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I would like to focus my remarks on a problem that has plagued numerous law schools in recent years: How should a dean think about the institutional issues posed by the need to evaluate "novel," "controversial," or "unorthodox" forms of scholarship in the context of faculty appointments and promotions? It is appropriate to examine this issue in a conference on The Voices of Women because the most important and most visible cases regarding this question in recent years have involved the work of feminist scholars.

I should state two rather obvious caveats at the outset. First, not all women scholars engage in feminist or "unorthodox" forms of scholarship. Thus, the problem I am addressing is not directly relevant to the appointment or promotion of all or perhaps even most women faculty. Second, the underlying problem I am addressing is not unique to feminist scholars. To the contrary, in varying forms the problem can be, and has been, posed by very different types of work at different institutions. It can be posed not only by feminist scholarship, but also by critical legal studies; law and economics; critical race theory; legal realism; public choice; empirical research; legal history; jurisprudence; law and literature; representational art; and fiction, such as my colleague Norval Morris's short stories, which are designed to illustrate important points of criminal law.

The starting point is with a conception of "good" scholarship. Is there any consensus on the attributes of "good" scholarship? I will accept for these purposes the definition Stephen Carter sets forth in a recent piece in *Reconstruction:*[1]

> [T]he quality of a piece of scholarly work . . . turns on a demonstrated mastery of the relevant material and the ability to contribute to a dialogue, or to spark a new one. It turns on saying something that not only is not *in* the prior literature, but is not *obvious* in light of the prior literature. It turns, further, on making a logical argument—not a correct one, necessarily, or even a non-controversial one, but certainly one that is coherent. And it turns on setting out fairly the possible objections and dealing with them, or even noting, when appropriate, the extent to which they successfully limit one's own position.[2]

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1. Stephen L. Carter, The Best Black, And Other Tales, Reconstruction, Winter 1990, at 6, 29.

2. Id. at 29.

Put differently, "good" scholarship *must* be "original" and it must advance our understanding. Beyond that, it *should* be thorough, careful, even-handed, coherent, and intellectually honest.

So, why can't we just read the material and decide whether these requirements are met? There are at least three problems. First, we may undervalue "good" work because we do not understand it. Aficionados of law and literature may not appreciate the subtle elegance of a novel application of the Coase Theorem. They may not understand why the work is original or useful. Moreover, because they do not grasp the work's substance, they may tend to dismiss its significance. Even law professors fall victim to human nature.

Second, we may undervalue "good" work because it suggests, implicitly or explicitly, that the work we do is not valuable. Practitioners of law and economics may feel that feminist theory rejects the basic premises of their work. An all-too-human response is to dismiss those ideas that do not "appropriately" value our own.

Third, we may undervalue "good" work because it promotes a view of the legal system or society or human relations that is fundamentally inconsistent with our own world view. Such work may challenge not only the value of our work, but also our broader sense of the appropriate order of things socially, economically, politically, and personally. Work that casts doubt upon everything we cling to is not likely to be embraced enthusiastically.

While recognizing the danger that we may tend reflexively to dismiss or to undervalue new or unorthodox scholarship, it is also important to recognize that such scholarship is not necessarily "good" merely because it is new or unorthodox. To the contrary, just as there are dangers of undervaluing such work, there are dangers of overvaluing it as well.

For one thing, there is a real risk of fadism. We like new things. They make life exciting. We must guard against the temptation to be swept away by what is in vogue and by the appeal of new answers to old questions. We need only think back, perhaps with some embarrassment, to some past fads in the realm of ideas, art, literature, music, dress, and the like to see the danger.

Moreover, the risk of overvaluing such work may be especially acute in the realm of scholarly research. Quite frankly, it is difficult to make a useful contribution at the cutting edge of legal scholarship. Sometimes it seems that everything worth saying has been said. But then comes a new way of thinking, a new way of approaching old problems. Suddenly, there is all sorts of work to be done. Whole new avenues of inquiry are opened to us. Opportunities abound. As if by magic, there is suddenly an easy answer to the often paralyzing question: What do I write about next? New forms of scholarship may provide easy, perhaps too easy, temptations.

Because we have limited resources, and, in any event, should care about excellence, we cannot escape responsibility for making judgments about the quality of particular scholarly works. We need a way to make judgments wisely. How do we do that? As a dean, I have often faced this problem, not only as an individual making my own judgments, but also as one charged with the responsibility for helping to guide a particular law

school towards better rather than worse institutional decisions. When faced with an appointments issue that poses such questions, I try to promote an environment in which the decisions will be made fairly, carefully, open-mindedly, and with a healthy dose of skepticism.

First, I urge faculty members to talk with each other. I urge them to define for one another precisely why they like or dislike the work in question. I ask them to try to understand why their colleagues may hold different views. Second, I urge those colleagues who view the work negatively to reread it and ask themselves not, "What is wrong with this work?" but, rather, "What can I learn from it?" Third, I urge those colleagues who view the work positively to try to translate it into more conventional or more familiar terms for those who are doubtful. Even if something is lost in translation, this may help those who are negative to better understand why those who are positive value the work. Moreover, such discussion sometimes works in the opposite direction. In attempting to translate the work into more familiar terms, a proponent may come to appreciate the work's weakness.

Finally, I encourage faculty at all times to respect the judgments and trust the good faith of their colleagues. I remind them *ad nauseam* that, as colleagues, they share a common mission and that they must remember that other members of the faculty are just as sincere and just as well-intentioned as they are. I urge them whenever possible to defer to the strongly held views of their colleagues. At the same time, I urge them not to have strongly held views unless they are prepared to ask others to defer and they are willing to take real responsibility for the ultimate decision.

The idea, in short, is to talk it out over a period of time in an effort to reach a shared consensus. This works best, I think, if the discussion takes place informally, behind closed doors or in small groups over lunch, rather than in formal memoranda or open faculty meetings. In formal settings, feelings are more likely to be hurt, nasty comments are more likely to be hurled, ideological lines are more likely to be drawn, and angers are more likely to rise.[3]

I should offer some final thoughts. This process is most likely to succeed if disputes over the value of unorthodox forms of scholarship arise from different perspectives at different times. It is important that different members of the faculty find themselves on different sides of the "let's take a risk" versus the "let's be cautious" issue in different cases. Deference, mutual respect, and consensus are impossible if one group within the faculty is always asked to defer to the other. Deference, mutual respect, and an effort to achieve consensus will be in the self-interest of all members of the community only if all participants understand that in the long run it is in their individual as well as their common interest. The jurisprude is more

3. I agree with Sylvia Law that such "informal caucusing" has its risks. *See* Sylvia A. Law, Good Intentions Are Not Enough: An Agenda on Gender for Law School Deans, 77 Iowa L. Rev. 79, 86 (1992) (observing that closed-door meetings and informal caucusing have disadvantaged women scholars in the past). However, in my view a careful dean can guard against those risks while at the same time making effective use of such informal meetings.

likely to credit the judgment of the empiricist if she knows the empiricist will give similar respect to her judgment when the occasion arises.

There will, of course, be cases when consensus just cannot be reached. After all the dust settles, some people may still feel quite strongly about the issue from directly incompatible positions. What happens then? Should a dean or a law school err on the side of acceptance or rejection of new, unorthodox, and controversial work in such circumstances? One way to think about this issue is to assess the relative costs of error. If you reject work because you think it is bad and you are wrong, you deny your students and your faculty exposure to new and different ideas. That is obviously a significant cost. It is not necessarily an irrevocable cost from the standpoint of the institution, however, for it may be possible to mitigate the long-term cost by correcting the error at some point in the future. In the short run, however, the cost of this error to students and faculty alike is potentially quite serious. And, of course, the cost to the particular appointments candidate involved may be enormous, especially if the issue arises in the context of an internal promotion to tenure.

On the other hand, if you make an appointment because you think a person's work is good and you are wrong, you may set up an especially painful tenure decision several years down the road. If the appointment in question involves tenure, you may stick your school with a lifetime of bad work from one or more of your colleagues, thus undermining both the institutional sense of mission and the commitment to excellence. The stakes, either way, are unavoidably high.

There is, of course, no universally correct way to resolve this conflict. The matter will depend primarily on the culture, values, and needs of the particular institution involved. Some law schools can and should be all things to all people, providing a rich diversity of views across the entire spectrum of ideas and methodologies. Consistent with this self-definition, such schools may tend to err on the side of risking the appointment of controversial or unorthodox scholars. Indeed, their greatest strength may lie in their willingness to take such risks in order to foster the broadest possible diversity of views. There is, however, a cost to such an approach, for in a world of limited resources, breadth of views across a faculty may come at the price of depth of expertise in any particular field.

For this reason, other schools can and should focus on developing certain areas of specialization. They may prefer to concentrate faculty in particular fields, such as law and literature, feminism, jurisprudence, law and economics, or the like. The strength of these schools lies to some degree in their specialization, in their ability to provide students with especially extensive exposure to particular areas of inquiry, and in their capacity to provide an unusually supportive and intellectually collegial environment for those who work in or around the fields of specialization. Given this self-definition, such schools might approach new or unorthodox forms of scholarship with a somewhat greater sense of caution.

Ultimately, however an institution resolves these issues, it should always strive towards two ideals. First, law schools should always be open to new ideas. Scholarship should never be dismissed as unworthy merely because it is unorthodox, controversial, or even deeply unsettling. Second,

at all levels of appointment, law schools should insist on excellence in scholarly research. Such excellence can take many forms, but that does not mean there are no standards. To the contrary, we can articulate coherent standards of excellence, those standards can be applied to the broadest spectrum of legal scholarship, and it is the duty of each law school to find ways to implement those standards in a fair, rigorous, and open-minded manner.