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Drawing (Gad)flies: Thoughts on the Uses (or Uselessness) of Legal Scholarship

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DRAWING (GAD)FLIES: THOUGHTS ON THE USES (OR USELESSNESS) OF LEGAL SCHOLARSHIP

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In this essay, I argue that law schools should continue to encourage and support wide-ranging legal scholarship, even if much of it does not seem to be of immediate use to the legal profession. I do not emphasize the relatively obvious point that scholarship is a process through which we study the law so that we can ultimately make useful contributions. Here, rather, I make two more-subtle points. First, legal academics ought to question the priorities of the legal profession, rather than merely take those priorities as given. We ought to serve as Socratic gadflies—challenging rather than merely mirroring regnant assumptions about what ought to matter in and to the law. Second, the freedom to serve this role is a large part of what attracts people capable of doing so to academic life. If we were to insist that legal scholars think about only those things that already matter to the legal profession, we would not attract the people we most need—people willing and able to help us rethink our assumptions about what ought to matter.

I. QUESTIONING THE PRIORITIES OF THE LEGAL PROFESSION

A. Welcoming Scrutiny

The apparent uselessness of much legal scholarship is a recurring theme in the legal profession. The persistence of this critique is well illustrated by D.C. Circuit Judge Harry Edwards, who followed up his notorious 1992 Michigan Law Review article with a recent piece in the Virginia Law Review making essentially the same point—that legal scholarship is too far removed from, and thus of little use to, the bench and the bar.[1] This debate has been rekindled in the academy by Jeffrey Harrison and Amy Mashburn, who have argued that citation rates overstate the influence of scholarship and have suggested that we increase "the accountability of legal scholars and the utility of what they

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1. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Harry T. Edwards, *Another Look at Professor Rodell's Goodbye to Law Reviews*, 100 VA. L. REV. 1483 (2014).

produce."[2]

As with the broader pressures law schools are facing, we should embrace and learn from this scrutiny. What follows, therefore, is not a defense of the status quo. It is clear, for example, that citation-counting is a poor way to measure the value of scholarship, that much scholarship is driven by career advancement rather than authentic inquiry, and that much research is of little utility. We should welcome efforts to help us focus our work. Moreover, responding thoughtfully to questions about our research can help us be more thoughtful about the appropriate role of legal education as a whole. In that spirit, this essay aims to highlight three related ideas about the uses (or uselessness) of legal scholarship.

First, at least some legal scholarship should question, rather than accept as given, the current aims and priorities of the legal profession and policy-makers. We should be willing to rethink, rather than merely reflect, current ideas about what matters—about what is or is not truly useful. Our aim is and should be, at least in part, to turn the attention of lawyers, judges and policymakers towards aspects and implications of the law that they do not yet see as important. Thus, some of our work will, by definition, initially strike the legal profession as useless—at least if we are doing our job. In this way the disjunction between legal scholarship and the profession is a blessing as well a curse. Second, lawyers who have the capacity to do this sort of thinking choose academic careers largely so that they can exercise that capacity. Support for a certain amount of wide-ranging scholarship thus attracts and helps retain scholars who can challenge and rethink assumptions of the profession about how the law works and what ought or ought not matter. Third, legal academics with this ability and inclination can—if they are also good and dedicated teachers—help students develop useful and practical versions of that same capacity.

B. Megalegoria

Legal academics serve the profession best and most fully when we do not simply help lawyers and judges do what they already think matters, but rather when we question what they are doing and encourage them to rethink what ought to matter.

"Megalegoria" is the term used by Xenophon to describe the way

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2. Jeffrey L. Harrison and Amy R. Mashburn, *Citations, Justifications, and the Trouble State of Legal Scholarship: An Empirical Study*, (University of Florida Levin College of Law Research Paper No. 15-2, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569499.

Socrates spoke to the Athenian jurors at his trial.[3] It means, literally, "big-talking," and carries connotations of arrogance, self-importance, and overstepping one's appropriate role. Similar charges are frequently leveled at legal academics, and with much more justification. We are not Socrates. It is good, if discomforting, to be reminded of that fact regularly by the profession we serve and by the students we teach. There is, however, a sense in which we can and should emulate Socrates. He was dedicated to the service of his city—first on the battlefield and later by doing the more dangerous work of persistently questioning that city. He questioned not only his city's practices but also its aims and priorities. As a self-styled gadfly, he served his city not by thinking and talking about what the citizens already valued, but rather, by challenging their ideas about what they should value. At least some law professors should do the same, and we should be grateful if the consequence of doing so is merely that we are sometimes seen as out of touch or annoying.

In this light, there is a sense in which critics of legal academia may actually *overstate* the value of much legal scholarship. They seem to assume that, if legal research is actually read and put to work by the profession, it is therefore of at least some value. But, that is not necessarily the case. Being useful to people's work is not, for that reason, worthwhile unless the work is itself worthwhile. To the extent that we are merely Lilliputian law professors helping people argue about which end of the egg to break—however instrumental we might be to that end—we are not doing anything of actual worth. Scholarship that takes as given the current aims and priorities of lawyers, judges, and policymakers is not doing any of them the service they need and deserve. And this means that if we are doing our job we will do some work that lawyers, judges, and policymakers do not yet think worthwhile. Rather than being defensive, we should focus on better explaining why our ideas are important.

Lawyers engaged in particular work for particular clients or constituents are not often in a good position to step back from that work and ask how the law fits together more broadly. Less often are they in a position to question whether and how the enterprise as a whole is serving the community. But as legal academics we are in such a position. We serve the profession and the community best and most fully when we reflect upon, rather than merely reflect, accepted ideas about what is or is not useful. And providing that service requires several things: first,

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3. XENOPHON, XENOPHON'S APOLOGY OF SOCRATES (David Konstan, ed. , Bryn Mawr Commentaries, Inc. 1987).

that we have in the law schools authentic, creative scholars who are capable of seeing familiar things in new ways; and second, that we support and encourage students to do so as well.

II. ATTRACTING NEW PROFESSORS WHO HAVE THE NECESSARY SKILLS

A. Drawing (Gad)flies

Lawyers who are not only willing but also truly able to rethink and challenge the aims and priorities of the profession in the way the profession needs and deserves are hard to find—such lawyers have many career options other than teaching law.

At his trial, Socrates said that if the Athenians were to kill him, they would not easily find his like again;[4] many of the jurors, no doubt, hoped he was right. But the serious point behind Socrates's remark was that it is not easy to find and retain gadflies who are both capable of rethinking accepted priorities and willing to spend their lives doing so. And the situation faced by law schools in hiring teachers is in some ways more difficult still. Our first and essential mission is to help prepare young lawyers for the practice of law, so our gadflies must be also and above all good teachers.

It is clear, however, that the brightest and most creative young lawyers are not always or necessarily the best teachers. That is why the capacity to rethink the basic aims and assumptions of the law is only one of many things we look for in teachers. It is why we employ a range of teachers who bring to bear a range of capacities, knowledge, and experiences. The particular talent I emphasize here is just one of many things we need on law faculties. And of the potential academics who have this particular capacity, fewer still also have the other traits necessary for an excellent law teacher—a thorough knowledge of their subject, an understanding of and appreciation for the work our students will do, strong communication skills, work ethic, and the like.

As much as we like to joke about how "those who can't do, teach," the fact is that people with these capacities have many options. And many of these options are more lucrative and/or offer an opportunity to make a more direct and immediate impact on the community. We need at least some of them to come into teaching. And what brings them into teaching is in large part the opportunity to work on the things they

4. PLATO'S APOLOGY OF SOCRATES: A COMMENTARY 93 (Paul Allen Miller & Charles Platter, eds., University of Oklahoma Press 2010).

believe truly matter. If they wanted to think and write about only those things that a client or constituency already values, and only in ways that client or constituency would immediately embrace, they would go to work in private practice or government and do so.

Obviously, not any effort to encourage more useful or focused legal scholarship would immediately drive these teachers away; but some measures eventually might. For example, Harrison and Mashburn suggest that teaching loads be conditioned on a process of advanced submission and approval of specific research projects based on their perceived usefulness.[5] Set aside for the moment whether such a policy would be a good idea for any particular law faculty as currently constituted. A law school adopting such a policy would find it difficult to hire and retain the brightest and most creative young academics.

B. Corrupting the Youth

The capacity to think critically and originally about the law is also essential to authentic, Socratic teaching. If it lives up to its ideals, Socratic teaching can help future lawyers develop practical versions of that same capacity.

At least some law schools believe that this sort of teacher—who values the job because it supports not-yet-valued research—should still form an important subset of our faculties. I should emphasize the terms *some* and *subset*. Not every law school will want to attract or retain this sort of law teacher. And no law school should want all of its classes taught by such teachers. Different schools have different views about who should be teaching law, and thus will have varying perspectives about the importance of attracting and retaining the sort of potential Socratic gadflies I have described here. And our views on who should be teaching law will in turn hinge on our views about the appropriate aims of legal education more broadly.

Thus, the question of whether and how to support scholarship forces us to think also about how and what we hope to teach. What knowledge, skills, and capacities do we most want our students to develop? The first and most obvious answer, of course, is that our students need to learn the law—doctrine, procedure, and the like. Teaching the substance of the law is our essential mission, and nothing I say here is meant to suggest otherwise.

But, of course, our aim is not merely to teach legal doctrine and

5. Harrison & Mashburn, *supra* note 2, at 61–62.

procedure. Along with the substance of the law in any particular class, we hope to help our students develop capacities that will serve them throughout their careers. Some of those are relatively narrow professional skills, but others are broader and deeper—intellectual capacities and habits of mind that will transcend any given subject matter. One such capacity is a variation of the one I have described above—the ability to see familiar issues in a new light or from a new perspective. We hope that our students will learn to think carefully but creatively about legal issues—to reexamine, rather than merely track, how those issues have previously been framed. We hope they will learn to see new aspects of, or relationships between, issues.

This may seem far removed from the practical work of the law. It may thus be suggested that most law students just need to learn the law as it is, and we are wasting their time encouraging them to think creatively about the law and its aims. That view would be short-sighted and would sell our students short. While the ability to see familiar issues in new ways is just one of many capacities a lawyer needs, it is a valuable and practical capacity indeed. Although practicing lawyers may not have motive or opportunity to rethink the basic aims and assumptions of the law, we should treat and teach each student as if he or she is capable of doing so. More to the present point, all of our students will benefit from nurturing this capacity in ways that will serve them in the work they do. Every day, lawyers solve problems, serve their clients, and benefit society by seeing familiar issues in new and helpful ways—if, that is, they have acquired the capacity to do so.

Thus, a teacher need not only have and be willing to pursue fresh insights, but must also see and nurture such insights in students. Even the brightest students will have just seeds of ideas—not fully developed theories, but rather tentative, fresh perspectives. We fail our students badly when we miss or dismiss a potential insight because it is not framed in the way we have come to expect. We should recognize a nascent insight, even if it is coming from a very different perspective—*especially* if it is coming from a very different perspective. That is a precious moment in the intellectual life of a young lawyer. We should seize it. We should be able to grasp the heart of what the student is trying to get at, and then press the student to clarify it, explain it, and explore it. This is what nurtures the capacity for creative and critical thinking—that is also clear and careful. And, crucially, we must do this in ways that further and enhance, rather than compromise or distract from, the core mission of teaching the doctrine and skills everyone in the class needs. I explore this vision of teaching in a companion *Caveat* essay—*The Seventh Letter and the Socratic Method*, 49 U. MICH. J.L.

REFORM CAVEAT 52; so suffice it to say here that it is this sort of teaching that merits being called Socratic, and which makes a legal academic useful not just as a gadfly to the profession but also as a teacher to future professionals.

C. Know Thyself

Our obligation is to do for the profession what it needs rather than what it wants. But, we can learn a great deal from listening carefully to questions and criticisms about the value of our work because that forces us to think more deeply about what we do.

In evaluating the considerations that I have highlighted here, it should be acknowledged that different law schools may have different aims. Those of us who teach law and participate in law school governance should ask ourselves what our aims are. What is our vision of legal education? How do we conceive of our roles as scholars and teachers? What aspirations do we hold for our students? How much do we value, if at all, the capacity for insightful, authentic thinking about both the operation and aims of the law? More broadly, along with doctrinal knowledge and professional skills narrowly defined, what deeper traits and capacities do we believe our students should strive to develop? These questions, of course, are relevant not just to our thinking about whether and how to encourage legal scholarship, but also to a range of questions about legal education. This is why thinking about this particular issue can help us conceive of legal education more broadly. This is why we should welcome, rather than respond defensively to, the hard questions from the profession.