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# Some Thoughts on Scholarship for Beginning Teachers

Mary Kay Kane

Any discussion of the successful law teacher necessarily will include references to scholarship. Thus it is not surprising that the most common and crucial advice given new law teachers is: *you must engage in legal scholarship in order to progress and earn tenure*. But what is scholarship and why do law professors take such an unbending or immutable view of its desirability?

Let me begin with an assertion: scholarly endeavors form the core of what law teachers are about. Indeed, I think the reason for this phenomenon (or the why of scholarship) helps to define the very concept of scholarship. So I will begin with that question in an effort to explore what scholarship is, and I will conclude with some remarks about what the novice teacher should consider in deciding the kinds of scholarly endeavors to pursue in the earliest stages of a teaching career.

## I. What Are Your Colleagues Looking For and Why?

### A. *The Goals of Scholarship*

Academic legal scholarship has two important goals. Both are recognized as essential to the academic world and thus both represent the rationale for requiring scholarship of some sort as a *sine qua non* for tenure.

In an intangible yet clearly identifiable way, engaging in serious research and writing about legal topics both enriches your teaching and makes you a more valuable colleague. It is true that teaching makes you think more deeply about a subject than you probably ever realized was necessary or possible. But after that first exposure to the classroom, the new teacher will find that given the time constraints—not to mention the students' interest—there are many topics whose surfaces one can only begin to brush. It is the repeated opportunities to pursue these topics through research and writing that revives and revises a teacher's ideas, and enables him or her to return to the classroom fresh with new enthusiasm. Additionally, the expertise gained by doing research becomes a resource for one's colleagues. Free from the constraints of the "billable hour," teachers should be encouraged to share

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new ideas and research and to help each other develop their thoughts; this reciprocity is the hallmark of a true intellectual community, as well as of a vigorous institutional life. Since all your colleagues will benefit, they want to see you participate fully in this aspect of law school life.

But this goal could be achieved even if teachers never published a word. Simply keeping abreast of the latest work in one's field, researching, and trying to write out one's thoughts would create the climate I have described. Nonetheless, in most law school faculties, publication is a necessary requirement for tenure, and for an entirely practical reason. Published research adds to an institution's prestige, which is built largely on the prestige of its faculty. The faculty, in turn, become more widely known largely through publication. Even if your colleagues think you are the most useful and engaging new faculty member they have seen in years, the broader institutional needs of the university as a whole make their own demands and encourage outside recognition. Your reputation among administrators and other faculty in the university has many values—only some of which are expressed in terms of tenure and dollars.

### *B. Standard for Assessing Scholarly Ability*

Given the above goals, your colleagues are looking for essentially three things when they evaluate the scholarly output of your early, pre-tenure career.

#### 1. Basic Scholarly Ability

Do you have the capacity to find and develop a topic, research it thoroughly and write about it clearly? I would imagine when most of you hear that question the answer seems self-evident. After all, haven't you come from positions—in practice or clerkships—in which you were constantly required to do research and to write? What is the difference between legal scholarship and other forms of legal writing?

There is something special in the academic form of writing, and it should be evident in your publications. Now your opinions must reflect more than ardent and able advocacy, partisan arguments developed while burning the "midnight oil." Academic life provides the opportunity for serious reflection, and you will be expected to examine your topic thoroughly from all sides, without being obliged to conceal weak spots. Indeed, you should be able to expose the problems and yet argue for whatever conclusion seems most consistent with the policies you think should dominate. Scholars have the luxury of distance. We can examine the way the law *ought* to be from the perspective of the judicial system or some societal goal; we can recognize the shortcomings of our own suggestions without having to distort matters in order to present the best case for "our client." Academic detachment is a luxury, but it is also a responsibility that may take time getting used to.

#### 2. Progression and Dedication

I want to emphasize that my discussion of these criteria pertain only to the evaluation of scholarship in the pre-tenure years, that is, the earliest stages of

your career. Given this time limitation, what we are really looking for when we evaluate the written output of a tenure candidate is evidence that the candidate understands and is committed to the scholarly part of law school life, for the reasons stated earlier. It is true that this commitment could be demonstrated by one truly masterful piece, but in most cases that doesn't happen and any number of promising careers have foundered because an attempt to dazzle fails. A series of less ambitious pieces provides better evidence of future productivity. If a tenure committee and the university overseeing tenure decisions believe that you are not merely churning out last-minute "tenure articles," but rather, are engaged in serious research, and dedicated to writing, they can have some confidence that you will continue to grow both in the kinds of ventures you undertake and in the impact you are likely to have on your field. The tenure committee focuses on past achievements, but with primary emphasis on what those achievements reveal about the likelihood of future accomplishments.

### 3. Impact and Novelty

Law faculties vary as to how important these last factors are, but they commonly do try to assess what kind of impact your output to date has had or is likely to have. Depending on your own school's self-image, the forms this assessment may take range from an evaluation of the number of your pieces cited or relied upon elsewhere, to a more subjective attempt to assess the novelty of the ideas within your work and to judge whether they are likely to challenge or change current thinking about a particular topic.

The standard applied to these last factors may also be affected by the school's recognition of the amount of time and support you have been given to allow you the leisure to develop your ideas. For example, at my own school, Hastings, we have a heavy teaching load (12 units per year), no research leaves prior to tenure, and rather burdensome committee assignments. Tenure evaluations are made in the sixth year. We do not expect (although we have been fortunate to see some) monumental, original works; rather, we look for shorter, continuous productivity promising growth in the future. Other schools with which I am familiar are able to give their younger faculty much more support and correspondingly may expect more during the pretenure period. More free time allows for more reflection and work of greater magnitude. It is important to get a sense of your own institution to know best how to evaluate this last criteria.

## II. Considerations in Choosing Kinds of Scholarship to Pursue

Scholarship can take many forms, some more controversial than others. Your decision to engage in a particular kind of scholarship should of course be governed primarily by your interests. Practical consideration also should play a role, however, particularly when you are a new scholar who must build a record for review by your tenured colleagues. The preceding description of what your colleagues are looking for when they evaluate your writings may help you decide what kind of work to pursue in those early years. They are no absolute taboos. The preceding discussion simply suggests some

factors to consider in choosing the form of scholarship most congenial to you, one that also will sharpen your skills and assure your early success.

### *A. Traditional Scholarship*

Turning first to the traditional forms of scholarship; the classic publication is the law review article that examines some legal doctrine and exposes its problems, or shows where it is going and argues for a change. However, there are other kinds of traditional scholarship that you may also wish to attempt and that should be evaluated in light of the previously discussed goals.

For example, what about writing practice books for lawyers, such as treatises, or even commentary to form books? Casebooks for other teachers? Or study aids and outlines for your students? Having myself written an outline, a nutshell, a hornbook, and several volumes of a treatise, I obviously cannot think these are bad things to do. But remember that in your early years you must demonstrate your intellectual growth and your ability to take the distanced or academic view of the law. Each of the kinds of books just mentioned show that you work hard and can put something into final form and get it published, and their publication may bring some prestige to your institution.

But you also should consider that books take much longer to write than do articles. Thus one book might be all you can produce before you come up for tenure. Outlines and study aids are recognized and moderately profitable, but they do not add to your own prestige or to that of your school, and they do not really allow you to display any of the true scholarly characteristics I have described. Some casebooks have been models of scholarship and innovation. But compiling teaching materials is probably the most time-consuming project of all and requires several trial years in the classroom. Further, casebooks are often hard to evaluate—at least for university committees. So the advisability of engaging in even some traditional forms of scholarship in the pre-tenure years is questionable.

### *B. Nontraditional Scholarship*

Clearly, however, nontraditional scholarship poses the greatest dilemma for tenure committees. Faculties assessing nontraditional work generally feel that they simply do not know how to determine whether it represents a contribution or whether it is well done; most law teachers have little experience with this kind of scholarship. Thus nontraditional scholarship is often viewed skeptically. There are additional practical problems, depending upon the kind of nontraditional scholarship involved. To illustrate, I have identified three different nontraditional forms of legal scholarship; each of these presents some special concerns for novice law teachers.

#### 1. Empirical Research

In many ways empirical research is probably the most accepted of the nontraditional forms. Many law faculties have members who engage in

empirical research; it is published in some of the major law reviews; and it is sponsored by well-recognized and respected groups such as the American Bar Foundation. Faculty members who must evaluate empirical work easily can find others to help them when they do not feel comfortable with the task. Thus the major disadvantages of pursuing this research are, as I see them, the time commitment it requires and the fact that the researcher often undertakes such projects only to discover that the findings are inconclusive and thus not really worth publishing. In addition, unless you have engaged in empirical work before, it takes time and some special expertise to design inquiries and models and to evaluate the data collected. This last observation also applies to other forms of interdisciplinary work. Unless you come to law teaching with past experience in other disciplines, the task of gaining teaching or research experience while at the same time refining your legal skills can be overpowering.

Indeed, the need for special expertise often encourages researchers to collaborate. Although co-authoring can be great fun as you exchange and develop your ideas with someone as interested and committed as you to the project at hand, that very process of exchange usually entails a greater time commitment than if you work alone. More important, it might be difficult for a tenure committee to evaluate who is responsible for what part of the work, and thus you may not receive as much credit as you should. Early tenure evaluations force you to consider whether you can risk such a venture. Remember, deciding not to do empirical research as your first project does not prevent you from doing such work later on.

## 2. Clinical Writings

I am using this title as an umbrella term for what I would call the “how-to-do it” articles. A significant component of legal education today is clinical. As more teachers spend more time devising and offering courses in advocacy and negotiation and simulated trial and pretrial experiences, they also are devoting more time to writing about these experiences. To be honest, however, I think that most law faculties do not view this form of writing as sufficient in and of itself to merit tenure. Like committee reports, which you also may write, it fulfills a professorial duty, but not the requirements of scholarship.

It is hard to explain why, other than to note that clinical writings do not demonstrate the kind of analysis and in-depth research that is considered the hallmark of academic scholarship. Although viewed as useful, they generally are treated as mundane. That is, they are not perceived as innovative, as presenting possibilities for changing the law and the profession. Thus clinical writings fail to demonstrate two of the essential goals of scholarship mentioned above—basic scholarly ability and impact. Although this view may change—and I think it is changing at some schools—it is important to have a sense of how your own institution judges such matters before you devote your early career to writings that may not be valued highly (and may even be scorned) when you are being considered for tenure.

### 3. Critical Legal Studies, Radical Movements, and Polemical Writing

Many of you may have read about the Critical Legal Studies debate now raging in the country's law schools, with the core debate focused on Harvard. I confess I have no junior colleagues who are devotees of this or other radical movements and hence have not had to confront the problem of how to evaluate their scholarship for tenure purposes. However, I will share my own view of what may be a least one of the causes of the distrust of CLS and similar movements.

CLS, along with radical feminist scholarship, challenges some of the deepest tenets of our legal traditions. This fact alone makes it a somewhat risky venture. But for many this same fact might be the hallmark of great scholarship—it is theoretical, it provides an overview, and it presents arguments in order to try to foster a change in the system. All these are good qualities representative of the values traditionally associated with legal scholarship. The problem is that the style of scholarship CLS advocates use to advance their notions is often (not always or necessarily) too polemical; it lacks the analytic underpinnings of careful argument. It becomes argument for argument's and confrontation's sake. For the beginning scholar, it offers enormous pitfalls, both because of its content and, for reasons peculiar to its participants, because of its very style.

### III. Conclusion

Let me close with a general word of advise and encouragement. Remember, I have been talking about your early years in teaching and how to develop and demonstrate your scholarship potential. Whatever you choose to do now is only the beginning; no piece of research is ever a total loss, and nothing you do now prevents you from developing new areas of specialization as you mature. The key is to build your skills early and continuously so that you may benefit from the immense learning experience of becoming a "scholar," and share to the fullest the excitement of the academic enterprise in which we all are engaged. It is this last fact that for the most part supports my belief that you ought to look forward to these scholarship demands.

I have been teaching for 12 years and have engaged in a fair amount of scholarship during that time. Aside from the enormous pleasure of pursuing and discovering new ideas and developing them in a concrete form, a real reward of scholarship is the excitement of being known outside your faculty. You will find that through your writing others gets to know you and you can become involved in a sophisticated dialogue with those who are interested in the very subjects dearest to your heart. Imagine—there actually are others who want to spend their time discussing *res judicata* or indispensable parties! We law teachers are a small community, and there is nothing more rewarding than participating in the continual exchange of ideas that is the life blood of our community. The rewards and the excitement of scholarship continue beyond tenure or promotion and throughout your careers.