The Illusion of Creative Scholarship in American Universities and Law Schools

David Barnhizer
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Abstract

The aim of this brief essay is to explore several of the dominant forms of scholarship in the university and in law schools. This is done by examining what are described as five sometimes incompatible ideals, those of development and pursuit of original knowledge for its own sake, preservation, refinement and transmission of the best forms of knowledge, objective social critique, individual activism and collective activism.

Tenure track positions in American universities and in law schools particularly are comfortable sinecures. In far too many instances these privileged and lifetime positions serve mainly the personal interests and agendas of the purported scholar and teacher who often produce what could be called “fugitive rubbish” in their intellectual work, or that possess the characteristics of largely technical reportage while proclaiming elevated intellectual merit. Beyond those issues the situation has become considerably worse with the rise of an incredible array of special interest journals, many of which allow “scholars” to publish their analysis in journals whose editors share political agendas with the authors and whose pages are open only to analyses that fit the specific aims. A result is that perhaps a majority of American legal scholars are essentially “preaching to the choir” with little readership outside the ranks of the already converted and scant impact outside academia.

An American legal scholar’s reputation is too often generated not by the intellectual power of the work but by the name of the law school at which one is a faculty member and the choices made by third-year student law review editors. Of course there remain journals that accept scholarship of deep consequence but one is hard pressed to identify on a consistent basis what those enlightened journals are. This is a particular problem in American legal scholarship where the most prestigious journals (but not automatically the best) are law reviews run by law students who by definition are generally highly intelligent but lack the depth of knowledge, expertise and context of the kind required to evaluate the intellectual quality and significance of the pieces they select for publication.

A result is that the published writings of members of American law school faculties run a gamut in terms of quality, meaning and intellectual depth. Much of what is published is “useful” to a restricted group interested in the specific technical topic, or to members of a political “identity collective”. A fair amount of the 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 where American legal scholarship seeks to formulate a philosophy and critique of government, power, rights and duties. Much of legal scholarship, however, is little more than technical explanation of a doctrine, rule or statute of the kind that might be
better done by practitioners, or political polemic based on assumed facts and values held by activist scholars.

One challenge is sorting true scholarship from mediocrity and rubbish is that virtually anything a faculty member writes can find a home in print somewhere. The proliferation of narrow special interest journals has exacerbated the situation. The problem is that writing is not the same as scholarship. Yet it has increasingly become the case that since we lack the criteria, courage or political will to carefully evaluate and critique what is put forward as legitimate scholarship a great deal of what makes its way into print is of questionable merit when assessed against any traditional standards. This is so embedded in the academic system’s terms of operation at this point that it is unlikely to change. A result is that we will increasingly produce vast volumes of verbiage of limited merit and consequence outside the narrow limits of our personal and group agendas.

A Lack of Intellectual Integrity and Perspective

Universities and the scholars that inhabit their hallowed halls are part of flawed human institutions that “talk the talk” far better than they “walk the walk” of courage, independence, honesty and intellectual freedom. For both the more traditional orthodoxy and the challengers who have been successful in capturing a significant place for their own views, the most effective constraints on real intellectual freedom and quality of scholarship tend to be implicit rather than overt. Diekema, for example, suggests that there is a “chilling effect” that creates a climate in which scholars steer clear of controversial or unpopular topics, arguing: “Self-censorship is often a result of the “chilling effect.” [He adds] As one writer puts it: “It is not the iron fist of repression but the velvet glove of seduction that is the real problem.” Diekema concludes that: “Faculty simply do not always say what they believe, or what they know to be true, because they don’t want to deal with what may be the resulting hassle—peer alienation, negative student opinions, or the ire of a constituent community.”

Within the university the person purporting to be a scholar is often something else. Too often, the person doing scholarship mixes the distinct role of independent scholar with those of rhetorician, ideologue, and even propagandist. Some scholars who fit loosely into the label postmodernist and others who are activist-scholars intent on achieving a specific political goal have challenged the pursuit of truth itself. They argue that the claim to truth is an orientation that offers a false goal, that truth is relative or that the

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1 PETER BERGER, INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE (Doubleday & Co. 1963): observes: “Very potent and simultaneously very subtle mechanisms of control are constantly brought to bear upon the actual or potential deviant.” At 11.


3 Diekema, Academic Freedom, id.

methods insisted on by what these scholars consider to be a repressive orthodoxy are simply tools to perpetuate discrimination and preserve power.\(^5\)

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 cliches of the out-groups …. The stereotype, … helps man to avoid thinking, to take a personal position, to form his own opinion.”\(^6\) Maxine Greene warns further that slogans and 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.”\(^7\)

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.”\(^8\)

In this connection, Pinsker warns that “an increasing number of professors no longer believe in the ‘pursuit of truth’ because they no longer believe that truth exists.”\(^9\) He adds: “They do, however, believe in politics - and most especially in identity politics. Thus, efforts to equalize genders, races, and cultures become the value that academic freedom presumably protects, while the criteria of truthfulness (as argued through evidence and rational argument) is seen as that which continues to exploit women, people of color, homosexuals, the poor and other victimized groupings. Not surprisingly, the two conditions usually overlap; and the results [sic] so muddies the waters that defending academic freedom is harder now than at any time in this century.”\(^10\)

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5 Maurice Friedman, in his Introduction to Martin Buber, *The Knowledge of Man*, describes the necessity as well as the extreme difficulty of achieving real communication. “Speech, from this point of view, is no mere function or tool. It is itself the stuff of reality, able to create or destroy it. …. Speech may be falsehood and conventionality, but it is also the great pledge of truth. Whether he takes refuge in individualism or collectivism, the man who flees answering for the genuineness of his existence is marked, writes Buber, by the fact that he can no longer really listen to the voice of another. The other is now only his object that he observes. But true dialogue … means that the other has not only ears but a mouth. He can say something that will surprise one, something new, unique, and unrepeatable for which the only adequate reply is the spontaneous response of the whole being and nothing that can be prepared beforehand. Only if real listening as well as real talking takes place will the full possibility of learning be present ….” 40, 41.


8 Camus, *Demain* interview, in Resistance, Rebellion, and Death, supra n., at 238.

9 Pinsker, “Tenure can rescue the academy.”

10 Pinsker, “Tenure can rescue the academy,” id.
Bradford Wilson echoes Pinsker and argues there is a “progressive political orthodoxy that currently dominates the public life of the academy.”  

He warns, however, that: “What is unhealthy for the interests of higher learning is less the existence of a political orthodoxy on the campuses than the replacement of intellectual criteria for determining what kinds of expression should be defended with non-intellectual criteria -- be they political, sexual, or otherwise. .... This sacrifices, on the altar of political correctness, what the sociologist Edward Shils has called ‘the central academic value of truthfulness.’ ”

The connection between universities, legal scholarship and power has increasingly dominated the world of academia. 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.”

Peter Drucker describes what is happening as the “new realities” of an increasingly pluralist democracy, explaining 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.”

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.” In this sense power is defended if one possesses it, sought if one desires it, and undermined if the scholar and the reference group with which a scholar identifies engages in a strategy of “softening up” the foundation principles and assumptions of competitors. In his classic 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.

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12 Wilson, “Vulgarizing Scholarly Discourse,” id.
13 Not the least of the consequences is the shaping of the scholarly mission to fit the specific group’s agenda. Dahl suggests how collectives operate. “Organizations thereby strengthen both solidarity and division, cohesion and conflict; they reinforce solidarity among members and conflicts with nonmembers. Because associations help to fragment the concerns of citizens, interests that many citizens might share—latent ones perhaps—may be slighted.” ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL 44 (1982).
14 Friedman, American Law 257.
16 Hofstadter also concludes that scholars have increasingly sought the solace of celebrity and “relevance” as a substitute for independence and originality. Hofstadter, Anti-Intellectualism in American Life, supra n. at 427 (1963).
17 Adolf A. Berle, Power 92 (1967).
There are few academic domains where power is almost inextricably intertwined with scholarship as in the legal dimension. In a system governed by the Rule of Law, law is, after all, the core method by which we infuse social and political desires with the power of the state. Lawrence Friedman explains why this is so. “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 …” 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.”

Law is therefore the manifestation of power whether in a defensive or offensive mode and the scholarship done by law school academics inevitably relates in some way to the exercise of the power and force of law. My aim in this brief essay is to identify and highlight some forms by which this is done and to explore in a preliminary way the incompatibility and political nature of the forms.

Red Giselle and the Five Ideals

Even prior to the essay’s more formal discussion of the five ideals of scholarship, one way to explain the distinction between the ideals may be through an analogy to ballet. Several years ago I taught in St. Petersburg, Russia and a wonderful part of the experience was the opportunity to see both classical and modern Russian ballet performances. Few would argue that classical ballet in Russia is an exquisite experience performed at the highest level of artistic talent. 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. Classical ballet is a sort of time

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18 The role of law was described by Roscoe Pound. “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. ROSCOE POUND, LAW FINDING THROUGH EXPERIENCE AND REASON at 23 (1960).

19 Friedman, American Law 257. See also, Lawrence M. Friedman, The Horizontal Society vii (1999) where Friedman discusses what he refers to as the rise of “identity wars and identity politics”.

20 Friedman, American Law 275.

21 Felix Cohen described the European jurist Von Jhering as dreaming he had died. Von Jhering found himself in a “special heaven reserved for the theoreticians of the law” with all legal concepts in their purest form. A pre-condition to entering heaven was that new entrants were required to drink the “draught of forgetfulness” so they would no longer be encumbered or tainted with earthly knowledge. The irony is that the draught proved superfluous for jurists. The problem was that given their knowledge was of legal theory and doctrine “[t]hey had nothing [of any real substance] to forget.” Felix Cohen, “Transcendental Nonsense and the Functional Approach”, 25 Columbia L. Rev. 809 (1935). Although he was not proclaiming the emptiness or insubstantiality of law, Donald Elliott has written that: Law is a scavenger. It grows by feeding on ideas from outside, not by inventing new ones of its own.” D. Elliott, “The Evolutionary Tradition in Jurisprudence,” 85 Columbia L. Rev. 38 (1985).

22 Charles Axelrod offers insight into our dilemma of scholarship, intellect and interest group power. “Ideas do not float freely among people; they become rooted in commitments, ossified and sustained within intellectual communities; they are cradled among avid sponsors and defenders whose work relies on their stability. Thus the tension of discourse refers not merely to the presence of one language addressing (and straining) another, but to the presence of one language addressing the inertia of another.” CHARLES AXELROD, STUDIES IN INTELLECTUAL BREAKTHROUGH, FREUD, SIMMEL, BUBER, at 2, 3 (1979).
machine. The music, choreography, costumes, gestures and 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 way that recognizes its worth and connects our culture and civilization.

Of course, classical ballets were also innovative and creative 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 and the search for perfection in existing knowledge. The difference in perspectives 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 contrast between classical and modern ballet 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 with another purpose. But while modern ballet may shift the music, rhythms, movements and the like, it still derives from and depends on the underlying *technique* of ballet. While the commitment to the art form and its highest quality remain essential elements, modern ballet creates a new variation and extends the form. It is therefore an experiment, but one that operates within the commitment to 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.

This is not the end of our analogy, however. I suggested three additional versions of the university ideal—the critique of society for purposes of its regeneration and improvement; individual activism, and collective activism. Here I will offer the work of Boris Eifman, a Russian creator of modern ballet with whose work I was enthralled in St. Petersburg. Boris Eifman created adaptations of existing balletic works that 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 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.

In *Red Giselle*, Eifman uses the power and technique of the ballet to convey a powerful message about people and power. The work is a critique of the darkness of unfettered power while offering a glimmer of hope. *Red Giselle* illustrates a critique of society and is consistent with the third 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 tends to abuse power if left unrestrained. And we also know that the Soviet period carried with it some severe abuses of power. So *Red Giselle* in 1998 builds on knowledge that is not new, even though it uses a new art form 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.

A very different situation is created if we move *Red Giselle* back in time eighty-five years to 1923 when the conditions being 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 is attacking. Even in 1998 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 even in 1998 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 have been 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.

**Five Distinct (and Conflicting) Scholarly Ideals**

The five versions of the scholarly ideal produce significantly different forms of intellectual work. 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 some kind of 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 a matter of degree. Each represents different values, assumptions and commitments as to 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 been honored more in lofty rhetoric than in the reality of what most scholars actually do. Wolff reminds us 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.” 23

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. 24 While the ideal of the pursuit of knowledge for its own sake is offered

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24 Crane Brinton, *Ideas and Men: The Story of Western Thought* (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,
rhetorically as a justification for independent research and scholarship the likelihood of individuals actually behaving in accord with such a strongly principled norm depends on the incentives and disincentives to which they are subject. 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 in which they were initially indoctrinated.  

In an institution whose scholars often claim a commitment to the pursuit of “pure” knowledge, there is very little purity. If one lacks the courage or insight required for original thinking then intellectual freedom can be a curse since it forces you to become aware of your limitations. Working in a system that lacks self-awareness and that never tests itself against its lofty rhetoric allows the university intellectual to “have his cake.” Nor, given the difficulty and risk in attempting to achieve original insights rather than fitting comfortably into an existing niche, is it surprising that some scholars pursue activist causes or submerge themselves in membership in an intellectual or political group that protects their positions and provides a template for what is considered acceptable work. The adherents in such interest groups will praise whatever the scholar says because it comports with the collective’s agenda, validates its members, and seems to advance “the cause” even if they are really only talking incestuously with each other.

Bernard Meland places much of the blame for the degradation of modern scholars’ intellectual integrity at the foot of universities’ obsessive drive to achieve status, a goal not unrelated to economic gain, ego, and ambition. He concludes: “the 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

the kind involved in fields like metaphysics, ethics, political theory, even most epistemology … as a complete waste of time.” At 516, 517.


26 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: “the 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.” Hofstadter, *Anti-Intellectualism in American Life* .

27 Ernest Becker has written of the “delicately constituted fiction” of human aspiration, saying: “Man’s freedom is a fabricated freedom, and he pays the price for it. He must at all times defend the utter fragility of his delicately constituted fiction, deny its artificiality.” Ernest Becker, *The Birth and Death of Meaning* 139 (2d ed. 1971).

28 In this regard consider the situation with law school rankings related to the annual *US News & World Report* listings of American law schools. Deans have been fired for not elevating their schools in the US News rankings. Law schools are chosen by applicants based on these data even though the methodology inevitably rewards the continuing reputational hierarchy of the “haves” v. the “have nots” independent of the actual quality of education or scholarship.
recognized for what one is worth would, in many instances where status is dominantly a concern, be tantamount to being publicly disclaimed.” 29

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”. 30 The self deception and rationalization become even easier when the scholar works within “soft” disciplines such as law, social science, literature, politics or the like which 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.” 31

Each of the five ideals can offer a legitimate orientation, depending on the degree and context of their use. But when the ideals are confused and inappropriately commingled 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 virtually 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 the evaluator.

The Demise of the “Free-Floating” Intellectual

The processes of modern 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 fair or just. Those presenting their positions inside the systems of scholarship are aiming to “win”, not to dispassionately and objectively offer all facts and arguments that would allow an independent fact-finder to determine the argument’s actual truth.

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,

29 Bernard E. Meland, Higher Education and the Human Spirit 7 (University of Chicago 1953).
30 For an insightful analysis of the state of the modern university and how it reached that point, see, Ernest L. Boyer, Scholarship Reconsidered: Priorities of the Professoriate (Carnegie Foundation for the Advancement of Teaching 1990). Boyer seeks to clarify and redefine our understanding of scholarship and its proper balance with teaching and service, suggesting that the research and publication model that has arisen primarily since the end of World War II is distorted and inadequate to the point that the educational process is being diserved and a substantial amount of not very helpful scholarship is being published. He offers four types of scholarship: discovery, integration, application and teaching. Id. at 16.
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.” 32

Daphne Patai makes the point of how this political culture is working within the university. She explains: “Forty-five years 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.” 33

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.” 34 Since much of modern noncumulative scholarship contains an activist/advocacy element we need to be concerned about its effect on the scholar’s clarity of vision.

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, infuses the activist scholar’s work with an aggressiveness and bias toward achieving the underlying agenda that 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. Eric Hoffer argues: “Many 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; the envisioning of a millennial society on earth—are clearly discerned in the prophets.” 35 This kind of prophetic intensity of belief and identification with a cause can easily blind 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.

35 See, Hoffer, The Ordeal of Change, supra n. At 43, 45.
The inherent conflict between the five forms of scholarship is due to a distinction between the first three ideals, those of discovery, refinement and objective social critique and the individual and collective activist ideals that results in a difference in kind and not simply degree. Sadly, commitment to the values of individual intellectual freedom and independence has increasingly degraded. Mannheim, for example, used the concept of the “free-floating” intellectual during the 1920s to describe those of independent mind who possessed the courage to critique power wherever their journey led. But Jacoby says that even when first written: “Mannheim’s defense of independent intellectuals earned him the ire of both left and right.”  

Jacoby goes on to argue: “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.” A result is that we see the rise of “cliques” of scholars in pursuit of particular political or intellectual agendas. This by itself is not inevitably bad but when the cliques constrain the full range of potential work by their members something is lost in the trade offs between political outcomes and intellectual merit. Similarly, the intensity of politics generates a deadening aura once those who believe deeply in that mission achieve a significant present in the institution. Others can easily be intimidated by the politics and assumptions of an intensely political faculty group with what they claim to be “moral” leverage and begin to alter their own work to avoid conflict.

The goals, methods and cultures are fundamentally different between the practitioners of the competing 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 are in fact extreme. “[T]hose on the conservative side of the political spectrum don’t have much of a place in the Ivy League faculty lounges. Just 6 percent of Ivy League professors would describe themselves as either conservative or somewhat conservative, and only 3 percent consider themselves to be Republicans.”

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37 Jacoby, *End of Utopia*, supra n. 12 at 111.
38 Davenport, “Few universities are open to conservative views,” *supra* n. . *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.”
The problem is that politics is not about truth in any strict sense but is concerned primarily with attaining or challenging power and 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.  

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.…”  

The argument is not that activism or collective organization within the university is illegitimate--in fact it is a key function of an institution responsible for pursuing not only truth but also social justice. But while activism is an essential element of the modern university 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 fatally back to earth as the wings melt from the heat.

The “sun” of scholarship was thought to be reason, evidence and the honest analytical process. If one seeks to break down such long-standing assumptions it is not surprising that the foundations of reason and evidence are a necessary target. 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 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.” Honest rational discourse is the victim. In part this is because the intention is to “speak to the choir” of similarly oriented activist-scholars or to support or expand a political movement outside the university rather than to pursue truths that are already assumed to be valid.

I suspect it is a characteristic of activist-scholars that many not only have allegiances with their primary university discipline but are devoted members of political collectives working outside the university. Avoiding the blurring of the lines becomes very difficult.

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40 JM 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.
41 C.G. Jung, The Undiscovered Self 12, 13 (Mentor 1957). Translated from the German by R.F.C. Hull.
when one is embedded in a political interest group. 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. 42

A result of loose collections of scholars working within institutions operating according to 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 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. 43

Martin Buber offers a sense of the difference between honest discourse and propaganda. “Genuine conversation, and therefore every actual fulfilment [sic] of relation between men, means acceptance of otherness. …. The strictness and depth of human individuation, the elemental otherness of the other, is … not merely noted as the necessary starting point, but is affirmed from the one being to the other. The desire to influence the other then does not mean the effort to change the other, to inject one’s ‘rightness’ into him; but it means the effort to let that which is recognized as right, as just, as true … through one’s influence take seed and grow in the form suited to individuation. Opposed to this effort is the lust to make use of men by which the manipulator of ‘propaganda’ and ‘suggestion’ is possessed….” 44

The differences from one scholarly culture to another are not simply linear. 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 requires the suppression of another.

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42 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.
43 Brinton, Ideas and Men, id., at 13.
44 Buber, The Knowledge of Man 69, supra n. .
Ideal 1. The Development and Pursuit of Original Knowledge for Its Own Sake

The first ideal has been described as the “Academic Dogma,” the pursuit of knowledge for its own sake. It has been argued that this ideal is the most important element of the university and is the force that drives and insulates the operation of our intellect; it allows us to inquire. It is claimed that this spirit gives life to all else that 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. The university, Madden stated, “is based upon an historic ideal that is incompatible with many of the forces of modernism . . . [T]he university is today the last surviving medieval institution, and . . . is now being destroyed by a secular Last Reformation.”

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.”

The analysis offered here relates to disciplines of the kind that are essentially non-scientific in nature, 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.” He adds: “Over two thousand years ago, men of letters were writing in Greek on these matters…. But our contemporary men of letters 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.”

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 which are inevitably political, philosophical, moral or religious in nature. To the extent there are *trutht*hs in the context of such knowledge they are of a different kind than exist in science and technical disciplines. The noncumulative truths 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

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46 Madden, Foreword to Nisbet, *Academic Dogma*, id, at v, vi.
47 Madden, *Foreword to Nisbet, Academic Dogma*, id, at v, vi.
49 Brinton, *Ideas and Men, id.*
values. This makes legal scholarship extremely difficult to place in the realm of creating original knowledge because generation-by-generation it deals primarily with the interplay between law, social force and power as developed within the operating terms of particular societies. Such work can be original in a contextual sense rather than as universal knowledge about which legal academics have little or nothing to contribute.

Ideal 2. The Preservation, Refinement and Transmission of Knowledge

Madden’s concept represents one dominant thread but its traditional and competing alternative is reflected in the classic articulation by John Henry Cardinal Newman in his prefatory remarks to 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. 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.” 50 Newman’s 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 its traditional competitor—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 further tests its validity and also extends and determines the dimensions of its application.

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 in which the breakthrough is the work itself, not criticisms of the work or repetitions 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 activity.

Ideal 3. Objective Social Critique

If Madden’s search for pure knowledge offers one view and Newman’s transmission of wisdom and existing knowledge another, a third approach that has gained ground over the past century begins to expose the core of our dilemma. The third form of the university ideal involves use of either original or traditional knowledge to critique the conditions of society. In the environment produced by this ideal there is a greatly increased engagement of the scholar with the conditions of society, with the explicit or implicit aim of understanding and improving that society. The Ivory Tower is remodeled to include doors that allow two-way interactions and the scholar deliberately looks out windows rather than in a mirror.

The selfless pursuit of knowledge for itself is only one among several ideals that have been claimed for the university scholar. The first two—the discovery of original knowledge and the refinement and transmission of the best existing knowledge—are ones that have themselves been in tension but that have nonetheless traditionally dominated the discourse over the ideal focus of university scholars. But as we move away from the first two ideals, the concept of the scholar’s role becomes gradually more activist in nature over the past two centuries—presumably with the rise of the social sciences and their focus on the concrete conditions of society. The social sciences, in contrast to the natural sciences, take humans and human social conditions as the focus of their laboratories. As the concentration on humans and society intensified so did the critiques of the conditions and inequities are revealed by the research.

Bernard Meland captured the essence of the ideal of objective social critique in his discussion of the reforms implemented by Robert Hutchins at the University of Chicago and set forth in Hutchins’ *The Higher Learning in America.* In describing the reforms advocated by Hutchins, Meland observes: “To say that it has turned university education back to the humanities is to overlook the critical turn of its reform. The earlier humanity-centered education was idyllic compared to the vigorous mood of this reform. The appeal [of Hutchins’ approach] is not to the humanities as such, but to the discipline of intellectual effort exemplified in certain humanistic studies. Its vigor arises, in part, from the intensity of its concern. It is more prophetic than educational in mood. Its motivation is heightened by a desperate sense of the urgency of the immediate need for achieving discipline in thought upon issues requiring decision and action in the world at large. It has become a people’s movement extending far beyond the bounds of the academic community.”

Scholars working according to this more active ideal of social critique accept that one of the functions of the university and of those who conduct scholarship is the critique of society in ways that tend to make it more just, or more sustainable, or more efficient. This type of work is a challenge to the more dispassionate and detached inquiry of the kind involved in scientific, mathematical or philosophical discovery. This undertaking threatens the culture essential to the first two ideals from the perspective of the scholar’s

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52 Meland, *Higher Education and the Human Spirit* at 10,11, supra n. .
ability to seek truth in a balanced way because it requires scholars to move toward the conditions of human society rather than look toward the Platonic “light” of pure knowledge. This represents a fundamental metaphysical shift.

**Ideals 4 and 5. Individual and Collective Activism**

Beyond the commitment to developing knowledge objectively in service of society—whether as critique or direct positive contribution—are the phenomena of individual and collective activist scholarship. Individual and collective activist scholarship represent phenomena that are both related and distinct. The choice to pursue an activist ideal of social justice, and the use of strategies to acquire the power to achieve that vision, is of great consequence to a community of scholars that has long-professed the detached pursuit of truth to be the defining characteristic of its members’ work. As we move from *detached* and independent truth-seeking based upon a definable and shared methodology to a context in which the scholar is *attached* to a specific interest, and engaged in analyzing and critiquing situations in which the scholar is a participant and active element rather than an objective external observer, we are simply not operating in the same culture as was thought to be necessary for traditional scholarly work.

The degree of subjectivity, passion and distorted perspective is the point where the conflict between the three more traditional university ideals--discovery, refinement and social critique--and the individual and collective activist ideals--becomes most intense. It is also the intersection where the culture and values needed to sustain the more traditional university ideals become incompatible with the culture and values required for the more activist ideals in which the active visions of social justice are sought to be implemented rather than only talked about as potential paths of action. Activist scholars seek not only to identify the injustices of our society but rectify them through action. This in itself can be both admirable and moral.

The key lies only partly in the fact of its activist nature. The individual and collective activist ideals in many ways represent a radical departure from the spirit in which the first three forms of the university ideal are pursued. The first three, regardless of their differences, are evaluative, objective, and are used in an honest attempt to seek truth. The latter two are devoted to seeking change as the dominant characteristic.

Unlike the Enlightenment’s naïve faith in the innate goodness of humans, the activist ideals implicitly accept that human behavior is a reflection of power, not goodness and Reason. The power of choosing one’s path through action is both an individual and identity group phenomenon. This implicit difference in perspective, one that to its practitioners not only trumps but rejects traditional assumptions about scholarship, is a fundamental challenge to the university culture. An important distinction between objective critique and activism, however, is that the activist becomes a part of the process of change and in doing so brings to it a heightened level of subjectivity and a strategic
political agenda that—like all politics—inevitably distorts the truth in the process of advocacy.\(^{53}\)

Faced with conditions that are seen as unjust there is a moral imperative to act and not to simply observe and comment about the tragedy of the condition. As to the inherent morality of seeking to act against injustice, John Bunyan asks “at the day of Doom, men shall be judged according to their fruits. It will not be said then, Did you Believe? But, were you Doers, or Talkers only? And accordingly shall they be judged.” \(^{54}\)

Maxine Greene explains this human duty through the existentialist belief that we create ourselves through our chosen actions. “For the existentialist,” she states “the self is devoid of character or coloration before action is taken. When the individual begins devising projects and purposes, he begins creating an identity. No outside factor or force, no science or set of rules or moral law, can make decisions for him. The only significant choices are those that involve him totally and project his existence into a future still unknown. The only meaningful choices are those for which he takes full responsibility.”\(^{55}\)

Activist scholarship represents a fundamental challenge to the traditional culture of the university and is a significant shift in the role of university scholars because the activist scholar is not content with explaining or critiquing society from an impartial point of observation. Instead the activist scholar seeks to change society, often with such a passion that the scholar becomes participant and strategic actor.\(^{56}\)

Sanford Lakoff cites Justice Holmes for the maxim: “‘As life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived.’” \(^{57}\) This imperative of action raises difficult issues. How far can the scholar go in taking action? If everyone in the community of scholars is an activist convinced subjectively of the truth of their positions and the righteousness of their actions what does this do to the university as an institution? Activist scholars take

\(^{53}\) “No longer merely an impartial refuge for those pursuing enlightenment, the university world now actively seeks to promote particular ideas and values in an effort to transform society. The word for these new perspectives—and for the brave new world towards which Stanford’s social engineers hope to lead America—is ‘multiculturalism’. ” Diversity Myth, id, at 17.


\(^{56}\) See, John S. Nelson, Ch. 12, “Stories of Science and Politics: Some Rhetorics of Political Research” at 198. “Is there anywhere a scholar of any kind—let alone a political scientist—who can attend to the least part of everyday affairs in the academy without discerning that politics is important in scholarship?” 199 “The evidence suggests that political scientists, like other scholars, do in fact notice large parts of academic politics, although their appreciation might slant unduly toward the kinds dominated by interest coalitions. The main evidence is that political scientists, like other scholars, do indeed practice various sorts of politics, in virtually every aspect of their academic activities, and often with a vengeance that shows their concerns to be truly serious.” In John S. Nelson, Allan Megill, and Donald N. McCloskey, editors, The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs (University of Wisconsin Press, Madison, WI 1987) at 199.

\(^{57}\) In Sanford Lakoff, “The Mind and Faith of Max Lerner,” Social Research, v. 61, No. 2 (Summer 1994) at p. 245.
the critique of society further than critical scholars because they are seeking to achieve change and the implementation of their personal vision of a more just society rather than only talking about what should happen.  

One of the key considerations is that the activist scholar is seeking in varying degrees to remake society in accordance with a particular set of values and ideology—including doing so in competition with other sets of values and ideologies. This competition, as noted by Deborah Tannen in describing the emergence of the argument culture, inevitably involves the use of polemic, rhetoric and propaganda. In this activist context, intellectual activity is driven primarily by agendas designed to achieve desired goals. Activist scholarship that forces us to confront and explore the larger questions and their systemic connections may be lacking in honest and balanced treatment of the individual fragment but be “true” in a larger context. Or due to its intensity and passion such scholarship may at least compel the reconsideration of injustices and in doing so advance social justice. The “truths” in such activist disciplines are matters of individual and community choice both in the immediate context and in terms of values shared across generations and traditions.

To some degree the activist scholar combines the role of the “public intellectual” with that of the more removed scholar. Ayn Rand explains: “The more specialized and diversified a society, the greater its need for the integrating power of knowledge; but the acquisition of knowledge on so wide a scale is a full-time profession. A free society has to count on the honor of its intellectuals: it has to expect them to be as efficient, reliable, precise and objective as the printing presses and the television sets that carry their voices.” The roles are at best in an uneasy balance and often in conflict. Though they overlap in many instances, the roles of the intellectual and that of the scholar are not identical.

Although Richard Posner has become known popularly for his writing on the “public” intellectual the more relevant meaning of that term is one that was used earlier by Cynthia Ozick. Ozick draws a distinction between the public intellectual and the “other kind” by arguing: “Public intellectuals know that history is where we swim, that we are in it, that we can’t see over or around it, that it is our ineluctable task to grapple with it.” She goes on to say that: “Thinkers … do not simply respond to existing conditions; in the buzz, confusion, and chaos of the Zeitgeist they strive to sort out—to formulate—the cognitive and historic patterns that give rise to public issues.”

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59 Ayn Rand, For the New Intellectual (Signet 1961), argues: “The intellectual is the eyes, ears and voice of a free society: it is his job to observe the events of the world, to evaluate their meaning and to inform the men in all the other fields. A free society has to be an informed society.” 26, 27.


61 Ozick, Quarrel & Quandary, id.
Even here the situation is not clear because the activist field is not monolithic but takes many forms. There are activist scholars who are seeking the implementation of carefully developed reforms identified after careful analysis and insight and activist scholars who are much closer to propagandists seeking to alter the culture to reflect their preferred moral and political views of the world, ones that are more ideological than thoughtful. Such activists may believe that truth is neither possible nor relevant to their goals. But while the dangers of activist work may vary in intensity, all activist commitments to some extent threaten the intellectual integrity of the traditional scholar.

The problem for many modern scholars is that they have lost objectivity by being too close to their subject—and in an increasing number of instances this has meant they are the subject themselves. The subject also includes the collective to which they have pledged allegiance, and their subjective preferences and agendas. None of these allow objectivity. Paul Bator, in criticizing the impact of CLS charged it had, “politicized the Harvard faculty, lowered academic standards, blocked faculty appointments, and discouraged qualified professors elsewhere from going to Harvard--because, [Bator] said, ‘serious and productive non-left scholars do not want to be at an institution devoted to guerrilla warfare.’ ”

The increased porosity of the walls of academia has added to the political nature of the university. This is reflected in, for example, the observations of feminist scholars acknowledging and even proclaiming the emancipatory and political aims of their work. The activist scholar, whether operating as an individual or as part of a political collective, seeks through scholarship and other uses of intellectual power to not only create but to implement a particular vision in concrete terms. Fonow and Cook state in the context of feminist scholarship, for example: “[a] feature of the feminist approach to research is the emphasis on action. This action orientation is reflected in the statement of purpose, topic selection, theoretical orientation, choice of method, view of human nature, and definition of the researcher’s roles. This emphasis on action is something feminists share with other traditions of social thought such as Black Studies, Marxism, and Gay and Lesbian Studies.”

Ruth Anshen suggested that humans don’t just use language but are the language they use. Frug takes this idea beyond any general context and argues that: “The postmodern

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62 In “Objectivity and Truth,” in Fonow and Cook, Beyond Methodology, supra n. , at 135, Acker, et al. indicate: “…the women’s movement outside of academia posed new questions and new formulations of women’s situation which then could be taken up in the academic setting. Women researchers, in addition, were usually members of the women’s movement and had, and still have, a political commitment to ending women’s oppression.”


64 Mary Margaret Fonow and Judith A. Cook, “Back to the Future: A Look at the Second Wave of Feminist Epistemology and Methodology,” 1.5; in Mary Margaret Fonow and Judith A. Cook, editors, Beyond Methodology: Feminist Scholarship as Lived Research, supra n. .

65 Anshen, Language: An Enquiry into Its Meaning and Functions, .
position locating human experience as inescapably within language suggests that feminists should not overlook the constructive function of legal language as a critical frontier for feminist reforms. To put this “principle” more bluntly, legal discourse should be recognized as a site of political struggle over sex differences. 66 Frug added: “The liberal equality doctrine is often understood as an engine of liberation with respect to sex-specific rules. This imagery suggests the repressive function of law, a function that feminists have inventively sought to appropriate and exploit through critical scholarship, litigation, and legislative campaigns.” 67

Frug continued with this activist theme. “Examples of these efforts include work seeking to strengthen domestic violence statutes, to enact a model anti-pornography ordinance, and to expand sexual harassment doctrine.” 68 Frug went on to say that: “This is not a proposal that we try to promote a benevolent and fixed meaning for sex differences. … Rather, the argument is that continuous interpretive struggles over the meaning of sex differences can have an impact on patriarchal legal power.” 69 Frug clearly offers the language of political struggle, strategy and a war of attrition, not that of the detached and independent scholar.

Frug’s is the language of collective political movements organized under the umbrella of a common agenda. It is a characteristic of these collectives that the truth of the underlying propositions has already been decided. Scholarship is seen as a means for advancing social agendas, not for evaluating whether they should be advanced or how the concerns of the particular group should be balanced with other legitimate considerations. Because the issues brought into the discourse by the scholars who are members of the activist-collective are so volatile and deeply felt, and so vehemently opposed by others, it is an aggressive, strategic, and in many ways irrational discourse between the various interest groups. In such a heated process legitimate criticisms from all political perspectives too easily slide toward becoming fanatical assertions seeking to maximize impact and rally support. The problem, however, is that as Gabriel Marcel warns: “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.” 70

It is clear that the activists are oriented to power—including confronting it, weakening others’ grip, and capturing a share for the interests they represent. While the activists “speak” to power in the prophetic sense, the hardest question is whether they always “speak truth” to power, or primarily care about the power itself. Individual and collective activist scholars do not trust in the Socratic ideal of the innate moral goodness of humans in which all that was necessary to achieve the good was to understand it—a belief that in

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66 Frug, “A Postmodern Feminist Legal Manifesto,” Harvard L. Rev. at 1045. See also Fonow and Cook, Beyond Methodology, supra n. , at 5.
67 Frug, “A Postmodern Feminist Legal Manifesto,” id. .
69 Frug, “A Postmodern Feminist Legal Manifesto,” supra n. .
many ways served as the grounding principle of the French Enlightenment. Activist scholarship is more impatient. Offering true insights is therefore not enough for activist-scholars because social change is understood as a product of power—not truth. But how far does the necessity of political power as the key element of changing conditions perceived as unjust allow the activist-scholar to go?

To the extent it is accurate, criticisms of Stanford University’s approach to a multiculturalist curriculum arguably describes a movement that is beyond the boundaries. 71 The Sacks and Thiel report, *The Diversity Myth: “Multiculturalism” and the Politics of Influence at Stanford*, makes the complaints about students being censured for “incorrect” views and for a culture that intimidated those who would otherwise have voiced opposition to the proposed curriculum changes. The authors concluded that: “At the very least, the charges of racism, sexism, and ethnocentrism—often explicit, always implicit, and constantly repeated in protests, classroom discussions, dormitory programs, and the Stanford Daily—discouraged supporters of the existing program from voicing their views.” 72

As to some aspects of multiculturalist criticisms of Western society, the observation is made that: “An honest study of other cultures might entail a drastic reassessment of the role and nature of the West, but hardly in the direction … while many cultures have practiced slavery, only in the West did the doctrine of individual rights develop, that shattered the cultural basis for slavery.” 73 Sacks and Thiel argue: “If there is a consistent intellectual mistake made by the West’s critics, it appears to be this: Because the West has recognized its episodes of historical injustice, it is judged more harshly than cultures that present a rosier, but less accurate, accounting of themselves.” 74

**Implications**

The concern is the degree to which one ideal should be given priority over another. While I find great solace in both of the first two ideals there is a need to consider the consequences of choices that favor those traditional goals and reject more active roles for scholars. When virtually no other institution is able or willing to undertake the role of the honest critique of human society, and even the attempt to change and improve that society, the critiquing perspective is one of the most vital roles of the university scholar.

But as scholars move from detached positions to active 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 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 and the refinement of existing knowledge. As

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71 David O. Sacks & Peter A. Thiel, *The Diversity Myth: “Multiculturalism” and the Politics of Influence at Stanford* (Foreword by Elizabeth Fox-Genovese) (The Independent Institute, Oakland, CA 1995).
72 *Diversity Myth*, id at xiii and 13. 13
73 *Diversity Myth*, id, at 8.
74 *Diversity Myth*, id, at 8.
this occurs objectivity and detachment lessen and the work takes on a higher probability of being shaped by the scholars’ opinions, social goals and allegiances rather than intellectual clarity and honesty.

Even in the strictest application of the scientific method to the conditions of what we are calling *cumulative* knowledge the researcher’s process of observation alters the phenomena being observed. As we move further away from the application of strict methodology and from the measurement of *cumulative* knowledge phenomena to the material of *noncumulative* knowledge the dangers of subjectivity and distortion of the observed and critiqued reality by the researchers’ bias increase. Even so, this is not as difficult for the scholar seeking to objectively critique society in a balanced way than with the phenomenon of activist scholarship. 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 critiquing 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 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 that 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 still more 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 of the scholar and more of the political activist—converting the discourse into a form and style that is highly manipulative, goal-oriented and rhetorical rather than balanced and explanatory.

Both critical and activist scholars have often decided on what is likely to be a vision of the truth before they offer their conclusions--or even before they initiate their research. There are, however, important distinctions between scholars who critique the conditions of society according to accepted research methods and activist scholars committed to changing that society through political action. The critical scholar offers insights that demonstrate deficiencies or explain paths by which solutions can be created. While the scholar critiques the society and political process, the choice as to whether those

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criticisms are adopted is left to the society itself. The critical scholar’s work is essentially complete at the point of the critique. The activist-scholar seeks to be engaged in the political process in order to achieve change and is committed to the implementation of an agenda.

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. Risk aversion is found throughout American universities. Scholars fear the consequences of writing something that will displease an academic political collectives. They either write cautiously or alter their analysis to appeal to one of the more powerful interest groups.

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…” 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 new political orthodoxy distort how we interpret knowledge. Such an environment also creates a risk-averse unwillingness to critique colleagues’ work.

This enables scholars to obtain benefits from conformity without facing the hard questions about how their minds are being shaped or the ways in which the distribution of rewards influences the direction, tone and content of their intellectual inquiries. For most scholars it is not a matter of conscious bad faith or overt dishonesty but a question of prudent and self-serving conceptual blindness.

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76 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. Diekema, *Academic Freedom*, supra, n.  .