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Shame

PAUL CAMPOS*

*"Man is the only animal that blushes—or needs to."*¹

—Mark Twain—

One of the characters in *Anna Karenina* is a lady of St. Petersburg's high society who is known for her brilliant and witty observations. Yet this reputation, Tolstoy notes, is a product of nothing more than the fact that she merely utters what other people are thinking but are too polite (or cowardly) to say.

In that spirit, I would like to make some observations, drawn from nearly seventeen years spent as a legal academic. I will do so using a particular device: the depiction of several fictional yet all-too-familiar legal academic characters. With one exception these characters are imaginary - yet their name is legion. You already know them; indeed, to a certain extent (the precise extent being between you and God) you—or rather we—are at least a little like one or more of them.

THE DRONE

Long ago, in a galaxy far away, Professor X was a reasonably productive and successful legal scholar at a private law school in the Los Angeles area. During the first fifteen years or so of his academic career, he wrote a number of well-regarded articles, and a book in the field of tax law that proved to be of real use to both academics and practicing lawyers. But as he reached his late 40s, Professor X found that his outside consulting activities, which had always taken a fair amount of his time, were becoming increasingly lucrative. By the time he turned 50 Professor X had abandoned legal scholarship altogether. Now in his mid-70s, Professor X has dedicated the past quarter century to running a

* Professor of Law, University of Colorado. This is a paper presented at a conference on the Ethics and Economics of Legal Education, at the University of San Diego School of Law.

1. MARK TWAIN, FOLLOWING THE EQUATOR 256 (Dover Publications 1989) (1897).

full-time legal practice, while spending perhaps ten hours a week for seven months out of the year on what is still technically a full-time job as a law professor: The law school that employs him pays him more than \$200,000 per year to perform this job (a simple calculation reveals the university is paying Professor X about \$700 per hour, or roughly 30 times the rate it would pay an adjunct professor to replace Professor X's labor).

Not surprisingly, Professor X has become quite cynical in his old age, and, on those rare occasions in which he engages in conversation with one of his academic colleagues, he is likely to make comments about what an enormous scam he and they are perpetrating on the public in general, and on their students in particular. Even less surprisingly, Professor X's students tend to give him very low marks on their faculty course questionnaires. Professor X candidly admits that he rarely bothers to revise course notes he has been using in some instances for more than 40 years, and that it causes him considerable annoyance when the Supreme Court issues an opinion of sufficient relevance to his field that his students will expect him to read it. Because of this, Professor X has tiny course enrollments, a circumstance that spares him the inconvenience of grading large numbers of exams, meeting with students, writing letters of recommendation, and other tasks which might interfere with his legal practice.

Many years ago the law school's administration stopped putting Professor X on important committees, since he could never be counted on to do even a minimally adequate job. Now he serves on no committees at all, nor does he ever attend faculty meetings, meet with job candidates, go to colloquia or conferences, or do anything whatsoever associated with his job other than showing up at the appointed times to teach his sparsely attended classes.

The same utilitarian philosophy that for the past 25 years has enabled Professor X to earn a six-figure annual salary for doing almost nothing has served him well in the Southern California real estate market, where his canny purchases have made him a wealthy man. Indeed, he has been heard to complain that managing his real estate holdings has forced him to cut back on the time he can devote to his tax law practice. In sum, his university salary represents only a small portion of Professor X's cash flow; yet it's taken for granted by his putative colleagues that Professor X won't formally retire in the foreseeable future. Again, in utilitarian terms, why would he? As a practical matter, he is presented with the option of being paid a salary that by itself would put him in the 98th percentile of American annual income for doing almost literally nothing, or being paid nothing for doing literally nothing. Suffice it to say that

Professor X doesn't seem to consider the choice between these options to represent a particularly difficult game theoretic problem.

THE BULLY

More than thirty years ago, Professor Y became the first African American to be hired to the tenure track faculty at a Southern law school whose student body was all-white until the late 1960s. By any sane standard, Professor Y's career has been something between a mordant joke and an institutional catastrophe. After three decades, Professor Y's entire scholarly opus consists of the law review article he published before being granted tenure, and a casebook—consisting almost entirely of the texts of cases—on a particularly obscure subject. Moreover Professor Y has spent his career proclaiming loudly, over and over again, that legal scholarship is a complete waste of time. (This viewpoint has not kept him from being placed on the school's appointments committee on various occasions. As any dean will tell you, a diversity of backgrounds and viewpoints is crucial to a successful hiring process).

As for teaching, Professor Y has a long and colorful history of abusing students in the classroom, in ways that go well beyond the traditional idiocies of the so-called Socratic method. The most benign element of Professor Y's pedagogic peculiarities is that he often spends entire classes discussing current events, or controversial political issues, or other matters having no apparent relation to the class's subject. When students challenge his views on such matters, Professor Y sometimes flies into spectacular rages, during which he has, for example, told a white female student that she will never have a satisfactory sex life because no black man would deign to sleep with her. He also has a history of mocking the religious beliefs of students: for example, in his Criminal Law class he never teaches *Dudley & Stevens*, the famous lifeboat case in which the defendants killed and ate the cabin boy, without also claiming that the doctrine of transubstantiation makes all Catholics into cannibals. This history of engaging in various forms of psychological abuse has led several students over the years to demand to be transferred to other sections of the required first-year Criminal Law course Professor Y continues to be assigned to teach every year by his administrative supervisors.

Curiously, given his open contempt for most aspects of legal academic life, Professor Y continues to play a major role in the institutional life of his law school by, for instance, insisting that his views on faculty hiring

be given due consideration. Professor Y's only apparent interest in this process is to do everything he can to increase the number of members of his own ethnic minority group on the law school's faculty. When his colleagues venture to disagree with him on such matters Professor Y's standard response is to accuse them of racism. In recent years, the sheer familiarity of these accusations has produced deep sighs, eye-rolling, and other similar gestures among some of Professor Y's colleagues—gestures which Professor Y has noticed, and that have caused him to fulminate further about the racism of the faculty which hired and tenured him. All this is complicated by the fact that no one can quite figure out if Professor Y is actually black. Although it is of course racist to say it—and therefore nobody does—most people would say he looks rather white—more or less like Elaine's boyfriend of indeterminate ethnic background in the famous *Seinfeld* episode on this theme. But, as Professor Y constantly reminds everyone within earshot, most people are racists, and are in no position to have a legitimate opinion on such matters.

A few years ago, after he had published his casebook, Professor Y decided he should be promoted to full professor. The university of which Professor Y's law school is a part takes promotion to full professor quite seriously, and it's not uncommon for tenured faculty members in various fields, including law, to remain at the level of associate professor for their entire post-tenure careers. Nevertheless, in Professor Y's case, the law school's faculty and administration, in an impressive display of lawyerly skill, set about to construct a file that would be sufficiently mendacious to overcome this institutional difficulty.

These efforts appeared to have failed, after the university's central academic evaluation committee voted unanimously to deny Professor Y promotion. At this point, the politically connected members of Professor Y's law school faculty sprang into action, and twisted many an arm to the point of shoulder dislocation, in an ultimately successful effort to have the university committee's recommendation reversed. Thus it came to pass that Professor Y achieved the dignity of the title "Professor of Law."

THE HACK

Professor Z was hired about ten years ago, at a state law school in the Midwest, in an early instance of what might be called affirmative action for political conservatives. Prior to entering legal academia, Professor Z had been involved in various conservative political causes. She clerked for Justice Scalia, and her husband, a prominent conservative lawyer, was the nephew of the governor of the state where the law school that

eventually hired Professor Z is located. Although as a job candidate Professor Z possessed certain superficially impressive academic credentials, her personal interviews and her job talk seemed to indicate a disturbing lack of interest in ideas as such. Conversations with her seemed to quickly veer into discussions of whether her interlocutors knew various political luminaries Professor Z considered among her closest friends. Other popular topics during her job interviews were the best restaurants in the Washington D.C. area, and the endearing habits and chronic health problems of her three cats, Zoroaster, Alcestis, and Doug.

Nevertheless arguments were put forth that objections to her candidacy were politically motivated (this was undoubtedly true in some cases), and that similar superficially impressive but intellectually uninspiring candidates of a liberal persuasion had often been hired by the school in the past (also true). When the further point was made that the law school's faculty was still heavily male, most of the remaining resistance to her candidacy yielded, and Professor Z was hired.

Professor Z spent most of her tenure on the law school's faculty attempting to get another job. For several years she wrote nothing, while angling for various federal judgeships and the like. As her tenure decision approached, the law school's faculty and administration began to panic. Professor Z, as people always discovered or were reminded of within the first two minutes of any conversation with her, had many friends in high places: friends who could do serious damage to the financial welfare of both the law school and the university. As in the case of Professor Y's promotion at his school, the advocacy skills of the faculty's most talented lawyers performed Herculean—or perhaps Dworkinian—labors, while constructing a file that would contain just the right mix of audacious overstatements, demure lacunae, and not-quite-provable lies.

Yet these efforts seemed initially doomed to failure. Professor Z suggested her slender collection of scholarly writings should be sent to certain eminent conservative legal scholars for evaluation, apparently on the assumption that the shared political viewpoints of the evaluators and the candidate would produce a happy meeting of the minds. This turned out to be a bad miscalculation, as the scholars produced evaluations that, despite all the genteel euphemisms traditionally employed on such occasions, were far from positive.

Then, just as things seemed darkest—such is the obligingness of fate!—Professor Z was awarded one of the plum appointments she had been pursuing for so long: she was nominated for a federal appellate judgeship. This, naturally, gave many members of the faculty the excuse

they needed to vote yes on her tenure case, since, they reasoned or rationalized, she would be resigning from the faculty anyway.

Yet, just as in the case of Professor Y's institution, the university's central academic committee failed to appreciate the local equivalent of the universal insight that Paris is worth a Mass, etc., and voted to deny Professor Z tenure. And at this school, as well, the law school's administration engaged in a frenzy of lobbying, which succeeded in overturning the academic committee's recommendation, and thus spared the candidate and the law school from the potential political costs that might arise from actually enforcing something resembling academic standards.

Professor Z's story has a particularly edifying ending: because she is a politically connected federal appellate court judge who happens to be a woman, she is now beginning to be mentioned in certain influential circles as someone who might fill the next vacancy on the United States Supreme Court. After all, only the most partisan observer would dare question the credentials of someone who survived the rigorous tenure process at the distinguished law school on whose faculty she served.

THE FRAUD

Professor C has been a legal academic for nearly 17 years. Now in his mid-40s, he practiced law for less than a year before joining the faculty of his school. Professor C thinks of himself as an academic first and foremost, and the idea of returning to the world of legal practice fills him with unspeakable loathing and dread. Indeed, he is all too aware that he actually knows very little about the practice of law, and would essentially have to start from the ground floor if he were to rejoin the profession into which he has been forcibly ejecting his students over the past decade and a half.

Professor C's jurisprudential tendencies are deeply skeptical. Because he thinks of law as an academic subject, he is struck constantly by the intellectual incoherence of the subject matter he teaches and writes about. It requires very little effort on his part to demonstrate that the typical judicial opinion often makes no sense even on its own terms; that the pretensions of the legal system to achieving something resembling formal logical consistency are absurd; and that the long-standing goal of much of American legal thought to convert law into a species of "policy science" is laughably misguided.

Professor C, in short, doesn't believe in law; but unlike most of his predecessors and contemporaries of a similar jurisprudential bent, he doesn't much believe in politics, either. The same skepticism that allows him to poke holes in both formal legal rules and what passes in the American legal academy for policy analysis also disables him from

getting very enthusiastic about using law in an instrumental way, to bring about what he would consider politically desirable results—especially since his sense of what constitutes a politically desirable result is often diffident, and subject to sudden shifts. (This diffidence annoys and confuses those of his colleagues who consider the slogan “law is politics” to be a coherent plan of action, rather than the statement of a more or less insoluble epistemological puzzle).

All this leaves Professor C in a rather difficult situation, especially in regard to training future generations of lawyers. For one thing, Professor C doesn’t have much sense of the extent to which the intellectual edification (if indeed it is that) provided by his teaching is of practical use to his students once they become attorneys. For another, he is burdened with a recurrent sense of bad faith: he would be hard pressed to explain to his students why he thinks it’s a good idea for them to become lawyers—beyond the singularly uninspiring observation that somebody has to do society’s dirty and unpleasant jobs—yet he has dedicated his professional life to helping them achieve this precise goal. Most of all, he recognizes the essential pedagogic tension between legitimating the legal system (which after all is one of the central functions of the American law school) and giving his students what in his view is an accurate description of how law does and doesn’t work.

In short, he feels the sting of Roberto Unger’s (in)famous description of law school professors as priests who had lost their faith but kept their jobs, save that, in his case, the words of another contemporary philosopher seem more germane: “You had no faith to lose, and you know it.”²

Still, Professor C soldiers on. For one thing, at this point he really isn’t qualified to do anything besides what he does, whatever that may be. As for his writing, he can recognize through the usual fog of ego and regret that he has produced some valid pages; but he doubts if that alone can justify a life dedicated largely to pursuing practical outcomes that he can embrace only uneasily, if at all. Meanwhile, there are bills to pay, and so he teaches his classes, writes his books and articles, and attends academic conferences on topics such as the Ethics and Economics of Legal Education.

The four types of personal and professional dysfunction described above can probably be found in some form or another in just about any

2. See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 675 (1983). Cf. BOB DYLAN, *Positively Fourth Street*, on BIOGRAPH (Columbia Records 1989).

law school. And again, while it's true the first three characters are fictional composites, all of us know real world cases every bit as outrageous as these inventions. What can be done about such things?

Answering this question at all satisfactorily requires confronting more than the personal flaws of particular individuals: it necessitates grappling with the structural failures of the contemporary law school. Now it's true that some of what is wrong with legal education is no different than what's wrong with higher education in general. Two of the cases I sketch involve the invidious effects of affirmative action, which so easily corrupt any evaluative process. Another touches on the special problems academia in general faces because of legal barriers to involuntary retirements (even here, though, the relatively high salaries of legal academics exacerbate the problem). And law is surely not the only academic subject that faces a crisis of disciplinary confidence.

Still, I would argue that, in legal academia, the especially problematic relationship between the requirements of professional training and of pursuing knowledge create special problems for the integrity of the discipline. My former colleague Steve Smith has suggested that the typical law school can be thought of as an uneasy combination of a seminary and a department of religion (or perhaps it was I who suggested that to him; at this point I no longer remember). This seems right; and one consequence that flows from this confusion is a pervading sense of bad faith among legal academics. Are we training future lawyers or studying law as a subject of scholarly inquiry? The facile answer that we're doing both is vulnerable to the reply that the two tasks are to a significant extent incompatible, and that to the extent we are trying to do both, we will do neither well.

My own sense of the matter is that this pervasive sense of bad faith in legal education—of the fact that many or most of us have, to use William Ian Miller's term, at least an intermittent sense of "faking it"—helps enable the sorts of dysfunctions that I sketched above.³ After all, if all of us are rendered at some times and to some extent drones and

3. See, for example, the first paragraph of Miller's hilarious and disturbingly accurate description of his experiences teaching property law to first year law students: "It happened again today: I was bluffing my way through some material in my Property class, about which I knew no more than the teaching manual told me, it being the extent of my researches on the topic. On such occasions I present the material in the pompous style in which professional banalities are often uttered, meaning thereby to prevent student questions by elevating myself to the regions of the unquestionable. God forbid one of them should start thinking deeply about the stuff and expose the limits of my knowledge." The entire description, which serves as the introductory section of Miller's book *FAKING IT*, is well worth reading for any law professor, if only as an exercise in self-mortification. WILLIAM IAN MILLER, *FAKING IT* 1 (2003).

bullies and hacks and frauds by the very structure of legal education, then who are we to draw the line by claiming that this or that egregious behavior goes too far?

While this reaction is understandable as a matter of normal psychology, it is, I believe, unhelpful. All the cases described above pose serious ethical and economic problems for the contemporary law school. Although these problems recur in some form throughout the American academy, legal education is especially vulnerable to several of them. For example, burnt-out sociologists who no longer have anything to say don't have the option of making hundreds of thousands of dollars annually at side jobs while working ten hours per week for seven months out of the year. Nor, unlike legal academics whose main motivation for their careers is to avoid practicing law, did they go into sociology to avoid living in a society. Nor are they especially likely to treat their discipline as simply a form of politics by other means. And so on.

None of these problems can be solved or even significantly ameliorated without a willingness to face the fact that the structure of contemporary legal education, prone as it is to several forms of bad faith, is as a consequence vulnerable to several kinds of serious ethical and economic failure. These failures undermine intellectual standards and interfere with professional training, thus often denying students the benefits that would flow from attending either a good seminary or a competent department of religion.

As to what precisely such solutions might entail, a first step toward answering that question would surely involve legal academics facing up to various uncomfortable truths about the way we live now.