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A Quartet of Essays on Scholarship

David Barnhizer



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A Quartet of Essays on Scholarship by

David R. Barnhizer

Professor Emeritus of Law, Cleveland-Marshall College of Law

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Introduction: Law, Power, and Legal Scholarship

Law is a form of politics made concrete. It both reflects and generates political values and positions in ways that, in a complex Rule of Law society that has lost its shared values and ability to communicate and negotiate based on commonly held norms, is an engine that creates and allocates power and duty. Oddly enough, many of the interests that are now relying on the Rule of Law as the justification for their positions would be complete “losers” if their arguments and institutional manipulations were not successful. “Law”, writ large, is the only thing that underpins such issues as gender and sexual rights, racial preferences, wealth redistribution and so much more. Given the character of law as the (theoretical) source of value and the instruments of implementation it is inevitable and appropriate that legal scholars are political theorists and critics. They are responsible for expressing their carefully developed insights through the mechanism of legal scholarship. The problem is that the discourse has become unbalanced and the discussion one-sided.

Law is a manifestation of power and the best scholarship done by law school academics inevitably relates to the exercise of the power and force of law. Lawrence Friedman explains the connection thus: “it is through law, legal institutions, and legal processes that customs and ideas take on a more permanent, rigid form. The legal system is a structure. It has shape and form. It lasts. It is visible. It sets up fields of force. It affects ways of thinking. When practices, habits, and customs turn into law, they tend to become stronger, more fixed, more explicit.”¹ Explaining, critiquing, influencing and challenging the aims and interactions of law and power are the primary responsibility of legal scholars, that which legitimates their claim to tenure and privilege within the university.

The reality of group behavior is that power is defended if one possesses it, sought if one desires or needs it, and undermined when the scholar and the reference group with which a scholar identifies successfully engages in a strategy of “softening up” the foundation principles and assumptions of competitors. In his book, *Power*, Adolf Berle warns that control of institutions is the only way by which people can extend their power beyond the limited reach of their fists or guns. Those collective identity groups that are seeking to capture the ability to dictate rules to others or to protect themselves against others’ control create strategies to gain possession of the institutions that make and enforce the rules or laws.²

While it is appropriate and necessary that legal scholars include the political in their work, including the politics of justice and a critique of unjust elements of the system, it is inappropriate that scholars become so possessed by the political that they lose their fragile objectivity in the passionate embrace of political agendas. Our job is to understand and

¹ Lawrence Friedman, *American Law* at 257.

² Adolph A. Berle, *Power*, at 92 [1967].

critique the political dimension of law, not to *become* the politics themselves. In many of its aspects law is a form of “applied philosophy”. A result of our succumbing to the lure of the intensity and celebrity of the political sphere is that we have gone from a pseudo-intellectual culture characterized by a false claim to Langdellian science to an incoherent *melange* without a core methodology or standards of evaluation.

I. A Preliminary Note on Five Scholarly Ideals

Here I briefly describe five ideals or forms of scholarship. I am not arguing a priority for any single ideal at this point and recognize that different disciplines conducted by varying scholarly schools of thought or methodology would consider some of the ideals irrelevant or even illegitimate. Nonetheless they are being offered as one way to look at what scholars do in the pursuit of knowledge or in the attempt to persuade and implement what they consider to be reform of social conditions they consider unjust. I also want to make it clear that the dividing lines between the ideals are not entirely neat or that there is a mixing of forms in some contexts. Yet I do think that, as expressed, the five ideals represent a set of distinct orientations that produce a different kind of scholarly behavior and output as the primary characteristic of what the particular scholar or collectivist school is doing.

Each of the five scholarly ideals can offer a legitimate orientation depending on the degree of bias and the context of their use. The problems arise when the ideals are confused and inappropriately commingled. When this occurs the result is an incoherent muddle. This is because even when operating at its best each ideal serves a different scholarly mission and generates a distinct product and arguably in some instances requires a different kind of person filling the role of the scholar. A consequence is that there are no consistent intellectually based standards by which to judge the merit of a scholar’s work when it is being done in service of a different form of the university ideal than that possessed by evaluators who are not part of a school or collective. Serious problems also emerge when scholars are activists and advocates who tend toward the extremes of a strongly held “cause” because effective advocacy almost invariably involves degrees of overstatement and distortion as part of seeking to influence others and advance agendas.

At the beginning it is helpful to realize that the five versions of the scholarly ideal produce different forms of intellectual work with distinct goals and motivations. The scholar engaging in such activity can vary dramatically in terms of what the individual is seeking to achieve through his or her research output and actions that might be taken related to the findings reflected in that product. Similarly, there is a diverse set of targets at which the work is directed. These targets include communicating ideas and knowledge to other scholars who are invested in a specific sub-discipline. They also include overt (and covert) attempts to influence and reshape the behavior of institutions the individual scholar or scholarly collective considers to be a means through which changes thought necessary can be achieved. The five ideals are:

1. *Development and pursuit of original knowledge for its own sake*
2. *Preservation, refinement and transmission of the best forms of knowledge*
3. *Objective social critique*
4. *Individual activism*
5. *Collective activism.*

These ideals are not simply a reflection of what has been traditionally thought of as the dichotomy between “pure” and “applied” research. Nor are they necessarily on a linear continuum in which each is a variant or extension of the other. The simple fact is that each ideal in its most strict sense is different in kind and not only degree. Each represents different values, assumptions and commitments as to what is involved in the central role of the scholar.

Each ideal, including the two long-cherished ideals of the discovery of new knowledge and the refinement, preservation and extension of existing knowledge, has often been honored more in lofty rhetoric than in the reality of what most scholars actually do.³ Even our supposed core paradigm of the pursuit of “pure” scientific knowledge is not quite as pristine as some would have us think. Robert Wolff reminds us, for example, that:

Orthodox science is “established” in our society in just the way that particular religious creeds have been established in earlier times. The received doctrine is taught in the schools, its expounders are awarded positions, fellowships, honors, and public acclaim; dissenting doctrines ... are excluded from places of instruction, denied easy access to media of communication, officially ridiculed, and—in the case of medical practices—even prohibited by law from translating their convictions into action.⁴

Regardless of academic rhetoric, universities are powerful institutional systems that are as doctrinaire and hidebound in their behavior as any other institution whose beneficiaries are seeking to protect vested interests or simply defend that with which they are most

³ I have written a fair amount on the nature of the university and the role of scholars. See David Barnhizer, “The University Ideal and the American Law School,” 42 *Rutgers L. Rev.* 109 (1989); “A Chilling of Discourse,” 50 *St. Louis University L. J.* 361 (2006); “Truth or Consequences in Legal Scholarship,” 33 *Hofstra Law Review* 1203 (2005); “Freedom to Do What? Institutional Neutrality, Academic Freedom and Academic Responsibility,” 43 *J. Legal. Ed.* 346 (1993); “The Justice Mission of American Law Schools,” 40 *Cleveland St. L. Rev.* 285 (1992); “The Purposes of the University in the First Quarter of the Twenty-first Century,” 22 *Seton Hall L. Rev.* 1124 (1992); “The University Ideal and Clinical Legal Education,” 35 *New York L.J.* 87 (1990); “The Revolution in American Law Schools,” 37 *Cleveland St. L. Rev.* 227 (1989); “The University Ideal and the American Law School,” 42 *Rutgers L. Rev.* 109 (1989); “Prophets, Priests and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America,” 50 *Pitts. L. Rev.* 127 (1988).

⁴ Robert Paul Wolff, *The Poverty of Liberalism* 16 (1968).

familiar and on which their training is based and reputations sustained. This is consistent with Keynes' conclusion that most university faculty are little more than "academic scribblers" who live their lives content to operate within the safe confines of the ideas and reward system in which they were initially indoctrinated and from which they extract benefits.⁵ While the ideal of the pursuit of knowledge for its own sake is frequently offered as a justification for independent research and scholarship, the likelihood of individuals behaving in full accord with such a strongly principled norm depends on the incentives and disincentives to which they are subject.

The University as a Simultaneously Symbolic and Adaptive Institution

Richard Hofstadter reminds us: "*the university is only a symbol of a larger and more pressing problem of the relationship of intellect to power: we are opposed almost by instinct to the divorce of knowledge from power, but we are also opposed, out of our modern convictions, to their union.*" Hofstadter also concludes that scholars have increasingly sought the solace of celebrity and "relevance" as a substitute for independence and originality.⁶ Peter Drucker offers a vital point in his explanation that what is happening represents the "new reality" of an increasingly pluralist democracy, concluding that: "*The new pluralism ... focuses on power. It is a pluralism of single-cause, single-interest groups—the "mass movements" of small but highly disciplined minorities. Each of them tries to obtain through power what it could not obtain through numbers or through persuasion. Each is exclusively political.*"⁷

Think about the effects such "realities" have on the scholarly activity of individuals and groups determined to advance causes they hold most dear. Nor is this in any way a defense of how scholars have behaved before now. My point is that many of those engaged in the scholarly function, particularly in the disciplines Crane Brinton defined as *non-cumulative*, have changed into a set of people whose agendas are more political than intellectual and whose interests are being defined by the aims of a collective movement rather than independent thought.⁸

Then and now, within the institution of the university whose scholars claim a commitment to the pursuit of "pure" knowledge and full intellectual honesty, there is very little purity, honesty or even self-awareness about how the mission of the scholar is corrupted. Richard Hofstadter may have identified the root of the problem in his explanation of the inherently non-intellectual nature of the modern pursuit of knowledge, including the work of most university professors. He concludes:

⁵ John Maynard Keynes, *The General Theory of Employment, Interest and Money* 383, 384 (1935).

⁶ Richard Hofstadter, *Anti-Intellectualism in American Life* 427 (1963).

⁷ Peter Drucker, *The New Realities* 76 (1989).

⁸ Crane Brinton, *Ideas and Men: The Story of Western Thought* 516, 517 (1950) suggests why we have failed to develop a more integrative form of knowledge about humans-in-community and as individuals: "logical positivism asserts that the only valid kind of knowledge is cumulative knowledge, the kind one finds in natural science." He concludes, "The logical positivist tends to regard all traditional philosophical thinking, the kind involved in fields like metaphysics, ethics, political theory, even most epistemology ... as a complete waste of time."

[T]he work of lawyers, editors, engineers, doctors, indeed of some writers and of most professors—though vitally dependent upon ideas, is not distinctively intellectual. A man in any of the learned ... professions must have command of a substantial store of frozen ideas to do his work; he must, if he does it well, use them intelligently; but in his professional capacity he uses them mainly as instruments. *The heart of the matter ... is that the professional man lives off ideas, not for them. His professional role, his professional skills, do not make him an intellectual. He is a mental worker, a technician.*⁹

The Increasingly Ideological Nature of the University

Much of what is going on among academics working in the “soft” disciplines of law, philosophy, social studies, political theory and literature is ideological. As such, it seeks to influence social behavior and has an impulsion toward taking action at its core. In that world it is fair to describe the use of ideas as “weapons” fashioned to overcome opponents.¹⁰ For scholars operating from an ideological base they have already decided that change is needed and their work aims at achieving what they consider necessary. But since it is far more likely that the coordinated efforts of groups will be able to mobilize the pressures and momentum involved in strategies for social change, activist scholars inevitably tend toward enlisting in a collective rather than engaging in individual action. For those possessed by an ideology this behavior seems natural because it is change they are seeking rather than knowledge.

Daniel Bell reminds us: “Ideology is the conversion of ideas into social levers.” He adds: “*For the ideologue, truth arises in action, and meaning is given to experience by the ‘transforming moment.’ He comes alive not in contemplation, but in ‘the deed.’*”¹¹ In our modern academic culture, interest groups of all persuasions are engaging in exchanges based on propaganda and stereotypes and increasingly, activist scholars who are allied with specific identity factions and who are skilled at using words as weapons, are central participants in the conflict. In that intensified context legitimate criticism of the flaws in our social institutions easily slides toward fanaticism and resistance to the ideological critique is scorned as ignorant bigotry. Some of our most important social disputes have drifted toward the extremes. I am, for example, still waiting for the so-called “dialogue on race” to begin, as opposed to the “slings and arrows” thrown about by bigots and radicals of all ethnic backgrounds. Whether we are even capable of actually discussing issues in the “tinderbox” of modern discourse is questionable to the point where everything of consequence is a matter of political power struggles and very little that scholars say is free of an ideological “taint”.

The consequences of the clash of ideologies have been unfortunate from the perspective of the integrity of the university and its scholars. Maxine Greene warns that slogans and

⁹ Richard Hofstadter, *Anti-Intellectualism in American Life* (1963).

¹⁰ See, e.g., Max Lerner, *Ideas Are Weapons: The History and Uses of Ideas* (1991).

¹¹ Daniel Bell, *The End of Ideology* 370-371 (1960).

propaganda have replaced real dialogue. She describes slogans as, “rallying symbols” that “in no sense describe what actually exists, yet they are taken—wishfully or desperately—to be generalizations or statements of fact.”¹² Consider Camus’ observation about the need to keep sufficient distance from the heated conditions of society in order to retain a clear perspective. He writes: “[I]t is not possible to be a militant in one’s spare time. And so the artist of today becomes unreal if he remains in his ivory tower or sterilized if he spends his time galloping around the political arena.... [T]he writer must be fully aware of the dramas of his time and that he must take sides every time he can or knows how to do so. But he must also maintain or resume from time to time a certain distance in relation to our history.”¹³

The Search for Security and Power Is Easier Than the Creative Pursuit of Knowledge

If one lacks the courage or insight required for original thinking true intellectual freedom can be a curse rather than a blessing since it forces you to become aware of your limitations. The “solution” for some is to work in a system characterized by a received orthodoxy that takes its own legitimacy for granted, lacks self-awareness and never tests itself against its lofty rhetoric. This allows a university intellectual to “have his cake” of status and lifetime employment through tenure without using his talents in an attempt to create true and meaningful knowledge. True creativity and insight is considerably more rare than we might hope. Even when we manage to do work early in our careers that “shows promise” to other scholars, we often find ourselves pursuing “safe” topics in an increasingly politicized university or find that we have said all we had to say in that early burst of productivity that earned the boon of lifetime job security.

Belying the image of scholars and intellectuals as courageous moral beacons or as deeply committed to the pursuit of truth wherever it might lead, Diekema identifies self-interest as at the core of the problem, reasoning: “*Self-censorship is often a matter of personal convenience for faculty. They simply assess the potential costs before speaking out....*”¹⁴ Scholars operating in a culture filled with implicit inhibitions against pursuit of a particular strand of knowledge with rewards distributed for following the agenda of the political orthodoxy distort not only how we interpret knowledge but even what knowledge we seek. Such an environment also creates a risk-averse unwillingness to critique colleagues’ work. I have had law faculty from various institutions tell me that they “hid” positions until they were awarded tenure out of fear that an unpopular position would cost them votes. The same applies to assessing others’ work because academics have long memories and thin skins.

Risk aversion is found throughout American universities.¹⁵ Scholars fear the consequences of writing something that will displease members of an academic political

¹² Maxine Greene, *Teacher as Stranger: Educational Philosophy for the Modern Age* 70 (1973).

¹³ Camus, *Demain* interview, in *Resistance, Rebellion, and Death*, at 238.

¹⁴ Diekema, *Academic Freedom*, *id.*

¹⁵ Consider the comments of Arthur Koestler, in Diekema, *Academic Freedom*, concerning the defenses raised by what he refers to as *academic mediocrities* who fear anything new will destroy their intellectual fiefdoms and expose their inadequacies.

collective. This apprehension or “shaping” causes them to either write cautiously or alter their analysis to appeal to one of the more powerful interest groups. There are many topics that are simply taboo and are avoided by any university academic interested in remaining employed. Nor, given the difficulty and risk involved in attempting to achieve original insights rather than being content to fit comfortably into an existing niche, is it surprising that some scholars submerge themselves in intellectual or political groups. For many scholars the situation has become one of risk avoidance rather than intellectual independence and pursuit of deep and creative insights into the human condition. This stifling of intellectual freedom and honesty occurs during a scholar’s most important formative period in which career agendas are being set and a base of intellectual capital created.

Becoming part of a scholarly community with an accepted focus protects a scholar’s employment position and also offers a template for what is considered to be acceptable work. When this occurs, and it is a common element in American law schools, the members of such interest groups automatically praise whatever a member-scholar says. This phenomenon occurs because it is seen as supporting the collective’s agenda, validating and increasing the institutional power of its members. It seems to advance “the cause” even if the actual situation is too often that members of a scholarly collective are mainly talking incestuously with each other by “preaching to the choir”. As to true discourse, it is a victim. As Jacques Ellul tells us: “modern man is beset by anxiety and a feeling of insecurity.... The conflict of propaganda takes the place of the debate of ideas.”¹⁶

One inevitable effect is that the collective explicitly and implicitly dictates the scope of a scholar’s research agenda and in doing so provides a kind of career “sanctuary” while limiting and foreclosing a full range of inquiry and experimentation. This occurs because some topics advance the collective’s mission while others are taboo because they have the potential to undermine the arguments being made by the group. While this is important for group solidarity it is a contradiction to what we have long considered to be the mission of the scholar.

Stereotypes, Propaganda, Slogans and Collectivist Repression

I equate part of what is going on in the rise of scholarly collectives committed to activist matters as bordering on a form of stereotypical “group think” in which otherwise intelligent people trade their intellectual independence and depth of inquiry for status and security. In *Propaganda*, Ellul reminds us: “A stereotype is a seeming value judgment, acquired by belonging to a group, without any intellectual labor.... The stereotype arises from feelings one has for one’s own group, or against the “out-group”. Man attaches himself passionately to the values represented by his group and rejects the clichés of the out-groups.... The stereotype, ... helps man to avoid thinking, to take a personal position, to form his own opinion.”¹⁷

¹⁶ Jacques Ellul, *The Technological Society*, at vii (1964).

¹⁷ See Jacques Ellul, *Propaganda* 180 (1965).

Although the names have changed and the interests being advocated by the activist collectives transformed, the problem with university integrity and scholarship is not entirely new. Bernard Meland placed much of the blame for what he saw as the degradation of modern scholars' intellectual integrity at the foot of universities' obsessive drive to achieve status, a goal not unrelated to academics' economic gain, ego, and ambition. He concludes:

[T]he concern for status in the academic world and, by this measure, in the world at large is of more serious consequence. The concern for status, we are told by our psychologically informed colleagues, is one of the basic human traits in the normal human community. To be recognized for what we are worth--this, it would seem, is a human requirement. Yet the concern for status in the academic world rarely achieves this level of restraint. To be recognized for what one is worth would, in many instances where status is dominantly a concern, be tantamount to being publicly disclaimed.¹⁸

The distorting effects of reward and status systems do not, however, stop scholars from engaging in self-deception as to the professed integrity of their intellectual pursuits or from using idealized rhetoric to defend their own positions regardless of their suspicions about how their work might be biased or corrupted by personal agenda or the power of "group-think". The self-deception and rationalization become easier when the scholar works within "soft" disciplines such as law, social science, literature, politics or the like, those Brinton referred to as *non-cumulative* because we are using the same concepts today that were developed and applied centuries ago. This is because those disciplines operate through layers of interpretation and opinion more than hard data capable of being tested through repetitive methodologies.

This criticism of the soft or non-cumulative disciplines does not mean there is any lack of bias, distortion or closed-minded opposition to new ideas and discoveries in the hard sciences. Bernard Cohen reminds us that: "*new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.*"¹⁹ The message is that if bias and control by dominant orthodoxies and "old boy networks" occurs even within the realms of hard science there is absolutely no chance that such biases would not be more pervasive in the "opinion-based" disciplines such as law.

Some Other Implications

Eric Hoffer reminds us that "faultfinding men of words" are the initial step in attacking an existing system. The aim of "faultfinders" is not to offer a full and balanced intellectual analysis of the truth of the system being critiqued but to undermine its stated principles and legitimacy.²⁰ As scholars move from detached positions to active and legitimate

¹⁸ Bernard E. Meland, *Higher Education and the Human Spirit* 7 (1953).

¹⁹ I. Bernard Cohen, *Revolution in Science* (1985).

²⁰ See Eric Hoffer, *The True Believer: Thoughts on the Nature of Mass Movements* 120 (1951).

engagement with the conditions of society there is an increasing risk that the scholar will lose perspective. The active role is one for which many scholars are ill prepared and one capable of changing the people who fulfill it. The activist role comes close to guaranteeing a skewing of perspective as assumption and bias increasingly influence perception and interpretation. The result will often be that the scholar becomes an advocate and rhetorician, even a propagandist, rather than a seeker of truth in the way demanded by the goals of the pursuit of original knowledge, the refinement of existing knowledge or honest and balanced critique of critical social issues. As this occurs, objectivity and detachment lessen and the work takes on a higher probability of being shaped by the scholars' personal opinions, by collective agendas, and by social goals and allegiances rather than intellectual clarity and honesty.

As Thomas Kuhn remarked, even in the strictest application of the scientific method to the conditions of what we are calling *cumulative* or scientific knowledge the researcher's process of observation alters the phenomena being observed.²¹ As we move further away from the application of strict methodologies and the measurement of *cumulative* knowledge phenomena to the "softened" material of *noncumulative* knowledge the dangers of subjectivity and distortion of the observed (and critiqued) reality due to the researchers' bias increase. This danger exists even for the scholar seeking to objectively critique society in a balanced way but expands significantly with activist scholarship and dramatically with the work of activist collectives housed within the university. In those activist realms the critique is often so personal that the scholar becomes a subjective element of the data being studied rather than an objective observer.

The scholar who is attempting to generate a balanced and objective critique of society for purposes of its regeneration and reform is not predominantly activist in focus as opposed to critical, explanatory and prescriptive. Social science can, for example, be used to inform our understanding of the truth of the conditions studied. The critical scholar's hope is that—once understood—this understanding of right and wrong will inform policy-makers and lead to changes that improve the conditions. But the difference is that the scholar's strategy of intellectual critique is still based on careful use of a shared and accepted methodology and concern for the authenticity of what is discovered. In this context the scholar remains at a remove from the work and while it is political in nature in that it critiques a specific sphere of human activity it continues to retain a significant degree of objectivity.

The identification of injustices and the use of social science and analysis to formulate potential remedies allow the scholar to engage in relatively traditional forms of analysis because the dominant mode of inquiry is explication and testing. But as the detached, critical and evaluative scholar moves from that active but traditional posture toward becoming an activist-scholar who demands the political implementation of solutions that inevitably require the reallocation of social goods, power and responsibility, conflict is heightened. This is also the point at which the individual becomes less the scholar and

²¹ See, Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Enlarged edition, University of Chicago 1962, 1970).

more of the political activist—converting the discourse into a form and style that is highly manipulative, goal-oriented and rhetorical rather than balanced, explanatory and illuminating.

The risk is that activist scholars, particularly those who are members of a collective, may have decided on a preferred version of the truth before they offer their conclusions--or even before they initiate their research. Responsible critical scholars offer insights that demonstrate deficiencies or explain paths by which solutions can be created or implemented. They analyze with balance and integrity and demonstrate clearly the pathway followed to reach the conclusions. While the scholar critiques the society and political process, the choice as to whether those criticisms are adopted is left to the society itself. The critical scholar's work is essentially complete at the point of the critique, including the crafting of effective strategies and solutions.

The argument being made here is not that activism or collective organization within the university is always illegitimate--in fact challenging abuses of power is a key function of an institution responsible for pursuing not only truth but also social justice. The question is about balance and the clear tendency of dominant orthodoxies and ideological collectives to distort and suppress by subtle influences as well as overt sanctions. In a corrupted culture it becomes more important than ever for the university and its scholarly voices to "speak truth to power" and it cannot do this if its scholars succumb to the mania of ideology and the corruptions of those in power who will always try to use scholars' voices for their own ends.

While activism is an essential element of the modern university in a world increasingly driven by widespread propaganda, economic distortions, abuses of power and lies it also produces consequences for the scholar who, like Icarus risks coming too close to the "sun" of power, ideology and politics and metaphorically falls back to earth as the wings melt from the heat. The "sun" of scholarship was thought to be reason, evidence and an honest analytical process. If one is seeking to break down such long-standing assumptions about how to approach the truth of reality it is not surprising that the foundations of reason and evidence are targets. This of course brings us to the sometimes valid, but overstated, claims of postmodernism's assault on reason and truth as little more than a manifestation of discriminatory power.

A result of the assault by Hoffer's "faultfinders" is the weakening and even abandonment of reasoned discourse and the substitution of emotional criteria and political polemic. In this regard Jung warns: "*Rational argument can be conducted with some prospect of success only so long as the emotionality of a given situation does not exceed a certain critical degree. If the affective temperature rises above this level, the possibility of reason's having any effect ceases and its place is taken by slogans and chimerical wish-fantasies.*"²² Honest discourse, or even the attempt to engage in such activity is the victim. In part this is because the intention of the extreme activist "scholar" is to "speak to the choir" of similarly oriented activist-

²² C.G. Jung, *The Undiscovered Self*, 12, 13 (Mentor 1957). Translated from the German by R.F.C. Hull.

scholars or to support or expand a political movement located outside the university rather than to pursue truths.

II. *Red Giselle* and the Five Scholarly Ideals

The five ideals as discussed in *A Preliminary Note on Five Scholarly Ideals* are as follows.

1. *Development and pursuit of original knowledge for its own sake*
2. *Preservation, refinement and transmission of the best forms of knowledge*
3. *Objective social critique*
4. *Individual activism*
5. *Collective activism.*

Among the five ideals, I suggested three versions of the university scholar's ideal--the critique of society for purposes of its regeneration and improvement, individual activism, and collective activism—that are aimed primarily at creating a fairer and more just society within the scholars' frame of reference. A problem with these ideals, particularly the activist versions, is that both knowingly and subconsciously truth, evidence and accuracy become increasingly subordinated to desired outcome even to the extent that the activist scholar is unaware of what has occurred. It is also a challenge that critiques of such work on grounds such as excessive subjectivity, lack of evidence or overreliance on a personalized preference or emphasis on a skewed or limited dataset are considered as inappropriate because after all "every one knows" what the problem is and the issue is only about fixing the issue rather than revisiting it with comprehensive evidence and analysis that allows us to come closer to the truth of what exists.

As with any approach it is possible to use the methodology in ways that corrupt or undermine its core thesis. Abandoning commitments to such values as truth, accuracy, rational discourse and balance undermines the legitimacy of work purporting to advance the purposes of an ideal. Claiming that one is doing something that fits those commitments while hiding behind masks of elevated rhetoric is an hypocrisy that risks destroying the legitimacy of the specific undertaking itself while distorting the mission of the university world in regard to its commitment to truth, evidence, fairness and open discourse.²³

²³ Marcel writes: "The first ... observation to be made is that the fanatic never sees himself as a fanatic; it is only the non-fanatic who can recognize him as a fanatic; so that when this judgment, or this accusation, is made the fanatic can always say that he is misunderstood and slandered." GABRIEL MARCEL, *MAN AGAINST MASS SOCIETY* 136-137 (1969).

Arguments have even been made by some of the most activist scholars that such commitments are themselves mechanisms of repression and that concerns with truth, evidence, critical but fair analysis and honest discourse are the products of centuries in which those in power, i.e., “white males” have used such tools to maintain their dominance and discriminate against others.²⁴ Taking this position within the university means that politicized, ideological, arational and self-interested writing becomes “scholarship” when in fact in many instances it is what might be called “fugitive rubbish”.

Another element of some of this critical scholarship is that, as Seth Stephenson writes, the power to condemn is seen by the activist collectives as a one-way street. This has been demonstrated in university speech codes that reflect many academics’ and an increasing number of students’ agreement with the suppression of open discourse do to reasons of claimed insult, insensitivity, hurt feelings or the giving of offense. Following this path confers a veto power to individuals and groups that have increasingly stifled social communication while accelerating and intensifying the fragmentation of American society. Stephenson argues, *“These [university speech] codes have their roots in theories, which gained favor with campus radicals in the 1960s, contending that ‘[i]f the powerful and the weak were required to play by the same rules the powerful always would win.”* In other words, this theory goes, the disadvantaged need different rules. What’s more, these rules should extend to speech, not just to actions, because speech can be just as powerful and hurtful.”²⁵ Such intimidation of speech by aggressive and angry political movements have spread well beyond the Ivory Tower [although universities have been complicit in the process] to the extent our social discourse has been poisoned and virtually all our speech is characterized by slogans, stereotypes, propaganda and distortion even to the point of lies.

Red Giselle, Russia and the Power of Love

The distinction between the five scholarly ideals can be understood through an analogy to ballet. When I first taught in St. Petersburg, Russia a wonderful part of the experience was the opportunity to see a stimulating variety of classical and modern Russian ballet performances. Few would argue with the assertion that classical ballet in Russia is an exquisite experience performed at the highest level of artistic talent. In a sense, classical ballet is a sort of “time machine”. It offers the finest traditional forms of the balletic art to new generations, allowing audiences in the twenty-first century the same experiences enjoyed by theater attendees in 1755. The music, choreography, costumes, gestures and

²⁴ MARTHA C. NUSSBAUM, *CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION* 19 (1997) (“Socratic argument is suspected ... of being arrogant and elitist.... [T]he elitism is seen as that of a dominant Western intellectual tradition that has persistently marginalized outsiders. The very pretense that one is engaged in the disinterested pursuit of truth can be a handy screen for prejudice.”)

²⁵ Seth Stevenson, “The Thought Police,” January 2003, available at http://www.bostonmagazine.com/articles/the_thought_police/.

dance movement are identical to those of centuries earlier. This can be equated with the spirit of the second ideal of the university--the preservation and sharing of the highest form of knowledge in a manner that recognizes its worth and connects our culture and civilization across generations and centuries.

Of course, classical ballets were also innovative, creative and “new” when first offered, helping to construct new forms of the art and changing the culture within which they first appeared. This reflects some of the inevitable tension between what are being called the first and second ideals--the efforts to discover and create new knowledge and forms and the search for perfection in refining existing knowledge. The difference in perspective was captured as well as any in Ricky Nelson’s song *Garden Party* in which he laments the audience’s negative reception of his new songs by singing, “*If memories were all I sang, I’d rather drive a truck.*” The ideal of creating new knowledge cannot be stated any better.

The contrast between classical and modern ballet also helps clarify what I am talking about in the context of the knowledge role of the university and the various ideals that apply to the work of university scholars. Modern ballet is not *better* than classical--it is simply a *different* form. On one hand it is an interpretation of what *is*, and on the other an entirely new creation. But while modern ballet may shift the music, rhythms, themes, movements and the like, it still is derivative in that it takes from and depends on the underlying *technique* and ethos of ballet. But while the commitment to the underlying art form and staging at its highest quality remain essential elements, modern ballet also extends the form and even creates a new variation. It is therefore an experiment, but one that operates within the commitment to discipline of ballet and the technique of ballet. This is consistent with another ideal of the university--the quest to discover, create and develop--and a look to the future instead of the past.

In order to explain more specifically what I consider to be the differences between the five ideals I offer the work of Boris Eifman, a Russian creator of modern ballet with whose work I was enthralled when teaching in St. Petersburg. Eifman created adaptations of existing balletic works I consider brilliant in their scope and quality. Of the five Eifman ballets I saw in Russia one was called *Red Giselle*. *Red Giselle* focused on a ballerina who was caught in the transition from Tsarist Russia to the Soviet Union, including the darkness, repression and terror. In this work Giselle was loved by an agent of the Cheka, the forerunner of the KGB, and used her power as a seductive woman just as the Chekist used his power as an agent of the state. *Red Giselle* communicates the abuse of power and manipulation of humans, as well as the power of love as the Chekist allows Giselle to escape to Paris even though he wants to hold her for himself.

In *Red Giselle*, Eifman uses the power and technique of the ballet to convey powerful messages about people and power and people *in* power. The work is a critique of the darkness of unfettered power even while offering a glimmer of hope in the ability of even key parts of the state to retain parts of their humanity in a regime committed to inhumanity. *Red Giselle* illustrates a critique of society by its creator, Boris Eifman, and is consistent with the third “individualist” ideal of the university. But Eifman’s own

commitment is still grounded in technique, quality and excellence of the form--with the added element of a powerful message.

The differences as we move from the ideal of social critique to those of individual and collective activism are relatively easy to set out but difficult to know where to draw valid lines. In *Red Giselle*, for example, we admit there is a political and moral critique that is wise to heed. In a sense this can even be seen as a new form in which traditional knowledge is being conveyed so that perhaps it is a reminder or reaches new ears in a different and more powerful form. In this artistic vehicle it penetrates the psyche at a point other than the rational and can therefore be more deeply embedded.

Most of us also know at some level that government always tends to abuse power if left unrestrained. And we also know that the Soviet period carried with it severe abuses of power entirely inconsistent with its professed ideals. So *Red Giselle* as performed at the beginning of the Twenty-first Century builds on knowledge that is not new, even though it uses a newer art form as the vehicle through which to communicate its message. In the Russia of the present day *Red Giselle* is a reminder of the dangers of uncontrolled state power. But it is safer to voice the message at this time than at the height of the former Soviet Union. At least it was safer before Vladimir Putin consolidated his control and began to shut down Russia's instrumentalities of social criticism and free speech.

A very different situation is created if we move *Red Giselle* back in time ninety years to 1923 when the conditions portrayed were contemporaneous. At that point Eifman's work is not simply a new variation on the balletic art form or a cautionary political warning against a regressive form of government but a direct confrontation with the early Soviet regime it would have been attacking. Even in 2000 when the new Russia was in a state of potential collapse with calls for a return to some strong man leader who would help recapture the stability and power of the Soviet Union, Eifman's message was a reminder of the dangers of the Soviet system. Nor is it hard to envisage a reaction against Eifman by those seeking a return to the Soviet era. In 1923, however, *Red Giselle* would either never have appeared if created, or would never have been created inside Russia. If it had been we should expect Eifman to be quickly convicted of the ever-popular "crimes against the state" and eliminated one way or another.

Assume, however, that the 1923 fictional Eifman created the work and realized that it would never be allowed on the public stage due to its subversive nature. But being opposed to the Soviet State he wants his message to be communicated to those who share his perspectives and to educate others who may be willing to listen. So rather than try to present *Red Giselle* to the general public Eifman offers his ballet in private homes, in rural villages, and other hidden venues in order to convince others of the dangers of the USSR and the need to destroy or reform it. I suggest this describes a venture driven primarily by the message he wants to convey to the relevant political community in which he hopes they are moved to act, not by the balletic form itself. Here we have the individual activist ideal of the university.

Now shift this approach slightly to one in which Eifman creates a group of ballet composers and convinces them to orient their works around the common theme of abuse of power by the Soviet government and the need for reform or revolution. The members of this new movement look at each other's works and think about how they can be adapted to send the desired messages most effectively. Their focus is no longer primarily on the ballet as art form but on the message that can be sent through the use of the form. This, I suggest, represents the collective activist ideal which uses the art form to shape and communicate powerful messages and in which the form is primarily a means to an end rather than an end in itself. Similarly, the message is shaped by the collective rather than as an independent and creative act of the composers. Here also, the "truth" of the message being communicated is accepted *a priori* and the collective members are designing ways in which the greatest impact on the selected problem is achieved rather than concentrating on the quality of the underlying art form.

But what do we say if the power of the art form is controlled by the state and is used as a way to inculcate the supposed legitimacy of its rule to all citizens? When this happens we call the process propaganda because there is only one acceptable point of view and others are suppressed, deviants are eliminated or "re-educated", and the collective is intent not on the creativity of the art form but on its use to compel adherence to its point of view and acceptance of its sovereignty.

III. Demise of the "Free-Floating" Intellectual

Commitment to the values of individual intellectual freedom and independence has been increasingly degraded. Karl Mannheim used the concept of the "free-floating" or socially disconnected intellectual during the 1920s to describe those of independent mind who possessed the courage to critique power wherever their journey led. But Russell Jacoby says that even when first written: "Mannheim's defense of independent intellectuals earned him the ire of both left and right."²⁶ Jacoby goes on to suggest that: "If Mannheim's analysis of the "free-floating" intellectuals seemed questionable [even] in the late 1920s, eighty years later it is outright impossible. Today intellectuals are increasingly "attached," affiliated or institutionalized. Mannheim can [therefore] be seen as the last theorist of the independent intellectuals, not the first. *After Mannheim, the older vision of intellectuals as independent and rootless makes way for a view of intellectuals as dependent and connected.*"²⁷

The conflict between the five ideals of scholarship I introduced in *A Preliminary Note On Five Scholarly Ideals* and continued in *Red Giselle*--is due to a distinction between the first three ideals, those of discovery of original knowledge, refinement of existing knowledge and objective social critique, and the individual and collective activist ideals in which the "truth" of a scholar's proposition is largely (or entirely) accepted and the scholar often

²⁶ Russell Jacoby, *The End of Utopia*, at 110.

²⁷ Jacoby, *End of Utopia*, at 111.

becomes part of an effort to change the reality that has been critiqued. The distinction results in a difference not simply in degree or orientation but in kind.

The processes of individual and collective scholarship of an activist bent--are aimed at achieving preferred outcomes in which committed university-based intellectuals ranging from traditional legal scholars to "true believers" seek to influence systemic behaviors and reshape institutions in ways they consider more fair or just. Those presenting their positions inside the systems of scholarship are aiming to "win" rather than dispassionately and objectively offering all facts and arguments that would allow an independent fact-finder to determine the argument's actual truth. It is this commitment to "winning" that alters the nature of the scholarly enterprise.

A result is that we see the emergence of "cliques" of scholars. The problem at this point is that in many instances these "attached" scholars are not pooling their intellects in efforts to advance knowledge for itself but are in pursuit of particular political agendas. This by itself is not inevitably bad because creativity can be stimulated in some ways through the sharing of insights, but when the cliques are comprised of "true believers" and ideologues convinced of the rightness of their positions or submerged in a collective in order to gain the security and benefits of membership they constrain the full range of potential work by their members. Although we all yearn for the social justice many of these groups claim as their goal within the construct of issues a collective is advocating, something is lost in the trade off between political outcome and intellectual merit.

Similarly, the intensity of politics and ideology generates a deadening aura once those who believe deeply in a particular mission and agenda achieve a significant presence in an institution and gain the power to define agendas. It is not inappropriate to suggest that by their very nature many scholars are easily intimidated by the politics and assumptions of an intensely political faculty group trumpeting what they claim to be "moral" leverage. A result for some is to join the "in crowd". Others alter their own work. They do this to avoid conflict by suppressing themes they might otherwise pursue, choosing non-controversial areas of inquiry and making sure that they do not criticize anything of concern to the dominant cliques of "scholars".

The conflict for power among factions suggests strongly that postmodernists are correct about the historical fact that law is an instrument of interest group power. As one commentator observes, postmodern critics may not believe in a search for truth, but "[t]hey do, however, believe in politics—and most especially in identity politics." Pinsker further suggests that for postmodernists, "academic freedom" has come to represent the struggle for equality by these interest groups, while "truth" may be seen as an obstacle to that equality.²⁸ But such critiques seem oblivious to or even seek to obfuscate the fact that such behavior is intrinsic to anyone or any group who occupies a position in which power is wielded. This means that those who have been successful in challenging the older applications of power against them by what they consider discriminatory or self-interested

²⁸ Sanford Pinsker, "Tenure can rescue the academy," *Wash. Times*, Oct. 31, 1996, at A23.

groups with different agendas are themselves inevitably subject to the same tendency to serve the agendas of their own identities and ideologies.

Deborah Tannen describes a “culture of argument” that has emerged within academic and political circles as one in which we approach public dialogue as if it were a fight, concluding the “argument culture” causes us to be adversarial. She describes the path she followed to her insight, revealing: “*The answer crystallized when I put the question to a writer who ... had misrepresented my work: [I asked] ‘Why do you need to make others wrong for you to be right?’ Her response: ‘It’s an argument!’*” Tannen realized the fact that her critic perceived what was going on as argumentation rather than reasoned discourse was the answer. She concludes: “*[w]hen you’re having an argument with someone, your goal is not to listen and understand. Instead, you use every tactic you can think of—including distorting what your opponent just said—in order to win the argument.*”²⁹

As Arthur Schopenhauer observes, the search for “truth” in any kind of public discourse is a fiction—the universal goal of the base human beings who engage in such discourse is to win, not to understand.

[I]n a dialectical contest we must regard objective truth as an accidental circumstance, and look only to the defense of our own position and the refutation of our opponent’s. Truth is in the depths. At the beginning of a contest each man believes, as a rule, that right is on his side; in the course of it, both become doubtful, and the truth is not determined or confirmed until the close. Dialectic, then, has as little to do with truth as the fencing master considers who is right when a quarrel leads to a duel. Thrust and parry is the whole business. It is the art of intellectual fencing: and it is only when we so regard it that we can erect it into a branch of knowledge.³⁰

Daphne Patai makes the point of how this political culture works within the university. She explains that quite some time ago: “[Walter] Metzger and [Richard] Hofstadter argued that academic freedom hangs by a slender thread. Today, instead of heeding their warning and giving serious thought to a tradition in danger of dissolution, throughout the university people convinced of their political righteousness challenge the very concepts of academic freedom and free speech, and they back that challenge with the coercive power of rules, codes, and disciplinary tribunals.”³¹

Much of academic scholarship has become a form of advocacy and advocacy cares about truth only when it serves the advocates’ interest. The problem with the advocate/activist focus is as Anthony Kronman observes: “*The indifference to truth that all advocacy entails is likely ... to affect the character of one who practices the craft for a long time and in a studied way.*” Since a great deal of modern noncumulative scholarship in areas such as philosophy,

²⁹ Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue* (1998).

³⁰ See Arthur Schopenhauer, *The Art of Always Being Right* 33-42 (2009).

³¹ Daphne Patai, “Speak Freely, Professor -- Within the Speech Code,” *Chronicle of Higher Education*, June 9, 2000, pg. B7. See also, Patai, *Heterophobia: Sexual Harassment and the Future of Feminism* (Rowman & Littlefield, 1998).

law, politics and literature contains an activist/advocacy element we need to be concerned about its effect on the scholar's clarity of vision as well as aim and motivation.³²

If, for example, the university scholar's motivation is a dispassionate search for original knowledge for itself or refinement of the highest forms of existing knowledge, the inclusion of an activist agenda by other scholars represents a threatening challenge. The sense of activist mission, however noble in some areas of action, infuses the activist scholar's work with an aggressiveness and bias toward achieving the underlying agenda. This bias intuitively offends the values of scholars committed to advancing pure knowledge for its own sake according to processes that are as demonstrably objective as can be achieved. The same can be said for any scholar who is simply attempting to offer a full and balanced view on an important topic. Advocacy does not seek balance as opposed to outcome. This is shown clearly in Aristotle's message in his *Rhetoric*.

Eric Hoffer argues that one "of the characteristic attitudes of the modern intellectual—his tendency to see any group he identifies himself with as a chosen people, and any truth he embraces as the one and only truth...." ³³ This kind of *prophetic* intensity of belief and identification with a cause easily blinds the activist scholar to the fuller implications of his or her work. To the extent the scholar is pursuing the implementation of a specific agenda the blindness may well be willful or seen by the actor as a legitimate method of achieving political change. Scholarship thus becomes just another weapon in the pursuit of agendas.

The goals, methods and cultures are fundamentally different between the practitioners of the five ideals. Much of modern activist scholarship is self-consciously and aggressively political in nature and is to a large extent highly subjective. It has been argued that a *political monoculture* has come to dominate academia, one in which the vast majority of academics think the same, share the same values, and collectively fail to evaluate the foundations of their own assumptions while rejecting and denigrating others. The figures on political diversity in the university world are extreme. ³⁴

The problem is that politics is not about truth in any strict sense but is concerned with attaining power or challenging power and gaining influence. The rightness of the protests by the collective interests and their goals of fair treatment, opportunity and non-discrimination should not mask the fact that the language used by each collective movement (and counter-movement) has been language of attack, protest and opposition—not reasoned discourse. It is language used as weapons to gain or defend power. ³⁵

³² Anthony Kronman, "Legal Scholarship and Moral Education," 90 *Yale L. J.* 955, 964 (1982).

³³ See, Hoffer, *The Ordeal of Change*, at 43, 45.

³⁴ Davenport, "Few universities are open to conservative views". See also, *The Chronicle Review*, Page: B7, "Inside the Mind of an Ivy League Professor," Frank Luntz, FrontPageMagazine.com | August 30, 2002. Luntz writes: "A new survey of Ivy League professors conducted by the Luntz Research Companies on behalf of the Center for the Study of Popular Culture reveals an indisputable and painfully evident lack of diversity when it comes to the attitudes and values of Ivy League faculty. Not only is there an alarming uniformity among the guardians of our best and brightest minds, but this group of educators is almost uniformly outside of mainstream, moderate, middle-of-the-road American political thought. So much for diversity."

³⁵ Max Lerner, *Ideas Are Weapons: The History and Uses of Ideas* (Transition, 1991).

While truth is not necessarily irrelevant to many activist scholars it is often subordinated to a stronger priority or is subsumed by powerful and often untested or partial assumptions on which the subsequent analysis and conclusions are based. Keynes observes: “[The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the ruled is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slave of some defunct economist....”³⁶

I suspect it is a characteristic of activist-scholars that many not only have allegiances with their primary university discipline but are also devoted members of political collectives working outside the university. Avoiding the blurring of the lines becomes very difficult when one is embedded in a political interest group. Having a university professor advocating the concerns and interpretations of intensely held political agendas not only adds weight to those agendas but piggy backs on the belief that a university scholar’s analyses are truth-based and objective rather than ideological. In fact we face a situation in which the university has in many instances become a deliberately co-opted platform to advance political agendas that are intimately connected to the goals of external actors with which the new activist scholars identify.

The strategic and goal-oriented behavior of activist-scholars inevitably leads to the use of political speech. Activists who are seeking to build new paradigms through critique and active reform can be expected on occasion to be abrasive, deceptive, aggressive, and irritating. Just as are those they challenge, they are hostages of their own experiences and allegiances even to the extent they become intellectually blinded to alternative perspectives and are intolerant of anyone who disagrees with their particular vision of a brave new world. They become what Hoffer called “true believers” in the rightness of their cause and will do virtually anything to advance it.³⁷

A result of loose collections of scholars working within institutions operating according to one or more of these multiple ideals is a decreased ability to evaluate, value or even tolerate work done within a different scholarly paradigm than the one served by particular scholars. There is a conflict for power, priority and dominance just as in any other political system that distributes rewards, status and opportunity. It too often becomes a contest between competing propagandists rather than a legitimate search for knowledge.

The problem is that political speech is inherently manipulative, not through the attempt to persuade by demonstrated truth and balanced analysis but through rhetoric, polemic and propaganda. I argue that a substantial amount of activist *noncumulative* scholarship of the kind found in American law schools involves rhetorical deception--both conscious and

³⁶ Keynes adds: “[T]he power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas.... [S]oon or late, it is ideas, not vested interests, which are dangerous for good or evil.” Keynes, at 383, 384.

³⁷ See, Eric Hoffer, *The True Believer: Thoughts on the Nature of Mass Movements* 120 (1951), and his discussion of how the “fault finding man of words” attacks a dominant orthodoxy in order to undermine its perceived legitimacy and hold on power.

subconscious--aimed at achieving political ends whose truth and justice are taken for granted or ignored in order to achieve power, group identity or status.³⁸

Maxine Greene warns that slogans and propaganda have replaced intelligent dialogue. She states that slogans are, “rallying symbols” that “in no sense describe what actually exists, yet they are taken—wishfully or desperately—to be generalizations or statements of fact.”³⁹ What we are calling lies involves confusion, accidental misapplication of “truths” to inappropriate contexts, and category mistakes. But it also includes an increase in overt lying, obfuscation, deliberate misinterpretation and falsification of data, biased interpretations, and out-of-context arguments and analyses. Many in pursuit of agendas in the “culture war” consider it allowable and necessary to deceive as part of the strategy of conflict. They consider their noble ends to justify the means.

While we might assume that there is room within the university for all the cultures to coexist, the culture of each ideal threatens the fundamental beliefs, agendas and goals of the other. The rise to dominance of one version of the university ideal seems to require the suppression of others. The emergence of “identity sects” that provide meaning and psychological security to their members creates a situation in which it is dangerous to question the avowed tenets of the group whether from inside or without. As a result, challenging the assumptions of factions brings accusations of heresy, disloyalty, and bigotry.⁴⁰ Of late we have seen the powerful sanctions involved in being labeled as having “phobic” mindsets in which an interest group can condemn those of whom they disapprove as being homophobic, Islamophobic, anti-Semitic, sexist, racist or, failing that, “insensitive” or “intolerant.”⁴¹ These are powerful condemnatory terms that, once leveled, are virtually impossible to dispel.⁴²

Our dilemma is that, like all hypocrites or true believers, we cannot afford to admit that all our fundamental norms are assumptions and choices. This is because we must have reasonably consensual criteria on which social choices are grounded. Otherwise we are adrift in a limbo where there is neither stability nor consistency. We elevate Reason to the highest levels, but Reason is only a tool and method. It does not provide the initial substantive premises on which it operates. Freeman and Appel remind us that: “All we can

³⁸ Brinton, *Ideas and Men*, at 13.

³⁹ See Maxine Greene, *Teacher As Stranger* at 70.

⁴⁰ Seth Stevenson, “The Thought Police,” January 2003, http://www.bostonmagazine.com/articles/the_thought_police/.

⁴¹ WILLIAM F. ALLMAN, *THE STONE AGE PRESENT: HOW EVOLUTION HAS SHAPED MODERN LIFE—FROM SEX, VIOLENCE, AND LANGUAGE TO EMOTIONS, MORALS, AND COMMUNITIES* (1994). Allman quotes Yeats. “Civilization is looped together, brought under a rule, under the semblance of peace by manifold illusion.” *Id.* at 220. Allman goes on to describe the increase in complexity that has generated some of the conflict between factions and the need to label and antagonize opposing groups. Specifically, Allman notes that for most of human existence, survival depended upon the ability of individuals to identify with and support small groups comprising family members and close associated friends. *See id.* at 221. With the development of large-scale societies, individuals and family groups suddenly had to deal with the conflict between minds adapted to identification with small family groups and the need for interrelationships with complete strangers. *See id.* Arguably, factions and their conflicts with other factions are the natural result of the human mind’s search for group support coupled with distrust of the “other” who is not part of the group.

⁴² The power to condemn is seen by the collectives as a one-way street. This has been demonstrated in university speech codes that reflect academics’ agreement with the suppression of open discourse. Seth Stevenson, “The Thought Police,” January 2003, available at http://www.bostonmagazine.com/articles/the_thought_police/.

do by reasoning is to learn that if our first assertion is true, then all the implications, which follow from it according to the laws of valid reasoning, must also be true. But the laws of reasoning are silent concerning the truth of the crucial first premise.”⁴³

IV. The Legal Scholar as Propagandist

Let’s begin by considering Albert Camus’ observation about the need for the scholar to keep sufficient distance from the heated conditions of society in order to retain the clear perspective required to fulfill the traditional ideals of the university—those being the creation of original knowledge and the refinement, preservation and application of the best existing learning and insight achieved by humans’ exercise of intellect and wisdom.⁴⁴ This is not happening with the thrust of “advocacy” scholarship that has flooded academia.

Peter Drucker writes that what we are experiencing is a form of combative pluralism in which identity groups are continually maneuvering to seize and maintain power. Drucker remarks: “The new pluralism ... focuses on power. It is a pluralism of single-cause, single-interest groups—the “mass movements” of small but highly disciplined minorities. Each of them tries to obtain through power what it could not obtain through numbers or through persuasion. Each is exclusively political.”⁴⁵ The problem for understanding legal scholarship is that political affiliation involves allegiance and membership. These influence not only how we see things but how and whether we are willing to describe them to others.⁴⁶ An advocate holds one’s cards “close to the vest” and reveals only that which is thought to be in the individual or interest group’s interests.

With the power-focused identity group pluralism Drucker describes, it has become extremely difficult to draw the line between maintaining the necessary distance that allows us to stand apart from turmoil that blurs our intellectual clarity and objectivity, and effects our desire to challenge the dynamics of an unjust world. We care deeply about unfairness and injustice. This means that it is very easy to feel that the issues at the heart of our disagreements are too important to be left to the cold language of rational analysis. Heart as well as mind comes into play in how we view the world. This has to be taken into account in assessing the intellectual integrity of our scholarly interpretations.

In warning about the need for distance Camus wrote: “[I]t is not possible to be a militant in one’s spare time. And so the artist of today becomes unreal if he remains in his ivory tower or sterilized if he spends his time galloping around the political arena.... [T]he writer must be fully aware of the dramas of his time and that he must take sides every time he can or knows how to do so. But he must also maintain or resume from time to time a certain

⁴³ See EUGENE FREEMAN AND DAVID APPEL, *THE WISDOM AND IDEAS OF PLATO* 71 (1963).

⁴⁴ On the ideas, see, J. Newman, *The Idea of a University* xxvii (Longmans ed. 1947) and Ward Madden, *Foreword* to Robert Nisbet, *The Degradation of the Academic Dogma: The University in America, 1945-1970* vi (1971).

⁴⁵ Peter Drucker, *The New Realities* (Harper & Row 1989). 76.

⁴⁶ Max Lerner notes that: “Mill was a pioneer in seeing, with the growth of social egalitarianism and mass culture, the shadow of “an oppressive yoke of uniformity in opinion and practice.” Lerner, *Mill’s Essential Works*, 250.

distance in relation to our history.”⁴⁷ The tension between activist and dispassionate intellectual activity is at the core of what passes as modern scholarship, particularly in disciplines such as law that are intimately and inextricably bound to power.

“Speaking Truth to Power” or Chasing Our Own Share?

Power is at the core of our dilemma. Of course we must seek to “speak truth to power” but we unfortunately seem to be often seeking to undermine existing systems so that those with whom we politically identify seize power and then act to advance their own interests and agendas while marginalizing and demonizing those they replace.⁴⁸ In a system governed by the Rule of Law, law is, after all, the core method by which we infuse and advance social and political desires by gaining access to the power of the state. Lawrence Friedman explains why this is so, arguing: “In complex societies custom is too flabby to do all the work—to run the machinery of order. Law carries a powerful stick: the threat of force. This is the fist inside its velvet glove ...”⁴⁹ He adds: “law and ... courts stand at the very core of crucial decisions in the United States. These decisions concern policy in many spheres of life, including the major social questions and such sticky issues as obscenity, abortion, sexual deviancy, personal morality, and drug laws—in short, the whole social revolution.”⁵⁰

Roscoe Pound described the function of law in moderating the disputes and making required adjustments in a system beset by fundamental social and political disagreements. He explained the internal tensions as emanating from the fact that: “Law must be stable and yet it cannot stand still... [A]ll the writing about law has struggled to reconcile the conflicting demands of the need of stability and the need of change If we seek principles, we must seek principles of change no less than principles of stability.”⁵¹ Yet even though law “cannot stand still” in the face of social change and injustice, if it changes too fundamentally and too rapidly it becomes the transparent exercise of naked power. When this occurs it corrupts and corrodes the underlying belief in the authentic spirit of the Rule of Law, converting it to nothing more than Rule by Law.⁵² This evokes Aristotle’s warning that: “the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law.”⁵³

⁴⁷ Camus, *Demain* interview, in *Resistance, Rebellion, and Death*, at 238.

⁴⁸ Eric Hoffer, *The True Believer: Thoughts on the Nature of Mass Movements* (1951), discusses how the “fault finding man of words” attacks a dominant orthodoxy in order to undermine its perceived legitimacy and hold on power. *Id.* at 120.

⁴⁹ Lawrence Friedman, *American Law* at 257. See also, Lawrence M. Friedman, *The Horizontal Society* vii and the discussion of the rise of “identity wars and identity politics”.

⁵⁰ Friedman, *American Law*, *id.* At 275.

⁵¹ Roscoe Pound, *Law Finding through Experience and Reason*, at 23 (1960).

⁵² On this and related issues see, David Barnhizer and Daniel Barnhizer, *Hypocrisy & Myth: The Hidden Order of the Rule of Law* (2009).

⁵³ See, Aristotle, *The Politics*, B. Jowett trans., *The Oxford Translation of Aristotle*, W.D. Ross ed. (1921): Bk. II, c. 8.

Law and Instrumentalism and an Age of Uncertainty

Unfortunately, we are a nation of idiosyncratic believers in which far too many reject the possibility of a deeper system of principles that guide our decisions, and only hold to the idea of a kind of natural law or justice when an interest to which we are deeply committed is at stake. We are sophists and advocates who have lost our grounding and can only resort to slogans aggressively converted to linguistic “framing” pronouncements.⁵⁴ Former Library of Congress Director Daniel Boorstin described our quandary, saying “the mystery—of law in modern society ... [is] How retain any belief in the immanence of law, in its superiority to our individual, temporary needs, after we have adopted a whole-hearted modern belief in its instrumentality? How continue to believe that something about our law is changeless after we have discovered that it may be infinitely plastic? How believe that in some sense the basic laws of society are given us by God, after we have become convinced that we have given them to ourselves.”⁵⁵

The unprincipled uncertainty this instrumentalism and plasticity implies about the sources of authority underlying our system of law and politics has further metamorphosed into a system in which the ability to control the levers of power is the only source of authority. A result is that there is no real discourse because everything is concentrated on achieving an interest group’s agenda, one that inevitably allocates “the spoils of war” to the group’s members and allies. Part of this transformation is that everything becomes a strategic game in which subtle as well as overt manipulation is seen as legitimate by the competing actors.

Law and legal scholarship are inescapably part of this strategic power-directed behavior with the result that corruption, dishonesty, smugness, self-centeredness and even ignorance are reflected in what too many “scholars” write. In such a context stereotypes run amok.⁵⁶ Rather than seeking to “discover” new knowledge or preserve and refine the best of our hard earned understanding many modern scholars are engaged in rationalizing and justifying positions they held even before they developed the work. The world of scholarly publishing in many disciplines, including law, has experienced a radical transformation to the point that it is a confusing hodgepodge of approaches, methods and products. Much of what is being published bears scant resemblance to what is thought of as the traditional role of the scholar--the in-depth pursuit of knowledge of the kind that enriches our intellectual world or helps us to understand critical issues in a balanced way and cope with the most challenging matters facing our society.⁵⁷

⁵⁴ David Barnhizer. 2013. "An Essay on "Framing" and Fanaticism: Propaganda Strategies for Linguistic Manipulation", http://works.bepress.com/david_barnhizer/8. David Barnhizer. 2013. "'Linguistic Cleansing': Strategies for Redesigning Human Perception and Behavior", *The Selected Works of David Barnhizer*, http://works.bepress.com/david_barnhizer/81.

⁵⁵ Daniel Boorstin, *The Decline of Radicalism* 76 (1969).

⁵⁶ In his brilliant book, *Propaganda*, Jacques Ellul reminds us: “A stereotype is a seeming value judgment, acquired by belonging to a group, without any intellectual labor.... The stereotype arises from feelings one has for one’s own group, or against the “out-group.” Man attaches himself passionately to the values represented by his group and rejects the clichés of the out-groups.... The stereotype ... helps man to avoid thinking, to take a personal position, to form his own opinion.”

⁵⁷ Edward Levi remarks: “The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas.... Furthermore, agreement on any other basis would be impossible. In this manner the laws

Power, Propaganda and Polemic

It is fair to ask whether the “scholarly” activities of law teachers produce the degree of social benefit to society and to the legal profession and judiciary that should be expected (if not demanded) from a group of well-paid individuals entrusted with defending and advancing the system of justice and protecting the essential principles of the Rule of Law? One of the core obstacles to answering such questions is that we have lost the ability to distinguish between scholarship and advocacy, between propaganda and the willingness to engage in honest analysis wherever it leads. Much of what is published is advocacy and all good advocates understand the danger of offering qualifications and data that can be turned around on the writer or speaker by those representing other interest groups pursuing contrary outcomes.⁵⁸

There is in fact a huge amount of writing being done by university faculty in an increasingly vast array of forms and contexts. Former University of Michigan faculty member Francis Allen wrote thirty years ago of a fragmenting phenomenon that has only continued apace. He observed: “We feel less confident than we did formerly that we understand our colleagues’ judgments on questions of intellectual style, purpose, or technique. We sense a dissolving accord on what is good scholarly work.”⁵⁹ If that dissolving accord was already being felt in the 1980’s aggressive one-sided critique is the dominant ethos of much of legal scholarship today.⁶⁰

Something we seem to have lost sight of in too many instances is that writing is not the same as scholarship even if done by a faculty member of a university. And polemic is not congruent with careful and dispassionate analysis even if that analysis is aimed at recommending solutions to critical social problems. One academic has drawn the distinction between “academic writing” and “scholarship” in the following way, saying: “scholarly writing is produced to add to the body of knowledge, extending, challenging, or

come to express the ideas of the community and even when written in general terms, in statute or constitution, are molded for the specific case.” Edward H. Levi, *An Introduction to Legal Reasoning* 4 (Univ. Chicago 1949). Levi continues, “The law forum is the most explicit demonstration of the mechanism required for a moving classification system. The folklore of law may choose to ignore the imperfections in legal reasoning, but the law forum itself has taken care of them.” *Id.*, at 4.

⁵⁸ Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue* (Random House, N.Y. 1998), explains how that culture operates: “In the argument culture, criticism, attack, or opposition are the predominant if not the only ways of responding to people or ideas. I use the phrase “culture of critique” to capture this aspect. “Critique” in this sense is not a general term for analysis or interpretation but rather a synonym for criticism.” At 7.

⁵⁹ Francis A. Allen, “Legal Scholarship: Present Status and Future Prospects”, 33 *J. Legal Educ.* 403 (1983). “Many in the law schools are speaking a language incomprehensible to lawyers and judges.” At 404. Allen: At 404.

⁶⁰ Tannen, *supra* n. 14, describes a moment of personal epiphany. “The answer crystallized when I put the question to a writer who I felt had misrepresented my work: “Why do you need to make others wrong for you to be right?” Her response: “It’s an argument!” When you’re having an argument with someone, your goal is not to listen and understand. Instead, you use every tactic you can think of—including distorting what your opponent just said—in order to win the argument.” 5

expanding what is known or believed within the field. Thus, while all scholarly writing is academic writing, not all academic writing is scholarly writing.”⁶¹ Sandra Shannon adds: “academic writing may be defined broadly as any writing completed to fulfill university or college requirements, scholarly writing is produced to inform a specialized audience of other scholars in a particular field.”⁶² To this we can add another category, that of writing done to shape attitudes related to political interests of a faculty member with the intention that others accept it as being more accurate and powerful because it is done with the patina of a university professional.

The problem is that published writing is not automatically the same as scholarship. At this point in the degradation of the process this probably is of little consequence. In any event, even if we did decide to regenerate some criteria for actual intellectual quality and creativity in legal scholarship one important challenge in trying to sort “true” or profound scholarship from mediocrity and rubbish is that virtually anything a faculty member writes can find a home in print somewhere, including electronic media. The proliferation of narrow special interest journals has exacerbated the situation. It has increasingly become the case that we lack the criteria, courage or political will to carefully evaluate and critique what is put forward as legitimate scholarship.

“100 Monkeys, Will Shakespeare, and Legal Scholarship”

In a comprehensive discipline such as law with the many interfaces at which law, society, politics, economics and philosophy influence, intertwine and collide with each other, the incoherent diversity of American legal scholarship and the “amateurish” nature of its publishing system in which student-edited law journals are the most important elements in creating a scholar’s reputation results in a degree of diversity and randomness that on occasion can produce research of substantial merit. The system of American legal scholarship could be compared to the hypothetical situation in which there is a probability that 100 monkeys typing madly away for a billion years could recreate the works of William Shakespeare. Of course, even if true, this would require that we create an indexing system that allowed us to extract the “diamonds” of the monkeys’ creativity from the incredible volume of impenetrable and meaningless dreck that characterized the vast proportion of the “monkeys” productivity system.

American legal scholarship is becoming steadily more randomly “monkey-like”. There are more than a thousand journals publishing legal scholars’ works, and unlike the “hard” science disciplines there is no reproducible methodology to “prove” (or disprove) the scholar’s point in all but a few areas in which some form of empirical method has been applied to a specific issue. This situation has become much worse with the self-publishing and electronic publishing capabilities granted us by the Internet and the communication

⁶¹ Sandra L. Shannon, *A Guide to Academic and Scholarly Writing* (Baldwin 2011), <http://edit911.com/wp-content/uploads/2011/12/GUIDE-TO-ACADEMIC-AND-SCHOLARLY-WRITING2.pdf?d45b35>.

⁶² Shannon, *A Guide to Academic and Scholarly Writing*, id.

systems that have come into play over the past twenty years. I'm even willing to accept that I am contributing to the mess.

Being able to figure out what the "best" scholarly research is and locating where it is published is a great challenge. Extracting the "diamonds" from the dross is pretty close to impossible. Keeping up with what is being produced in any field of relevance or interest is a daunting task. Creating "sorting criteria" by which we are able to identify and access the most intellectually beneficial and accurate works lags far behind the need and in any event the volume of production far outstrips our ability to remain current.

Let's return then to the idea of our randomly creative "monkeys" hammering away at their word processors. We have a pretty good idea of the independent quality of Shakespeare's works. We do not, however, have an effective system or set of criteria for evaluating the most brilliant works of legal scholars. Given that a key function of legal scholarship is now the extent to which it advances an interest group's search for power it may well be that such an end establishes all that needs to be said. Since legal scholars lack a clear method for testing the validity of what they and other legal scholars produce they do so through an "act of faith" based on the reputation of the journal in which a work is published.

If a work on a provocative issue in which a group is interested appears in a highly respected journal then it is obviously an important addition to the process of transmitting the message the members most want disseminated. In a sense this equates with Marshall McLuhan's well known point that the "medium is the message". For legal scholars the "medium" is publication in an elite law review and the law school at which the person teaches. The combination of these factors gives "weight" and "gravitas" not matched by lesser criteria regardless of the quality of thought actually represented in a work.

The problem with this from an intellectual and traditional truth-seeking scholarly perspective in the multifaceted discipline of law is that a particular law journal's institutional cachet is far more important than all other considerations. If something has been published in the law reviews of Harvard or Yale it is far more likely to be cited by other legal scholars simply because "that is how it is done". While this may be a "cheap and easy" selection criterion--and may be the single clear standard in the muddle we have created even if it is not a guarantee of substance or meaningfulness--it is intellectually banal and embarrassing. This fact is bolstered by the reality that these "elite" journals are run by law students who by definition are not peers of the scholars they select for publication and are applying selection standards such as the ranking of the institution at which the submitting individual teaches. A predictable result is that the system preserves the status of the well-positioned members of the law school hierarchy far more than it operates as a true intellectual system.

A fair amount of legal scholarship can be seen as philosophical in that it attempts to join the principles contained (or claimed to be found) in the US Constitution or in the jurisprudential principles on which the Western Rule of Law is grounded. Constitutional and jurisprudential analyses are in fact the closest sub-discipline among the many sub-disciplines of law where American legal scholarship seeks to formulate a philosophy and

critique of government, power, justice, rights and duties. That very nature, however, makes writings on constitutional issues particularly vulnerable to being captured by political activist scholars intent on advancing a specific political agenda.

The Two Traditional Ideals: The Pursuit of Original Knowledge for Its Own Sake and the Preservation, Refinement and Transmission of Knowledge

In closing this “rant” I want to briefly note what traditionally have been seen as the ideal functions of the university and its scholars. The first ideal of the university has been described as the “Academic Dogma,” the pursuit of knowledge for its own sake.⁶³ It has been argued that this ideal is the force that drives and insulates the operation of our intellect and that this spirit gives life to all else the university does. In his foreword to Robert Nisbet’s, *The Degradation of the Academic Dogma*, Ward Madden described the university ideal, albeit an ideal threatened with destruction by modern values. Madden argues: “The heart of the academic dogma is the pursuit of knowledge for its own sake. Knowledge and the processes of coming to know are good in themselves, and the university, above all institutions, is-or used to be-devoted to them. To investigate, to find out, to organize and contemplate knowledge, these are what the university is all about. They constitute an ideal inherited from the Athenians, but first institutionalized in the form of the university during the Middle Ages.”⁶⁴

Disciplines of the kind that are essentially non-scientific in nature represent a form of knowledge intellectual historian Crane Brinton called *non-cumulative*. Law is high among such disciplines. Brinton suggests the character of *noncumulative* knowledge in his observation that: “Men ... make certain propositions, entertain certain ideas, about men, about right and wrong action, about beautiful and ugly things.”⁶⁵ He adds: “Over two thousand years ago, men of letters were writing in Greek on these matters.... But our contemporary men of letters are today writing about the very same things the Greek men of letters wrote about, in much the same way and with no clear and certain increase in knowledge.”⁶⁶

Attention to the noncumulative dimension is important because law, politics, literature, much of economics, philosophy and so forth provide and incorporate the deep principles by which we identify and communicate values, allocate power and obligation, and conduct political discourse. The noncumulative disciplines are not conducive to demonstrations of truth and validity through empirical testing. Certainly this is true in terms of the disciplines’ fundamental assumptions that are inevitably political, philosophical, moral or religious in nature. To the extent there are *truths* in the context of such knowledge they are of a different kind than exist in science and technical disciplines. The noncumulative truths

⁶³ See generally Madden, Foreword to Robert Nisbet, *The Degradation of the Academic Dogma: The University in America, 1945-1970* vi (1971).

⁶⁴ Madden, Foreword to Nisbet, *Academic Dogma*, *id.* at v, vi.

⁶⁵ Crane Brinton, *Ideas and Men: The Story of Western Thought* 13 (1950).

⁶⁶ Brinton, *Ideas and Men*, *id.*

are much more open to dispute, far less susceptible to empirical verification, and are supported in large part by a system of shared culture and values.

This makes legal scholarship extremely difficult to place in the realm of creating original knowledge. The reason is that generation-to-generation such scholarship deals primarily with the interplay between law, social force and power as developed within the specific operating terms and needs of particular societies. Such work can be “original” in a contextual sense in relation to a specific “generational moment” rather than as some form of over-arching and permanent universal knowledge about which legal academics have little or nothing to contribute.

Ward Madden’s concept of the advancement of universal knowledge as the university ideal represents a dominant thread, but an alternative is reflected in the classic articulation offered by John Henry Cardinal Newman in *The Idea of a University*. He begins: “The view taken of a University in these Discourses is the following—“That it is a place of teaching universal knowledge. This implies that its object is, on the one hand, intellectual, not moral; and, on the other hand, that it is the diffusion and extension of knowledge rather than the advancement.” He adds: “If its object were scientific and philosophical discovery, I do not see why a University should have students; if religious training, I do not see how it can be the seat of literature and science.”⁶⁷ Newman’s dichotomous argument opposes the scientific and philosophical ideals of the pursuit of “pure” knowledge and offers the goals of the systematic refinement, extension, and transmission to each generation of students of the best of our universal knowledge.

The search for original knowledge and the preservation and refinement of the best existing knowledge each give rise to the image of the Ivory Tower in which scholars work detached from the mundane and corrupting concerns of human society. In empirical science, for example, the real scholarship is the discovery itself. The reporting on the discovery done through writing that disseminates the insight is an important secondary expression of the discovery that allows others to further test its validity. In mathematics the scholarship or discovery that matters is in the mathematical proofs that can be approximated through written expression but the purity or “elegance” of the formulas themselves is the “thing” created by the mathematician. In music the creative act is found in the power and beauty of the musical work, not the secondary and much more lifeless verbal description of the work. The same can be said of literary and poetic creativity where the creative breakthrough is the *work* itself, not criticism of the work or even its repetition in performances. We honor the brilliance of the original creation even while appreciating the opportunity to experience its power through witnessing a performance.

This suggests a tension between what is directly creative and what is dependent on the underlying creative work or raw data. Yet the fact of the nature of creativity in specific disciplines can remind us of the need to examine the terms of operation of individual disciplines regarding the nature of intellectual activity. It also represents the relationship between underlying data, direct insights into knowledge, and more derivative intellectual

⁶⁷ J. Newman, *The Idea of a University* xxvii (Longmans ed. 1947).

activity. A “bottom line” question is, what is the creative act in the discipline of legal scholarship? How do we define it or recognize legitimate intellectual quality? Or is legal scholarship nothing more than derivative secondary or tertiary critique emanating from subjective individual or group agendas?