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THE FUTURE OF SCHOLARSHIP IN LAW SCHOOLS

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I. INTRODUCTION

Law schools are in a state of rapid change as a result of the law school crisis that plunging enrollments have caused. It seems certain that many if not most law schools will change significantly over the course of the next five-to-ten years. It is in this context that this *Touro Law Review* issue is devoted to exploring thoughts that Associate Deans for Research and Scholarship have on their role in law schools, in particular with regard to the question of how their role affects a law school's visibility. Although there are many ways of approaching this issue, fundamentally, it revolves around the future role of research and scholarship within law schools. Law schools are sensitive—as they should be—to numerous constituencies, not all of which place a premium upon or even value scholarship. Giving renewed consideration to the role of scholarship—and what if anything it contributes to a law school's visibility, and whether any such visibility is worth the cost—is particularly appropriate now when many of the pressures facing law schools create incentives for sacrificing it.

II. DISCUSSION

A. The Scholarly Obligation

Law schools have an obligation to engage in research and scholarship for numerous reasons: because they have come to be situated in university settings; because they have special expertise in explaining the law and promoting legal and regulatory reform; because they have an obligation to train leaders who will impact society; and

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many others.

Law schools' incorporation into university settings brings with it both an expectation and imperative to conform to university norms, which include research and scholarship. Whether in the case of ancient institutions of higher learning or in the development of the Western-style university, the tradition of higher learning has long been coupled with an imperative to inquire, which is dedicated to better understanding ourselves and our world. In its modern form, this imperative is summed up in the development and promotion of the 19th-century German concept of *Wissenschaft*—the systematic pursuit of knowledge, learning, and scholarship¹—which defined modern academic inquiry through methods that would contribute to epistemic credibility, such as sustained, objective study and reliance on primary sources and documents.² This concept served as a cornerstone for the elite American law school and served as a primary catalyst—perhaps *the* primary catalyst—for law schools embracing a scholarly role.³

This tradition has served us well. Whether part of a university system or as a stand-alone law school, the pervasive role of law in modern society has left law faculties with both a special opportunity and responsibility to question, challenge, explain, and help develop the law. Admittedly, this can and is done through teaching. But the level of knowledge necessary to deeply engage in the endeavor comes only through scholarship pursued in the *Wissenschaft* tradition: through dedicated study and research, development and application of expertise, and contemplation of the most difficult or pressing questions that confront us. Waves of anti-intellectualism come and go.⁴ We are in the midst of one now, a wave whose crest may even have reached the highest levels of our judiciary.⁵ But it is undeniable

¹ Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 *NEW ENG. L. REV.* 251, 277 & n.152 (2005).

² *Id.* at 279.

³ *See id.* at 274-300.

⁴ *See generally* RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (1963).

⁵ *See* Richard Brust, *The High Bench vs. the Ivory Tower*, *A.B.A. J.*, Feb. 2012, at 50, 52 (recounting Chief Justice Roberts's dismissive comment at a 2011 Fourth Circuit Judicial Conference that in any copy of a law review the "first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th century Bulgaria"); *see also* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *MICH. L. REV.* 34, 35 (1992). *But see* Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 *NW. U. L. REV.* 995, 1025-26 (2012) [hereinafter Petherbridge & Schwartz, *An Empirical Assessment*] (de-

that legal scholarship has had, and continues to have, an impact on the most important legal issues that confront us.⁶ It influences public and academic discourse, legislation, and judicial decisions, all of which guide our conduct.

Law schools are especially well placed to produce future leaders at the community, regional, and national levels, as well as for businesses and institutions of all sorts and in government and the judiciary. Law schools' obligation to provide an education that maximizes the benefit graduates obtain from their law degrees requires that any such education reflect, and provide some sort of preparation for, those future leadership opportunities. Certainly, such a legal education must provide more than vocational training. Many reformers insisting upon a need for greater practical training⁷ may seek to imple-

terminating that Chief Justice Roberts cites legal scholarship at approximately the same rate as other current Justices).

⁶ Professor Robert Condlin has usefully collected citations exemplifying “numerous contributions of legal scholarship to the development of law over the years,” in areas as important and diverse as privacy, tax, commodities trading, antitrust, property, environmental protection, copyright, consumer financial protection, product safety, “and dozens of others,” and also pointed to “the systemic contributions of [numerous other] scholars.” Robert J. Condlin, “*Practice Ready Graduates*: A Millennialist Fantasy, 31 *TOURO L. REV.* 71, 80-81 n.28 (2014). The law and economics movement, including Coase’s Theorem and more, has had terrific influence.

Empirical measures of Supreme Court citations to law review articles show that, though the Court is citing to such articles less frequently than in the past, it continues to cite them at a rate far outpacing what would be true if they really were of little usefulness or relevancy. See Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 *DREXEL L. REV.* 399, 407-16 (2012); see also Derek Simpson & Lee Petherbridge, *An Empirical Study of the Use of Legal Scholarship in Supreme Court Trademark Jurisprudence*, 35 *CARDOZO L. REV.* 931, 933-35 (2014); Petherbridge & Schwartz, *supra* note 5, at 998-99 (finding that “[t]he overall trend during the last sixty-one years has been an increase in the use of legal scholarship by the Supreme Court,” and that “the Court disproportionately uses scholarship when cases are either more important or more difficult to decide,” and concluding that “the Court uses legal scholarship rather frequently, and, moreover, uses it systematically to support the decisional lawmaking process,” an indication that “legal scholarship is neither useless nor irrelevant to the Court”); David L. Schwartz & Lee Petherbridge, Ph. D., *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 *CORNELL L. REV.* 1345, 1346-48 (2011); Whit D. Pierce & Anne E. Reuben, *The Law Review Is Dead; Long Live the Law Review: A Closer Look at the Declining Judicial Citation of Legal Scholarship*, 45 *WAKE FOREST L. REV.* 1185, 1186 (2010) (“judicial citation of law reviews might not be in decline at all, and . . . in some cases, just the opposite might be true”). The likelihood that law review articles influence advocates or judges without being cited is quite high, making it likely that actual citation counts in the Supreme Court underrate the influence and utility of legal scholarship. See Petherbridge & Schwartz, *supra* note 5, at 1000.

⁷ Two highly influential reports released in 2007 were quite critical of legal education and strongly recommended providing law students more practical training. The Carnegie Foundation for the Advancement of Teaching issued one of these reports. WILLIAM M. SULLIVAN

ment a model that provides more than vocational training. However, their emphasis on increased practical training calls into question whether graduates will maximize their potential. This is because increased practical training is in tension with the broad range of scholarly inquiry and thinking that more fully trains and familiarizes law students with the critical thinking about law and policy that more fully prepares them to become leaders.

To maximize the benefits of a legal education, research and scholarship must have a prominent role because they are central to the role of institutions of higher education as creators of knowledge and fonts of ideas about law's role in society, government, and business. Research and scholarship are also central because they inform and therefore help fulfill the teaching mission by deepening law professors' knowledge and thinking about the subject at hand. Often, this deepening becomes even more useful and profitable because it extends into related fields. All of this results in a private benefit to law students as well as a public benefit to society at large.⁸

B. The Law School Crisis & Scholarship

Of all law school missions, research and scholarship are cur-

ET AL., EDUCATING LAWYERS (1st ed. 2007). The second report was issued under the auspices of the Best Practices Project of the Clinical Legal Education Association. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007). Both of these reports followed in the footsteps of a major 1992 report—known as the MacCrate Report—that similarly called for greater practical training for law students. AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992). The Task Force that the American Bar Association recently charged with examining the future of legal education has joined this movement. See AM. BAR ASS'N, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION: REPORT AND RECOMMENDATIONS 27-28 (Jan. 2014) [hereinafter A.B.A. TASK FORCE ON LEGAL EDUCATION] (calling upon law faculty to support “Constructive Change” in faculty culture so as to support law schools that deemphasize scholarship); *id.* at 34 (recommending that law schools “Develop and Implement a Plan to Manage the Extent of Law School Investment in Faculty Scholarly Activity, and Continually Assess Success in Accomplishing the Goals in the Plan”).

⁸ The recent A.B.A. task force report on legal education strongly implies that scholarship is at most only a public good, and that it is inherently in tension with students' private interests. See A.B.A. TASK FORCE ON LEGAL EDUCATION, *supra* note 7, at 6-7, 11, 25-26. Implicit in this formulation is that law school students and graduates, already burdened by high tuition and student loan debt, receive no adequate benefit from subsidizing faculty scholarship with tuition dollars. See *id.* at 7. This conception incorrectly posits a non-existent mutually exclusive relationship and ignores that students can and do receive private benefits from faculty scholarship, such as in the classroom, in discussions with faculty members outside the classroom, and through exposure to scholarly events at law school, at a minimum.

rently most at risk as a result of prominent calls for reform in legal education that emphasize practical training and devalue scholarship,⁹ and also due to the increasingly limited resources and budget austerity that the current enrollment crisis has caused. Consequently, the current challenge is to find ways to promote and encourage research and scholarship and continue to emphasize their importance during a time when all the immediate incentives are to sacrifice them in favor of other priorities.

Until recently, most law schools had incorporated numerous innovations to promote scholarship. These innovations fell into two categories: providing *time* for scholarly production, and *funds* to promote it. Time was afforded by providing lighter teaching loads, and accommodative class scheduling. Funds were provided through increasingly generous summer research and writing stipends;¹⁰ research assistant budgets; annual and automatic research and scholarship budgets per faculty member; and travel funds to encourage attendance at conferences and symposia or for research. Though the extent of support for research and scholarship through these and other techniques varied among law schools, the vast majority of law schools provided some meaningful level of support.

In the past few years, these scholarship incentives have been reduced or withdrawn, a trend that is likely to continue into the foreseeable future. This has been true at most law schools at all levels throughout the nation. Thus, scholarship's role in contributing to a law school's visibility is diminishing, possibly rapidly, depending on the law school.

All of this poses a severe challenge to the continued viability of a scholarly law school model. Many believe that, to the extent a scholarly role will survive, it will do so at a limited number of schools, perhaps the "Top 20" or so law schools with enough reputational capital and resources to continue to invest in scholarship, while the remaining law schools will, to differing extents, move toward more of a practical (vocational?) training model. We should strive to avoid such an outcome because it would disserve everyone, not least of all students who would be deprived of important and crucial educational (as opposed to training) opportunities that would expand and

⁹ See *supra* notes 7-8.

¹⁰ Law professors typically work on nine-month contracts reflective of the academic year, and thus are technically unpaid over the summer absent another source of income, such as these stipends or payment for summer teaching.

deepen their knowledge, helping to equip them for a professional life in which they will provide the greatest value if they are able to deal with their clients' and employers' most difficult problems.

C. The Future: Scholarship & Law School Visibility

From a strategic planning perspective, all of this leaves law schools at an uncertain crossroad, facing three fundamental options: (1) essentially or actually ending scholarly production, or severely reducing it; (2) reversing recent reforms and limiting future ones so as to recreate the ability to offer scholarship support in terms of time, funds, or both; or (3) finding new ways to support research and scholarship that can co-exist with recent and future pedagogical reforms.

The first option should be rejected, and the second is likely impossible. The first option of ending or reducing scholarly production is inconsistent with the mission and role of higher education, law schools' potential for producing leaders, and the obligation to maximize graduates' benefits from their law degrees. The second option of reversing or limiting reforms is likely unavailable given regulatory reforms, calls for reform from the legal profession, and an enrollment crisis that has forced budget austerity that will persist in legal education generally for the foreseeable future.

Thus, the only realistic and best alternative is to embrace the third option of making efforts to find new ways to support research and scholarship that can co-exist with pedagogical reforms. This is an effort in which the entire law school community can and should participate, though Associate Deans for Research and Scholarship can have a special role in promoting the initiatives among law faculty. A non-exhaustive list of innovations that might help achieve this goal includes:

- more accommodative class scheduling for faculty who regularly produce scholarship (e.g., giving priority to the teaching and scheduling preferences of these faculty; two teaching days per week; class periods that can exceed 1-2 hours to more efficiently schedule faculty teaching time; for commuting schools, assigning teaching obligations in a manner that saves these faculty substantial commuting time);

- increasing use of technology to make more efficient use of faculty time, for example by encouraging and making possible more online courses such as to decrease commuting time;
- moving toward a specialized faculty model in which faculty who have not meaningfully produced scholarship, or have little or no interest in doing so, take on additional teaching, committee, service, or administrative responsibilities in exchange for being freed from a scholarly obligation, thus, making it possible to reduce the teaching loads for faculty who are productive in their research and scholarship duties;
- creating and awarding special recognition titles for faculty who are prolific in their scholarly duties, and possibly rewarding them with a reduced teaching load for an applicable term; and
- encouraging faculty members to consider alternate outlets for their scholarship that are more accommodating of shorter forms of writing, such as essays, commentaries, or blogging, preferably in a format in which the shorter pieces can later be used to produce a longer essay or article.

In these ways, scholarship can continue to contribute to law school visibility. This will benefit law schools themselves. More importantly, it will also benefit law students, who will continue to be exposed to faculty engaged in the scholarly model. It will also benefit society at large, which will profit from law faculties' continued and sustained scholarly approach to the law and its development.

The imperative to maintain a scholarly law school model will persist even as the legal profession changes. A compelling prediction about the legal market is that it will become increasingly specialized and commoditized over time, primarily owing to cost pressures and greater efficiencies that technology will make possible.¹¹ It is a mistake to conclude from this that law schools should depart from a scholarly model. Nothing about this possible (likely?) future reduces the need for a resource that will grapple with the legal implications of

¹¹ See generally RICHARD E. SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013).

societal and technical change, and law schools and their faculty are the primary and perfect institution to serve as that resource. So long as change occurs—and it always will—there will exist not only a need, but also an imperative, for legal scholarship.

The proper response to future changes in the legal market is not to abandon the scholarly law school model, but to change our conception of lawyers and the functions they serve, opening the more technical and ministerial parts of those functions to non-lawyers (who may or may not be trained in law schools).¹² In recent remarks (much of which I disagree with), Justice Scalia was correct in suggesting that some roles that lawyers currently fulfill need not be the sole province of lawyers, while also emphasizing that lawyers will continue to have a crucial role in our society.¹³ He conceded that some legal tasks could be competently undertaken “without knowing much about the whole field. I expect that someone could be taught to be an expert real-estate conveyancer in six weeks, or a tax adviser in six months. And maybe we should train such people—but we should not call them lawyers.”¹⁴ What will set lawyers in this future world apart is not merely more *training*, but an *education* that is grounded upon a scholarly model that has exposed them to the Wissenschaft tradition and methodologies, which these future lawyers can then apply to the world in which they find themselves, as well as to their clients’ and employers’ difficult problems.

III. CONCLUSION

Moving forward, law schools should be committed to a culture of excellence in scholarship that both contributes to the advancement of the law and supports excellence in teaching. To promote this goal, law schools should continue to consider meaningful ways to encourage research and scholarship. Doing so is not only important for their own visibility, but it is important to preparing law

¹² See Dan Kittay, *An inside look at limited practice for nonlawyers in Washington and other states*, A.B.A. BAR LEADER (Sept.-Oct. 2013), http://www.americanbar.org/publications/bar_leader/2013-14/september-october/inside_look_limited_practice_nonlawyers_washington_other_states.html.

¹³ Debra Cassens Weiss, *Scalia: Most law schools will have to cut tuition; cutting faculty would ‘be no huge disaster,’* A.B.A. J. (May 19, 2014), http://www.abajournal.com/news/article/scalia_most_law_schools_with_have_to_cut_tuition_cutting_faculty_would_be_n/.

¹⁴ *Id.*

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students for their professional careers and to fulfilling a crucial societal need for legal evolution.