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LEGAL SCHOLARSHIP AS RESISTANCE TO “SCIENCE”

Steven D. Smith¹

The aspiration to make law and legal scholarship into a “science” (whatever that means) is very common, and has been for decades or even centuries.² My own motivation for doing scholarship is in a sense just the opposite of this: I see legal scholarship as a vehicle for *resisting* science, or at least for resisting “science.” But though I’m serious about this self- description, I’m also aware that, unexplained, it is likely to be misleading. And I don’t exactly want to come across as some sort of obscurantist or Luddite foe of science. So my hope in this brief essay is to explain what I mean in a way that might elicit at least a little sympathy, from at least a few of you, for the notion of legal scholarship as a form of resistance to science.³

I want to come around to this idea indirectly, though, so for the moment I’ll set it aside and start with the question for this panel:

Why Do We Write?

The question is a hard one for various reason, I think, and one reason is that like so much

¹ Warren Distinguished Professor of Law, University of San Diego. I thank Eric Claeys for helpful comments on an earlier draft.

² For an engaging, entertaining, and skeptical presentation of that aspiration, see Grant Gilmore, *The Ages of American Law* (1977).

³ Readers will quickly notice that this short essay addresses some large and complicated issues in a very unsophisticated and unnuanced way: I only ask that these readers remember that the essay is the reduction to writing of what was supposed to be a ten-minute talk. I have tried to discuss some of the issues in much greater depth (or at least at much greater length) elsewhere. See, e.g., Steven D. Smith, *Law’s Quandary* (2004).

in law, the question quietly mixes the “is” and the “ought.” That is, the question calls in part for a *descriptive* answer— or for an explanation of what it is in our psyches that drives us to engage in the somewhat peculiar activity of writing, say, law review articles. But I think the question also has another aspect: at least by implication it asks whether there is some reason that *justifies* the activity of writing legal scholarship. And the description or explanation of “why we write” might not provide any justification for using our time in this way; it might actually make the justification more difficult.

To illustrate what I mean, let me ask you to recall James Boyd White’s brief account of looking around his office, “littered with books and journal articles” that he is supposed to read, and experiencing not “eager anticipation” but instead a “feeling of guilty dread.”⁴ I suspect that most of us have had that experience, and it might provide a partial explanation of why we write. I’ll confess that I at least sometimes write because it provides an excuse not to read: writing is sometimes more fun or at least less painful than reading the sort of legal scholarship I’d otherwise feel obligated to be reading. But of course if by doing this I’m just increasing the quantity of material that will produce “guilty dread” in my friends and colleagues, then this *explanation* for writing isn’t much of a *justification*. On the contrary, it suggests that although *readers* of legal scholarship may approach their task with “dread,” it’s actually the *writers* who should feel “guilty.”

And in fact on every faculty I’ve observed, there have been people (often quite a few of them) who tacitly or sometimes explicitly adopt what we can call the anti-scholarship view, which maintains that scholarship is *not* valuable and that producing it is a waste of time. This is

⁴ James Boyd White, *Justice as Translation* 8 (1990).

an awkward position to take, particularly since we all get some of the benefits (such as relatively low teaching loads) of the assumption that producing scholarship is an important part of our job. In addition, the anti-scholarship view, in my observation, tends to demoralize those who hold it, for pretty obvious reasons. But for all that, the anti-scholarship view isn't obviously wrong. I myself find it quite powerful.

So then why *should* we write? What should motivate us? The answers to those questions vary, certainly, but I want to mention some common reasons that surely motivate some people to write, but that I think wouldn't be sufficient to motivate many of us over the long haul. Then I want to talk, a bit more personally, about the reasons that in fact motivate me- which will lead back to the idea of scholarship as resistance to science.

Common (but Insufficient) Reasons for Writing

So to start with the obvious: most of us write at least in part for career or professional reasons. We write to earn tenure and promotion, or higher raises, or to increase our mobility or enhance our reputation. These are legitimate motives, I think, or at least inevitable ones, and they affect all of us to some extent, especially early in our careers. But there comes a time when we have tenure, and we don't want to move (or we realize that we aren't likely move), and the marginal effect on our salaries or reputations of an additional article just wouldn't justify the time and effort required to write it. At that point, if careerist motives were our only reasons for writing, then we would probably stop- which of course is just what many of us do.

A different kind of reason for writing is curiosity. I've had colleagues who say- sincerely, I believe- that they write mostly for the intellectual satisfaction of solving a difficult

puzzle. I admire these people— their motives seem about as pure as any I can think of— but I would have to say that this reason probably wouldn't be sufficient to motivate me. It's not that I'm wholly devoid of curiosity. But in my case, I think curiosity would lead me to read, think and discuss; but once I thought I had solved a puzzle, I'm not sure I would see the reason to go to the effort of writing it all down, supplying all the footnotes, haggling with the editors, and so forth.

Scholarship as a Calling . . . to Do What?

Quite a different kind of reason for doing scholarship— and one that affects (or perhaps afflicts) me— views writing as a calling or vocation. My wife thinks I'm peculiar in this respect, but for whatever reason I've always had the sense that I wasn't put on earth just to pass the time and enjoy myself, but rather that there is something I'm supposed to do. So although there were plenty of advantages in law practice, I constantly had the sense that I wasn't put here to help one corporation win money (or keep money) from another corporation.

And however odd the idea may seem to some people, I don't think there's anything especially unusual about doing legal scholarship out of a sense of calling. The terms "calling" and "vocation" often have a religious connotation, but the sort of motivation I have in mind has a clear secular counterpart: many law professors have produced scholarship in an effort to promote justice, or peace, or the progressive agenda. My sense is that this sort of motivation may have been more common among people who went into law teaching in the '60s and '70s than among more recent entrants. In recent years, the notion that you could write a law review article demonstrating a right to a minimum income, or to the lifestyle of your choice, and expect some

justices to read the article and adopt your position has seemed naive. (Probably it was always naive.) So legal scholars who write from *this* sense of calling have surely experienced frustration in recent years (though perhaps the Supreme Court's last term has revived their hopes just a little bit).

For me the notion of scholarship as a calling, though attractive, is also frustrating or confusing— but for a different reason. I never thought I had a calling to advance the progressive political agenda by writing law review articles. On the contrary. But I have a different problem: though I got into the legal academy in part from a sense of calling, I've never had any very definite conception of just what that calling is. This is, to honest, an ongoing source of perplexity, and if forced to try to articulate what my calling is, I'm certain that my answers would vary from year to year, and probably even from week to week. But here's my best current attempt: it'll be a statement that may sound strange to some of you, and that I think can't have any very wide appeal, but that I suspect will have some resonance with at least a few people working in the profession. And in any case, the statement will bring us back to the relation between legal scholarship and science.

Scholarship and the Scientific Worldview

So here's my thought. As academics today, we live in the imposing shadow of "science." Science means many things, and nearly all of us admire and appreciate some of those things. And some of science's effects on legal scholarship are probably beneficial as well. But I don't think all of them are.

On what might seem a trivial level, I think that not science, exactly, but what we might

call the “image of science” or perhaps the “scientific aura” has had an unfortunate influence on the way legal scholarship is written. That is, I suspect that the tendency of law review editors to discourage personal or idiosyncratic styles in favor of a numbing standardization reflects a sense that the more homogenized and impersonal prose is somehow more objective and scientific. And the editors’ intermittent insistence that every sentence capable of being contradicted be burdened with a footnote mirrors the “scientific” understanding that propositions need to be supported by evidence. We all know that these norms are enforced in erratic and sometimes silly ways: the editors who won’t let me assert my own naked opinion in an article will usually be perfectly happy if I drop a footnote to an article in which a junior colleague expressed the same opinion, or even to an earlier article in which I myself expressed the opinion. But the overall effect of this attempt to make legal scholarship look scientific is that the actual human interest tends to get squeezed out.

On a more substantive level, I believe that science (or the image of science) powerfully affects legal scholarship by sponsoring a sort of worldview within which we live and write-- usually without paying much attention to it. In simple terms, that worldview goes something like this: the world is composed of particles and forces (which are studied by physicists), and these particles and forces interact and combine in complicated ways (which are studied by physicists and chemists), and over time some of these particles have combined to form complex systems that through processes of natural selection (which are studied by biologists, among others) have evolved into amazingly complicated creatures-- including, of central concern to ourselves, *us*-- with abilities to talk, think, plan, and produce all of the remarkable things you can see if you walk into a Barnes & Noble or a Circuit City.

There is no particular *point* to our being here: we weren't "put on earth" (as I put it a moment ago) for any "purpose." Rather, our existence is (for us) a sort of happy, or sometimes unhappy, accident. Still, here we are, constituted as we are with "interests"— things we happen to want— including an interest in survival. So the sensible thing is to devote ourselves to surviving and to satisfying our interests as fully and efficiently as possible. And in this spirit legal scholars should do what we can to contribute to that enterprise of satisfying human interests with maximum efficiency.

Of course, not all legal scholarship embraces this "social scientific" project. There is still traditional doctrinal scholarship, which some of us do because, well, . . . that is what law professors do. And there is a lot of discussion of themes such as distributive justice, political liberalism, and human rights. This rights- or justice-oriented work seems committed to maintaining a more overtly moral view of the world. But precisely because that more moral views fits a bit awkwardly with the more scientific view that prevails at the "meta" level, it can have a dated and perhaps parochial feel. You can *say*, loudly and righteously, that human beings have inherent dignity and are entitled to be treated with equal concern and respect. It's a nice thought— so nice that hardly anyone these days is perverse enough to contradict it. Still, it's not clear how these sorts of claims can be persuasively maintained— or even understood— within the framework of the modern naturalistic worldview as I've described it.

So my own view, which I've argued for elsewhere but can only report here, is that much of the rights- or justice-oriented scholarship is calculated in part to obfuscate— to bootstrap the absence of any foundation into a foundation. And as a further consequence, much of this scholarship seems to me to be not only fragile but also a bit disoriented, even in the elaboration

of its own commitments.

Other scholarship more enthusiastically embraces the scientific, interest-oriented, efficiency vision. It sometimes seems to me, exaggerating slightly, that law school colloquia and especially job talks consist of wave after wave of technically-adept speakers offering some version of game theory or rational choice analysis to support some sciency-looking “model” of how some cubbyhole of life works. Sometimes these models issue directly in policy recommendations for making that area of life run more efficiently— for improving the content or timing of disclosures in real estate transactions, or for construing statutes so as to reduce the inefficiencies of the legislative process. Sometimes the models have no immediate payoff; they seem more designed to contribute to some emerging, scientific understanding of life that, when complete, will presumably allow us to maximize the efficiency with which we pursue and satisfy our interests.

Now I have no deep principled objection to these presentations. Sometimes they are interesting, and illuminating. More generally, I have no objection to using science to improve our understanding of the world. I freely admit that *I* have “interests”— too many of them, probably— and so do my friends and family; and I want to see those interests satisfied as fully as possible. If the proliferation of models will help achieve that goal (about which I admit to some skepticism), then more power to the modelers.

But I also have to admit that I find the I inundation of models and grids and prisoners’ dilemmas a bit confining. And I believe the worldview in which these studies resonate, and which as a cumulative matter they tend to ratify and reenforce, to be not only depressing but fundamentally false (at least when that view comes to be accepted, often only half-consciously

and half-heartedly, as not just a part of the truth but instead as *the Truth*). False and also threatening, because I don't think this worldview is ultimately capable of supporting our most fundamental and valuable commitments.

I'm not sure what to do about this situation, but my thought is that there is some value in trying to maintain a resistance— not to science, exactly, but to the *domination* of science and especially of the naturalistic worldview so often associated with science. There's value in resisting the scientific worldview in favor of some other overarching view in which *persons* (of various sorts) have ontological primacy over particles.

Just *how* legal scholarship can serve to resist the scientific worldview, and to preserve a more personalist worldview, presents a complicated question, which I can't explore here (in part because I don't know the answer). It's a question that calls for experimentation.⁵ Sometimes the resistance may be direct and affirmative, but often, I suspect, it will be critical and oblique.

This view of the purpose of (some) legal scholarship may seem quixotic and doomed to failure, but let me end with two observations that provide a bit of hope. First, it might be that law is distinctively well suited to serve as a field of resistance— in part because of its inherent tendency, that I noted at the outset, to mix “is” and “ought.” Joseph Vining's work in particular suggests that lawyers who think seriously about the presuppositions of their own discipline will inevitably be pointed to a worldview at odds with prevailing naturalistic assumptions— one more attuned to “mind,” “purpose,” and “persons.” I'm not sure whether Vining is right, but it's a

⁵ Such experimentation is apparent in the work that attempts this task in a more sustained and self-conscious way than any other legal scholarship I've encountered. See Joseph Vining, *The Song Sparrow and the Child: Claims of Science and Humanity* (2004); Joseph Vining, *From Newton's Sleep* (1994).

hopeful thought.

Second, in this matter, substance and style may not be wholly separate. My own thought is that every time a law professor writes a book or article that some other person might actually want to read— might actually *enjoy* reading, and might think he or she actually *benefitted* from reading— that is a small victory for the resistance, and for persons. If that thought is right, then it poses a challenge that may provide us with at least a modest motive for caring about writing— even after we've been granted tenure.