic review systems seems equally warranted.

Olswang & Fantel, supra note 24, at 28–29 (emphasis added, footnotes omitted). In the next paragraph, they quote from the AAUP policy statement favoring periodic review of academic administrators. And then, also without qualification but apparently with some
There is not even a viable compromise between "the goals of the scholar" and "the goals of the institution." As to scholarship, the university must have no goal save the scholar's freedom—and whatever truth it may yield. At least as to scholarship and outside service, "we must" as Carol Simpson Stern puts it, "resist the impulses of the managerial class and its rage to order."\textsuperscript{215} If we do not, we are sure to become, or to remain, one of Walter Metzger's "cadres of bureaucratized white-collar workers" who have traded truthseeking for managerial acceptability.

One reason I am happy to be a fanatic in this matter has to do with the kinds of persons I want lured into teaching, even university and law school teaching. I want us to continue to be able to say, "Look, we can offer you a creative freedom that, unless you are a writer or artist of independent means, no other industry can promise." I want us to keep attracting people who find that kind of pay richer than gold. I want the teacher-scholar-servant job to remain one that can attract a generous share of the brightest, most creative people God can create.\textsuperscript{216}

Call me paranoid, but I am afraid that we may soon lose however much or little individual autonomy we now have. At some schools, the subtle but final surrender may already have begun. At least as to scholarship, I do not want to see continual-for-life "performance review" coupled with group-determined criteria that would attract people looking for someone to manage their lives. I want those other-directed aspirants to go elsewhere—far away from students—please.\textsuperscript{217}

Probably one's views on all such matters come down to whether one is more inclined to trust the unbridled individual or the bridles of bureaucracy. If one is wary of the latter but thinks most individual faculty members worthy of trust, one is apt to applaud or at least to accept tenure and its corollary, the self-directed, self-regulated senior scholar. If one places her sense of "Gotcha!" Olswang and Fantel observe, "Such reasoning equally applies to reviews of tenured faculty."\textsuperscript{Id. at 29.}

The analogy to lawyer recertification has its problems. Unlike a lawyer, or an eye surgeon or an aircraft mechanic, a scholar \textit{qua} scholar has no specific human client whom she places specially at risk. Unlike most work of a client-serving lawyer, throughout her career a scholar's work is routinely subjected to public peer scrutiny before her ideas are specially relied upon.

The what's-fair-for-the-administrator-is-fair-for-the-faculty tour de force is especially troubling. The work of the scholar and that of the administrator are as similar as night and day. The latter's duties, although creative, are in direct day-to-day servitude to the often quite specific wants and needs of his boss or bosses. And he retains his administrative position solely at the pleasure of that or those parties. He is, \textit{in his administrative role}, the perfect opposite of a free scholar.


\textsuperscript{216} No matter how rigorous the probationary period, and though tenure is not a license for sloth, the job will of course also attract its share of loafers. But that is true of any feasible job profile, including the most bureaucratic. Does a bureaucracy exist that fails to attract its fair share of persons skilled in the art of doing and thinking as little as possible and otherwise "beating the system"? And all that sinning lacks even the counterblessing of freedom.

\textsuperscript{217} Law schools' responsibilities in the education of future legal professionals make a climate of exuberantly free scholarship more rather than less essential. Imposed as a lifetime mandate, a definition of legal scholarship less ideologically open than that urged in this article promises educational impoverishment as part of its political and academic tyranny.
confidence in committees and/or in chains of command, one is apt to prefer permanent probation, reviews of everything, and an enforced consensus of acceptable scholarly forums, forms, and methods.

Either way, one must trust. And consistency is improbable. Those who cannot trust a tenured individual to manage his own scholarship somehow acquire the faith of a child when they meld such individuals into The Benevolent Bureaucracy. Others, like me, seem to idealize the individual yet incurably fear her bureaucratization.

I am, however, not so romantic as always to opt for the individual. I often place my trust in bureaucracy. But not when what I most want is individual creativity. And in scholarship individual creativity is what I most want.218

But perhaps I am totally wrong.219 Perhaps, little by little, Management must triumph over all else.220 If that must happen, then even I, with all my verbosity, have nothing very earnest to say. I can only remember some post-freedom words from 1984:

Something changed in the music that trickled from the telescreen. A cracked and jeering note, a yellow note, came into it. And then—perhaps it was not happening, perhaps it was only a memory taking on the semblance of sound—a voice was singing:

"Under the spreading chestnut tree
I sold you and you sold me."221

218. Individual creativity in no sense precludes free collaboration. Indeed they often enrich each other.

219. Thus whatever the reader’s views, I should be most grateful to receive them.

220. And the commercial media will be totally (not just, as now, mostly) pornographic, sexually and otherwise, and all the universities and their well-managed professors, and the other “think tanks,” will be totally co-opted. Much as the original Kurt Vonnegut warned, the RAMJAC corporation will have absorbed them all. It would resemble Marcuse’s one-dimensional-man society, sans even peaceable subversives.

221. George Orwell, Nineteen Eighty-Four 296 (New York, 1949) (last two lines italicized in original).