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## Toil of the Firestarters

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# TOIL OF THE FIRESTARTERS

Peter A. Alces\*

IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION. By *Julius Getman*. Austin: University of Texas Press. 1992. Pp. xvi, 294. \$24.95.

Thomas Wolfe, probably slumped over a refrigerator top, formulates the toil of the teacher-scholar:

In this, he told himself, he was just like most of the other piddling instructors at the School for Utility Cultures, from which he had fled, and to which he would return to resume his classes in English composition when his leave of absence expired. They talked forever about the great books they were writing, or were going to write, because, like him, they needed so desperately to find some avenue of escape from the dreary round of teaching, reading themes, grading papers, and trying to strike a spark in minds that had no flint in them.<sup>1</sup>

Wolfe's reflection was autobiographical,<sup>2</sup> and that autobiography supplies the power of his character's observation<sup>3</sup> — a power sensed most profoundly by those who have too confronted the "dreary round." Most teachers, however, do not respond to their experience the way Wolfe and his character did: Wolfe disliked teaching so much that he chose instead to write the great American novel, or a few of them.<sup>4</sup> The contemporary response of the cynical teacher-scholar is to consider the state of the academy from within and to despair of its decline.

Teachers, and perhaps law teachers more than some others, are introspective,<sup>5</sup> constantly thinking about their place in the cosmos,

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1. THOMAS WOLFE, YOU CAN'T GO HOME AGAIN 16 (1940).

2. Wolfe had been a rhetoric instructor at New York University in the 1920s. See DAVID H. DONALD, LOOK HOMEWARD: A LIFE OF THOMAS WOLFE 103-232 (1987).

3. In his posthumously published *Autobiography of an American Novelist*, Wolfe acknowledged and responded to charges that his books were too autobiographical:

I protested against this term . . . upon the grounds that any serious work of creation is of necessity autobiographical and that few more autobiographical works than *Gulliver's Travels* have ever been written. . . . [M]y conviction is that all serious creative work must be at bottom autobiographical, and that a man must use the material and experience of his own life if he is to create anything that has substantial value.

THOMAS WOLFE, *The Story of a Novel*, in THE AUTOBIOGRAPHY OF AN AMERICAN NOVELIST 1, 19 (Leslie Field ed., 1983).

4. See, e.g., THOMAS WOLFE, THE WEB AND THE ROCK (1937); THOMAS WOLFE, OF TIME AND THE RIVER (1935); THOMAS WOLFE, LOOK HOMEWARD, ANGEL (1929).

5. There are, of course, books written about the trials and tribulations of other occupations.

some coming to Wolfe's conclusion, others less morose. In fact, as attacks on the citadel of higher education have proceeded apace, teachers themselves have often led the assault.<sup>6</sup> While legal education, specifically, has, for the most part, avoided direct attack, higher education more generally is under siege.<sup>7</sup>

One of the most articulate, thoughtful, and provocative representatives of the genre is Professor Julius (Jack) Getman's *In the Company of Scholars*.<sup>8</sup> Getman has "made it": he joined the faculty of the Indiana University School of Law in Bloomington in 1963, after a two-year term as a teaching fellow at his law school alma mater, Harvard. He visited at the University of Chicago School of Law in 1972 and then joined the Stanford Law School faculty in 1976. After only two years at Stanford, he joined the Yale faculty in 1978 and remained there until 1986, when he accepted the Earl E. Sheffield Regents Chair

*See, e.g.*, BEN HAMPER, RIVETHEAD: TALES FROM THE ASSEMBLY LINE (1991) (automobile worker); J.F. POWERS, WHEAT THAT SPRINGETH GREEN (1988) (minister); GEORGE F. WILL, MEN AT WORK (1990) (professional baseball players and managers). The relative glamour of these occupations as compared with college and professional school teaching is beyond the scope of this review.

6. *See, e.g.*, MARTIN ANDERSON, IMPOSTORS IN THE TEMPLE (1992); ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND (1987); DAVID LEHMAN, SIGNS OF THE TIMES: DECONSTRUCTION AND THE FALL OF PAUL DE MAN (1991); C.P. SNOW, THE MASTERS (1951). Other attacks have recently come from outside the academy. *See, e.g.*, DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991); ROGER KIMBALL, TENURED RADICALS (1990).

7.

Within that world [the world of higher education], integrity is dead, having succumbed to the death of a thousand cuts. Each cut small, and by itself, not fatal . . . [b]ut collectively, they cannot be explained away; instead they stand as an indictment of the institution of higher education itself.

ANDERSON, *supra* note 6, at 9.

The university now offers no distinctive visage to the young person. He finds a democracy of the disciplines . . . This democracy is really an anarchy, because there are no recognized rules for citizenship and no legitimate titles to rule. In short there is no vision, nor is there a set of competing visions, of what an educated human being is.

BLOOM, *supra* note 6, at 337.

Within the tall gates and old buildings, a new worldview is consolidating itself. The transformation of American campuses is so sweeping that it is no exaggeration to call it an academic revolution. The distinctive insignia of this revolution can be witnessed on any major campus in America today, and in all major aspects of university life.

D'SOUZA, *supra* note 6, at 2.

Academic tenure for American professors is an extraordinarily self-contradictory phenomenon. A society whose view of things economic borders on cosmic significance grants a lifetime of job security to a segment of its population least demonstrative of economic value. . . . In a society where "economic consideration" borders almost on religion, what it gets in return from professors, especially from the "academic" professors, is not worth the money it spends on them.

JON HEUR, TENURE FOR SOCRATES 3 (1991). "It is my aim . . . to expose these recent developments in the academic study of humanities for what they are: ideologically motivated assaults on the intellectual and moral substance of our culture." KIMBALL, *supra* note 6, at xviii.

8. Julius Getman is the Earl E. Sheffield Regents Chair at the University of Texas School of Law.

at the University of Texas School of Law.<sup>9</sup>

The subtitle of Getman's book is both grand and revealing: *The Struggle for the Soul of Higher Education*. Of course, the struggle for the soul of the academy is a continuing one, just as "[t]he condition upon which God hath given liberty to man is eternal vigilance . . ."<sup>10</sup> Perhaps because law professors are introspective, a great deal of our professional time is spent reflecting on, and often despairing of, the state of the legal academy.

The life of a law professor is different, in numerous and important ways, from the life of any other university educator: law professors generally receive higher salaries than professors in other departments; law students necessarily have better credentials than most undergraduates; and, at least in the second and third years, law school classes may be smaller than undergraduate classes. However, in certain respects, the challenges and frustrations of the law teacher are akin to the challenges and frustrations of the English professor. Thomas Wolfe hinted at them; Jack Getman reveals them. *Company* is the story of Getman's disaffection with much that defines the legal academy — indeed, the academy generally. *Company* is a reflection on higher education generally, as Getman does not restrict his judgments to legal academe. However, Getman is a law professor; his teaching experience has been as a law teacher, and he has written as a legal scholar.<sup>11</sup> This review applies Getman's observations and conclusions to law teaching, the source of our common experience, in order to test *Company's* currency from the perspective that the author and I share.

Throughout *Company*, the author returns to a tension that, recited at length, begins to resonate like a mantra: the conflict between elitist ambition and egalitarian values.<sup>12</sup> According to Getman, the mem-

9. ASSOCIATION OF AM. LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 1993-94, at 429 (1993).

10. John P. Curran, Speech on the Right of Election of Lord Mayor of the City of Dublin (July 10, 1790), in SPEECHES OF THE RIGHT HONORABLE JOHN PHILPOT CURRAN . . . ON THE LATE VERY INTERESTING STATE TRIALS 1, 5 (Dublin, J. Stockdale & Sons, 2d ed. 1808); see also JOHN BARTLETT, FAMILIAR QUOTATIONS 479b n.2 (Emily M. Beck ed., 14th ed. 1968) ("Eternal vigilance is the price of liberty. Attributed . . . to Jefferson.").

11. See, e.g., Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803 (1993); Julius G. Getman, *The Changing Role of Courts and the Potential Role of Unions in Overcoming Employment Discrimination*, 64 TUL. L. REV. 1477 (1990); Julius G. Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHI. L. REV. 45 (1986); Julius G. Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984); Julius G. Getman, *The Midwest Piping Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma*, 31 U. CHI. L. REV. 292 (1964).

12. Getman begins developing the elitism-egalitarianism tension on the very first page of his book, describing the conflict in terms of his experience, and he continues to weave this theme through the text as a foundation for his major premises. See pp. 15-17 (describing the tension for teachers between elitist egotism and egalitarian pedagogical methods); pp. 30-32 (distinguishing between traditional elitist rhetoric and egalitarian teaching); pp. 94-96 (showing the potential elitist-egalitarian conflict that exists within the key areas of appointments, curriculum, and ad-

bers of the academy are preoccupied both with their prestigious titles and trappings and, at the same time, with disseminating their message and its benefits to all in earshot, literally or figuratively. However, Getman's attention to the elitism-egalitarianism dichotomy ultimately obscures his vision. While it enables him to reveal the deficiencies, or at least the continuing struggles, of the teacher-scholar, his focus leads him to conclusions that may insidiously distract the academicians from their relentless, if self-absorbed, effort to find meaning in the mission Wolfe and his character found vacuous.

*Company* is a very strong book, a contribution to our understanding of higher education. It is sometimes depressing, even cynical, but consistently well and entertainingly written. It is also a provocative book. It demands a response from the reader who has invested in the academy. This review responds to Getman by disagreeing with some of his conclusions. Though he and I might well agree on a good deal concerning merit and injustice in the academy, I argue that the different ways in which we would cast our conclusions matter to the academy's conception of itself, to the public's perception of our mission, and, ultimately, to the continuing struggle.

### I. WHAT HATH SOCRATES WROUGHT?

It may be that the difference between legal study and the other disciplines is never more pronounced than it is in the classroom. At its best, law teaching — legal education — empowers. Once you have endured the Socratic method, so the apology goes, you can teach yourself anything. You have gained the power to appreciate how things work, to inquire, and to understand how your own conceptions and preconceptions are broken down, refined, reconstituted, and ultimately molded into understanding. Along the way you endure confusion, regret, self-doubt, and perhaps occasional embarrassment, but all to a purpose — all to gain the self-knowledge that will truly set you free.

Getman recognizes that this ideal is too rarely realized, that in teaching, the unconscientious or less-than-brilliant professor may mask incompetence, laziness, and even ennui. Getman reflects on the educational experience from the perspective of both teacher and student, and he discovers fundamental deficiencies that deprive both of their due (pp. 11-14). He is bitter.

Getman was educated at Harvard's law school and rails against what was done to him.<sup>13</sup> His argument, however, goes beyond that

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missions); pp. 127-29 (describing the blatantly elitist but potentially egalitarian institutions of tenure and peer review); pp. 197-98 (criticizing the apparent elitist attitude that engenders academic snobbery toward workers' education).

13.

I remain appalled and angry at the Harvard Law School of my day: its arrogant assumption of intellectual superiority; its social, intellectual, and professional rating systems; its limited

personal experience to identify the fatal flaw of education: teachers prepare students for a life that the teachers themselves have rejected in favor of academia.<sup>14</sup> That must be true because the academy would be something of an intellectual pyramid scheme otherwise: somebody must actually do; we all cannot teach.

Standing alone, those judgments about teaching generally would be too sweeping and indiscriminate to inform thoughtful reform of legal education, so the author elaborates by juxtaposing effective with ineffective teaching.<sup>15</sup> He concludes that the classroom experience is a good one when the fit is right among teacher, teaching method, and student (p. 39). According to Getman, the methods for achieving this fit are various (pp. 15-19). Nothing groundbreaking there. Getman's book goes beyond previous efforts when he acknowledges what every teacher knows, but dares not disclose: personality is at the heart of teaching (p. 19). There is a fine balance between maintaining a thick skin, bolstered by fortified veneer, and caring enough about the classroom experience to be hurt by it. He understands that ego makes teaching possible, "a degree of boldness" (p. 25), especially in light of the teacher's greatest fear, the "fear of being exposed as an intellectual charlatan" (p. 25). The strength of his narrative here reveals itself in his reader's nodding assent.

The conflict Getman describes may be exacerbated in the law school class conducted in any degree of the Socratic method. The Socratic teacher assumes an artificial distance from the learning process; she facilitates self-revelation and is perhaps at her best when the students do not quite appreciate the method of her madness until its subtlety finally unfolds. It seldom works that way. The chemistry could only rarely be just right, even if teacher and students were each bringing all that they could to the exercise. So the law class works well sometimes and not so well others, serendipitously, Getman realizes. Indeed, it is a wonder that it works as often as it seems to work,

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focus; its overemphasis on professional competence; its failure to provide an opportunity to express other aspects of our intellectual ability . . . .

P. 13.

14. P. 14; see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (describing how the cynicism of law professors is transferred to their students, creating a generation of lawyers who question the legal profession even before they have entered it); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991) (describing how law professors transfer their own cynicism to their students, thereby creating lawyers who will ultimately be dissatisfied with the practice of law).

15. Getman offers Professor Theodore Goodman, a demanding English teacher who taught Getman at the City College of New York, as an example of a good teacher. Getman reports that Goodman allowed his students to write about familiar topics and was "a model of scholarly and artistic integrity." Pp. 17-19. This stands in direct opposition to Getman's first teaching experience at Harvard, as a first-year instructor, which he describes as frustrating and occasionally depressing. P. 23.

though it may seem to work because those making the assessment have so much invested in its seeming to work.

*Company* boldly confronts us with the fragility of the classroom experience: we are practicing alchemy, and we dare not deny the production of gold nor acknowledge the lead. Why should the process be so imprecise, have this adventitious hit-and-miss quality? Getman offers a hint, and, if we are honest, we have known it all along: we are distracted. The very ego that makes it possible for us to go into the classroom and exude the confidence of knowing for certain the fundamentally uncertain keeps us waiting for "the call." Jack Getman knew he "was destined for more important things than being a professor at Indiana University";<sup>16</sup> Thomas Wolfe knew he would write "great books."<sup>17</sup>

Getman argues that the anticipation, the preoccupation with professional advancement, to a greater or lesser extent gets in the way of what we do. It gets in the way of our teaching because it requires us to formulate a persona; to try to live, teach, and write up to it; and then to wonder why the artifice undermines the teacher-class relationship. Certainly ambition may get in the way quite tangibly — for example, the class the teacher canceled to finish footnotes. Getman, however, confronts the ambitious teacher with the reality that ambition is more insidious than that — it gets in the way because it corrupts the creation of that artificial personality that we march confidently up to the podium four or six times a week.

## II. WRITING IN ORDER TO TEACH OR TEACHING IN ORDER TO WRITE?

Some people are law teachers so that they can write for a living; others write so that they can be teachers for a living. The distinction is not fine, and many law school appointment committees tend to be constituted of those who are looking for the writer willing to be a professor in order to have the time to write rather than for the person who will write in order to get tenure. The writers are hard to find, and good ones even harder, but the cynic might conclude that quality is less important anyway. The reason it is important to these committees to find the writers who would be teachers rather than the teachers willing to be writers is because scholarship is currency in the legal academy, for teachers and institutions alike. Tenure comes so fast, often in less than six years; the incentive to publish is gone once the danger of perishing has dissipated.<sup>18</sup> Publication may still matter to

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16. P. 27. Getman's tone here is self-deprecating.

17. See *supra* note 1 and accompanying text.

18. See Michael I. Swygert & Nathaniel E. Gozansky, *The Desirability of Post-Tenure Performance Reviews of Law Professors*, 15 STETSON L. REV. 355 (1986) (describing the need for post-tenure safeguards that will ensure productivity). *But see* Ralph S. Brown & Jordan E. Kur-

the ambitious teacher, but the "get-to-the-next-level" ambition wanes with maturity, or perhaps surrenders to circumstance.

*Company* recognizes the uneasy relationship between teaching and scholarship. While it may well be that the engaged scholar is a more effective teacher and that the excitement of remaining current in the literature animates the classroom too, it may just as easily be the case that the time and energy devoted to writing detracts from the preparation that is the foundation of teaching.<sup>19</sup> Though all teachers have an opinion about this, were we candid, we would admit that we do not know for sure the nature and extent of the relationship between scholarship and teaching. It may well be that something has to give. If so, perhaps the ambitious law professor will focus on what will more certainly gain favor with hiring committees at the better schools than on what will impress the students *du jour*.

Just as we might recognize that determining what makes for effective teaching is problematic, it is also difficult to discern what constitutes good scholarship. Truth be told, quantity is a pretty good surrogate for quality, our protestations to the contrary notwithstanding. A well-respected law professor, who has taught at a "top-ten" school, once shared with me his perception of the generally accepted standard of effective scholarship. By "effective" he meant the type of

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land, *Academic Tenure and Academic Freedom*, LAW & CONTEMP. PROBS., Summer 1990, at 325, 331-34 (arguing that, when fear of sanction is removed, incentive to publish increases).

19. To come to terms with the scholarship-teaching relationship, it might be necessary to consider more carefully what we mean by effective teaching and what the scholarly perspective has to do with it. Recognize that there is no reason to assume that what makes a good teacher will necessarily make a good scholar, particularly in light of the fact that we are so uncertain when it comes to deciding what represents good teaching and good scholarship. Is a good teacher someone who makes the students teach themselves or someone who demonstrates all of the crucial interrelations clearly? Or some combination of the two? Is a good teacher someone who is entertaining? Is a good teacher someone whom the students "like" because she has a pleasant, perhaps self-deprecating manner? The questions could go on.

Even more troublesome, after we have decided what makes a good teacher, how do any of us know that one or the other of our colleagues is a good teacher? Do we rely on the tenure committee visits, perhaps three or more and probably "announced"? Do such evaluations focus on effectiveness, the evaluator's having read the assignment the class was to have read and knowing enough about the subject matter to appreciate subtlety and nuance? Do we defer to the students' judgment and read the course evaluations, assuming that students know good teaching when they see it and will not mistake a pleasant and entertaining demeanor for the ability to do whatever it is we think the teacher must do?

If the thoughtful scholar-teacher reflects on it, she realizes that we simply do not know what it means to be an effective teacher. The dean's definition, truth be told, might recognize first and foremost the ability to keep the students from complaining too loudly, because complain they will — and at these prices should — from time to time about virtually every teacher.

The concerned, or even simply egotistical, law professor (a tautology?) will care deeply about what students think of her, for several reasons. First, perhaps foremost, the egotistical may not be the most secure, and so the more egocentric the teacher, the more she may need the approval of everyone in a position to withhold it. In addition, because of what any teacher must do in the classroom — reveal a good deal of intellectual and emotional self — it is particularly painful to fail to live up to a high self-image before the consumers of that classroom persona. Indeed, some classes at some times may get to know a side of the teacher better than anyone else ever has; the interrelation may be that profound.

scholarship that will enhance professional opportunities. He concluded that the three crucial indicia are "quality, quantity, and genre."

First, he told me, your stuff must be good. Say something (anything?) and make sure your cites are accurate and intricate. Next, you should write a good deal; get your name in print early and often. Now with those two criteria satisfied, you will get tenure. You may even move up a notch or two in the popular polls. However, to "make it," he said, you need to capture a distinct genre, if not a unique voice. It does not so much matter that you offer an idea that advances the literature; just be philosophical or economic or otherwise obscure and pretentious and that should do. Those suggestions intimate the sense of Getman's despair over the direction of scholarship.<sup>20</sup>

Perhaps it is in some measure a reflection of our uneasiness with that perception of the direction of legal scholarship that, when describing a law school's mission, administrators appealing for alumni support emphasize that their institution is first and foremost devoted to teaching, and scholarship merely enhances that primary teaching function. Most practicing lawyers would find most legal scholarship, at least the stuff that attracts attention among academics, to be curious and probably even silly.<sup>21</sup> The alumni, however, remember teachers, sometimes more and sometimes less fondly than they first responded to those teachers in the classroom.

To some extent, that dissonance between the focus of the students and alumni — that is, teaching — and the focus of appointments and tenure committees at the thirty or so schools that are second only to Yale — that is, scholarship — is a challenge to the legal academy and perhaps to the profession too. This a relatively new problem, one that has become current only in the last twenty-five years or so. Getman remarks upon the direction of scholarship and suggests an explanation:

The gap between educated laymen and academic specialists constantly grows. I do not think the gap is attributable to the speed with which the frontiers of knowledge are being pushed back; instead, it reflects the desire by academics to be thought part of a special, elite, intellectually rigorous world and the fear that, if what we wrote was intelligible, the claim would be more easily dismissed. [p. 47]

It may be that Getman's conclusion is skewed by the elitism-egalitarianism tension he emphasizes throughout the book. I am not con-

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20. Getman argues that there is a trend toward the esoteric and pretentious. These kinds of articles are not original but a deceptive twist on what has come before. He succinctly describes this period as one "where not publishing is rare but nonscholarship is common." P. 57.

21. See generally Edwards, *supra* note 14. Some innovative scholarship is even criticized for its "brilliance." Professor Farber defines brilliant scholarship as the kind of scholarship that upsets conventional thinking in order to say something that sounds profound but could lack a reality referent. Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367 (1987); Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986). But see Pierre Schlag, *The Brilliant, the Curious, and the Wrong*, 39 STAN. L. REV. 917 (1987).

vinced that scholars try to be elite, to maintain an artificial intellectual distance from laymen. I suspect that our writing has become more obscure because that is, to a substantial extent, what the market for our services has demanded as a result of relatively recent changes in the legal academy.<sup>22</sup> The forces that have shaped the contemporary scholarly dialogue were developing during the years Getman was safely tenured at leading national law schools;<sup>23</sup> he did not break into the law teaching profession during the time that determined the legal academy's present course.

In the late 1960s and early 1970s, legal education was poised to expand substantially as the number of college graduates pursuing a law degree increased. Law school enrollment grew 14.5% from 1970 to 1971, and the number of candidates receiving J.D.s or LL.B.s increased 15.5% during that same period.<sup>24</sup> This follows a remarkable trend for the decade. The enrollment from 1961 to 1971 had increased 127.6%.<sup>25</sup> The best and brightest finishing college at that time, with degrees in English and American literature, political science, sociology, economics, philosophy, and interested in pursuing graduate work in those fields in order to secure tenure-track teaching positions in the country's colleges and universities, found that there were in fact places available in graduate school. The trouble was only on the horizon, when the work for the degree had been completed and the search for a college-level teaching position would begin. There were few jobs to be had; the early baby-boomers and Vietnam War student-deferment

22. See, for example, Paul Brest, *Plus Ça Change*, 91 MICH. L. REV. 1945 (1993), stating: There is little question that the level of pretension has increased, but I doubt that the overall proportion of fatuous articles has.

. . . The law reviews undoubtedly contain more abstract legal theory than they did thirty years ago; but they also contain articles that illuminate legal issues from various points of view — race, gender, economic analysis, and empirical social science . . .

*Id.* at 1949. See also George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929 (1993), stating:

There is little question that the most significant development in American law of the past century has been the realist revolution leading to the broader understanding of law and legal doctrine as instruments of social policy. . . .

This change in the understanding of the role of law, however, had important implications for legal scholarship and teaching. Both had to be redirected necessarily toward illumination of the functions and philosophical underpinnings of the law.

*Id.* at 1931-32.

23. See, for example, Lee C. Bollinger, *The Mind in the Major American Law School*, 91 MICH. L. REV. 2167 (1993), stating:

Legal scholarship is significantly, even qualitatively, different from what it was some two or three decades ago. . . . [M]ore than anything else it is the interdisciplinary movement in legal thought, which began in the late 1960s and continues with unabated force to this day, that has transformed the character of modern thinking about law. Virtually every field of human knowledge is being mined for what it can contribute to our understanding of the processes of law and of legal issues.

*Id.* at 2167.

24. Millard H. Ruud, *The Burgeoning Law School Enrollment*, 58 A.B.A. J. 146, 146 (1972).

25. *Id.*

Ph.D.s had taken nearly all of the tenure-track positions in the liberal arts graduate departments. Faced with the prospect of at least four more years of education and then no job to help satisfy the student loans, record numbers of college graduates decided to pursue legal careers rather than unemployment. Colleges and universities expanded the availability of legal education in response to increased demand.<sup>26</sup> That, in turn, swelled the ranks of those holding law degrees.

There was more than enough legal work to go around, and, by the early 1980s, the better students at the better schools had more job offers than they could ever have imagined. The times were indeed good for the legal profession. What impact did this development have on law teaching and the evolution of legal scholarship?

To meet the increasing demand for legal education in the 1970s, waves of new teachers entered the academy, and they produced legal scholarship. In their writing they brought to legal scholarship the interest in the liberal arts that energized their undergraduate education and, for many, their pre-law-school graduate education. From the late 1960s through the 1980s, alternative perspectives in legal scholarship emerged and matured.<sup>27</sup>

When, by the early 1980s, the tenure track and tenured positions on law faculties were filling up or were already full, it became more and more difficult to get into law teaching. There were indications that the expansion of the legal profession could not continue even for the duration of the decade. At the same time, satisfaction among associates earning figures unimaginable just five years earlier waned as the demands of practice increased.<sup>28</sup>

Throughout the 1980s, the competition for places in law school classes increased. Many students did some graduate work before applying to law school, and many of those students, more mature and better writers, assumed positions on the law reviews of the most prestigious law schools. So, as the first audience for the submitted manuscripts of the tenure-track assistant professors and, in an increasing number of cases, manuscripts of those seeking tenure-track appointments, the boards of the law reviews were making publication deci-

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26. Millard H. Ruud, *The Burgeoning Law Enrollment Slows*, 59 A.B.A. J. 150 (1973).

27. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1972); Arthur A. Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

28. See Katherine Behof, *For Love or Money? Finding the Job You Really Want*, *STUDENT LAW.*, Nov. 1987, at 16 (pointing out the time demands of the law and the concomitant loss of independence associated with it); Joe Bower, *Young and Restless: Lawyers Who Leave*, *BARRISTER*, Summer 1986, at 55 (describing lawyers' feeling that they are not making a difference and would not have time to make a difference even if they still had the desire to do so); Barbara Raab, *The \$65,000 Answer: If Law Firms Are Sweatshops, Money Won't Make Them Tolerable*, *Says One New Graduate*, *STUDENT LAW.*, Nov. 1986, at 16 (recounting stories of young lawyers who dislike their jobs).

sions about articles that were increasingly less accessible.<sup>29</sup> As Getman observes, “[r]esearch has become more esoteric, interdisciplinary, mathematical, and professionally oriented so that nonacademics are far less likely to understand or be interested in what is written” (p. 47). His uneasiness is with manuscripts that draw on just enough social science or philosophy, just enough pretention to assure the articles editor that the writer must know what she is writing about, and just enough references to other pieces in the genre to assure the review editors that this piece would “advance the literature.”

The student law review editors, of course, are not exclusively, not even primarily, at fault. It is the legal academy that has defined the law reviews, but law review editors have been willing accomplices. Getman points out the randomness of the entire process, highlighting the impressionistic fashion in which third-year students choose a tenure-seeking professor’s article for publication (p. 48).

Getman recognizes that legal scholarship has evolved in the years he has been teaching and writing (pp. 46-47). Law reviews that would have received 300 unsolicited manuscripts a decade ago will receive perhaps as many as a thousand this year. The substance of the articles has changed since the early 1960s as well. Ambitious pieces advocating revolutionary reconceptions of the law compete for the very few lead article spots in the nation’s most prestigious law reviews. An article applying sophisticated finance theory to reveal the incongruities of whole fields of the law competes for a place with an article offering one more gloss on the persistent “battle of the forms” issue. Moreover, both the finance theory piece and the doctrinal analysis piece compete with articles urging innovative political perspectives.

While the breadth and depth of legal scholarship have become increasingly varied, the bases of comparison have become increasingly vague. Student editors are not the only ones facing this difficulty. How does an expert in finance theory judge the critical legal studies piece that posits the relativity of all value systems? For that matter, how does the criminal law scholar decide whether an article concerning bankruptcy preferences advances the literature? The task is daunting, so it generally remains undone.

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29. It has been suggested that this inaccessibility is a product of the fact that these journals are published primarily so that the works can be written and not so that they can be read. Roger Cramton, “*The Most Remarkable Institution*”: *The American Law Review*, 36 J. LEGAL EDUC. 1, 7 (1986). Further, law review editors are helped along in their views of scholarship by those on the tenure track who, as Getman realizes, have expended “[a] great deal of . . . effort . . . determining when to submit articles, how to attract the attention of editors, and how to play one journal off another to obtain publication in the more prestigious ones.” P. 49.

Professor Cramton has argued that student-edited law reviews have lost their utility and have no standards by which to judge their contents. Cramton, *supra*, at 7, 10. Phil Nichols responded that Cramton was too quick to judge the institution. Nichols blamed any lack of law review quality on those who are submitting the articles. He also added that the lack of specialty in the student editor creates a blank slate that cannot be found in faculty-edited periodicals. Phil Nichols, Note, *A Student Defense of Student Edited Law Journals*, 1987 DUKE L.J. 1122.

Most academics, if they are candid, will acknowledge that, at least outside their immediate area of expertise, they rely on a surrogate for informed judgment: they reach conclusions about the contribution a particular piece makes to the literature by relying on the status of the law review in which it is published or on the reputation of the author. Were the review in which an article is published a reliable indicator of its quality, there would be no problem equating reputation of a journal with the quality of scholarship that appears in it. There are problems with such an equation, but the present inquiry is not dependent on our resolution of them. It is enough to recognize that the legal academy is, to a significant extent, uneasy with the course of current scholarship and the law review system. That skepticism has an impact on the way that academics value scholarship.

### III. TENURE

In light of the current state of teaching and scholarship, it is not surprising that the fabric of higher education, and legal education especially, is most strained when members of the academy endeavor to agree on a judgment about qualifications. Perhaps the most passionate portions of Getman's book concern his reaction to the tenure cases of Professors Janet Lever and Adrienne Birecree. Neither was a law school teacher. But let us proceed from common ground.

First, recognize that all tenure cases, at least all that involve the denial or near denial of tenure, are necessarily contentious. At those schools that make a retention determination some time before the tenure decision, it is rare indeed that all concerned agree that it would be better for school and candidate if the candidate not be retained after a vote of her peers. If the candidate were comfortable with that determination, she would resign and avoid the vote.

Second, law teachers, perhaps contrary to public — or at least some students' — perception, are reasonably compassionate, no more and no less so than generally walks the streets. Therefore, it is difficult, even wrenching, for the group to decide that any of its number, even the novice, does not belong. That is particularly true given the consequences of a negative retention or tenure vote: the candidate may be out of teaching altogether, banished to compete for a position in practice without skills that have any currency in that arena.<sup>30</sup> It is a

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30. It is difficult to move back into the type of sophisticated practice that offers the same lifestyle as law teaching if you have written the type of articles that most academics write and done little else during your "probationary" period. Getman recognizes this when he describes the consequences of a negative decision. Pp. 112-13. The extremity of these consequences is a function of our want of consensus, our indeterminacy: just as we do not always agree on what it takes to be awarded tenure, we do not know how to construe a negative tenure vote. *See also* Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REF. 191 (1991) (noting a trend in which law professors used to be primarily practitioners but are now primarily teachers who have never practiced "in the real world").

frightening prospect, of the "but for the grace of God go I" variety.

Third, virtually everyone who teaches at a school for six or even fewer years makes friends, and friends have trouble saying no to friends. There are consequences. The candidate may well have constituencies, groups that sympathize with him and are ready to see him as a victim in the event the retention or tenure vote is negative. Such constituencies may be quite passionate, and in law schools, they are lawyers, or, as students, incipient lawyers, who know an injustice when they want to see one.

Finally, and of greatest concern for the current and future state of legal education, we have no reliable criteria of merit and, what is even more disquieting, no resolve to develop such criteria.<sup>31</sup> Indeed, it may make little difference that we have no coherent standards, because there does not generally seem to be any real interest in applying criteria: we too rarely read each other's writing and even less frequently observe each other's teaching.

Against that backdrop, Getman reviews at length his experience with the Lever and Birecree tenure cases to demonstrate "academic injustice" in the tenure process.<sup>32</sup> He offers a clue to the source of the problem in his prefatory observation: "The injustice is generally committed in the name of excellence, typically when the school or department considers itself great or on the verge of greatness and the credentials of the person being evaluated are suspect according to currently fashionable elitist criteria" (p. 112). Getman thereby formulates the institutions that would deny tenure, and he plants the source of injustice firmly in the clay of the elitism-egalitarianism tension.

Lever and Birecree were denied tenure, and Getman believes that the schools erred. He explains that virtually all, if not all, of the candidates' faculty colleagues and virtually all, if not all, of the candidates' students supported the tenure applications. Nonetheless, the administration of both schools denied the tenure applications of the two women. In Lever's case, the denial was followed by legal action against the school (p. 118). Both schools based their decisions on the candidates' records of scholarship, each school finding that the candidate's writing was deficient, not up to the school's standards as those standards existed or were evolving (pp. 115, 124).

In his reaction to the two cases, Getman asserts that the candi-

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31. As times change in the law school, the standards upon which we have depended to evaluate scholars disintegrate. Professor Rubin states:

These are not cheerful times for standard legal scholarship. . . . [T]he field is widely perceived as being in a state of disarray. It seems to lack a unified purpose, a coherent methodology, a sense of forward motion, and a secure link to its past traditions. . . . The field even lacks a conceptual framework within which to criticize itself.

Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1835 (1988).

32. This subsection of the third chapter is titled "Tenure, Peer Review, Excellence, and Injustice." P. 109.

dates' scholarship, teaching, and service were deserving of tenure, and he concludes that Professors Janet Lever and Adrienne Birecree "were victims of unconscious but powerful sexism" (p. 127). He levels that charge despite an express finding in the Birecree matter that gender discrimination was not in evidence<sup>33</sup> and a failure of the reviewing tribunal in the Lever case to reach the merits of the gender discrimination allegation. In fact, Getman reports that Lever had to allege gender discrimination in order to obtain judicial review of the tenure denial:

Courts will not review the correctness of tenure decisions made by academic institutions in accordance with traditional procedures. To get the decision denying her tenure set aside, she would have to demonstrate that the decision was discriminatory — that a male candidate with her record would have been awarded tenure. [p. 118]

This may not be the best state of affairs for either the courts or the academy.

#### IV. PROFESSOR GETMAN'S ERROR

To realize excellence in the academy, we must distinguish. We must distinguish the work that advances the literature from the pretentious and stylish; we must distinguish on substantial and legitimate bases and recognize the development of important ideas. Getman's accusation of "unconscious" discrimination undermines our distinguishing on legitimate bases. It exposes those who are willing to distinguish legitimately to charges of insidious discrimination to which it is impossible to respond, and thereby makes it easier for even the most conscientious academician to withdraw from the continuing struggle for excellence, to abdicate the responsibility to build consensus. Those who charge discrimination must identify something observable in order to shock the unconscious out of their torpor and avoid trivializing the charge of discrimination, belittling those who have been, are now, and will in the future be victims of real rather than imagined discrimination.

Casual accusations of discrimination may preempt the conscientious work, reflection, and judgments that are the academy's only hope of formulating substantial excellence, the excellence in which even Getman continues to believe.<sup>34</sup> If you cannot vote "no" for fear of

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33. Adrienne Birecree filed a complaint with the Commission of Academic Freedom and Tenure, alleging gender discrimination and violations of her academic freedom. The committee rejected the gender discrimination charges and found that she had been denied tenure for legitimate academic reasons. P. 124.

34. It is inappropriate to allege discrimination capriciously and condescending to charge that its alleged perpetrators have discriminated "unconsciously." That indiscretion becomes more troublesome when Getman observes that "[a]cademic defendants are typically able to explain even discriminatory decisions in objective academic terms. In addition, academic officials, for a combination of institutional and personal reasons, often bitterly resent and strongly battle the claim that they were guilty of sex discrimination." P. 118. We cannot take this argument seri-

being accused of invidious discrimination, it is more difficult to vote "no" and less likely you will do so. If you lose the freedom to vote "no," you lose the means to build consensus, to refine our conception of excellence. You surrender to the very "style" and "pretense" that Getman abhors and decries.

Getman does not describe the Lever and Birecree cases as aberrations<sup>35</sup> but finds in them the substance of insidious intent pervasive in academic judgments. Because the academy, in his view, perpetrated the injustice in the name of excellence, he questions whether excellence really has been corrupted in the academy: excellence in the pejorative sense is a function of elitism, he finds, not the result of the disintegration of consensus (pp. 128-29). The consequence of Getman's erroneous accusation is that he sacrifices excellence and makes it a code word for corruption by suggesting that it describes "unrealistically high standards" (p. 129).

Getman disservices the academy when he alleges "unconscious sex discrimination." The accusation is incendiary, does not advance the inquiry, and does not get us closer to a definition of academic excellence that is considerate of the *intellectual* diversity reflected in our teaching and scholarship. However, from the perspective of the legal academy, a dynamic community, perhaps the greatest cost of condescending accusations is that they chill the very dialogue that is crucial to development of legal scholarship and of the legal academy as an institution uniquely postured to affect and improve the justice system. How is it even in the interest of those whose writing proposes the most radical ideas to have those who would criticize such ideas disengage from the discourse by recoiling from unsubstantiated allegations?

On the one hand, once you accuse those who have reached a particular conclusion in good faith (they believe) of not being conscious of their own insidious agenda, you preempt a courteous and worthwhile exchange. It is akin to the right-to-life advocate's promising to "pray for" the free-choice advocate: walls go up, and the scaffolding of consensus crumbles. On the other hand, if those whom you would disparage have not reached their conclusion in good faith, there is nothing "unconscious" about their insidious discrimination; it should be exposed as a conscious affront to the legal academy and to the integrity of the scholarly mission. Getman errs in not appreciating that distinction and in allowing that error to undermine his conclusions about the tenure process and academe generally.

The academicians who voted to deny Professors Lever and Birecree tenure may well have determined that the candidates' contri-

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ously. It would be more remarkable if professional academicians, some of the brightest and best-trained minds on the planet, did not resent such allegations and respond bitterly.

35. "Each case also is a reminder of how *often* injustice in academic institutions is perpetrated in the name of excellence." P. 128 (emphasis added).

butions to the community of scholars were *not as valuable as the contributions that would have been made by others*.<sup>36</sup> Granted, it is difficult to rely on subjective rather than objective criteria<sup>37</sup> and avoid altogether accusations of arbitrariness.<sup>38</sup> However, it is clear that, especially in the maelstrom that is contemporary legal scholarship, conscientious scholars could differ. The measure of each scholarly community's differences may well be the measure of the differences among the faculties at different schools. In that way, different faculties will develop different personalities. So long as faculties are tolerant, there will likely be several scholarly predispositions represented at most schools, as indeed, in the main, there are.<sup>39</sup>

## V. INTEGRATION THROUGH DISINTEGRATION

The disintegration of consensus in the legal academy, perhaps in the academy generally, is a good thing — a very good thing. The contributions of scholars from alternative perspectives — law and economics, critical legal studies, feminist jurisprudence — will improve the law and law teaching. Alternative perspectives will improve the contributions of doctrinal scholars who do not write in one of the evolving genres because it will keep them from making the mistakes that result from ignorance of different perspectives. So we all benefit.

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36. This, I would argue, is a proper standard. It is entirely appropriate for a faculty to deny tenure to someone who has not been productive if the faculty determines that there are candidates more deserving of a chance to succeed in the academy. The relatively anonymous applicant is no less entitled to the opportunity to thrive as a scholar-teacher than the less than successful untenured professor is to a secure position in the academy. It is, of course, easier for faculty members to feel compassion toward someone whom they have gotten to know over the course of several years than it is to recognize the right of the entry-level, and relatively unknown, applicant to take a place in the academy.

37. A useful first step toward developing consensus with regard to scholarship may be the provision of criteria that demonstrate excellence rather than mere reliance on the adjective "excellent" in tenure and promotion standards. See, for example, *Substantive Standards Governing Tenure* (George Washington Univ. Natl. Law Ctr. 1988) (on file with author):

*Quality and quantity of professional writings.* While it is expected that the professional writing standard ordinarily will be fulfilled through the production of published scholarly books, articles, or teaching materials, other materials, such as briefs or other studies, may, if they fully evidence comparable attributes of scholarship, be considered in partial fulfillment of the requirement. While no numerical bright line test can be specified, it is expected that at the time of the decision to recommend tenure there will be a minimum of two scholarly articles, or the equivalent, of *high quality, measured by thoroughness of research, critical analysis, contribution to the field, and clarity of expression.*

*Id.* at 1 (second emphasis added).

38. For an interesting treatment of subjective standards of excellence, see John Nivala, *Zen and the Art of Becoming (and Being) a Lawyer*, 15 U. PUGET SOUND L. REV. 387 (1992).

39. See David L. Gregory, 1987 DUKE L.J. 1138, 1143 (reviewing MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987)) (listing several law schools where critical legal studies is a sizeable influence); Gary Minda, *The Jurisprudential Movements of the 1980's*, 50 OHIO ST. L.J. 599 (1989) (describing the ability of these movements to dominate the personality of a school); see also Loren Feldman, *Tracking to the Right at George Mason*, AM. LAW., Dec. 1991, at 60; Richard M. Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505 (1987).

Insofar as the disintegration of consensus is a relatively new phenomenon, however, developing over the past twenty-five years, we are likely experiencing now the anxiety that necessarily attends the reevaluation of our normative and logical imperatives. To an extent, that anxiety explains why we are often too eager to dismiss the contributions of colleagues who confront us with new ways of thinking. Further, because we have not yet come to terms with the contributions that other disciplines may make to our understanding of the role of law, we may ignore what we have trouble understanding, labeling it pretentious and unhelpful. Indeed, our too frequent failure to review conscientiously and to take seriously our colleagues' teaching and scholarship may, in part, be the unfortunate consequence of our failure to appreciate the promise of ultimate integration through this transitional period of disintegration of consensus.

It is true that a good deal of the scholarship proceeding from alternative perspectives does not advance the literature, being pretentious, ultimately insubstantial. The same, though, could be said of a good deal of doctrinal work: remember Christopher Columbus Langdell? If all that we do with important work written from alternative perspectives is dismiss it as insubstantial, that is troubling. However, I suspect that, in time, the good alternative work will distinguish itself notwithstanding resistance to innovative ways of thinking.

From the other side, however, the development of alternative perspectives presents a danger to the legal academy: some people will reject what they do not understand or even try to understand and then accuse others who find value in it of serving an insidious agenda.

I am neither willing to give up on discerning the piece that makes the important incremental contribution from the piece that does not advance the inquiry, nor to accuse those who conclude that a work does not make a contribution of having reached that conclusion to vindicate an insidious agenda. I suspect I am in the vast majority of conscientious academicians in this regard. I fear that *Company* will suggest to the reader that that sense of professionalism is not generally to be found in the academy. That is most discouraging.

## CONCLUSION

Getman's book, perhaps more than any other of its genre, reveals the stuff of the academician, the toil of Wolfe's (*not* King's) firestarter. What Getman says, certainly because of his experience and perspective, challenges the legal academy. We teach the best and the brightest, often to the chagrin of our liberal arts colleagues, and we take credit for teaching law students to think about things in a way that no other discipline demands. Then, so empowered, our graduates set out to change the way things are. It is not mere vanity to observe that

they take a good part of us with them, maybe to a greater extent than they reflect the lessons of any teachers who have preceded us.

If we take the role of the legal academic that seriously, if nothing less than our society's way of life is at stake, then it may be easier to understand why access to and advancement within the academy is the focus of so much of our promise and pain. Though Getman takes us closer to an understanding of what is in the balance and the sensitivities and insecurities of those who are charged with maintaining the integrity of the academy, his unfortunate treatment of the tenure issue does not move us far enough away from the invective that has obscured our objectives and impugned the integrity of our mission.