

The Scholar's Dilemma

Chad Oldfather

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Repository Citation

Chad Oldfather, *The Scholar's Dilemma*, 101 Marq. L. Rev. 957 (2018).
Available at: <http://scholarship.law.marquette.edu/mulr/vol101/iss4/6>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

THE SCHOLAR’S DILEMMA

CHAD OLDFATHER*

I. INTRODUCTION.....	957
II. THE ARTIST’S DILEMMA	960
III. THE SCHOLAR’S DILEMMA	966

Academic work is publicly and correctly viewed as having a sacred quality involving the pursuit and transmission of truth. But it also involves a job or career carried out in a competitive milieu where the usual human virtues and vices are never far from the surface.

—Gary Marx¹

And I think a lot of it has to do with how you aim the work that you’re doing, and if you don’t aim it at all, if you’re just throwing chickens out the window, then I think in some ways you’re making art. Because if it’s more important to you to say something, even if that something is convoluted and hard to understand, than it is to attract something, or to sell something, then I think you might be making art.

—Jason Isbell²

I. INTRODUCTION

Imagine a legal academic at the beginning of her career. She has taken a job at a law school of no great renown in an unfamiliar city, remote from her family and friends. As she begins her career, what should guide her? As she begins to chart her trajectory as a scholar, what constitute proper motivations? What is best regarded as out-of-bounds? Do the answers change after she receives tenure and passes through the middle and later stages of her career? Do the questions change?

* Professor of Law and Associate Dean for Academic Affairs, Marquette University Law School. Many thanks to Steve Eagle, Brian Frye, Charlie Geyh, Elisabeth Lambert, Alan Madry, Laura Pedersen, Jack Preis, Ryan Scoville, Amanda Seligman, and Spencer Waller for their valuable comments on earlier drafts.

1. Gary T. Marx, *Reflections on Academic Success and Failure: Making It, Forsaking It, Reshaping It*, in *AUTHORS OF THEIR OWN LIVES* 260, 260 (B. Berger ed., 1990).

2. The Editors of GQ Style, *Watch Jason Isbell Meet George Saunders and Have an Epic Conversation*, GQ STYLE (Oct. 17, 2017), <https://www.gq.com/story/jason-isbell-george-saunders-in-conversation> [https://perma.cc/NL4R-7XUR].

As a descriptive account of the present state of play, it seems accurate to suggest that she can, without running afoul of existing norms, take into account matters pertinent to the advancement of her career, perhaps especially in its early years. Most of her colleagues would regard it as unremarkable for her to want to move to a different law school—one that has a better reputation, or that better suits her geographic preferences, or both. It will consequently be appropriate for her to be strategic in building a scholarly reputation and persona. She will be attentive to the placement of her scholarship, will attend conferences at which she can network with (she hopes) the right people, and will seek out and endeavor to follow advice on building a scholarly reputation. She will attempt more generally to attract the favorable notice of those who might help her to realize her goals, which are regarded as legitimate ends in themselves.

She might have other motivations as well. She may be a deeply committed partisan on some set of issues (whether in the political sense of the word or otherwise), and seek to influence the nature of the debate and course of the law. She may seek a reputation for its own sake, because it is rewarding to be held in high esteem by one's professional peers, or because of the various trappings that come along with such a reputation – acolytes and invitations and being part of an “in” crowd and so on. Her goal might be to increase the store of knowledge. Or perhaps to explore difficult questions simply for the sake of doing so. She may be thinking about nothing more than doing what is required to get tenure, or to secure a few thousand dollars in summer research funding. She may welcome other ways to supplement her income and thus be attempting to position herself to secure consulting work.

All of these things, it seems clear, are motivations that one can find among legal academics collectively, and to varying degrees within legal academics individually. Not all of them, I will suggest, are laudable or even appropriate. In doing so, I mean to make no claims to personal immunity from them or to having traveled exclusively along any sort of high road. But I have often felt uneasy about what I have seen, and sometimes about what I have done, and have wondered about the nature of the prize that, as the saying has it, I've attempted to keep my eye on. And so it seems appropriate to consider which of the things mentioned above (a list that I don't imagine to be comprehensive) ought to be regarded as proper goals for a legal academic, or at least to attempt to provide some sort of framework for thinking about such questions.

This, then, is an essay about scholarly motivation. What is it that motivates the production of scholarship? What ought to motivate it? To what extent do the answers to those questions overlap? How and to what extent does motivation count in determining whether something is scholarship, and whether a member of the academy is acting in an appropriately scholarly manner? What

are the implications for academic freedom and the role of the scholar within a university? How closely are questions of motivation related to questions regarding the proper purposes of scholarship? Might some sorts of motivations be thought better simply because the scholar who possesses them is more likely to continue to fulfill her obligation to be a scholar over the course of her academic career?

In academia, as in most facets of life, there are ideals and there is reality. In the world of the ideal, the scholar is, as Emerson put it, “Man Thinking,”³ who “plies the slow, unhonored, and unpaid task of observation.”⁴ “But he, in his private observatory, cataloguing obscure and nebulous stars of the human mind, which as yet no man has thought of as such,—watching days and months, sometimes, for a few facts; correcting still his old records;—must relinquish display and immediate fame.”⁵ He is to be indifferent to money, to power, and to popular opinion. His motivation is purely internal, and he is a scholar because he cannot help himself. He shall be “happy enough, if he can satisfy himself alone, that this day he has seen something truly.”⁶

Reality, at least as it stands some 180 years after Emerson’s address, is considerably messier. Scholars face a choice akin to that often discussed by artists, and must similarly choose a path between often-conflicting sets of considerations. At one extreme, we can stay true to our craft, pursuing the questions that interest us and following our muses wherever they happen to take us without regard to whether we expect that doing so will play well with any particular audience over the short- or long-term. We can emphasize the pleasures of engaging in scholarly inquiry over the results it might bring. Toward the other, we might focus on more immediate indicators of impact in pursuit of academia’s version of fame and fortune. It is perhaps even possible, to invoke the pejorative phrase for the latter option, for an academic to “sell out.”

These are not questions with easy or precise answers, due in large part to the nature of the enterprise. I stand with those who regard scholarship as a “practice” in Alasdair MacIntyre’s sense of the word,⁷ a “coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve

3. RALPH WALDO EMERSON, *The American Scholar*, in *ESSAYS AND LECTURES* 51, 54 (1983).

4. *Id.* at 63.

5. *Id.*

6. *Id.* at 64.

7. *E.g.*, STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* 63 (2014).

those standards of excellence which are appropriate to, and partially definitive of, that form of activity.”⁸ It thus does not exist as something fixed and determinate, but rather is more akin to an organism the shape and growth of which are products of the larger social, cultural, and institutional contexts in which it takes place. While we thus may not be able to isolate specific prescriptions, we can hope to identify the appropriate considerations to take into account in thinking about the nature and role of scholarly motivation, and thus to shape the practice in which we are engaged.

My goal in this Essay is accordingly to consider these questions at a fairly high level of abstraction, and in a necessarily preliminary way. One of its premises is that artists—broadly defined—face a similar set of choices. Because artists have devoted more time to considering these questions than scholars, I use their efforts as a point of departure for a consideration of scholarly motivation and its relationship to the role of universities and scholars. The contexts of art and scholarship do not exactly parallel one another, of course, and it may well be that doing scholarship well necessarily entails taming or at least channeling one’s muse in a way that art does not. But the contrast between them helps to highlight some of the tensions in the scholar’s role, and the various motivations that can pull his or her motivations off true north.

II. THE ARTIST’S DILEMMA

“[T]o thine own self be true” stands among the most quoted of Shakespeare’s writings,⁹ and its popularity suggests that concerns about authenticity are not confined to any subset of people. Each of us no doubt feels some core concept of who we are, and each of us likewise prefers to act in ways that are consistent with that self-concept. The former student activist who finds herself “working for the Man” must grapple with the disconnect, as must anyone who lands in circumstances in which they feel they must stifle some portion of who they “really” are.¹⁰ In Eleanor Roosevelt’s prescription, “[t]he standards by which you live must be your own standards, your own values, your own convictions in regard to what is right and wrong.”¹¹ This requires a certain isolation. “When you adopt the standards and the values of someone else or a community or a pressure group, you surrender your own integrity. You

8. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 187 (3d ed. 2007).

9. See Chris Wilson, *Here are Shakespeare’s 15 Most Beloved Quotes*, TIME (April 21, 2016), <http://time.com/4299219/william-shakespeare-plays-quotes-kindle/> [<http://perma.cc/Q5ZE-DPMY>].

10. For a pop-psychological discussion, see Stephen Joseph, *To Thine Own Self Be True*, PSYCHOLOGY TODAY (April 11, 2013), <https://www.psychologytoday.com/blog/what-doesnt-kill-us/201304/thine-own-self-be-true> [<https://perma.cc/SM9W-Z6VN>].

11. ELEANOR ROOSEVELT, *YOU LEARN BY LIVING* 111 (1960).

become, to the extent of your surrender, less of a human being.”¹² It is a species of the more general human discontent discussed by H.L. Mencken:

The great majority of us—all, in brief, who are normal—pass through life in constant revolt against our limitations, objective and subjective. Our conscious thought is largely devoted to plans and specifications for cutting a better figure in human society, and in our unconscious the business goes on much more steadily and powerfully. No healthy man, in his secret heart, is content with his destiny. He is tortured by dreams and images as a child is tortured by the thought of a state of existence in which it would live in a candy-store and have two stomachs.¹³

Feelings of inauthenticity, the struggle against the forces and limitations that thwart the expression of our authentic selves, and the desire to remain true to one’s vision regardless of the consequences are of course the subject of a great deal of art. And whether it is truly a special case, or simply felt more deeply and perhaps better articulated, artists (broadly defined) themselves often address these questions. Perhaps, as James Baldwin suggested, “the artist’s struggle for his integrity must be considered as a kind of metaphor for the struggle, which is universal and daily, of all human beings on the face of this globe to get to become human beings.”¹⁴ Here, too, there is an ideal and there is reality. In the ideal the artist relentlessly pursues a vision, heedless of whether the world is paying attention. He, like the protagonist in Kris Kristofferson’s *To Beat the Devil*, persists through hunger and rejection (and perhaps a face-to-face conversation with Satan himself) to express the things he feels compelled to express:

I was born a lonely singer
 And I’m bound to die the same
 But I’ve got to feed the hunger in my soul
 And if I never have a nickel
 I won’t ever die ashamed
 ‘Cause I don’t believe that no one wants to know¹⁵

12. *Id.*

13. H.L. MENCKEN, *The Art Eternal*, in A MENCKEN CHRESTOMATHY 325 (1956). Roosevelt again: “But the worst threat comes from within, from a man’s or a woman’s apathy, his willingness to surrender to pressure, to ‘do it the easy way,’ to give up the one thing that is himself, his value and his meaning as a person—his individuality.” ROOSEVELT, *supra* note 11, at 111.

14. JAMES BALDWIN, *The Artist’s Struggle for Integrity*, in THE CROSS OF REDEMPTION: UNCOLLECTED WRITINGS 50, 50–51 (Randall Kenan ed., 2010).

15. KRIS KRISTOFFERSON, *To Beat the Devil*, on KRISTOFFERSON (Monument Records 1970).

He may, along with George Saunders, have “comically, comically high levels of ambition,”¹⁶ and he may aspire to something beyond simply entertaining people to instead creating something of lasting value. But he of course also has to eat, and clothe himself, and pay the rent.¹⁷ He might sometimes wish to do these things at something beyond a minimal level. He is likely, at some point, to ask himself why he does what he does.¹⁸

The abstract expressionist painter Mark Rothko, in an essay entitled *The Artist's Dilemma*,¹⁹ addressed questions of inspiration and motivation and the societal constraints under which an artist may labor. Rothko reflects first on artists of the past, who lived in “dogmatic societies” in which “society is allowed only one Official Truth. The demands made upon the artist, therefore, issued from a single source, and the specifications for art were definite and unmistakable.”²⁰ But: “The Law of Authority has this saving grace: it can be circumnavigated. One can pay lip service to the letter and with equanimity violate its spirit. One bows to necessity, then schemes to defeat it.”²¹

The modern artist, though, has a choice:

Since the passing of the spiritual and temporal patron, the history of art is the history of men who, for the most part, have preferred hunger to compliance, and who have considered the choice worthwhile. And choice it is, for all the tragic disparity between the two alternatives.

16. See Editors of GQ Style, *supra* note 2.

17. For an example, the story of author James Wilcox’s struggle to balance these demands, see James B. Stewart, *Moby Dick in Manhattan*, NEW YORKER, June 27, 1994, at 46, 46–48.

18. A classic example of the genre is George Orwell’s *Why I Write*:

Putting aside the need to earn a living, I think there are four great motives for writing, at any rate for writing prose. They exist in different degrees in every writer, and in any one writer the proportions will vary from time to time, according to the atmosphere in which he is living. They are:

(1) Sheer egoism. . . .

(2) [Ae]sthetic enthusiasm. . . .

(3) Historical impulse. . . .

(4) Political purpose—using the word “political” in the widest possible sense. . . .

It can be seen how these various impulses must war against one another, and how they must fluctuate from person to person and from time to time.

GEORGE ORWELL, *Why I Write*, GANGREL (1946), reprinted in A COLLECTION OF ESSAYS 313, 315–316 (Sonia Brown Orwell ed., Harcourt, Brace, and Co., Inc. 1953). Joan Didion’s answer to the question is more personal: “[I] write entirely to find out what I’m thinking, what I’m looking at, wh[a]t I see and what it means. What [I] want and what I fear.” Joan Didion, *Why I Write*, N.Y. TIMES (Dec. 5, 1976), <https://www.nytimes.com/1976/12/05/archives/why-i-write-why-i-write.html> [http://perma.cc/U3QW-G5SP].

19. MARK ROTHKO, *The Artist's Dilemma*, in THE ARTIST’S REALITY: PHILOSOPHIES OF ART (Christopher Rothko ed., 2004).

20. *Id.* at 4.

21. *Id.*

The freedom to starve! Ironic indeed. Yet hold your laughter. Do not underestimate the privilege. It is seldom possessed, and dearly won. . . . Concerning hunger, as concerning art, society has traditionally been dogmatic. One had to starve legitimately—through famine or blight, through unemployment or exploitation—or not at all. One could no more contrive his own starvation than he could take his own life; and for the artist to have said to society that he would sooner starve than traffic with her wares or tastes would have been heresy and dealt with summarily as such. . . .

But here, today, we still have the right to choose. It is precisely the possibility of exercising choice wherein our lot differs from that of the artists of the past. For choice implies responsibility to one's conscience, and, in the conscience of the artist, the Truth of Art is foremost. There may be other loyalties, but for the artist, unless he has been waylaid or distracted, they will be secondary and discarded in his creation of art. This artistic conscience, which is composed of present reason and memory, this morality intrinsic to the generic logic of art itself, is inescapable. Violate her promptings and she will ferret out the deepest recesses of thought and conjecture. Neither sophistries nor rationalizations can quiet her demands.²²

Rothko delivers a stern message. The artist's legitimate concern is with art and art alone. Of course, Rothko also recognizes that the artist will have "other loyalties."²³ He, too, will crave affirmation, recognition, and the occasional nice meal. His creative goals might not be purely artistic—that is, he might seek to create something that has some additional, functional purposes to it, but to do so in a way that nonetheless has a substantial, aesthetic or otherwise meaning-laden component to it. He might simply find the processes of creation themselves to be satisfying, with little regard for whether the products of those processes are "art." But for Rothko, it seems, the purest, most legitimate motivations are intrinsic, and exist independently of whether anyone else finds the artist's expression valuable, or interesting, or proper. What he must not do, it seems clear, is tailor his work to the marketplace. Fame and fortune may be acceptable, but only when they are incidental to the recognition of genius on its own terms.

But we might ask why it matters. Does motive make a difference, and if so what are the consequences of an impure motive? If my goal is simply to

22. *Id.* at 3–4.

23. *Id.* at 4.

become famous, and to make a lot of money, and I happen along the way to create something that many people regard as “art,” then isn’t that enough? If it’s not determinative, does the presence of an “impure” motive at least make it less likely? Should we think less of Bob Dylan because he expressed an ambition “to join ‘Little Richard’” in his high school yearbook?²⁴ Does it matter whether what he meant by this was an ambition to greatness versus an ambition to fame?

Motivation cannot be the only thing that matters. Someone whose motivations are pure might nevertheless lack talent and thus be incapable of producing something that we would call art, under a restrictive definition, or good art, under a more expansive one. But talent, or at least not everything that might fit comfortably within some definition of talent, is also not determinative. Someone with great technical skill and a strong aesthetic sense may labor for a long time to create something that is not art (on most accounts), be it a concert poster, a McDonald’s jingle, or a romance novel, even though the ability to do those things successfully is undoubtedly not widely shared. A Brillo box may have been a work with high aesthetic value, and perhaps even a species of art,²⁵ but Arthur Danto argues that only Andy Warhol’s *Brillo Box*—designed to look as much like an actual Brillo box as was possible—was art in the high culture sense. Because there were no aesthetic differences, this could only be because of an invisible property, namely that Warhol’s boxes’ “purpose was purely to be seen and understood as art.”²⁶

24. John Robinson, *Bob Dylan: The Hibbing High School ‘Class of 1959’ Reunion*, TELEGRAPH (London) (July 23, 2009, 10:39 AM), <http://www.telegraph.co.uk/culture/music/bob-dylan/5887887/Bob-Dylan-the-Hibbing-High-School-Class-Of-1959-reunion.html> [<http://perma.cc/S9A3-C6A5>].

25. See ARTHUR C. DANTO, WHAT ART IS 44 (2013).

26. *Id.* Warhol certainly did not subscribe to Rothko’s views about the Truth of Art, at least insofar as the artist faces a choice between starvation and fidelity to the truth. As Warhol famously stated, “[b]eing good in business is the most fascinating kind of art. During the hippie era people put down the idea of business—they’d say, ‘Money is bad,’ and ‘Working is bad,’ but making money is art and working is art and good business is the best art.” ANDY WARHOL, THE PHILOSOPHY OF ANDY WARHOL 92 (1975). Still, it seems possible to square the two views, at least insofar as we can regard Warhol as not motivated simply by a naked desire to become famous but rather as making what he regarded as sincere points about art, culture, and society. That is a plausible interpretation. As one person familiar with Warhol put it, “Andy Warhol was a serious artist whose posture was unseriousness.” Richard Pearson, *Andy Warhol, Pioneer of Pop Art, Dies After Heart Attack*, WASH. POST (Feb. 23, 1987), <https://www.washingtonpost.com/wp-srv/style/longterm/review96/fishotandywarhol.htm> [<https://perma.cc/78JG-KCY8>].

Yet, motivation factors into only some efforts to distinguish “art” from “not art.”²⁷ Functional attempts at defining art place emphasis on the creator’s intention. Monroe Beardsley, for example, offered that something qualifies as “art” if it is “either an arrangement of conditions intended to be capable of affording an experience with marked aesthetic character or (incidentally) an arrangement belonging to a class or type of arrangements that is typically intended to have this capacity.”²⁸ Danto disclaims the appropriateness of an aesthetic component to a definition of art—because much modern art expressly disclaims aesthetic ambition—and offers a definition with the following two main components: “something is a work of art when it has a meaning—is about something—and when that meaning is embodied in the work—which usually means: is embodied in the object in which the work of art materially consists.”²⁹ But such a component does not feature in all definitions.

The philosophical questions surrounding the definition of art are difficult, and the preceding discussion has at best merely scratched their surface. But as the quotes above from Mark Rothko³⁰ and Jason Isbell³¹ suggest, a sense persists that a creator whose motivations are impure, who seeks money or fame for their own sake, and whose urge simply to express himself (or, on some accounts, conception of the truth of art) is insufficiently predominant in his thinking and activity, has failed to be sufficiently authentic, and has perhaps even “sold out.”³² In the words of Quincy Jones, “I have never in my life made music for money or fame. . . . No way. God walks out of the room when you’re thinking about money.”³³ Lewis Hyde distinguishes between those who labor in service to their creative gifts and those who deploy their gifts in service to

27. See generally Thomas Adajian, *The Definition of Art*, STANFORD ENCYCLOPEDIA PHILOSOPHY (Oct. 9, 2012), <https://plato.stanford.edu/entries/art-definition/> [<https://perma.cc/D5RP-3P6D>].

28. MONROE C. BEARDSLEY, *Redefining Art*, in *THE AESTHETIC POINT OF VIEW* 298, 299 (Michael J. Wreen & Donald M. Callen eds., 1982) (emphasis omitted).

29. DANTO, *supra* note 25, at 149.

30. See *supra* notes 19–22.

31. See Editors of GQ Style, *supra* note 2.

32. Jennifer Egan has noted the tension and the temptations:

The attention and approval I’ve been getting for *Goon Squad*—the very public moments of winning the Pulitzer and the other prizes—is exactly the opposite of the very private pleasure of writing. And it’s dangerous. Thinking that I’ll get this kind of love again, that getting it should be my goal, would lead me to creative decisions that would undermine me and my work. I’ve never sought that approval, which is all the more reason that I don’t want to start now.

Jennifer Egan, *Jennifer Egan*, in *WHY WE WRITE: 20 ACCLAIMED AUTHORS ON HOW AND WHY THEY DO WHAT THEY DO* 25, 33–34 (Meredith Maran ed., 2013).

33. David Marchese, *In Conversation: Quincy Jones*, VULTURE (Feb. 7, 2018, 8:00 AM), <http://www.vulture.com/2018/02/quincy-jones-in-conversation.html> [<https://perma.cc/D82N-3586>].

themselves, who he labels as narcissists. “The narcissist feels his gifts come from himself. He works to display himself, not to suffer change. . . . The celebrity trades on his gifts, he does not sacrifice to them.”³⁴ These are not suggestions that an artist must be deadly serious, or cannot poke fun at pieties or choose unconventional means of expression. Just that if she does any of it simply to become famous, or simply to earn money, and without a sufficiently strong desire to sincerely express herself, then she might be an entertainer rather than an artist, and what she creates might be something less than art.

III. THE SCHOLAR’S DILEMMA

One of my premises, of course, is that there is a fundamental similarity between the position of the academic and that of the artist. Each works in the shadow of an idealized conception of the role, in which the activity is guided entirely by some pure, overarching pursuit, in both cases reducible to concepts like “truth.” Practitioners of each likewise work subject to potential corrupting influences. For the artist and scholar alike ambition stands as a perhaps necessary predicate to success and a force susceptible to misdirection. Both endeavors present what are perhaps merely special cases of the more general human struggles associated with the tensions between immediate and delayed gratification.

So conceived, it is easy to imagine the scholar’s role as parallel to that of the artist’s, and many sophisticated discussions proceed from a conception of the role that is consistent with such a vision. Thus, for example, the AAUP’s *1915 Declaration on Principles of Academic Freedom and Academic Tenure*—which one scholar characterized as “the single most important document on academic freedom in the United States”³⁵—places the role of the scholar in clear opposition to influence by “pecuniary emoluments.”³⁶ Instead, the AAUP’s *Declaration* continues, the function of those called to academia

is to deal at first hand, after prolonged and specialized technical training, with the sources of knowledge; and to impart the results of their own and of their fellow-specialists’ investigation and reflection, both to students and to the general public, without fear or favor. The proper discharge of this function requires (among other things) that the university teacher shall be exempt from any pecuniary motive or

34. LEWIS HYDE, *THE GIFT: CREATIVITY AND THE ARTIST IN THE MODERN WORLD* 68 (2007).

35. J. Peter Byrne, *The Social Value of Academic Freedom Defended*, 91 *INDIANA L.J.* 5, 5–6 (2015).

36. AAUP, *1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE* (1915), <https://aaup.org.uiowa.edu/aaup-principles> [<https://perma.cc/Q4UE-9W9B>] [hereinafter AAUP 1915].

inducement to hold, or to express, any conclusion which is not the genuine and uncolored product of his own study or that of fellow specialists. . . . *To the degree that professional scholars, in the formation and promulgation of their opinions, are, or by the character of their tenure appear to be, subject to any motive other than their own scientific conscience and a desire for the respect of their fellow-experts, to that degree the university teaching profession is corrupted; its proper influence upon public opinion is diminished and vitiated; and society at large fails to get from its scholars, in an unadulterated form, the peculiar and necessary service which it is the office of the professional scholar to furnish.*³⁷

This entails something akin to Rothko's allegiance to the "Truth of Art."

The liberty of the scholar within the university to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit; that is to say, *they must be the fruits of competent and patient and sincere inquiry*, and they should be set forth with dignity, courtesy, and temperateness of language.³⁸

C. Wright Mills admonished beginning students "that the most admirable thinkers within the scholarly community you have chosen to join do not split their work from their lives."³⁹ Instead,

[s]cholarship is a choice of how to live as well as a choice of career; whether he knows it or not, the intellectual workman forms his own self as he works toward the perfection of his craft; to realize his own potentialities, and any opportunities that come his way, he constructs a character which has as its core the qualities of the good workman.⁴⁰

Yet much of the value of comparative inquiry lies in the identification and study of difference.⁴¹ The artist's and scholar's dilemmas are not identical, because the contexts in which the artist and the scholar work (and the materials with which they work) are not identical. Both have an ultimate loyalty to truth.⁴² But even here there is a subtle but significant distinction. The artist's

37. *Id.* (emphasis added).

38. *Id.* (emphasis added).

39. C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* app. at 195 (1959).

40. *Id.* at 196.

41. "The hardest thing in the world is to study one object; when you try to contrast objects, you get a better grip on the materials and you can then sort out the dimensions in terms of which the comparisons are made." *Id.* at 214.

42. I assume a somewhat expansive conception of truth here.

mission, as Rothko sets it up, is to further truth as he or she defines it.⁴³ The artist is to be guided by his light and only his light. The scholar's truth, in contrast, is a shared truth. He is to follow his own light, but do so to explore the shadows cast in places where others' light has not yet reached.

This distinction manifests itself in the processes of becoming. The path to becoming an artist certainly can involve education and immersion in a tradition, but it need not. It is easy to imagine someone who merits the label "artist" but who was not formally trained in her discipline, including a great many writers and musicians, and even some celebrated painters such as Henri Rousseau.⁴⁴ An artist, then, can develop a perspective or style that is disconnected from any identified school of thought, or that consciously chooses to reject them. And while it is undoubtedly the case that no one can stand outside his or her own culture and create art that is somehow not a product of that culture's fashions and assumptions, the fact that museums display items created by people who lived in cultures very different from our own at least suggests the possibility that "art" and "culture" are not necessarily interconnected.⁴⁵

To be a scholar, in contrast, is necessarily to be part of a community, and membership in that community requires formal training in which the prospective member absorbs substantive and methodological knowledge and internalizes the norms of a discipline. The 1915 AAUP *Declaration*, as characterized by Stanley Fish, conceives of academics as professionals "called to a vocation," who "must undergo a rigorous and lengthy period of training."⁴⁶ More than that: "Being a professional is less a matter of specific performance (although specific performances are required) than of a continual, indeed lifelong, responsiveness to an ideal or spirit."⁴⁷

Scholarship is thus an inherently communal practice. Art may transcend culture, or at least be limited only by culture's broadest constraints. Scholarly disciplines, in contrast, exist because of and subject to some more narrowly

43. ROTHKO, *supra* note 19, at 4.

44. *Id.* at 115.

45. Institutional theories of art provide a definition of art that, if accepted, would further bridge the gap between art and scholarship. On an institutionalist view, determining what is art is altogether a matter to be decided by . . . the Art World, which . . . is a sort of social network, consisting of curators, collectors, art critics, artists (of course), and others whose life is connected to art in some way. Something is a work of art, then, if the Art World decrees that it is.

DANTO, *supra* note 25, at 33.

46. FISH, *supra* note 7, at 3. As applied to the training required to become a legal academic, one might of course wish to add "(sic)" at the end of the quote.

47. *Id.*

held set of shared norms. Robert Post contrasts art and humanities scholarship as follows:

Insofar as humanities scholarship is disciplinary, therefore, it cannot be *inherently* “subversive” or “intrinsically revolutionary.” To imagine humanities scholarship as promiscuously unsettling is to endow it with a form of authority that is more like that of art than like that of a discipline. Artistic authority can be inherently subversive and intrinsically revolutionary because artistic success does not appear to depend upon either reproducible methodological competence or the approval of established organizations like universities.⁴⁸

Because what counts as good scholarship cannot be assessed except by reference to contemporary norms of scholarship, it is impossible for a scholar to create good scholarship in a vacuum. Topic selection, the selection and implementation of methodology, and the execution and assessment thereof are tied to this intangible communal conception of what falls within the appropriate range of the discipline. This is especially so in a field like law, where the object of study is not something that exists in the world in the way that the laws of physics do, but rather exists as a social product. (It is in this sense at least superficially distinct from science, as to which someone pursuing her own esoteric agenda might make a discovery the usefulness of which will be demonstrable on its own terms.)⁴⁹

It is thus proper—indeed inescapable—for a scholar who wishes to produce excellent scholarship to be mindful of the norms of the larger academic

48. Robert Post, *Debating Disciplinarity*, 35 *CRITICAL INQUIRY* 749, 760–61 (2009) (citation omitted).

49. Some readers of a draft of this Essay suggested a potential tension between the vision of scholarly activity implicit in my analysis and that embodied in Thomas Kuhn’s analysis of scientific revolutions. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). My sense is that Kuhn’s model provides, at best, an imperfect template for the analysis of change in either legal doctrine or legal theory, and that legal theory in particular exhibits many of the characteristics that Kuhn associates with pre-paradigm science. *Id.* at 13, 15. In a pre-paradigm world, as in the world of legal scholarship, there are “frequent and deep debates over legitimate methods, problems, and standards of solution, though these serve to define schools than to produce agreement.” *Id.* at 47–48. Kuhn himself is careful not to claim too broad a scope for his analysis. *E.g., id.* at 19 (distinguishing the rise of specialization in science from that “in fields like medicine, technology, and law, of which the principle *raison d’être* is an external social need”). To be sure, there is plenty of legal scholarship that takes one or the other of the available schools of thought as a paradigm and proceeds to undertake something that closely resembles Kuhnian “normal science.” *Id.* at 23–24. But there is also a great deal of work, and it tends to be among the most celebrated, that expressly aims at the production of novelty rather than at the production of results consistent with an existing paradigm. My sense is that disciplinary norms in law tend to evolve as much through the sort of collective drift associated with changes in fashion as through the sort of punctuated breaks identified by Kuhn.

community of which he is a part, and to appeal to and attempt to satisfy those norms to the highest and fullest extent, including by striving to build a reputation among members of that community as a good scholar, because there is no other way to measure the quality of scholarship. This is by no means a negative feature, and participation in such a community can itself provide a strong source of professional satisfaction.⁵⁰ Yet it means that even a scholar whose efforts to break new ground involve challenging accepted wisdom must at some level proceed from shared premises. A scholar who rejects all or even most of such premises opens himself to the charge that he is no longer practicing the discipline.⁵¹

There is a second set of audiences a scholar must be aware of, if not oriented toward. These exist beyond the university gate. The academic freedom faculty members enjoy is, on most accounts,⁵² a product of one of the university's core social functions, which is the advancement of knowledge and pursuit of truth.⁵³ Indeed, the 1915 *Declaration* places the university teacher's responsibility "to the public itself" on the same plane as "the judgment of his own profession."⁵⁴ Even Emerson's *Man Thinking* acts not simply for himself: "The office of the scholar is to cheer, to raise, and to guide men by showing them facts amidst appearances."⁵⁵

Disciplinary knowledge provides society its most reliable pool of knowledge about the natural and social world. I cannot determine whether smoking causes cancer by looking at cigarettes; I need to rely on the tested inquiries of scientists. This is true even though, and even because, disciplinary knowledge remains subject to critique and revision. The capacity of the university to generate such reliable knowledge

50. Mary Kay Kane, *Some Thoughts on Scholarship for Beginning Teachers*, 37 J. LEGAL EDUC. 14, 19 (1987) ("You will find that through your writing others get 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. . . . 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."); see also James Boyd White, *Why I Write*, 53 WASH. & LEE L. REV. 1021, 1037 (1996) ("I write out of my experience, including my reading, to others who reflect on their experience and may find my reflections of value.").

51. This is, more or less, the point that Paul Carrington made against Critical Legal Studies in *Of Law and the River*. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227–28 (1984) ("[T]he nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy.").

52. *But see* FISH, *supra* note 7, 12–13.

53. Byrne, *supra* note 35, at 6; AAUP 1915, *supra* note 36.

54. See AAUP 1915, *supra* note 36.

55. EMERSON, *supra* note 3, at 63.

provides the basis for the social value of academic freedom.⁵⁶

Society has recently, albeit with notable exceptions, valued the fruits of this inquiry a great deal, providing robust protection for academic freedom on the understanding that the bargain justifies the production of a great deal of bad or useless work.⁵⁷

The scholar, then, necessarily has significant loyalties beyond that to her conception of truth. These external constituencies ideally serve as a source of moderation. The search for truth must take place subject to the constraints of the discipline and the duty to society. But both also serve as sources of potentially corrupting influences, because an inappropriately calibrated desire to appeal to either constituency can sway a scholar away from the search for truth.

The desire to influence and otherwise be a part of the conversation within one's discipline naturally leads one to shape his views to those of other participants. This is, as noted above,⁵⁸ desirable to the extent that it brings any one participant's position to a "better" place as measured by disciplinary norms. But it also introduces pathologies that have the potential to draw the scholar away from the quest for truth and in search of more immediate and tangible rewards.

Perhaps the primary pathology is the pursuit of status. Status hierarchies exist throughout academia.⁵⁹ And academics as a class of people are perhaps especially likely to embody an enhanced susceptibility to ambition and accompanying anxiety about the worth of their own contributions. Scholars "compete in a very big league. They measure themselves not only against each other but against Aristotle and . . . Kant and all the other immortals. . . . Whatever they publish claims room on the same shelf with the classics."⁶⁰ Success and the recognition that accompanies it will often turn out to be fleeting,⁶¹ but they are treasured, and the best measure of their existence

56. Byrne, *supra* note 35, at 9.

57. *Id.* at 16. Of course, recent history suggests that not all state legislatures appreciate the nature of the bargain.

58. *See supra* Part II.

59. *See* Andrew Piper & Chad Wellmon, *How the Academic Elite Reproduces Itself*, CHRON. HIGHER EDUC. (Washington) (October 8, 2017), <https://www.chronicle.com/article/How-the-Academic-Elite/241374> [http://perma.cc/5TU6-6VSP].

60. DEBORAH L. RHODE, IN PURSUIT OF KNOWLEDGE: SCHOLARS, STATUS, AND ACADEMIC CULTURE 13 (2006) (first alteration in original) (quoting GERALD BRACE WARNER, THE DEPARTMENT 280 (1968)).

61. *Id.* at 13; Marx, *supra* note 1, at 260.

is the approval of those higher up the food chain.⁶² “In a world in which financial compensation and opportunities for advancement are highly constrained, smaller emblems of status become increasingly critical. Awards, speaking invitations, titles, publications in prominent journals, and references by scholars and media commentators all become coveted signals of success.”⁶³

This dynamic seems especially acute in legal academia.⁶⁴ Though hiring practices may be slightly less dominated by pure credentialism than in the past, legal academia as a whole seems content to disregard the notion that “past performance does not guarantee future results” as well as readily available lessons from elsewhere in the world suggesting that early promise often does not pan out, while late developers and those otherwise overlooked in the early stages of talent scouting often attain great success.⁶⁵ Whether as a byproduct or simply a continuation of this underlying phenomenon we remain obsessed with measuring our relative status—via law school rankings, citation rankings, download counts, and the like. Kenneth Lasson contends that “for many a law professor image is easily as important as substance.”⁶⁶ As Gary Marx observes in a footnote to the text quoted in the epigraph, such concerns are perhaps unsurprising given law’s methodological uncertainty.⁶⁷ Whatever the cause,

62. John Henry Schlegel, *A Certain Narcissism; A Slight Unseemliness*, 63 U. COLO. L. REV. 595, 601, 613 (1992).

63. RHODE, *supra* note 60, at 11.

64. My suspicion is that this is a product of the lack of any expectation that the path to becoming a legal academic involves graduate training, and the resulting lack of any sort of methodological uniformity.

65. Sports provides a useful analogy. Were we to imagine the legal academy as the National Football League, its current hiring practices would lead it to draft players almost entirely from traditional powerhouse programs—Alabama, Oklahoma, Ohio State and so on. The players in those programs are by and large the players who showed the greatest early potential. Yet in reality most of them end up undrafted or drafted behind players from lesser programs. And the roster of the greatest players in NFL history includes a substantial number from minor college programs, such as Walter Payton (Jackson State), Jerry Rice (Mississippi Valley State), and Brett Favre (University of Southern Mississippi).

66. Kenneth Lasson, *Scholarship Amok: Excesses in Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 948 (1990).

67. Marx, *supra* note 1, at 280 n.2 (“One observer even suggests that academic fauna can be ordered according to the degree of concern shown toward the outward presentation of self. Variation is inversely related to a discipline’s certainty of results: ‘Thus at one end of the spectrum occupied by sociologists and professors of literature, where there is uncertainty as to how to discover the facts, the nature of the facts to be discovered, and whether indeed there are any facts at all, all attention is focused on one’s peers, whose regard is the sole criterion for professional success. Great pains are taken in the development of the impressive persona At the other end, where, as the mathematicians themselves are fond of pointing out, “a proof is a proof,” no concern need be given to making oneself

Paul Horwitz has aptly characterized the result: “The legal academy is, truly, a collection of JD-carrying Lisa Simpsons. We are never happier than when a gold star is being put on our papers: by our local colleagues, by professors at elite institutions, and even (or especially) by student law review editors at the ‘right’ journals.”⁶⁸

The danger here is that work produced in pursuit of status, in order to be successful, requires a substantial degree of strategic thought and behavior. The academic in search of the next invitation, award, or lateral move will behave differently than the scholar with no such ambitions. The possibilities are easy to imagine. He will be deliberate in what topics he chooses to pursue, and, as importantly, not to pursue. He will attempt to curry favor in ways unrelated to his merits as a scholar or teacher. He may devote less effort to creating a quality product and more to building a positive brand. In doing this he will be guided by things other than his conception of the truth.

There is also a risk that scholars will allow forces external to the academy to exert inappropriate influence on their work. To a degree, such influence is unavoidable. Scholars live embedded in a specific place and time, and naturally carry with them most of the prejudices of that place and time. But they may also be susceptible to other influences, with politics being the most frequent intruder. The primary risk here is that a scholar’s political commitments will trump his obligations as a scholar, leading him to undertake a project as an exercise in justifying a conclusion predetermined by ideology rather than beginning with a question and following an analysis wherever it leads.⁶⁹ At

acceptable to others; and as a rule none whatsoever is given.” (quoting REBECCA GOLDSTEIN, *THE MIND-BODY PROBLEM* 202 (1983)).

68. Paul Horwitz, “Evaluate Me!”: *Conflicted Thoughts on Gatekeeping in Legal Scholarship’s New Age*, 39 CONN. L. REV. CONNTEMPLATIONS 38, 51 (2007). Others have made a similar point. Aviam Soifer characterizes the legal-academic *Zietgeist* as involving “a disturbing amount of ‘looking out for *numero uno*’” and being populated by people for whom “it seems the next logical step on some competitive escalator.” Aviam Soifer, *MuSings*, 37 J. LEGAL EDUC. 20, 23 (1987). Deborah Rhode observes the phenomenon as present in academia more broadly:

Desires for recognition shape much human behavior, but they are particularly pronounced in American academic settings. The nation’s competitive culture reinforces a preoccupation with rankings. And higher education attracts individuals with especially strong needs for achievement. Those who end up in faculty and administrative leadership positions are individuals who, by definition, have done well in competitive educational settings and who value the form of recognition that academic reward structures provide. By the same token, once these high achievers become academics, their status is in part derivative; their standing depends to some extent on the prestige of their employers.

RHODE, *supra* note 60, at 6.

69. FISH, *supra* note 7, at 18–19.

that point, on most accounts, the work no longer merits the label “scholarship.”⁷⁰ But one can also imagine a quest for some degree of public recognition or even fame influencing a scholar in undesirable ways. He may offer opinions in a form likely to be more palatable to the media or to generate greater public interest. He may offer opinions on topics as to which he is unqualified to speak. He would, in other words, offer conclusions not the product of a scholar’s methods.

All of this places scholars in a position akin to that of judges. Judicial independence is analogous to academic freedom,⁷¹ and neither is a one-sided coin. Judicial independence is designed to free judges from the ill effects of only certain influences and relationships.⁷² It is a freedom created not for its own sake or to allow judges to do whatever they like, but instead to enable judges to follow the requirements of the law according to their best understanding. Most accounts of academic freedom likewise do not regard it as a license to speak and write free of all constraints.⁷³ It is instead a freedom designed to enable scholars to fulfill their responsibilities, chiefly to the scholarly pursuit of truth. As Wayne Batchis observes, this freedom “is a double-edged-sword”:

It can promote impartiality by acting as a shield from inappropriate external influences—but it can also create the impression of raw political opportunism. It would be folly to dismiss the profound value of carefully designed institutional structures that self-consciously frame human behavior—selectively releasing individuals, for admirable ends, from the rules of the game.⁷⁴

Maintaining the balance between freedom and responsibility is tricky. For judges, the challenge becomes how best to situate them within a context of institutions and procedures that channel their decision-making so as to minimize a cluster of potentially improper influences including, among other things, politics, positioning oneself for promotion or reelection, the approval of one’s social peers, psychological biases, and so on.⁷⁵ This task is made even

70. “In the debates about academic freedom, one point goes largely uncontroverted. Inquiry the conclusion of which is ordained before it begins is not academic; it is something else, and because it is something else it does not deserve the protection of academic freedom.” *Id.* at 18.

71. See generally Wayne Batchis, *Academic Freedom and Judicial Independence*, 9 FIU L. REV. 35 (2013).

72. See, e.g., Stephen B. Burbank, *What Do We Mean by “Judicial Independence”?*, 64 OHIO ST. L.J. 323, 326–327 (2003).

73. See FISH, *supra* note 7, at 110–11.

74. Batchis, *supra* note 71, at 36.

75. See Chad M. Oldfather, *Aesthetic Judging*, 52 U.C. DAVIS L. REV. (forthcoming 2018).

more difficult because the line separating proper from improper influences is hazy and contested. For example, a judge should not act as a partisan politician would, but that is not to say that a judge in her decision-making must or even can act entirely free of influences that overlap with and could plausibly be characterized as political in nature.⁷⁶ A desire for promotion or reelection could sometimes lead a judge to decide in ways that we might regard as improper because they involve reaching a decision designed to appeal to the electorate or those responsible for selection. It perhaps more often serves as a source of restraint, pushing judges more toward more moderate positions. Because law is ultimately a reflection of society's norms, a more moderate judicial decision is, in the typical case, more likely to be congruent with those norms and therefore with law. The legal system uses a variety of mechanisms to shape the balance, including multimember courts, ethics rules, and the expectation that significant decisions will be justified in writing.

The scholar's mission is perhaps as easy to state, and as difficult to pin down in its particulars, as the judge's. The judge's obligation is to the law, and the scholar's is to sincere pursuit of the truth and, derivatively, to the knowledge-production function of the university. These obligations stand in tension. A scholar's responsibility to produce knowledge almost certainly entails some sort of obligation to be mindful of his impact. But as soon as he begins to focus on building an audience he finds himself subject to forces that pull away from the pursuit of truth. Building an audience—whether through networking or other overt means of doing so, or simply by writing one's scholarship in a manner mindful of its marketability—involves taking the target audience's preferences into account. That's a positive feature when it leads scholars to be more attentive to disciplinary norms. It takes on a negative cast when it diverts efforts toward more crassly instrumental means of drawing attention. The conditions of judicial employment are designed to largely eliminate competition over salary and title, while scholars compete over these and more.⁷⁷ Within the legal academy, as Dan Farber has (in my view) persuasively argued, the incentives are toward cleverness and a superficial form of brilliance, which is largely regrettable due to the nature of law itself, in which counterintuitiveness is considerably more of a bug than a feature.⁷⁸

76. *Id.*

77. See RHODE, *supra* note 60, at 11 (“Even well-established faculty find it difficult to escape the sometimes toxic effects of intellectual hierarchies. In a world in which financial compensation and opportunities for advancement are highly constrained, smaller emblems of status become increasingly critical. Awards, speaking invitations, titles, publications in prominent journals, and references by scholars and media commentators all become coveted signals of success.”).

78. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1985).

As one attempts to exercise influence outside the academy the danger tends more toward politics as a corrupting influence. External users of scholarship will have instrumental aims—winning a case, or scoring a political point—that do not require that they be sincere in their argumentation, and that are thus inconsistent with the scholar's truth-seeking mission.⁷⁹ The scholar will have to account for the strategic ways in which advocates will use his work, and if he does not succumb to the temptation to be strategic himself he is at least likely to alter the nature of his work in anticipation of the ways it will be used.⁸⁰ This, in turn, has the potential to make a scholar's utterances insincere, and thus to threaten their status as scholarship.⁸¹

We thus come back to the parallel between the scholar and the artist. Just as the artist faces the opposed forces of an obligation to the Truth of Art and, at the extreme, the need to eat, so, too, the scholar confronts an obligation to truth that stands in tension with a desire to compete for spoils with his peers and exercise influence inside and outside of the academy. Likewise, in both contexts, there is a sense that work done for hire does not represent the best of the form.⁸² The scholar's dilemma, as contrasted with the artist's, has received comparatively little attention. But consider, in addition to those raised at the outset, the questions a scholar must confront, assuming she possesses some core motivation to pursue truth. Should she allow things other than her best conception of what is interesting and important according to her own lights and her best understanding of disciplinary norms to influence her selection of topics, or her analyses? May she, for example, avoid certain topics and lines of argument based on a belief that to do so would be to her advantage given the internal politics of her discipline? Is it proper for her to take advantage of ways in which she expects the community or individuals within it will reward her for behavior that is independent of, and perhaps inconsistent with, its scholarly norms? There are various ways in which an academic might network her way to conference invitations and the like that are more a product of friendship or name-recognition than scholarly merit. And there are various unsavory

79. See Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. COLO. L. REV. 569, 581 (1992).

80. *Id.* at 586–88.

81. *Id.* at 587–88. Cf. Soifer, *supra* note 68, at 24 (“But I have a hunch that if you play it safe, you will find that even the significant achievement of tenure may turn out to be another Pyrrhic victory in the long line of empty successes our skepticism teaches us to recognize.”).

82. See HYDE, *supra* note 34, at 100 (noting that in both science and literature work that is done for compensation is held in less esteem).

practices associated with the law review system that are designed to secure prominent placements independent of an article's underlying merit.⁸³

Some of these, at least, are difficult questions, and it may not be possible to resolve them except by resort to intuitive moral judgments. All of them, it seems to me, involve situations in which there is the potential for the scholar to be diverted away from the sincere pursuit of a scholarly mission. My desire to get a good placement or a conference invitation or some other form of gold star can lead me to act in ways that are inconsistent with what I might do or say were I free of such influences. Taken to an extreme—the bribery of a law review board or hiring committee, for example—resort to extra-scholarly efforts is clearly improper. Beyond that we may be able to agree only that what I have identified are potentially negative influences, and that there are judgment calls involved in determining when the line is crossed.

My intuition is that anything that enhances the scholar's orientation toward sincerity and truth-seeking ought to be celebrated, and anything that diverts or corrupts that orientation ought to be viewed with skepticism if not hostility. There is undoubtedly a practical difficulty here, since it will often be difficult for an observer to distinguish legitimate efforts to appeal to disciplinary norms from self-serving behavior designed to build a reputation based on non-scholarly considerations, and for non-scholarly gain, especially given the boundaries of what counts as legitimate scholarly considerations. But having a disdain for such behavior be included among the set of disciplinary norms seems unquestionably valuable, even if its impact will be diffused and difficult to measure.⁸⁴

I stand, then, with Emerson in holding “Man Thinking”⁸⁵ as the scholarly ideal, and in believing that, “[i]n the degenerate state, when the victim of society, he tends to become a mere thinker, or, still worse, the parrot of other men's thinking.”⁸⁶ The scholar may—indeed, must—be externally oriented,

83. See, e.g., Ryan Scoville, *The Ethics of Baiting and Switching in Law Review Submissions*, 101 MARQ. L. REV. 1075 (2018).

84. Others have remarked on the consequences of status-oriented behavior for the quality of the scholarship it incentivizes:

When there is a marked competition for jobs and money, when such supposedly secondary goals become primary, more and more scientists will be pulled into the race to hurry “original” work into print, no matter how extraneous to the wider goals of the community. (In the literary community, at least in the last few decades, the need to secure a job has certainly accounted for a fair amount of the useless material that's been published, both as literature and as criticism.)

HYDE, *supra* note 34, at 108.

85. But not, of course, insofar as the reference is a gendered one.

86. EMERSON, *supra* note 3, at 54.

but her goal should be to bend her audiences to her way of thinking, rather than to have her way of thinking shaped by her audiences.

How, then, should the scholar orient himself? There are three natural points at which we might measure the whole of a scholar's accomplishments, and thus three time horizons by which a scholar might calibrate her efforts. The first is at the present moment, the second at her death, and the third at the point at which her words and her work have finally ceased to have any influence in the world. None of these can be assessed with any sort of precision. My contention, which I believe to be consistent with the ideal of the scholarly vocation (but which I concede may ultimately stand on an emotivist base), is that the proper scholarly aim is for the latter of these measures. It is with her eye on the most distant horizon that the scholar is most likely to pursue truth, and least likely to be influenced by extraneous considerations.

Do not take me the wrong way. I am not suggesting that maximizing the impact of one's work over the long term is necessarily incompatible with attention to the short term. Cultivating an audience now certainly increases the probability of having one later on. But the potential for conflict is greater, and the temptations toward the various spoils associated with the maximization of short-term influence can be counter-productive to the longer-term goals. The person seeking short-term prominence will tend to focus on the problems of the day, and will be more susceptible to influence by the prejudices of the day. As the issues change and one set of prejudices gives way to another, the scholar oriented toward immediate gratification stands a lesser likelihood of having an enduring influence.

Nor am I suggesting that the scholar limit herself to esoterica or abstraction. For legal scholars especially there is a strong argument to the contrary. Appropriately crafted doctrinal scholarship can satisfy the knowledge-production aims of the enterprise and influence generations of judges, lawyers, and students. It can be undertaken with a scholarly mindset using a scholar's methods, and it can produce work of great value to society. Appropriately focused efforts related to teaching, including perhaps especially the creation of teaching materials, can likewise have a broad and enduring influence.

Academics enjoy a privileged position. For many, tenure provides freedom from the need to worry about how to pay the rent⁸⁷ or whether there will be drastic professional consequences of choices to pursue certain lines of inquiry.

87. Cf. HYDE, *supra* note 34, at xviii ("For some years now I myself have tried to make my way as a poet, a translator, and a sort of 'scholar without institution.' Inevitably the money question comes up; labors such as mine are notoriously non-remunerative, and the landlord is not interested in your book of translations the day the rent falls due.").

Tenure likewise provides the luxury of time, and universities an abundance of scholarly resources, which combine to create a climate uniquely conducive to exhaustive research and deep reflection. A sense of responsibility to the office might therefore be itself a sufficient source of motivation.⁸⁸ But that freedom is so great, of course, that some exercise it to withdraw entirely from their responsibility to produce scholarship. The reasons for that, one suspects, often have something to do with motivation, and its diminishment, and perhaps the absence of the right sort of motivation in the first instance.

The answers to the questions I have raised do not have everything to do with motivation. But they surely have something to do with motivation, and my instinct is that they have a great deal to do with motivation. Legal academics, in particular, are fortunate not to face a choice so stark as that between the Truth of Art and hunger, nor do we, generally speaking, face pressures to secure external funding. It is a position of great privilege, and great freedom—as well as great responsibility. In the end, then, I join Deborah Rhode, Gary Marx, and Mark Rothko in urging scholars to value the process of engaging in their craft, of combining “playfulness of mind” with “a truly fierce drive to make sense of the world.”⁸⁹ This does not entail relinquishing ambition, whether for a spot on the same shelf as Aristotle and Kant or for something less grandiose. It is instead to feel with Jason Isbell the need to say something,⁹⁰ to be with George Orwell “driven on by some demon whom one can neither resist nor understand,”⁹¹ and to hold fast with Kris Kristofferson in refusing to believe—regardless of whether anyone is paying attention at that moment—that no one wants to know.⁹²

88. See Yale Kamisar, *Why I Write (And Why I Think Law Professors Generally Should Write)*, 41 SAN DIEGO L. REV. 1747, 1756 (2004).

89. MILLS, *supra* note 39, at 211.

90. See Editors of GQ Style, *supra* note 2.

91. ORWELL, *supra* note 18, at 320.

92. KRISTOFFERSON, *supra* note 15.