
THE IDEA OF THE LAW REVIEW: SCHOLARSHIP, PRESTIGE AND OPEN ACCESS

by
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This Essay is a rigorous and serious account of how the current economy of academic legal publishing thwarts efforts by authors and journals to supplant that economy via open access publishing and distribution models. Law professors, law schools, and universities generally like the system as it is. Instead, the Essay argues that open access models must complement that economy, rather than supplant it.

This appears to be a paper about law reviews, which happens to be situated in a conversation about open access. It's really a paper about open access, which happens to be situated in a conversation about law reviews.

I. INTRODUCTION

The idea behind open access for scholarly publishing—that is, increasing the spread of what academics call “knowledge”—sounds like it should be self-evidently good. But it's not; or, at least when the idea is considered in isolation, we can't tell. As a result, and although open access models are intended to make “knowledge” more widely available, any conversation about those models has to confront an important question: Who cares? Here I want to focus on open access for a specific brand of scholarship, that is, *legal* scholarship. In that context, the discussion of open access is complicated by the long and sensible criticism that law reviews are purveyors of turgid, vapid prose.¹ Who cares about disseminating *that*, we might say, except, perhaps, law professors themselves? In this Essay, I take a stab at answering that question.

Some scientific journals and academic scientists have taken steps along the open access path. By and large, academic lawyers have not. Yet asking why law reviews haven't yet joined their scientific counterparts (the nominal

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¹ See Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279 (1962) (updating and extending Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936)).

premise of this symposium) may put the proverbial cart before the horse. To ask about open access publishing for any scholarly domain is to ask about the very idea of scholarship in that domain. Open access for law reviews really invites a hard look at law reviews and legal scholarship in general. Instead of talking about the future of law review publishing, then, I want to talk a bit about its past. Law reviews and legal scholars have gotten along acceptably with the current system for well over a century. For them, the system has worked pretty well. The question isn't so much why law reviews haven't embraced change. The question for law reviews, as it might be for any scholarly institution, is why they should.

The Essay explains how open access might be accommodated in the only world that law reviews and legal scholars know.

I wrote a first draft of this piece using the usual rituals and conventions of legal scholarship, and then I discarded it. The disclaimer is necessary for some nonobvious reasons.

First, although I'm serious about my thesis, I really would like people to read this even outside the legal academy.² Along the way, I sacrifice some nuance, and occasionally some scholarly sobriety, in favor of narrative interest and readability.

Second, form aside, I have a broader point about substance. An abstract case for open access for law reviews doesn't make sense. Understanding the open access argument truly requires a discussion of the conceptual foundations of the publishing domain where the argument arises. The same principle applies to any other scholarly discipline and, for that matter, to any kind of published work. The title of the piece is a bit of misdirection; when we consider open access in any context, we're holding a concept of a scholarly domain up to the light of a publishing aspiration. "Open Access" in this context really requires investigating "The Idea of the Law Review." There is a concept of "the law review" that law professors have carried around in their heads, more or less consistently, for decades. I need to talk about what that is before I can talk about whether open access for law reviews is a good thing, why the reviews are reluctant to go down that path, and ultimately how to think about open access in general. To do that, I need to step just outside my usual scholarly role.

Third, I don't claim that I'm the first person or that this is the first piece to make the claims that follow.³ So, this piece doesn't track some conventions of

² The title is a holdover from that earlier concept, which draped a deconstruction of the various traditional and modern purposes of law reviews over an intellectual framework borrowed from JAROSLAV PELIKAN, *THE IDEA OF THE UNIVERSITY: A REEXAMINATION* (1992), in conversation with JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY* (Frank M. Turner ed., Yale Univ. Press 1996) (1852). Pelikan argues that an institution derives its character from the ideas—plural—that precede it, and he evaluates the modern research university accordingly. See PELIKAN, *supra*, at 24.

³ See Rob Kling & Geoffrey McKim, *Scholarly Communication and the Continuum of Electronic Publishing*, 50 J. AM. SOC'Y FOR INFO. SCI. & TECH. 890 (1999); Rob Kling, Lisa B. Spector & Joanna Fortuna, *The Real Stakes of Virtual Publishing: The Transformation of E-Biomed into PubMed Central*, 55 J. AM. SOC'Y FOR INFO. SCI. & TECH. 127 (2004). Cf.

“good” legal scholarship. While legal scholars are supposed to give the answer away before the argument begins, I don’t want to do that. I will give away the following, however: As I wrote in the very first sentence of this Essay, what is the text of my discussion and what is the context, or what is field and what is ground, can easily be mistaken.

II.

Before I get to the idea of the law review, I’ll start with open access publishing in general. “Open access” means an arrangement under which a journal allows its authors to self-publish their articles on freely-accessible websites or to post those articles in freely-accessible “open access” archives.⁴ The point is to make the content more widely accessible, so that more people can read it. Academic writing is “knowledge,” in scholars’ conventional if somewhat self-aggrandizing understanding, and our duty as scholars is to promote the dissemination of knowledge for the good of humanity. If that’s the baseline, though, then it really isn’t so clear right away why open access is a good thing. There are perfectly respectable commercial publishers out there, and their owners and employees need to eat, and when they do their jobs properly, scholarly articles find their way into the journals, the journals find their way into the hands of paying customers, and the customers put them away on shelves and commercial databases where they are almost universally ignored by everyone—except other scholars. Open access doesn’t necessarily mean that existing scholarship gets read more, or that more scholarship gets read in the first place. It simply means that more scholarship is out there, and that existing scholarship is out there more, but that none of the work is necessarily any more visible than what we see today. Rob Kling and Geoffrey McKim made this point in simple terms when they observed that scholarly publication serves three functions: Making the work accessible, publicizing the work, and endorsing the work as trustworthy.⁵ Open access helps with the first problem, but not (necessarily) the other two.

All of this applies in spades to law reviews, which offer the paradigm for what law professors call *legal* scholarship. And legal scholarship in the law reviews adds complications to the general academic publishing picture. As every law professor, lawyer, and judge in the world knows, *legal* scholarship in the American law reviews tends to be even more impenetrably jargon-filled than *ordinary* academic writing. It tends to be much, much longer than ordinary scholarship (that is, journal writing by every other academic discipline), and

Paul Duguid, *The Social Life of Legal Education: First Impressions*, FIRST MONDAY, Sept. 2002, <http://www.firstmonday.org/issues/issue79/duguid/index.html> (noting that sometimes less access to legal literature is more consistent with the institution’s overall socializing function).

⁴ Like a lot of phrases in contemporary information policy debates, “open access” means slightly different things to different people. Since Dan Hunter was the first person to put the topic on the table in connection with legal journals, I adopt his definition. Dan Hunter, *Walled Gardens*, 62 WASH. & LEE L. REV. 607, 617 (2005).

⁵ See Kling & McKim, *supra* note 3.

(most important) it often has little to do with what *real lawyers* are interested in, which is making a living.⁶ This little rhetorical excess aside, realistically, law professors know that few people outside of law schools actually read the law reviews. They also know that even within law schools, a lot of law review writing isn't read very much, and only those faculty members with a certain idealistic bent, those without tenure, and those who are members of tenure and promotion committees seem to take the material seriously on anything approaching a regular basis.

That last paragraph consists of the usual indictment of law reviews, and that indictment seems to have little to do with publishing models per se, or with open access in particular. But the most important complication that legal scholarship adds to the usual journal publishing story isn't the fact that the substance, by and large, is irrelevant to the condition of the world at large. The most important complication is the fact that virtually every law professor and judge in America has free desktop access to law review literature via comprehensive commercial databases (Westlaw and LexisNexis). Almost every law review is published by a law school, which finances a significant portion of its production costs,⁷ and almost every law review is edited by law students. Hard copies of each issue are distributed via subscription, mostly to law libraries, and electronic copies are distributed to commercial databases in exchange for royalties. Most of the publishing process, however, is completely hidden from most law review readers, who directly pay little or nothing for the privilege of reading. For other academic disciplines, commercial publishing has the significant drawback of making it really expensive for scholars to get access to what's happening in their fields. Open access reduces the cost of access dramatically, whether or not it encourages scholars to read the work. In law, scholars already have ready access to their colleagues' work. And they still don't read it. What's the point of making the work . . . free?

So there's the dilemma in a nutshell. What's the difference between the system as we find it—scholarship written by scholars for scholars, and made available for free in online commercial databases that are entirely subsidized by our institutional employers⁸—and the open access system that we hypothesize

⁶ Oops; I mean, pursuing justice and solving their clients' problems. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Richard A. Posner, *Against the Law Reviews*, LEGAL AFFAIRS, Nov.–Dec. 2004, at 57, available at http://www.legalaffairs.org/issues/November-December-2004/review_posner_nov0604.msp. For a less critical view from the bench, see Kenneth F. Ripple, *The Role of the Law Review in the Tradition of Judicial Scholarship*, 57 N.Y.U. ANN. SURV. AM. L. 429 (2000), available at <http://www.nyu.edu/pubs/annualsurvey/html/issue.php?issueID=8>.

⁷ As Jessica Litman's contribution to this symposium observes, one law school subsidizes the production of the journal itself; the authors' law schools subsidize the production of the journal's content. Jessica Litman, *The Economics of Open Access Publishing*, 10 LEWIS & CLARK L. REV. 779, 789-90 (2006).

⁸ The subsidy may be deeper. It's plausible to assume that law schools aren't paying full freight for their students and faculty, and that academic access is subsidized by high rates paid by practitioners, which are often passed on to their clients. Thanks to Joe Miller for this observation.

we're missing? My first cut at the problem suggests that the difference is—nothing.

III.

There has to be more here than meets the eye, and there is, but to describe it I have to step even farther outside my scholarly role. I have to adopt a pose. To get from a premise that doubts open access to a conclusion that law reviews may not need it, I need a theory. I'm going to adopt a clever heuristic device and argue that it solves the problem and explains the universe, and I'm going to borrow it from some non-legal field that I declare to be relevant. I'm going to do this at such an abstract level that the result is unverifiable and probably unrepeatably. This is, of course, precisely the sort of undisciplined cross-disciplinary borrowing by a would-be legal "scholar" that practicing lawyers and non-lawyer academics criticize: Is this scholarship? *Legal* scholarship? Fortunately, I already have tenure.

The keys to the kingdom, the solution to Hilbert's Tenth Problem, the answer to the curious incident of the dog in the night time, is the following phrase: The economy of prestige. Law professors, law reviews, law schools, and law students think they have it (prestige, that is). They suspect that open access is going to take it away. The seemingly endless, bitter criticism of law reviews has the paradoxical effect of validating the current system. Challenging law reviews to subscribe to an open access norm, because that will make both scholars themselves and the world better off than they are now, may even be counterproductive. Let me explain.

The "economy of prestige" isn't my phrase, it isn't my idea, and this isn't the first time that anyone has tried to explain legal scholarship in symbolic terms.⁹ Julius Getman wrote that research serves as a "dress suit for academic elitism."¹⁰ There is, however, a method to my apparent madness. The precise phrase "economy of prestige" comes from the field of something called cultural studies, and it's the title of a recent book by James English, who teaches English at the University of Pennsylvania.¹¹ English looks at criticisms of literary prizes, which are frequently the targets of derision by supporters of writers who have been snubbed, and he puzzles over why the prizes persist, and are so highly valued, despite the criticism. I care about what English has to say, but if I had to explain the whole thing, then this piece would be even longer than it is already.¹² Instead, I'd rather borrow from the review of English's

⁹ Or in economic terms directly. See George L. Priest, *Triumphs or Failings of Modern Legal Scholarship and the Conditions of Its Production*, 63 U. COLO. L. REV. 725 (1992).

¹⁰ JULIUS GETMAN, *IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION* 43 (1992).

¹¹ JAMES ENGLISH, *THE ECONOMY OF PRESTIGE: PRIZES, AWARDS, AND THE CIRCULATION OF CULTURAL VALUE* (2005).

¹² If you must know, English's theory can be distilled into the concept that the tools of economic understanding can be applied (evoking and invoking Bourdieu) to fields of symbolic cultural production. The result is the sort of thing that Robert Merton praised as a theory of "the middle range":

book by Louis Menand, himself a Harvard professor. Menand sums up English's analysis this way:

[English's] theory is that when people make these objections to the nature of prizes [objections based on the idea that they really aren't all that important] they are helping to sustain a collective belief that true art has nothing to do with things like politics, money, in-group tastes, and beating out the other guy. As long as we want to believe that creative achievement is special, that a work of art is not just one more commodity seeking to aggrandize itself in the marketplace at the expense of other works of art, we need prizes so that we can complain about how stupid they are.¹³

Now it's not important to my argument whether Menand has English's theory precisely right or not; for now, the summary is close enough, and I'll call it Menand's theory. My point is that Menand's theory explains just about everything that we need to understand about why law review publishing works the way it does, why open access hasn't set the law review world on fire, and even why we're seeing blogging, shorter commentaries in online versions of the reviews, and so on.

When it comes to law reviews, the first part of the economy of prestige should be obvious to law professors. We believe that we're the most important part of the legal profession.¹⁴ More important than legislators, more important than judges, and much more important than actual practicing lawyers. This follows from a few commonplace observations. First, legislators, judges, and lawyers complain all the time that law professors don't write articles that matter to the real world of the law. And law professors don't care. They're too busy articulating the background assumptions of the law, reconceptualizing the law in terms of theories borrowed from other fields, and pointing out that you can't be a real lawyer (or at least an effective lawyer) without situating your client's position in its theoretical context.¹⁵ Second, law professors invented law school

On the one hand, we have various forms of close reading, in which one work or a small handful of individual works of art are meant to yield up a wealth of knowledge and insight through the sheer genius of the artist and/or ingenuity of the critic. On the other hand, we have various attempts to survey and pronounce upon the circumstances and trajectories of cultural life as a whole, based on general theories of cultural production and consumption and broad assessments of national or global trends. What's left out is the whole middle-zone of cultural space, a space crowded not just with artists and consumers but with bureaucrats, functionaries, patrons, and administrators of culture, vigorously producing and deploying such instruments as the best-of list, the film festival, the artists' convention, the book club, the piano competition.

Id. at 12. Cf. ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 39 (enlarged ed. 1968).

¹³ Louis Menand, *All That Glitters: Literature's Global Economy*, *NEW YORKER*, Dec. 26, 2005 & Jan. 2, 2006, at 136.

¹⁴ Cf. GETMAN, *supra* note 10, at 43 ("Research . . . [clothes] with respectability the attitudes that the academic enterprise is more important, demanding, and complex than other endeavors and that first-rate academics are different, smarter, and more creative than other people.").

¹⁵ Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 *MICH. L. REV.* 2075 (1993).

(that's true),¹⁶ and that means that they invented lawyers (mostly true, since lawyers all graduated from law school). To some of us, I suspect that it means that law professors invented law.¹⁷ Third, it's a lot harder to get a job as a law professor than it is to get a job as a lawyer. Almost anyone with enough money and three years of endurance can get a law degree and hang out a shingle. Nowadays, even getting a job as a law professor requires writing at least one law review article. Enough said.

Legislators, judges, and practicing lawyers undoubtedly don't agree with law professors on this, but I have to take a moment to point out why this matters. If law professors aren't the most important part of the legal profession (or at least if they don't believe they are, which may be more important) pretty much all of the rest of my argument falls apart, and I still have more than 5,000 words to go. But I think that the premise holds up. If law professors aren't fundamentally concerned with professional prestige, then they should be perfectly happy to publish "scholarship" that mimics Continuing Legal Education seminars and provides a direct and obvious service to practicing lawyers everywhere. A few law professors do that, and do it happily, but the vast majority do not.

Step two is really just some elaboration of the premise, so it's a half-step, or perhaps a couple of quarter-steps. The first piece is this. Not only do law professors believe that they are the most important part of the legal profession, but they believe that they are just as important as professors in other schools and departments in the university.¹⁸ Now it's easy to see why law professors have to be the most important members of the legal profession, because if they were less important than judges, say, they could never be as important as economics professors or academic art historians, who are at least as important as their non-academic colleagues. And it's key to my argument that law professors are as important as economics professors and academic art historians because those folks get tenure, which is lifetime job security, and not even law firm partners get that any more.¹⁹ How do those folks get tenure? How do law professors keep their position alongside fellow faculty and at the top of professional heap? How do *legal scholars* reap the prestige that is so obviously their due? By publishing their work in *scholarly journals*.

The second piece is a bit of amateur ontology. How do we know that *law reviews* are *scholarly journals*? The answer is that they're scholarly journals *because law schools say so*. Law schools have long enjoyed saying so. The law review as an academic enterprise was created, like so many things, by faculty and students at Harvard Law School, and it flourished in the late 19th and early

¹⁶ ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

¹⁷ This isn't the place for a jurisprudential debate, but "what is the nature of law?" is a question that has occupied a lot of law review pages.

¹⁸ Note that Getman's sartorial summary of research isn't limited to law.

¹⁹ Judges do, but judges often believe that law professors believe that law professors are more important than judges. Perhaps more than anything else, that explains the occasional burst of judicial hostility toward legal scholarship. See Edwards, *supra* note 6.

20th centuries as law schools came to adopt the “Harvard model” (which included both the case method of classroom instruction and publication of a scholarly journal) as a route to respectability.²⁰

Step three is to set these parts in motion, that is, to explain how law reviews are *scholarly journals* because law schools say so. Describing the workings of the economy of prestige requires, in short, that I unbundle “law schools” into some subparts. (“Unbundle” is a word that appeals to law-and-economics scholars. Critical scholars can substitute the word “deconstruct.” Mere mortals can read it as “This is what that phrase means.”)

One subpart is the faculty. Legal journals are scholarly journals because “scholars” say so, and faculty members at law schools are, to use the circular reasoning that the prestige theory depends on, legal scholars.

A second subpart is the students. Legal journals are scholarly journals because law students say so, especially, but not exclusively, the student editors of the law review. Student editors need the law review credential for the job market, and non-members of the review need to criticize the irrelevance of the review in order to validate its importance within the student body. Students and alumni also need the imputed prestige of the law review because law *school* prestige and law *review* prestige are closely correlated, and student perceptions of law school quality, and decisions on which school to attend, are closely correlated with law school prestige. The better the law review, the better the law school, and vice versa. Of course, students aren’t the only parts of the economy that benefit from this association.

A third subpart is the university. The university obviously isn’t a subpart of the law school, but I call it a subpart of “the law school” as an institutional player, because for my purposes the law school plays the dominant role in validating law reviews as scholarly, and the university generally plays a secondary role. Legal journals are scholarly journals because academic units within a university publish scholarship, and a university would be pretty ashamed to discover that tenured faculty were producing a newspaper.

Let me talk about each of those subparts for a paragraph or so. Where does this lead, and how do we know that the description is on the mark? As a bit of foreshadowing, here’s a tip: Look for the criticism of the reviews as useless hunks of parchment. That’s a signal that they’re worth something.

An economy is a means of producing things. What does the economy of prestige produce, especially for law professors themselves? As authors, they get the prestige of branding by the schools whose reviews publish their work. That branding feeds further branding by their own institutions, which validate this form of publishing via tenure and promotion reviews. Both forms of prestige circulation feed and are fed by colleagues in other schools, who recognize and respond to scholarship by praising publication in “higher quality” law reviews.²¹ “Higher quality,” of course, refers largely to the “quality” of the

²⁰ See STEVENS, *supra* note 16, at 118 n.34, 157 n.13, 191.

²¹ Despite the many and obvious flaws of an article selection system that puts authority in the hands of law students, authors take pride in being published in a “top 10” journal or a “top 20” journal, on the implied premise that the student editors who select the manuscripts

faculty, and the “quality” of the faculty is largely gauged (not to say measured) by its scholarship, which is gauged largely by its placement in law reviews.

I assume, by the way, that there is something that we can talk about coherently as “legal scholarship,” even though outside the law schools, pretty much everyone in the academy knows that what law professors do can’t really be called “scholarship” because *there are no quality standards*, and (aside from a few quirky journals) *there is no peer review*, and that means that *most everything that shows up in legal journals is badly-researched, badly-written, and badly-argued*. But those objections are mistaken.

Why? Because the rituals of scholarship, including its murkiness, define scholarship itself. Scholarship is what scholars exchange with one another, which means that scholarship is what shows up in scholarly publications, despite (or perhaps because of) the scholarly obligation to disseminate “knowledge” beyond the walls of the academy.²² Legal scholars, like other scholars, care most of all about what other scholars think of their work and not nearly so much about what other lawyers or judges, let alone “the public,” think of the work. Scholars of all stripes write primarily for each other.²³ Criticism of the forms and rituals of scholarship simply reinforces its scholarly character.

I can generalize the point: Legal scholars most of all love being part of The Academy. Being part of The Academy means that everyone thinks that you’re a scholar. Some law professors claim that they’re trying to find truth and meaning in the world so that they can improve the pursuit of justice.²⁴ That proposition is appealing, at least at first, since legal professors usually are lawyers too, which means that we subscribe to the norms of the legal profession as a whole. By setting out the proposition for contrast I don’t intend to disrespect its adherents. But since everyone knows that no one really reads legal scholarship, they can’t really mean that, at least not all of the time. If your mission is to save the world, there are better things to do with your time than write law review articles.²⁵

If that’s right, then practitioner criticism of law reviews just misses the point entirely. Law reviews aren’t supposed to help practicing lawyers solve their clients’ problems. (If law professors really wanted to spend as much time on clients as they spend on law review articles, they would be practicing lawyers themselves, and then most of them would make much more money.) Ray Stanz once said, “Personally, I liked the University. They gave us money

for publication are wise in proportion to the overall prestige ascribed to their law school and/or to their university.

²² See PELIKAN, *supra* note 2, at 121–33.

²³ See Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. COLO. L. REV. 569 (1992); Judith Kaye, *One Judge’s View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313 (1989).

²⁴ See Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327 (2002); Jeffrey S. Brand, *Law Schools and the Pursuit of Justice*, 37 U. TOLEDO L. REV. 13 (2005).

²⁵ See Robert C. Post, *Legal Scholarship and the Practice of Law*, 63 U. COLO. L. REV. 615, 624–25 (1992) (noting the intractable tensions between the scholarly tradition of law faculty situating themselves inside the profession and their desire to explore forms of scholarship that are external to the law itself).

and facilities, we didn't have to produce anything. . . . [Y]ou don't know what it's like out there. I've worked in the private sector. They expect results."²⁶ Ray was a Ghostbuster, but he had a wise soul. As writers, we're scholars, which means (and I say this in the best possible sense) that we're here to talk amongst ourselves. The application of the work comes through our teaching, and through our teaching to our students, and via our students into the world at large.

The mechanisms of professorial prestige for law faculty can be elaborated in more detail. Long articles on obscure topics get published under the imprint of an *academic institution*, almost always one that's attached to a *real university*. Law professors have few professional or learned societies to publish their work, so if you want to be treated as a "scholar" in law, you only have so many choices. One is to submit articles to peer-reviewed journals. In terms of manufacturing prestige, peer-reviewed publishing works pretty well, but there aren't many peer-reviewed journals for legal scholarship, and that limits their potential as prestige suppliers.²⁷ A second is to publish books. Like peer-reviewed publishing, book publishing usually marks quality and well-branded scholarship in most academic fields, but it doesn't work so well in law, even though once upon a time "scholarship" in "books" was a respectable activity for law professors. The problem is that the traditional form of book-based legal scholarship is the treatise, and the treatise is the kind of scholarship that doesn't count for tenure and promotion as much as it used to. Treatises on the law are wonderful and useful things if you're a practicing lawyer, but they aren't so helpful if you're a scholar, that is, a fellow traveler in search of The Truth. By definition, now that law professors have all thoroughly internalized the lessons of the Legal Realists, we're skeptical when we're told that someone else (that is, a treatise writer) has synthesized and rationalized the cases and in the process (implicitly) found The Truth. The law is intersubjective and constructed. Our job as scholars is to discern the social and cultural and economic relations hidden amid conventional legal forms. So we're hardly likely to validate The Truth as "scholarship." As authors, we'd rather engage in the search; as faculty reviewing our colleagues' work for tenure, we want to validate the search; and as colleagues, we want to praise those whose methods succeed in the law review selection sweepstakes. In the latter two contexts, there but for the grace of God go I. In the former context, of course, there I go. Or more simply put: What goes around, comes around.

Even law books that aren't treatises, by the way, don't feed the prestige economy so well, even though English professors and history professors write books, and they're authentic scholars. Academic books are usually published by university presses, which offer genuine academic branding in all of the senses that I just mentioned. For law professors, though, that strategy won't do, because they flatter their own field by arguing that the law changes, and sometimes it changes quickly. A medium that doesn't evolve quickly (books

²⁶ The words were actually spoken by Dan Aykroyd. *GHOSTBUSTERS* (Sony Pictures 1984).

²⁷ Scholars in other fields would concur. But they wouldn't see this as a problem.

typically take a while to write and to publish) can't handle the law, which we know is an incredibly dynamic thing. Moreover, monographs don't lend themselves to use in the modified Socratic case method that dominates law school teaching. Scholarly journals, on the other hand, and especially journals published with little editorial scrutiny, are just the ticket for legal scholars. In theory, you can assemble an article on some novel point pretty quickly and get it published pretty quickly after that. Because these journals look a lot like journals in other fields (articles, periodic publishing, paper and binding), legal scholars can get the best of both worlds. They get the prestige of being published in something that has the brand of a university and the relative speed of being published in a journal.

Not insignificantly, the system depends entirely on the mostly-free labor of a student editorial workforce. In fact, absolutely the worst thing about law review publishing, whether you're a reader or a writer, is that the law students who select the articles and edit them are absolutely unqualified to do so. So much so that all kinds of drivel finds its way to print, including cross-disciplinary and inter-disciplinary and non-disciplinary and just out-there kinds of things that no respectable scholarly journal in any other field would dare touch. From the students' and law schools' points of view, though, the great thing about the system is that for the most part, none of this matters. Law review membership is the traditional brass ring of the law school experience, the Golden Ticket, the top of the totem pole. It's the signal that counts for future employers, whether those are law firms or judges or even law schools. Law review membership used to signal that someone was not only willing to work hard but had also learned something of substance about reading, writing, and analyzing the law. Harvard at one point considered the law review to be an extension of the case method of instruction.²⁸ Some faculty even characterized it as a form of "clinical" education.²⁹ Now, at many schools, membership is a signal mostly of itself. Most students now recognize the work as sheer drudgery, reading endless half-finished manuscripts submitted by professors, learning and applying the *Bluebook* (the most arcane rule-based system they ever encounter in the legal profession) and, for a few, writing up an analysis of a recent case that few know and fewer will ever remember.

The essence of this system, remember, is the same thing that keeps law professors submitting their work to the reviews. Getting onto the law review originally meant top academic performance, so in a sense being an editor was double-dipping at the employment trough. But the imprint of the university, validating the double-dipping, was important. Most law professors were members of their own law reviews. Would that experience have been equally

²⁸ See STEVENS, *supra* note 16, at 118 n.34 (citing KARL LLEWELLYN, *THE BRAMBLE BUSH* (1930)).

²⁹ See *id.* at 215 n.88 (citing Alan W. Mewett, *Reviewing the Law Reviews*, 8 J. LEGAL EDUC. 188 (1955), and David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449 (1943)).

important if the journal had been named the “New Haven Law Review”?³⁰ Students aren’t really scholars, but they can more or less pretend to be because they hang around stacks of scholarship in the law review offices, and the label makes the pretense stand up. “New Haven Law Review” doesn’t sell anything as part of the clerkship application; “Yale Law Journal” sells Yale, *a company of scholars*.³¹ Now that even the elite law reviews accept members from writing “competitions,” the fact that Review membership is a branding factory is all the more transparent. Like fully-footnoted manuscripts submitted by faculty authors, hard work by student editors is often in short supply, unless it’s motivated purely by pride, or less often, by fear.

The economy of lawyers, scholars, and students inhabits and reacts to an institutional environment which is defined, first of all, by the university. The university, it’s reasonable to think, might wonder about the misuse of its name to support both a quasi-scholarly enterprise with a tenured faculty without terminal degrees and a segment of its student body that trades on the university’s scholarly reputation to get high paying jobs. The university, though, is hardly an innocent bystander. Langdell’s Harvard embraced a law review at precisely the time that Charles Eliot was trying to retool Harvard on the German research university model.³² Legal “science” and faculty scholarship were both clearly in tune with Eliot’s plan. In the process of seizing the scholarly high ground, the universities and the law schools were also able to seize control of the terms of legal debate, and to put their people on the cutting edge of the law in action.³³ In a handful of cases, it’s not much of an exaggeration to say that a Harvard Law Review article did, indeed, create the law.³⁴ Getting a Harvard Law Review article cited by the Supreme Court of the United States is the sort of thing that can go to your head. In fact, it may be just about the only thing that can briefly unsettle the belief that law professors are the most important members of the legal profession. Scholars don’t care so

³⁰ The University of Pennsylvania claims the oldest continuously published legal periodical in the U.S., since what is now the University of Pennsylvania Law Review started life in 1852 as the American Law Register. An ALR editor became dean of the law school in 1896 and brought the journal with him, turning it over to students as editors. Outside of Philadelphia, however, Harvard’s is universally recognized as the “oldest” law review. See Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 755–78 (1985).

³¹ This phrase comes from GEORGE W. PIERSON, *YALE: A SHORT HISTORY* (1976).

³² See STEVENS, *supra* note 16, at 270; Bernard J. Hibbits, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 626 (1996); John Henry Schlegel, *Langdell’s Auto-da-fé*, 17 LAW & HIST. REV. 149, 153 (1999).

³³ See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 58–59 (1977) (describing the Harvard-model law review as a “massive intellectual achievement” that responded, in part, to the glut of legal information created by the rise of West’s National Reporter System).

³⁴ The canonical example of the influence of a piece of legal scholarship on the law itself is Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). A better descriptor of this article might be “isolated.” Few law review articles have had such a clear and lasting impact on the law. Even today scholars cite it along with a handful of other pieces as evidence of the practical significance of legal scholarship. Michael W. Carroll, *The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 743 n.2 (2006).

much about whether their stuff gets read by non-scholars, except when it does, and when it gets read by the Supreme Court (well, it gets read by the clerks, and professors are clearly more important than they are), not only do scholars care, but the rest of the university notices, too.

Not that all of this “legal scholarship” is, or was, such a totally new thing from the standpoint of the university. In the German model, law had long been part of the university, because legal scholars were *scholars* and legal scholarship was “scholarship” like anything else.³⁵ It was the English that did things the other way; the English trained *lawyers*. But the idea of training lawyers (what the English did) and the idea of housing scholars in universities (what the Germans did) didn’t come together in a single concept until the Americans figured it out at the end of the 19th century, at Harvard. The *scholars* needed the law reviews to justify staying in the American university; the *lawyers* needed the law reviews to justify being treated as *scholars*. That system is essentially the same system that we see today. When the university notices the oddity of the whole thing, it does just that: It notices the oddity, basks in the reflected benefits, and then the university largely leaves it alone.³⁶

Can I (in a Step Three) tie all of this together? I think so, but whether it really hangs as an argument is beyond me. But then I’m a law professor, and it’s not clear that this is scholarship. Instead, let me sum up. There are more actors and interests and institutions to specify, but the point should already be clear. The theory of the economy of prestige holds that we see a grumpily mutually-reinforcing symbolic economy of law professors, lawyers, law students, law schools and their universities processing professional prestige through the unusual institution known as the law review.

Before I go back to what this has to do with open access and publishing, however, there is one more bridge to cross.

IV.

The economy of prestige sounds like a house of cards. And it is. We know this because almost everyone involved regularly complains that law reviews (and legal scholars) generally produce undisciplined and/or mediocre work and that such-and-such article either was much better than or worse than its placement. The most trenchant views come, not surprisingly, from Judge Posner: “Given the handicaps of ignorance, immaturity, inexperience, and inadequate incentives, the wonder is not that law reviews leave much to be desired as scholarly journals, but that they aren’t *much* worse than they are.”³⁷ The Harvard Law Review publishes lousy articles, and so-called fourth-tier law schools publish good ones. The student editors are uninformed judges of quality; they select pieces based on the author’s reputation, or based on the

³⁵ See PELIKAN, *supra* note 2, at 99–109.

³⁶ See Paul A. Samuelson, *The Convergence of the Law School and the University*, 44 AM. SCHOLAR 256 (1974).

³⁷ Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132 (1995).

reputation of the author's law school, or based on sexy but fleeting topics. Student editing typically makes articles worse. Doctrinal scholarship is uninspired. Interdisciplinary and cross-disciplinary labels are convenient cover for shoddy intellectual arguments that don't meet standards of rigor in "real" academic departments. Judge Posner is writing about student editors, but there is much in his commentary that could be—and has been—addressed to faculty authors.

Judge Posner is hardly alone, though he comes at the problem from an academic's perspective. From the judicial perspective, his colleagues on the bench are equally unsparing.³⁸ Even law professors themselves damn the system with faint praise; perhaps the best that we say about our own work is that we're suffering from an identity crisis.³⁹ Students are just as cutting in their criticism of the review system as faculty and judges are. At best, among other things, top tier students resent being used as unpaid research assistants by arrogant faculty authors and resent being blamed for their role in the law review system itself.⁴⁰ At worst, they're suffering the sins of their ancestors, that first group of law students who approached Dean Ames for permission to found the Harvard Law Review.

Importantly, the theory of the economy of prestige has a place for these critiques. Not only do the criticisms not take hold, but they actually reinforce the current system. Law reviews need the criticism because it highlights the sense that the reviews have value in the first place. Menand writes:

In an information, or "symbolic," economy, in other words, the goods themselves are physically worthless: they are mere print on a page or code on a disk. What makes them valuable is the recognition that they are valuable. This recognition is not automatic and intuitive; it has to be constructed. A work of art has to circulate through a sub-economy of exchange operated by a large and growing class of middlemen: publishers, curators, producers, publicists, philanthropists, foundation officers, critics, professors, and so on. The prize system, with its own cadre of career administrators and judges, is one of the ways in which value gets "added on" to a work. Of course, we like to think that the recognition of artistic excellence *is* intuitive. We don't like to think of cultural value as something that requires middlemen—people who are not artists themselves—in order to emerge. We prefer to believe that truly good literature or music or film announces itself. Which is another reason that we need prizes: so that we can insist that we don't really need them.⁴¹

³⁸ See Edwards, *supra* note 6, at 36–37.

³⁹ See Post, *supra* note 25, at 615, 624–25 (describing the "demoralization" of legal scholarship); Todd D. Rakoff, *Introduction, Symposium, Law, Knowledge, and the Academy*, 115 HARV. L. REV. 1278, 1279 (2002) (noting the multiple dimensions of debates about legal scholarship).

⁴⁰ See J.C. Oleson, *You Make Me [Sic]: Confessions of a Sadistic Law Review Editor*, 37 U.C. DAVIS L. REV. 1135 (2004).

⁴¹ Menand, *supra* note 13, at 137. See ENGLISH, *supra* note 11, at 197–216.

If you believe this, then what matters about the law review system is that the law schools sponsor the journals, and that the journals (or at least the article titles and attribution) get effectively communicated to other scholars. Nothing else matters much (not article quality, not selection mechanisms, not the way the articles are edited or how clearly they are written). So long as we freely criticize what the journals produce and how they produce it, almost everyone in legal academia will still want to get published in the Harvard Law Review.⁴²

Law professors have been pressing at the edges of this system by doing a variety of things that make it appear that they really do want an audience. Some law reviews have moved toward publishing more “commentaries” alongside full-blown articles,⁴³ and toward doing at least some of this on the Internet. Law professors are blogging. They are posting manuscripts on online open access archives like the Legal Scholarship Network at the Social Science Research Network (SSRN), and via bepress. Some of the “elite” law reviews have formed a cartel to police the length of law review articles.⁴⁴ There have been calls for faculty to reject the system of student-edited reviews and to publish with peer-reviewed journals,⁴⁵ and through university presses.⁴⁶ Not all of these things represent “scholarship” or moves toward improved “scholarship,” but there seem to be cracks in the law review foundation. What these really represent, I think, is not much more than ratification of the constructed-ness of the whole thing. Law reviews are the centers of the prestige economy precisely because of law professors’ anxiety over whether anything that we write actually matters. The more we chip away at the core of the system, the more we manifest that anxiety. The urgency of our implicit claim (“it’s shorter and easier to read, so please listen!”) only heightens the contrast between the new forms and traditional scholarship. It makes the latter that much more central to our scholarly standing.

⁴² Virtually all of this extends to criticism of legal scholarship by scholars in other disciplines, who are appalled that the university grants tenure to people who don’t publish in peer-reviewed journals. Withdrawal of university sponsorship and/or a collapse of the implicit hierarchy of law review “quality” undoubtedly would lead over time to substantial withdrawal of the generalized acceptance of law schools in universities. Without university-sponsorship for faculty scholarship, law schools would look uncomfortably like trade schools.

⁴³ Law reviews at Harvard, Yale, and Hofstra, among other law schools, have each recently begun to publish shorter and more timely commentaries and/or responses to “regular” scholarship. Harvard now publishes an online “Forum” (*see* Harvard Law Review Forum, About the Forum, <http://www.harvardlawreview.org/forum/aboutforum.shtml>). Yale publishes The Pocket Part online (*see* Yale Law Journal, The Pocket Part, <http://www.thepocketpart.org/>). Hofstra includes an “Ideas” section in its printed law review (*see* Hofstra Law Review, Ideas, http://www.hofstra.edu/Academics/Law/LawRev/index_LawRev.cfm).

⁴⁴ For a cheerful view of this development, see Robert C. Berring, *Less is More. Really*, 8 GREEN BAG 2d 231 (2005).

⁴⁵ *See* Posner, *supra* note 6, at 58.

⁴⁶ *See* Rosa Brooks, LawCulture, Goodbye to Law Reviews? (Jan. 17, 2006), http://lawculture.blogs.com/lawculture/2006/01/goodbye_to_law_.html.

V.

In an important sense, debating why open access hasn't made it to the law reviews is simply piling more criticism on an institution that's been taking a beating for a good long while. And without doubt, some law review articles are "better" than others, often much better, and the better stuff generates prestige for the publishing review and its law school and even its university. The economy of prestige not only goes round and round, but it also goes back and forth. Here, though, I should turn my attention to what the economy of prestige has to do with open access, or more precisely, how the publication model matters.

In the economy of prestige, something else has to happen between making something available to read and actually having it read. Professors, like most people, care about those two things in different degrees. I assume that most professors really, really like having scholarship (especially their own scholarship) available to read. I also assume that far fewer professors actually care about whether their scholarly work gets widely read. Read by colleagues, certainly, and when I say "colleagues," I mean both current and aspirational colleagues (people we would *like* to know and/or work with) but not necessarily by anyone beyond that. The gap between distribution and consumption, so to speak, is filled by authority. Among those who read the work, it's important that the work be authoritative, or at least credible. As Rob Kling observed, any scholarly publishing model has to account both for publicizing the work, and for declaring that the work is trustworthy. Merely making it accessible isn't enough.

In the old days of law reviews, before LexisNexis and Westlaw came along in the early 1980s, print publication and the imprint of the university-based law school often served as both publicity and validation enough.⁴⁷ In a related vein, Bob Berring has described the "cognitive authority" of the inherently limited circulation of other print-based legal literature: the National Reporter System, the West Digest System, and Shepard's.⁴⁸ Scholars of print have noted the inherently authoritative nature of "the book." Traditional law reviews, like all scholarly publications, benefited accordingly. Once LexisNexis and Westlaw started putting full texts of law reviews on their databases, the authority of print started to recede, leaving the authority of the publisher and, to a lesser extent, the authority of limited access. A lot of law professors these days never actually handle original physical copies of law review articles, unless they're stuffing envelopes with reprints to send out to colleagues. The patois of the professoriate long ago started to refer to

⁴⁷ See Hibbitts, *supra* note 32, at 616.

⁴⁸ See Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1692, 1695 (2000). Frederick Schauer describes the ambiguities inherent in the authority that we assign to legal scholarship and concludes that "legal scholarship may at times be treated as more authoritative than a perfectly rational decisionmaking environment would allow." Frederick Schauer, *The Authority of Legal Scholarship*, 139 U. PA. L. REV. 1003, 1017 (1991).

placement of an article simply by the school name, that is, by the authority of the brand. “I’m publishing in NYU,” or “I’m publishing in Florida State,” is a perfectly comprehensible statement among legal scholars.

The inherent limitations of print distribution meant that law review circulation built its own economy of prestige. Even for the Harvard Law Review, whose subscriber base far exceeds that of any of its scholarly peers, subscription created an aura of scholarly exclusivity. As a law student, I was a member of the law review at Stanford, and I remember more or less what I thought when I learned that a recent graduate of the law school had purchased an individual subscription to the Review: Man, that guy must be a serious intellectual!

The commercial database model obviously can’t match that aura step-for-step, since the databases include so much non-scholarly legal literature. Westlaw’s JLR database includes PLI and ALI-ABA course materials as well as the Yale Law Journal. But the relative exclusivity of the databases does have that effect. Pricing models differentiate between practitioners, on the one hand, and law schools and judges’ chambers, on the other. Practitioners often pay metered rates for access to the database; law schools pay a flat rate. Unlike practicing lawyers, law professors can search and use the databases at no marginal cost. It feels free. We’re inside the scholarly system again, and the rest of the world is outside.⁴⁹

What I described in the last Part as “cracks in the law review foundation” are tangible echoes of critiques of commercial publishing for scholarship. In the economy of prestige, and in terms of the publishing component of that economy, those cracks don’t reflect a breakdown of the economy so much as they reflect anxiety over its integrity. Law professor blogging is an effort to shore up the law review publishing model rather than an effort to undermine it, just as law faculty who post pre-prints (and post-prints) on SSRN and bepress are quick to defend the practice on the ground that it complements law review publication.⁵⁰ Right now, open access for law review publishing is treated like bashing law reviews for publishing sloppily-edited, undisciplined work—as a justification for the status quo.

What would happen to this economy of prestige if law reviews not only adopted open access publication policies but also pushed authors to publish their work in open access archives? Faculty would still submit their pieces to law reviews, have them selected, edited and formally published by law reviews, and then distribute their fully-edited articles on their own, for free, via their own websites or archives run by other people. What then?

One possibility, and this is the possibility that I think worries most faculty who actually bother to think about it, is that this would end up cutting the law schools out of the publishing business entirely. Some people see this as a good

⁴⁹ Some law reviews post open access versions of their content on their websites, but until search mechanisms for scholarship on the Web become as easy to use as Lexis and Westlaw search engines, lack of publicity for open access versions means that they remain poor substitutes for commercialized versions.

⁵⁰ See Hunter, *supra* note 4, at 633.

thing. In 1996, as the Internet was first being recognized for its broad popular (and popularizing, disintermediating) potential, Bernard Hibbitts foretold legal scholars' bypassing the law reviews and publishing their work directly online.⁵¹ Ten years on, this hasn't happened, which tells me that the economy of prestige is, in fact, an important part of the system. If open access is a stalking horse for this sort of thing, and if law reviews and law professors right now are making that kind of connection (that is, if we do this open access thing, why have a law review at all?), then it's no surprise to find that law reviews and law professors haven't jumped on board. They've got a good thing going, and they don't see why they should put that at risk. It's more than a massive collective action problem. Lots of faculty literally can't see that open access will do them any good. Why undermine the institution that makes the economy of prestige hum?

On the other hand, if open access leaves the law review system more or less as is, with everyone still sucking prestige out of the system as fast as new articles can be pushed in, then there's no reason not to welcome it. The worst case scenario is that we end up with a lot of digital copies of things that no one reads. The best case is that someone figures out a way actually to get the useful material into the hands of the people who need it. Open access gets hitched to publicity and quality-validation mechanisms that, in tandem, re-create the economy of prestige.

VI.

Those two possibilities sketch a kind of open access "innovator's dilemma." That phrase belongs to Clayton Christensen, at the Harvard Business School.⁵² The innovator's dilemma is a management problem. Classic "good" management, over time, tends to focus on products and services that enhance the firm's classic mission, or what Christensen calls "sustaining" technologies. Over time, firms that focus on sustaining technologies do so rationally, and they ultimately get knocked aside by firms that invest in "disruptive" technologies, that is, in paradigm shifting products and services that start out in niche markets but end up as category killers. The innovator's dilemma is that good managers have no incentive to invest in disruption, so they don't. Good companies die as a result.

Since the economy of prestige borrows the vocabulary of markets, it seems altogether appropriate to borrow another tool from the business toolbox. Open access, with its threat to scholars' economy of prestige, is perceived as a potentially disruptive technology. (Perceived by whom? It's fair to ask. The answer, of course, is "everyone.") No one can know whether marginalizing open access will lead to the catastrophic failure of the current, dominant publishing and prestige model. But Christensen's work does offer a way to limit the downside risk. Christensen has a series of prescriptions for managers who want to capture disruptive technologies. The one that seems to have the

⁵¹ See Hibbitts, *supra* note 32, at 668.

⁵² See CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* (1997).

most traction, both in his work and beyond, is locating development of disruptive technologies in organizations and places that are distinct from the basic firm framework. New city, new building, no organizational ties; don't make it a profit center; let new ideas fail and grow on small scales and build customer demand from the outside.

How might law reviews (and legal scholars, and law schools, and universities) do that? How can the legal scholars' economy of prestige capture the potential value of a disruptive open access model? Here's a sketch of a proposal for how to make that work by building a structure that allows the disruptive model to get a foothold and grow.

Open access publishing can be part of a working prestige economy if scholarly publication is standardized to a format that permits scholars in relevant disciplines to develop a digital "tagging" specification that can be read by Internet search engines and other online communications tools. Works in open access archives could be labeled electronically, that is, tagged, classified, and rated along various dimensions, by scholars and, potentially, by others. Those tags would consist of digital markers that are electronically associated with individual manuscripts.⁵³ *The Right to Privacy* by Warren and Brandeis, for example, could be associated with tags labeled "privacy" and "very high quality," for example (in addition to many others). Online search software programmed to search specifically for scholarly publications (such as Google Scholar) could include options that permit searching for and sorting results according to one or more tags. The result would be a kind of dynamic, searchable, shareable, bottom-up post-publication form of peer review. Tags could specify subjective characteristics that relate to authority, trustworthiness, and quality ("comprehensive," "advanced," "introductory"), as well as field, subject matter, theoretical orientation, and even more objective criteria, such as length, author, publisher, and so on.

How this gets off the ground is beyond my expertise (in fact, since I'm a law professor, most everything is beyond my expertise), but clearly it's easier for a handful of open access archives or even a handful of faculty members to get together on this sort of thing than it is for 6,000 law professors to commit to revamping the prestige model as a group. Importantly, none of this requires cooperation by the law reviews themselves or even substantial initial participation by a critical number of faculty, law schools, or universities.⁵⁴ SSRN, meet bepress and Paul Caron's Law Professor Blogs network. Bepress, meet SSRN and Law Professor Blogs. This is even the sort of thing that the blogosphere may be good at, that is, not in generating scholarship itself, but in solving a coordination problem at a very low level. A single faculty blogger with the technical skill (or support) to begin to implement the scheme that I'm describing could attract enough traffic to get the enterprise off the ground. The

⁵³ For the digerati among you, the proposal is obviously based on social tagging systems such as Flickr, <http://www.flickr.com/> (last visited Oct. 31, 2006).

⁵⁴ Cf. Michael J. Madison, *Social Software, Groups, and Governance*, 2006 MICH. ST. L. REV. 153 (describing the virtues of social software in facilitating the emergence of informal groups).

blogging and short-form “scholarship” that I characterized as cracks in the law review foundation may turn out to be precursors of something like this, that is, something that clearly feeds the existing economy of prestige, but from outside the traditional law review system. If successful, tags for open access scholarship (perhaps extending to tags for non-traditional short-form scholarship, too) may displace the current economy’s center of gravity, so that prestige hums around the distributed tags as much as or even to an extent greater than it hums around the journals’ institutional prestige. This summary focuses mostly on the law professors’ perspective. It is possible that the same thing could work from the reviews’ perspective. Some “tags” could be purely descriptive, so that the work is “tagged” with the journal name. Via extension of their brands, law reviews themselves would capture the prestige benefits they seek.⁵⁵ By offering scholars a means of re-creating the economy of prestige, a disruptive open access model, in other words, has the potential to morph into something altogether new, rather than implicit validation of the status quo.⁵⁶ The fact that knowledge may be more widely distributed is a happy byproduct of the process.

VII.

Can this be right? As I said above, I’m not the first person to frame journal publishing or law review publishing in terms of prestige. In his article forecasting the demise of law reviews in the face of online self-publishing by scholars, Bernard Hibbitts called the prestige argument “specious”:

“Halo effects” are intellectually suspect—surely serious scholars would agree that scholarly articles should ultimately be evaluated on their own merits, rather than according to the prestige of the law review in which they appear, especially when the law reviews exercise little if any true quality control. In this context, eliminating the “halo effect” of placement would remove a significant temptation in the way of free and fair evaluation of scholarship, while at the same time (re)focusing the attention of law professors on doing their scholarly work for its own sake, rather than playing the placement game.⁵⁷

The idealism is breathtaking.

If only this were true. In the decade since Hibbitts made this argument, and despite the presence of easy-to-use online publishing tools, law professors haven’t exactly embraced the idea that what they really want is honest,

⁵⁵ Some law review editors have told me recently that they are beginning to look at open access publication in precisely this light, so long as authors label their articles with journal names. Digital tagging reifies and potentially extends the effect.

⁵⁶ A somewhat related model of authoritative electronic publishing defined dynamically by the members of a discipline is described in Rob Kling, Lisa Spector & Geoff McKim, *Locally Controlled Scholarly Publishing Via the Internet: The Guild Model*, J. ELECTRONIC PUB., Aug. 2002, <http://www.press.umich.edu/jep/08-01/kling.html> (originally published in the Proceedings of the 2002 Annual Meeting of the American Society for Information Science and Technology).

⁵⁷ Hibbitts, *supra* note 32, at 679.

reasoned feedback directly from colleagues. In fact, I suspect that few academics really want that sort of thing. The only medium where this sort of exchange is occurring today is the expanding blogosphere, which is more and more full of law professors engaging in frank, direct dialogues.⁵⁸ But in the vast majority of cases, blogs are not “scholarship,” and some of the most widely-read law professor bloggers expressly disclaim the idea that what they are doing is scholarship.⁵⁹ (Related to scholarship, yes; actual scholarship, no.) Rather, those frank discussions tend to confirm the importance of their target. The very openness of blogs confirms both the speciousness and the specialness of law review publishing.

In fact, not only does the economy of prestige model predict that law reviews in their present form could not simply be abolished, but it also predicts that law reviews (and law schools, and law professors) have little incentive to improve the quality of legal scholarship. I’ve said nothing, for example, about exchanging publication in student-edited journals for publication in (supposedly higher quality) peer-reviewed journals. It’s implicit in what I’ve argued that as parts of the economy of prestige, these two selection and editorial systems are roughly interchangeable. The law schools finance the law reviews with cash, academic credit for students, promotion and tenure recognition for faculty, and salaries that support faculty research. Because they are underwritten so heavily by the university, law reviews are equipped to deliver all the prestige that anyone—at least anyone on a law faculty—needs. Most peer-reviewed scholarly journals come from commercial publishers, where underwriting comes through the marketplace. Authors and subscribers of these journals want prestige, too, but the universities aren’t in a position to supply it.⁶⁰ Faculty depend on grants for research support; peer reviews of proposals and of the resulting literature jointly supply the prestige that justifies the subscription price.⁶¹ In a way, obviously, the two systems resemble each other. In each case the economy of prestige ultimately runs through faculty offices. That’s not to say that the two systems have the same strengths and weaknesses, since they don’t. Law professors have widely varying opinions on the merits of law reviews, and some express pretty strong views regarding the merits of peer review. But each model, in different ways, is designed to

⁵⁸ Note that my “tagging” suggestion doesn’t require disclosure of individual reader or rater identities; in fact, it might be most effective if participation were limited to law faculty but individual identities were omitted by default.

⁵⁹ See Social Science Research Network (SSRN), Bloggership: How Blogs are Transforming Legal Scholarship, http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=890371 (last visited Oct. 16, 2006) (archiving papers from the April 28, 2006 Bloggership Symposium at Harvard Law School’s Berkman Center for Internet & Society).

⁶⁰ See Harriet Zuckerman & Robert K. Merton, *Patterns of Evaluation in Science: Institutionalisation, Structure and Functions of the Referee System*, 9 MINERVA 66 (1971).

⁶¹ See Bernard J. Hibbitts, *Yesterday Once More: Sceptics, Scribes and the Demise of Law Reviews*, 30 AKRON L. REV. 267, 294–95 (1996); Bernard Wysocki Jr., *Scholarly Journals’ Premier Status Is Diluted by Web*, WALL ST. J., May 23, 2005, at A1.

generate and maintain the kind of prestige that scholars crave.⁶² Open access is consistent or inconsistent with either one in equal measure, or least on the same terms that I've argued apply to journals generally. I don't need to take a position on the merits of peer review, but it strikes me as unlikely that the law schools will get out of the journal business any time soon. Inertia is a powerful thing. Law professors are unlikely to be willing to shoulder the real burdens of peer review, especially if a new version of the prestige economy can emerge at lower cost.

VIII. CONCLUSION

I suggested at the outset that this piece was really about open access in general, and only about law reviews in particular, rather than vice versa. I want to deliver on that suggestion. Does the economy of prestige theory have anything to say about the one scholarly community that seems to have wholeheartedly embraced open access principles for its scholarship, which is physics? The physicists' arcXiv.org open access e-print archive has co-existed peacefully with proprietary physics journals for 15 years.⁶³ The community of physics scholars and commercial physics journals hasn't collapsed. Why not? If the economy of prestige theory is right, and if I've applied it correctly to law professors and law reviews, then there must be some relevant differences between physicists and lawyers, and maybe we can use those differences to sketch some predictions regarding the likely success of open access efforts in other fields. It's possible, for example, that physicists don't care much about prestige. That seems doubtful. Or, open access publishing has supplemented the existing physicists' economy of prestige with a prestige dimension of its own. (In other words, for example, open access may be so cool in the physics departments that everyone has to get with the program.) I doubt that, too. Or, still, physicists may get their prestige (and their funding) in some way other than the disciplinary validation and self-congratulation that follows scholarly publication, as in law.

My intuition is that this third hypothesis is the strongest one,⁶⁴ and here's why. If you're really unlocking the secrets of the universe, then you sleep

⁶² Zuckerman and Merton characterize the issue slightly differently; they describe it as "authority." See Zuckerman & Merton, *supra* note 60, at 95–96. That's not quite the same thing as prestige, but it's pretty close, and the constructedness of both shows that peer-review and student-edited law school publishing are designed basically to accomplish the same thing, in very different ways. Berring, *supra* note 48, and Schauer, *supra* note 48, complete the circle by talking about mechanisms of authority for legal literature. Descriptions of the declining role of traditional legal authority in judicial decision-making reflect anxiety over the singular position of legal scholarship. See Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080 (1997); Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998).

⁶³ See Kling et al., *supra* note 3.

⁶⁴ Rob Kling and his colleagues suggest something similar in their comparison of the social locations of physicists and physicians, and the development of PubMed Central. See *id.* Their focus, however, is on institutional structure, not symbolic or cognitive structures.

pretty soundly at night. The exception, in other words, proves the rule. The economy of prestige assumes a constructed universe, a universe of cultural goods. Physics research isn't just a cultural good. Physics knowledge is constructed along with everything else, but it's constructed at such a deep level that our ordinary selves, and physicists most of all, don't see it that way. So it's good in itself in a way that "legal scholarship" really isn't. Physicists—who are, after all, smarter than lawyers—get this. Open access flourishes for them because they know that their brass ring isn't tenure and a spot at the university that exempts them from representing real clients with real problems and delivering real results. Their brass ring is the Grand Unified Theory of Everything.

This distinction is obviously more spectrum than either/or. Modeling legal scholarship as an economy of prestige implies that the made dominates the true, but scholars of all kinds want to be right as well as respected.⁶⁵ Does this slightly more refined idea of the law review, sharpened by contrast with scholarship in at least one salient discipline, tell us something that we can use to understand where and how to best operationalize open access? Legal scholarship isn't quite so important in the scheme of things, but scholars do care about the distribution of legal knowledge, even if it's often made up.

If I truly knew the answer to that question, then maybe I really could get published in the Harvard Law Review (which would be great!), so all I can do here is speculate a little bit. I think that the answer is yes. Maybe open access works for knowledge goods that have intrinsic value and not for knowledge goods that don't. Maybe the law reviews' reluctance to adopt open access policies and law professors' reluctance to seek out open access publication is a kind of jurisprudential clue. If law professors really want open access to take hold in legal scholarship, then they—that is, we—should take empiricism more seriously than we often do. Or, if we want to keep up our (and my) pose of reflective self-absorption, we need the justification and prestige that the current publishing system supplies. I'm not confident that we can have it both ways.

Making open access work in any context requires understanding a cultural economy. If open access doesn't challenge that economy, the two can co-exist, side-by-side. That's the model that I see in physics. Maybe open access undermines that economy. That's the threat that legal scholars and law reviews (and, I suspect, scholars and journals in a lot of fields) currently perceive. For cultural goods, the best hope for open access advocates may be to promote and build out a system in which the cultural economy incorporates and capitalizes on open access, giving the publishing platform a viable justification in recognizable cultural terms. This isn't a Field of Dreams; if you build it, they won't come. Open access tools and other resources must be designed so that they get taken up in the existing economic framework. If that new system operates from the outside in, becoming embedded in the economy, then it has the potential to subvert that economy from the inside out, starting from its

⁶⁵ See Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 911–13 (1992).

embedded position. Who knows if that will ever happen? But if it does, the distribution of knowledge that is the real idea of open access might be realized.