

# SCHOLARSHIP RAG

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“SO, what do you want to talk about?” Amanda asked.  
“How about scholarship?” Tony answered.

“Yours?”

“Don’t be cute, although I would find it fascinating,” Tony confidently smiled back at Amanda.

“I’m sure that you would, but let’s try to be a little more general than that. Who do you write for?” Amanda asked.

“You mean for whom do I write?” Tony edited her question. “I write for thee.”

“I won’t bite but I will take that as a nice little pseudo-poetic lead-in. You mean you write for deans at other law schools. Even though you are one of my mentors and closest friends, that is what I am Tony I am a dean at another law school.”

“You are that Amanda. And while I can still say your old friends miss you, our new faculty don’t even know who you are so I will admit that you are a dean at another law school. But why would I write for a dean at another law school?” Tony asked, with a trace of seriousness in his voice.

“There could be several reasons, but one might be that when writing for deans at other law schools you send them reprints of your articles and they see what and where you published and they are impressed by what you do. Thereafter, they think highly of you and of your law school.”

“You mean they would rank us higher in the yearly rankings.” Tony said.

“I might.”

“You mean you might mean that or you might rank us higher or both. And, by the way, do you think the deans to whom I send my articles really read them? But to get back to the heart of this conversation (I think), of course I think my work should be highly regarded and well respected and that our school should be ranked higher than it is but that—the indirect and unlikely higher ranking from one piece of scholarship—seems a feeble and hollow reason to write.”

“Then you write for some greater purpose?” Amanda asked.

“Of course I do. I write to improve the law ” Tony thrust back his shoulders, held up his chin and put his right hand over his heart.

“Let me reask the question: for whom do you write?” Amanda asked. “Do you write for other law professors?”

“Yes,” answered Tony cautiously “I write for them in part.”

“Do you write for them so they will read your stuff?”

“I do.”

“Why?” Amanda asked.

“You sound like my kids when they were three, always asking why ” Tony was trying to deflect the question.

“My kids were like that at four,” Amanda responded.

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"Mine must be brighter."

"I love you Tony so I'd rather not go there. Why is the question?"

"Why do I write for other professors?" Tony asked.

"Yes."

"I want them to read my material \_\_\_\_\_"

"So they think higher of you and of your law school and rank you higher in the yearly rankings?" Amanda asked.

"Amanda you are becoming a cynic; you have been a dean too long. Five years?"

"You betcha. But is that the reason you write for other professors?"

"I never get to vote in the yearly rankings," said Tony "I'd like to. Amanda, do you rank your school in the yearly ratings?" Tony asked.

"I do," Amanda answered.

"Don't you think there is a conflict of interest there?" Tony raised his right eyebrow

"I guess there is," said Amanda, truly considering the issue.

"I bet you rank it pretty highly," said Tony

"It's a great school," said Amanda.

"Don't you think most deans think that about their schools (and not necessarily yours)?" Tony asked.

"I would certainly hope so," said Amanda.

"My point exactly" Tony licked his lips. "And you say professors get to vote too—or at least some professors?"

"Yes," said Amanda.

"Well, wouldn't they have a conflict too? Wouldn't they tend to rate their own law schools high?"

"They might," said Amanda.

"And they might rank their alma maters pretty high too," said Tony "And I would also think that the students who vote have a conflict; they would rank their own schools high and others low"

"No Tony Students don't get to vote. At least not in some of the rankings. Let's get back to the scholarship questions." Now Amanda verbally tried to steer the conversation back to where she wanted it.

"Wow Students don't get to vote. I suppose you could argue that students have no basis to form an opinion about any law school other than their own but do many professors or even deans? Certainly, they don't have knowledge about all other law schools." Tony said.

"No but if you really don't have knowledge about a place you can check that box."

"Self-policing?"

"Yes. After all we are an honorable profession," Amanda said. "Tony, I would like to talk about scholarship, but I feel compelled to say that students do get to vote in some rankings."

"And do deans and law professors vote in those rankings in which the students vote?" Tony asked.

"I don't think so."

"So deans and faculty vote in some rankings and students vote in others?" Tony asked.

“Well, in the most publicized rankings deans, faculty, judges, and lawyers vote.” Amanda added.

“And I suppose I could ask the same series of questions about judges and lawyers that I asked about deans and law professors. One, how are the judges and lawyers selected? Two, do they vote on the law schools they attended? Serve as adjuncts at? Give lectures at? And, three, do they vote only on those schools at which they have substantial knowledge or others as well?”

“Good questions. Can we get back to scholarship?” Amanda asked.

“Sure. When we got diverted to rankings we were talking about why I think law professors are one of my audiences, correct?”

“Correct,” said Amanda. “And I, perhaps unwisely, asked you if you wrote for other professors so they would think better of you and your law school.”

“Right and we got sidetracked on all that ranking stuff.”

“We did,” said Amanda.

“And how it might relate to scholarship.”

“We did,” said Amanda.

“And now it is time for me to say once again that I write in order to improve the law and that one of my target audiences is other scholars who can read my work and engage in a scholarly dialogue about the best approach to a legal problem. Sound good?” Tony asked.

“It sounds great,” Amanda said, “but is it true?”

“Sure it’s true,” answered Tony

“And do you write for judges and lawyers?” Amanda asked. “It would seem to me that if you wanted to improve the law judges and lawyers would be one of your primary audiences.”

“And legislators.” Tony added.

“And legislators but these are your audiences Tony ” Amanda smiled.

“Of course I write for judges, legislators, and lawyers,” said Tony

“Because they can both read and act upon your work,” said Amanda.

“Sure, but so can other scholars,” said Tony

“By writing on the same or similar issues.” Amanda said.

“Yes.”

“Well let me ask you about accessibility of your material—your scholarship,” Amanda said.

“How do you mean?” Tony inquired.

“What I mean is that if you write about economics, psychology sociology, philosophy, etc., will your work be accessible?” Amanda asked.

“I suppose that depends upon how well I do it, doesn’t it? Amanda, you are not discounting the importance of other disciplines in analyzing or understanding law are you?”

“Of course not. But I wonder if at some point the level of the inquiry inspired by the other discipline does not make the work less accessible to a legal audience.” Amanda said.

“But audiences in other disciplines can appreciate the work,” said Tony

“I don’t doubt that but the legal audience becomes more removed from the scholarly endeavor ” Amanda added.

“Not the legal audience who analyzes law from a similar perspective,” Tony said.

“True but depending upon the perspective selected that legal sub-audience is smaller than the whole.” Amanda furrowed her brow

“Undoubtedly ”

“And,” Amanda continued, “does the analysis of legal problems from other perspectives have real meaning for judges, legislators, and lawyers?”

“I don’t know. Certainly the law and economics movement has had a real impact,” Tony said.

“Yes, it has indeed. But some of that is not generally accessible to a professional audience.”

“Granted,” said Tony. “But what’s your point? I’ll ask again. Are you discounting that kind of interdisciplinary scholarship?”

“Not at all, although I question somewhat the interdisciplinary title. Some of what many might call interdisciplinary scholarship is really just applying another discipline to a ‘legal’ issue. It is great stuff but it does not really get down and crunch doctrine, as in cases and statutes. That is not its purpose. But it is not always dealing with what I might call day-to-day legal issues. For instance, when I was taking Law and Economics during my LL.M. program—a course I thoroughly enjoyed and which has been incredibly useful to me—it took me about one full week to realize that some legal economists used the phrase “strict” liability to mean liability without fault in a rather general way free of many of the ambiguities that lawyers encounter when trying to define strict liability. That is, is strict liability *Rylands*-type strict liability? Is it strict products liability which may not be so strict at all? The point is that some of the analysis was much more economic than it was law and economic.”

“But,” Tony said, “You can’t deny that the influence of that work on economic thought and potentially on public policy may be critical to future legal regimes.”

“I can ask for proof but I won’t deny it. What I will say is that much of that very valuable work may not reach most judges, lawyers, and legislators trying to solve problems in more traditional concrete cases and legislative contexts. And I can say that type of interdisciplinary scholarship may be increasingly prevalent in our law reviews. And it may have increased importance in how law schools view each other.”

“If I can translate, do you mean that rankings may be heavily influenced by the placement and publication of non-traditional legal scholarship?” Tony said.

“I think that might be true.”

“Amanda, I want to respond but I want to state clearly for purposes of this conversation and the law review record that I very much value traditional scholarship. There is definitely a place for that.” Tony said.

“Tony you sound so diplomatic.”

“I am,” said Tony. “Maybe I should be the law school dean.”

“Maybe you should.”

“Don’t tempt me Amanda.”

“I won’t and we’ll get to how this relates to being a law school dean later. After all that is the subject of this symposium and we need some tie in to that,” said Amanda.

“We sure do and since this is my third or fourth conversation like this in this symposia series I wouldn’t want to rock the proverbial boat. I would say however

that the moniker 'traditional legal scholarship' is not as clear as one might desire. It certainly involves a close analysis and reading of cases, statutes, regulations and more. It involves stacking up cases (and other materials) against one another and pointing out and trying to eliminate or explain perceived inconsistencies. And it involves making predictions about what might happen and proposals for changing the law" Tony said.

"That is a good, if not totally complete explanation of traditional legal scholarship," said Amanda.

"I'm not done," said Tony

"Sorry," said Amanda.

"No problem. But I would like to add to that nice but not necessarily complete statement about traditional legal scholarship that traditional legal scholarship has always employed a fair amount of 'law and \_\_\_\_' analysis."

"How so?" Amanda asked.

"Well, what we are calling traditional legal scholars have long employed some economic thinking in analyzing law Risk/utility analysis in negligence cases predates the 1970s in both court decisions and literature." Tony said.

"Okay "

"And all sorts of legal scholars have looked to history since forever to explain, interpret, and criticize law "

"Okay," said Amanda again.

"Whether they got it right or wrong, psychology or at least what scholars thought was psychology has been employed by legal scholars for years." Tony added.

"I see your point," said Amanda.

"I would add that one problem with what you call traditional legal scholarship is that it's hard to evaluate against any sort of standard. Someone crunches cases and statutes and comes up with some solution slightly influenced by history, slightly influenced by efficiency, and slightly influenced by logic—with maybe a big dose of undisclosed bias thrown in. Is it good? Is it bad? How do you know?" Tony asked.

"I don't know," answered Amanda. "But I also don't know if somebody's article on law and anthropology is good or bad because I don't know enough (if anything) about anthropology "

"But an anthropologist might," said Tony

"An anthropologist might but then would the anthropologist be able to say anything about the legal aspects of the piece other than how they related to the anthropology And would it mean much of anything to a judge, a lawyer, or a legislator?" Amanda asked.

"I understand your point. But do you disagree with mine about the problems with traditional legal scholarship?" Tony asked.

"I don't although we are on the edge of a debate about whether law or traditional legal scholarship can have any real meaning outside of a particular time and place and whether it is inherently political in all its aspects and as biased as the culture which creates it." Amanda said.

"We are on the edge of anarchy and nihilism and meaninglessness you mean?" Tony asked.

"Maybe. And I suppose you've noticed that this year in this symposium we are not talking anywhere. There is no backdrop of the AALS recruitment conference or the Hiring Conference or the Southeastern Association of Law Schools meeting, and no footnotes. We are just engaged in stark, backgroundless dialogue."

"I did notice that Amanda. It's like Fritz Lang directed it. But we don't want to give away all the symbols to the readers; we want them to find some themselves."

"Sure thing Tony," said Amanda. "But let's get away from the edge of nothing. We know it's there and we know we are close to it but we won't jump in this year. And we both agree that there is value to law and \_\_\_\_\_ scholarship and value to traditional scholarship. We also agree that there are down sides to both."

"I am willing to say that is the case," said Tony

"And I think it is fair to say we are generalizing and leaving out of our conversation all sorts of scholarship in other genres that we might call writing about pedagogy, narrative scholarship, and more."

"I will agree to that as well," said Tony "But I bet that if we were to push it we would find that we agreed that there were benefits as well as potential problems with those scholarly endeavors as well."

"I wouldn't doubt it but I won't go there." Amanda said.

"Okay," said Tony

"But I do want to get back to traditional legal scholarship for a second—again realizing we are on the edge of meaninglessness. Even if traditional legal scholarship has long employed inconsistent and incoherent references to and reliance on other disciplines and even though the bias of the writer and culture are inherent, the traditional legal scholarly treatment of an issue uses terms, phrases, and techniques with which I, as a lawyer, am familiar. Consequently, I have some rudimentary ability both to evaluate (on some level) and criticize. I lose that ability with some interdisciplinary legal work. And I do not think I am being anti-intellectual in saying that," said Amanda.

"Okay" said Tony

"Now, let's get back to your scholarly audience. I can make a case that much traditional legal scholarship aims at judges, lawyers, and legislators to try to educate them and influence them. That scholarship seeks to get them to read the scholarship as lawyers and rely upon it in their actions. It has the potential to create a dialogue not just between scholar and scholar but between scholar and legal decision maker "

"I see your point," said Tony "But isn't that still the case today?"

"It may be," said Amanda, "but I have some concerns."

"Such as?" Tony asked.

"One is that as traditional law reviews have grown in number, judges and lawyers read them less. One could persuasively argue that there are too many law reviews and too many other sources of material of which to keep track. And many of them, like many CLE programs, are not as carefully crafted or as carefully researched as the traditional law review "

"That's just a paean to the good old days when things were simpler," said Tony

"Maybe," said Amanda. "But I also worry that as law reviews have included more and more interdisciplinary articles judges, lawyers, and legislators have turned to them with much less frequency To put it bluntly, legal decision makers have turned off to most law reviews."

"That," said Tony, "would be unfortunate and would be anti-intellectual."

"It would but it might be attributable to the fact that the interdisciplinary material is inaccessible to most legal decision makers." Amanda frowned.

"Well let 'em skip to the next article," said Tony

"People reading this dialogue may have already done just that," said Amanda. "And that is no doubt the best answer. And I have no doubt that legal scholarship as a whole is richer and broader than it has ever been before."

"Me too. But if you are right and legal decision makers read law review articles less than they used to, that is unfortunate," said Tony

"It is indeed," said Amanda. "And if we as law professors lose our realistic and practical link to the profession, our scholarly discourse does change radically "

"Yes it does," said Tony "But let's stick this out here for a second to analyze a side point."

"Sure."

"All of what you say has made me think," said Tony

"That's good. Thank you for the compliment. But what has it made you think about?"

"It's made me think that much of what many legal decision makers have to deal with day in and day out are matters of state law. Certainly we are all interested in how a particular state's solution to a legal problem fits within the broader context of the nation and hopefully, today, the world. But the fact remains that much of what we lawyers deal with occurs at the state level." Tony paused for a breath.

"Granted," said Amanda.

"Well, what are the implications of that for the points you have articulated?" Tony asked.

"Seems that one is that serious legal scholarship—most probably of the traditional variety—is very important to law and to law makers," said Amanda.

"Bingo."

"And it also may mean that as legal scholars turn away from that scholarship as I think they have tended to do, then they have less impact upon the development of a large part of the law—law at the state level." Amanda said.

"And if the academy turns away from scholarship focusing on law at the state level then state level legal decision makers will look less and less to law reviews and law professors for guidance," said Tony

"And we have lost an important part of the dialogue about law that can go on between scholar and legal decision maker." Amanda sighed.

"Of course, in many law reviews the student articles are casenotes and comments that may have a greater tendency to focus upon issues of local concern." Tony said.

"That is certainly the case but then do we leave to students the primary role of commenting upon law and its development at the local level?" Amanda asked.

"Maybe that's what is happening," said Tony

"It could be and everybody might not think that is bad," said Amanda, "although I will add that the irony is that for many law schools, particularly state supported law schools, the audience which faculty scholarship may be ignoring is an audience consisting of the school's alumni, friends, and funding sources. Most of us do not want that audience to see us as irrelevant."

"Me neither," smiled Tony

"In part because that audience's support allows us to engage in the interdisciplinary research as well," said Amanda.

"You said you were going to tell us what all meant for a dean," said Tony

"I don't think I quite said it that way, my dear. I think I said we could talk about how it related to being dean."

"Well do it then," said Tony "I ain't no dean."

"Faculty are expected to produce scholarship. Deans are expected to see that faculty are supported in their scholarly endeavors. As a dean I expect myself to produce scholarship. And yes Tony I do call these dialogues scholarship."

"Wow," Tony said. "Talk about inaccessible!"

"Funny Anyway what type of scholarship should I encourage my colleagues to promote? Interdisciplinary scholarship? Traditional scholarship? At the national level? If so, what message does that send to the state law scholar? Is she less valuable to the institution than the law and \_\_\_\_\_ scholar or the national scholar? Should I encourage people to produce what they are best at producing and what is most meaningful to them personally "

"That sounds more like you Amanda," said Tony

"I agree. I think that does sound more like me."

"But \_\_\_\_\_?" Tony asked.

"But, to return to the ranking thing. What kind of scholarship gets noticed the most in the ranking game? Not, I opine, the state law scholarship." Amanda said.

"I agree," said Tony

"So does that mean that I should not encourage or reward (to the extent possible) its production and dissemination?" Amanda asked.

"I hope it doesn't mean that," said Tony "That would be a shame."

"I think it would too but don't you think that could become a reality?" Amanda asked.

"I suppose it could but I agree with your earlier point that there is real value in traditional legal scholarship aimed at state level legal decision makers and I think they would too," said Tony "Which means that if you have people who are doing that type of work it probably should be valued and encouraged."

"But where is my national or rankings return on that?" Amanda asked.

"Maybe a rational ranking system would take that fact into account as well," said Tony "Maybe it does."

"Maybe," said Amanda.

"See ya ," said Tony

"See ya' " said Amanda.