Roger Williams University Law Review

Volume 8 | Issue 2 Article 2

Spring 2003

The Law Academy and the Public Intellectual

Arthur Austin
Case Western Reserve University School of Law

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation
Austin, Arthur (2003) "The Law Academy and the Public Intellectual," *Roger Williams University Law Review*: Vol. 8: Iss. 2, Article 2.
Available at: http://docs.rwu.edu/rwu_LR/vol8/iss2/2

This Article is brought to you for free and open access by the Journals at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

ARTICLES

The Law Academy and the Public Intellectual

Arthur Austin*

I. INTRODUCTION

A. *Posner in Decline?*

The Wolfes[1] of the Received Wisdom got the opportunity for a good old payback time when Judge Richard Posner stumbled with the publication of *Public Intellectuals: A Study of Decline.*[2] Perhaps expectations were too high for someone esteemed as the nation's preeminent intellectual – the "object of scholarly envy and awe."[3] Certainly he could not expect favors after "an omni directional Gatling gun" spree in which he hurls bombs at every other pretender[4] and, relying on "his own hunches and grudges,"[5] determines the boundaries of who is a Public Intellectual.[6] Alan Wolfe, who made the cut, complains that Posner's decisions "are not merely arbitrary; they are nonsensical."[7] But it was not the crite-

* Edgar A. Hahn Professor of Jurisprudence, Case Western Reserve University School of Law.

1. *See* Alan Wolfe, *The Fame Game*, NEW REPUBLIC, Dec. 31, 2001, at 34.

2. RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE (2001) [hereinafter PUBLIC INTELLECTUALS].

3. James Ryerson, *The Outrageous Pragmatism of Judge Richard Posner*, LINGUA FRANCA, May/June 2000, at 27.

4. David Brooks, *Notes from a Hanging Judge*, N.Y. TIMES, Jan. 13, 2002, (Book Review), at 9.

5. Caleb Crain, *License to Ink*, THE NATION, Feb. 22, 2001, at 25 (reviewing RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE (2001)).

6. *See* Jay Tolson, *All Thought Out?*, U.S. NEWS & WORLD REPORT, Mar. 11, 2002, at 54.

7. Wolfe, *supra* note 1, at 35.

ria; it was the *list* of top Public Intellectuals determined solely by media hits that rankled the "group."[8] "If the word *intellectual* can be applied to both William Butler Yeats and former Clinton adviser Sidney Blumenthal, its definition has become promiscuous beyond all hope of sense or meaning,"[9] a "preposterous roster."[10]

Nevertheless, Posner's thesis that public discourse is dominated by Public Intellectuals "affiliated" with the Law Academy survives the snide putdowns by mean-spirited elitist egalitarians. The college subsidies of income and free time invite professors to communicate with a receptive and pliable second non-peer audience: "the educated general public, itself expanding with the expansion of university education."[11] Working the public market involves less nuanced preparation and delivery and, in Posner's judgment, produces unsatisfactory results. Much of the book – the skewing part – is consumed by Posner's "instinctive hostility"[12] to the arrogance, bias, and outright stupidity of academic Public Intellectuals.[13]

In their zeal to pounce on Posner's apparent lapses his critics ignore the obvious flaw: despite an impressive legal pedigree the Judge does not examine the law professor as a discrete genre of Public Intellectual. In an afterthought chapter, he spends twenty-

---

8. PUBLIC INTELLECTUALS, *supra* note 2, at 209-11. A list that "blithely arrays the likes of Sidney Blumenthal, Bill Moyers and Ann Coulter on a continuum with Henry Kissinger, Arthur Schlesinger Jr., Gerry Wills and, of course, himself." Gary Rosen, *He Has a Little List – and a Long Indictment*, WALL ST. J., Jan. 15, 2002, at A14; Eric Alterman, *Judging the Wise Guys*, THE NATION, Jan. 28, 2002, at 10 ("[P]ure nonsense"); Christopher Caldwell, *Mind Games*, NAT'L REV., Feb. 11, 2002, at 45 ("Much of Posner's analysis of intellectual life rests on this exercise in garbage-in, garbage-out.") (reviewing RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE (2001)); Crain, *supra* note 5, at 26 ("It is disconcerting to see Camille Paglia and Oliver Wendell Holmes nearly tied in a ranking by media mentions.").

9. Tolson, *supra* note 6.

10. Jamie Malanowski, *Infinite Jest*, WASH. MONTHLY, Mar. 1, 2002, at 57 (reviewing RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE (2001)).

11. PUBLIC INTELLECTUALS, *supra* note 2, at 27.

12. David J. Garrow, *A Tale of Two Posners*, 5 GREEN BAG 2d 341, 343 (2002) ("Posner's instinctive hostility is focused upon what he views quite correctly as the utter unresponsiveness of the 'market' for public intellectuals to inept or indeed consistently erroneous job performance by widely-celebrated purveyors. Ergo Judge Posner has a defensibly clear idea of what it is he doesn't like, but even his most broad-stroke presumptions about why this state of affairs has come to exist suffer from misconceptions that greatly blinder his otherwise quite inclusive explorations.").

13. *Id.* at 343-49.

seven pages describing law as a source of dialogue of general "dubious interventions" by Public Intellectuals on behalf of notorious criminals, for example, Sacco-Vanzetti and Drayfus[14] or of the "trash"[15] of expert witnesses who, as Postmodernists, disdain truth and view testifying under oath a form of politics.[16] His conclusion: "how unfitted therefore most lawyers, even brilliant academic lawyers, are to play well the public-intellectual role."[17]

Admitting that his is not "*the* correct" definition,[18] Posner proceeds to eliminate the unfit (his competition), by narrowly defining the relevant product market. The audience is the general public, thus excluding various categories of specialization.[19] Translating the application of technology is not included, while explaining its ethical implication is. The relevant topics are of interest to a general educated public, ideally conveyed with authority, composed with precision, and spiked with an ideological or political edge. "The intellectual is more 'applied,' contemporary, and 'result-oriented' than the scholar, but broader than the technician."[20] Posner's litmus test is communication with the public – not intramural exchange.[21]

B. *Posner "Disses" Microeconomics*

Posner's Public Intellectual profile is an open invitation to the "affiliated" law academic. Legal education is, for faculty success, a "soft" field; student-edited journals assure publication and tenure, teaching loads are light, leaving time for media-sensitive moonlighting in high recognition "public" service enterprises. The inter-

14. PUBLIC INTELLECTUALS, *supra* note 2, at 359.

15. *Id.* at 365-66 ("The critic who testifies in a courtroom knows that his testimony will never be submitted to a jury of his academic peers – that if they get wind of it all they will commend him for doing the Lord's work in trying to hamstring the prosecution.").

16. *Id.* at 366.

17. *Id.* at 386.

18. *Id.* at 25.

19. Thus violating the "sub-market" category. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined sub-markets may exist which, in themselves, constitute product markets for antitrust purposes." Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

20. PUBLIC INTELLECTUALS, *supra* note 2, at 24.

21. Thereby excluding John Rawls, who "received some play in the popular media." *Id.* at 25.

disciplinary law school curriculum provides training in topical topics of interest to the educated public, which can be conveyed by scholars trained in rhetoric. Moreover, the law academic's status as a cross between scholar and pragmatist/activist inspires an appeal and sometimes celebrity status to, in Posner's market terms, "enhance the credibility of the output with that audience."[22]

Despite the suggestive transferability of expertise, lawyers are poorly represented on Posner's Top 100 List. Of a total of thirteen, only five are active academicians: Alan Dershowitz, Jonathan Turley, Susan Estrich, Laurence Tribe, and Lani Guinier. Posner ignores discussion of Estrich and Turley, briefly mentions that President Clinton's withdrawal of Guinier's nomination for head of the Civil Rights Division of the Department of Justice gave her martyr status enabling her to launch a Public Intellectual career on issues of race,[23] accuses Tribe of disingenuousness on abortion,[24] and condemns Dershowitz for resorting to "Chomsky-speak"[25] in making misleading distinctions in his defense of President Clinton.[26]

The mainstream work of the Law Academy Public Intellectual as defined by Posner does not square with his interest in a broad based macro-economic analysis of multiple intellectual genres (literature, political satire, the Jeremiah School,[27] public philosophy, law). Disentanglement from a law pedigree enables him to indulge a fascination with an undergraduate literature major,[28] to apply economics to Aldous Huxley's *Brave New World* and George Orwell's *Nineteen Eighty-Four*,[29] to skewer Robert Bork as an exemplar of the "casualness with which declinists handle evidence,"[30] and to show that Martha Nussbaum's dependence on

---

22. *Id.* at 49.

23. *Id.* at 57.

24. *Id.* at 91.

25. *Id.* at 126. "Chomsky is an irresistible example of the quality problem that besets the market for academic public intellectuals." *Id.* at 89.

26. For a Posner critic who agrees with Posner on Dershowitz's behavior, see Garrow, *supra* note 12, at 344 n.14.

27. Posner calls this "[d]eclinist works," a genre of "cultural pessimism or national decline." PUBLIC INTELLECTUALS, *supra* note 2, at 282.

28. *Id.* at 239 ("[T]he literary critic as public intellectual not only devalues literature but may actually endanger it.").

29. *Id.* at 271 (The contrast between the two novels' view on sex "suggests that there may not be a unique totalitarian position on sexual freedom.").

30. *Id.* at 285.

Aristotle is as "opportunistic as Catharine MacKinnon's alliance with Edwin Meese in the war against pornography."[31]

Under Posner's explication the macro-analysis produces an eclectic portmanteau book of gangsta rap put-downs and idiosyncratic flights of irrelevancies.[32] The market, he says, is in default – primarily the result of the work of the academic Public Intellectual who "is on holiday from the academic grind and all too often displays the irresponsibility of the holiday goer."[33] Yet inexplicably – especially for an economist – Posner ignores the micro side of the market – he fails to engage in a discussion of the dynamics of the fields or disciplines from whence the Public Intellectuals derive their vision.[34] The result is an anomaly – an economic analysis without an analysis of what determines the demand curve for scholarship resources in the Law Academy Public Intellectual market. On the significance of a balanced macro-micro evaluation, the late Paul Samuelson said: "You are less than half-educated if you understand one while being ignorant of the other."[35]

C. *A Précis*

In this essay I use Richard Posner's macro-protocol of the Public Intellectual phenomenon as reference for a discussion of its implication for legal scholarship. My thesis is that legal scholarship has developed a symbiotic connection with Public Intellectualism and in its contemporary manifestation legal scholarship often blurs with, or is virtually interchangeable with, Posnerian Public

---

31. *Id.* at 333. Nussbaum has the last word: to her Posner views life as all "struggle and suffering." *See* Ryerson, *supra* note 3, at 34 (quoting Martha Nussbaum).

32. Prompting one critic to conclude: "Posner has the attention span of a cartoon character." Caldwell, *supra* note 8, at 46.

33. PUBLIC INTELLECTUALS, *supra* note 2, at 389.

34. In the final chapter Posner continues his frustration at "the modern university" which subsidizes the soft life to monopolize the public intellectual, esteemed for contrariness – a "niche . . . likely to go unfilled as more and more public intellectuals opt for the safe and secure life of a university professor." *Id.* at 388. To correct this market imperfection, Posner offers several "constructive suggestions" that border on the irrational: "one solution might be for universities to require their faculty members to post annually, on the university's Web page, all the non academic writing . . . that they have done during the preceding year . . . ." *Id.* at 390. Next he proposes disclosure of "income from all their public intellectual work . . . ." *Id.* at 393.

35. PAUL A. SAMUELSON, ECONOMICS: AN INTRODUCTORY ANALYSIS 362 (7th ed. 1967).

Intellectualism. The law faculty market is a diverse portfolio of intellectual commentary circulated to an inclusive community of communication mediums – from elite law journals to bare-knuckle talk shows. My discussion of the evaluation of scholarship cross-elasticity of demand is prefaced by a short profile of Fred Rodell whose career at Yale Law School illustrates the long-standing friction between the Law Academy and Public Intellectualism. I next chart the post-Rodell erosion of the traditional doctrinal scholarship paradigm, with emphasis on Postmodern influences on the Law Academy. The resulting changes have created a revised legal scholarship market, congenial to Public Intellectualism, while sponsoring a new context for writing, promotion, tenure, and career options. After identifying those factors that transformed traditional scholarship conventions, I return to Professor Rodell to confront the ultimate issue: How would he, and his new colleagues, fare under present conditions?

II. FRED RODELL: FROM LAW PROFESSOR TO PUBLIC POSTMODERN INTELLECTUAL

At the micro level, the initial point of inquiry is the scholarship conventions of the affiliated academic's discipline. The doctrinal method of problem solving and analysis, reviewed by critical evaluation, has defined legal scholarship since the inception of the casebook method.[36] Up to the 1930s, scholars achieved success with doctrinal articles on basic areas like torts, contracts, criminal law, or property law, received tenure and then relaxed by writing a treatise.[37] Then came the ideological rush and excitement of the

36. *See* Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L. REV. 1113, 1113 (1981) ("[Doctrinal scholarship] involves the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis.").

37. The classical tradition of law scholarship is epitomized in the treatises of Samuel Williston (Contracts), John Henry Wigmore (Evidence), and Arthur Corbin (Contracts). They were the masters of vocational-doctrinal writing; large numbers of cases were compared, analyzed, and criticized. In a succinct and elegant style, the grand treatise writers succeeded in identifying rules and defining their operational effects. To the vocationalist, the treatise is the highest form of scholarship. A legal treatise (which must be a multi-volume set, not a single book) was written to be read and used by the profession. If Dean Wigmore supported your position, you won. If Professor Corbin stood against your argument, you talked settlement.

New Deal, an event assumed too important to practice balanced restraint, compelling professors to adopt a strident, subjective advocacy style.[38] The problem was that they were talking to the small choir of a law review audience – a closed-circuit of like-minded colleagues along with a few practitioners creating new alphabet agencies in Washington, D.C.

The first scholar to go on record with the implications of the limited audience range of the law review system was Fred Rodell of Yale Law School who responded by conducting his career as a Public Intellectual. He made his intentions known by repudiating law review publication in *Goodbye to Law Reviews*[39] – "perhaps the most widely read – and most controversial – article in all of legal literature."[40] Rodell took no captives as he described the skullduggery of a loose conspiracy of law professors and students exploiting law reviews to perpetrate the spread of what he deemed "spinach" on the profession.[41] Relying on "pedantic wheezes"[42] academics squabble "among themselves over the meaning or content of some obscure principle that nine judges out of ten would not even recognize if it hopped up and slugged them in the face."[43] With disdain Rodell signed off: "I do not care to contribute further to the qualitatively moribund . . . literature of the law."[44]

He made his point by becoming a journalist, writing articles for a wide range of publications, including the *New Republic, Esquire, The Progressive*, and the *New York Times*. Lawrence Spivak, the editor of *American Mercury*, called him "a first rate, hard-

---

See A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981).

38. *See* ARTHUR AUSTIN, THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION 33-62 (1998).

39. *See* Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

40. David M. Margolick, *Always the Rebel*, NAT'L L.J., May 5, 1980, at 24; *see* G. Beth Packert, Note, *The Relentless Realist: Fred Rodell's Life and Writings*, 1984 U. ILL. L. REV. 823 (1984).

41. Rodell, *supra* note 39, at 45 ("Maybe one of these days the law reviews, or some of them, will have the nerve to shoot for higher stakes. Maybe they will get tired of pitching pennies, and of dolling themselves up in tailcoats to do it so that they feel a sense of importance . . . . In short, maybe one of these days the law reviews will catch on. Meanwhile, I say they're spinach."). For the meaning of "spinach," see Packert, *supra* note 40, at 825 n.19.

42. Rodell, *supra* note 39, at 40.

43. *Id.* at 43.

44. *Id.* at 38. A promise he broke. *See, e.g.*, Fred Rodell, *Goodbye to Law Reviews – Revisited*, 48 VA. L. REV. 279 (1962).

working and careful journalist."[45] Rodell favored biographical profiles of judges and political figures which gave him the opportunity to exult those who stood up for liberal values while adhering to the realist school of law.[46] It also gave him a chance to take a few swipes at the "mish-mashy mumblings" and "restrained handwringings" of "languid liberals" like Adlai Stevenson and his "subsachem" Arthur Schlesinger, Jr.[47] And he could be downright mean; he called William Buckley's *God and Man at Yale* a "barbarian bleat . . . muddled, dishonest, inaccurate, sloppily argued, and dull."[48]

What defined Rodell as the first Postmodern Public Intellectual was his aesthetic range – long before the critical race movement[49] and imitators, he published narrative,[50] parody,[51] and even threw in bawdy limericks.[52] He also anticipated the notion that the medium is the message by conducting a class in Public Opinion and the Law designed to teach non-lawyers how to write on law topics, which produced "the first crop of [American] legal journalists."[53]

Rodell's career epitomized the risks of preferring the combat of undisciplined public dialogue over the peer determined authority of the academy. It was one thing to amuse one's colleagues with

---

45. Margolick, *supra* note 40, at 24 (quoting Lawrence Spivak). He was also a special feature writer for the *Chicago Times* (1940) and served on *Fortune's* board of editors (1937). Packert, *supra* note 40, at 825 n.22, 835 n.121.

46. Packert, *supra* note 40, at 835-38.

47. Fred Rodell, *Our Languid Liberals*, THE PROGRESSIVE, Mar. 1957, at 5.

48. Fred Rodell, *That Book About Yale: The Attack on Free Universities*, THE PROGRESSIVE, Feb. 1952, at 14.

49. *See infra* notes 165-88 and accompanying text.

50. *See* Fred Rodell, *My Debt to the Town Drunk*, READER'S DIGEST, Nov. 1941, at 54-55.

51. *See* Fred Rodell, *Ah, Scholarship*, THE PROGRESSIVE, Apr. 1956, at 12.

52. There was a young lady from Yale
Whose price was tattooed on her tail;
But from above and behind
For those who were blind
The same was emblazoned in Braille.
RODELL REVISITED: SELECTED WRITINGS OF FRED RODELL 260 (Loren Ghiglione et al. eds., 1994).

53. Including Victor Navasky, Philip Shrag, Jeff Greenfield, and Sidney Zion. *See* Margolick, *supra* note 40 (Margolick was also a class member). It was Zion who no doubt under Rodell's influence, complained that "[a]s character builders, law reviews rank a cut above high-class bordellos." Sidney Zion, *Burger's War*, VILLAGE VOICE, Feb. 4, 1980, at 39, 41 (reviewing BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN (1979)).

Goodbye to Law Reviews, which could be read as an in-house joke – perhaps a rebuke to snot-nosed student editors – but to direct traitorous criticism on institutional values in the popular press pushed the envelope over the edge. Instead of following the friendly advice of good friend and former colleague, William Douglas to "stay on and bore from within,"[54] Rodell opted to play the nasty gadfly and "chronic malcontent"[55] in the irresponsible public press. Harold Laski called him the "Walter Winchell of the law schools."[56] Ultimately exiled to an upper floor garret office, which "only a bloodhound could have found,"[57] he suffered the indignity of never getting a chair as colleagues "got calluses on their knees praying that he would drop dead."[58]

III. LAW AND ECONOMICS AS THE SOURCE OF THE LAW ACADEMY PUBLIC INTELLECTUAL

A. *The Stealth Factor*

The most consequential revision of legal scholarship came through the Law and Economics movement. Overcoming strong resistance from liberal traditionalism, the lingering influence of the Realists,[59] and reluctant courts, it became "the most important thing in legal education since the birth of Harvard Law School."[60] The catalyst for change came from Posner's *Economic Analysis of Law*,[61] which applied various economic principles – price, choice, and opportunity cost – to problems of resource distribution. The appointment of numerous law and economics academics to the federal bench assured a permanence that previous movements

54. RODELL REVISITED, *supra* note 52, at xviii.

55. *Id.* at xxx.

56. *Id.* at xxxv.

57. Margolick, *supra* note 40, at 24.

58. RODELL REVISITED, *supra* note 52, at xix.

59. *See* Robert Krulwich, *Eggs, Friends and Economics,* N.Y. TIMES, Oct. 23, 1988, § 7 (Book Review) at 47 (reviewing GEORGE J. STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST (1988)) (Rodell would have gone berserk over the use of trashy little equations that "place an equal value on eggs and friends.").

60. Paul Barrett, *A Movement Called "Law and Economics" Sways Legal Circles*, WALL ST. J., Aug. 4, 1986, at 1 (quoting Bruce A. Ackerman, Professor, Columbia University Law School).

61. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972) [hereinafter ECONOMIC ANALYSIS].

lacked.[62] What went unnoticed and unanticipated was that the movement would serve as a stealth vehicle for the entry of Public Intellectual dialogue into the law journals.

To the casual observer it looks like conventional linear doctrinal text – and it is. But the stealth factor is in the subject matter. As Posner decrees: "Economics is the science of human choice in a world in which resources are limited in relation to human wants . . . ."[63] For the Law and Economics type, this is a broad directive that includes topics such as sex, virginity, and the deregulation of adoption.[64] What followed was the publication in the mainstream law reviews by supporters and opponents of a wide-ranging Public Intellectual discourse over law, politics, and the economy, amongst other subjects.

On a mission to gain a dominant voice in the Law Academy, the Law and Economics advocates adopted Nobel Prize winner George Stigler's strategy: maximize the market for your ideas by circulating wave after wave of scholarship to force the opposition into a defensive posture in which they re-circulate your arguments.[65] The strategy worked, spreading the Economics coalition throughout the academy as the law reviews shoved conventional doctrine aside to publish the latest application of economics to a new problem. The more problematical the issue, the more attention it received. As the leader of the movement, and "because he has an uncommon taste and talent for controversy"[66] Richard Posner is the main lightening rod for criticism – even inciting radical nontraditional adventures in legal scholarship.[67]

---

62. Deborah Graham, *Conservative Academics: Rising Stars*, LEGAL TIMES, Mar. 18, 1985, at 1 ("The Reagan administration's appointment of venerated conservative scholars to judgeships or administration posts has opened the way for other law school academicians to gain greater prominence and influence as intellectual gurus of both the administration and the New Right.").

63. ECONOMIC ANALYSIS, *supra* note 61, at 1.

64. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); RICHARD A. POSNER, SEX AND REASON (1992).

65. GEORGE STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 67 (1988) ("The new ideas will normally require much repetition, elaboration, and, desirably, controversy, for controversy is an attention getter and sometimes a thought getter.").

66. Gertrude Himmelfarb, *Judging Richard Posner*, COMMENTARY, Feb. 2002, at 37.

67. *See infra* Part III.B.

B. *As a Cover*

One of the more popular tactics is to use literature as the dramatic cover for critical advocacy. Robin West capitalized on this genre by using Franz Kafka's *The Hunger Artist* as a double for the "ultimate Posnerian entrepreneur"[68] who, by starving himself in public for money, "depicts a perfectly functioning Posnerian commercial market that leaves old preferences satiated at every moment of autonomous choice."[69] It was an ingenious play on Kafka's byzantine imagination to mock Posner's totalitarian economics that idealizes individualism while abhorring intervention.[70] What in Posner's world view is respect for individualism becomes, under West's use of *The Hunger Artist,* an expression of moral corruption.

The next adventure demonstrated Law and Economics' power to erode doctrinal *style* as well as substance. The linear style, dating back to the scientific realism of Langdell's casebook method and institutionalized by the *Harvard Law Review*, was the remaining tradition of legal scholarship.[71] Using the ubiquitous Franz Kafka's short story *The Metamorphosis* as the guiding script, Professor D'Amato morphs a law professor into a thousand-legged cockroach[72] who, confined to his room, must haggle with his sister for necessities.[73] The professor/cockroach copes by resorting to basic Posnerian economics: he daily calculates the opportunity costs of staying in bed and losing working time (money), barters schol-

68. Robin West, *Authority Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 393 (1985).

69. *Id.* at 394.

70. Posner's response: "It [*The Hunger Artist*] may be about many things. But only superficially is it about hunger, poverty, the pitfalls of entrepreneurship, and the fickleness of consumers." RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 180-81 (1988). None of the literary critics support West's interpretation. *See* Arthur Austin, *The Top Ten Politically Correct Law Review Articles*, 27 FLA. ST. U. L. REV. 233, 262 n.217 (1999).

71. Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews,* 36 HASTINGS L.J. 739 (1985).

72. In the Kafka story "he is a divided creature, split, a halfway creature, something that oscillates between animal and man, that could become completely animal or return to being man and does not have the strength for a complete metamorphosis." PIETRO CITATI, KAFKA 64 (1989).

73. Anthony D'Amato, *As Gregor Samas Awoke One Morning from Uneasy Dreams He Found Himself Transformed into an Economic Analyst of Law*, 83 NW. U. L. REV. 1012 (1989).

arly treatises with his sister for food (he developed an assembly line method by substituting a new topic without changing a word), while trying to educate his mother on utility by reference to supply and demand curves (who unsympathetically says: "But that isn't a curve. It's two straight lines like an X.")[74] After unmasking the professor/cockroach as Posner, D'Amato concludes that it is "all just so much authoritarian *bullshit* . . . ."[75]

IV. THE RICOCHET EFFECT

A. *Lasson's Update of Rodell*

In 1990, Ken Lasson, a professor at Baltimore Law School, updated Fred Rodell's criticisms by noting the consequences of two new factors: one, the ascendancy of a publish or perish requirement was forcing a deluge of manuscripts on the student-run law reviews and, two, the deluge was mostly slop; "a gargantuan soufflé of airy irrelevance."[76] Since Lasson wrote his piece the problem has been exacerbated by the appearance of more – and more – student-operated journals, assuring the continuation of a steady diet of scholarship soufflé, radical babble, and high school journalism.[77]

There was another lesson in the Professor's article: by the 1990s the law journal system constituted a vehicle for the delivery of whatever the professoriate wanted to say. From the *Harvard Law Review*, which, after publishing Lasson's article, introduced the "F" and "C" words,[78] to the *Wisconsin Women's Law Journal* where Robin West discussed her promiscuity,[79] every law professor was assured of getting his or her whimsies, pain or indignations, in print. However, at least one professor has observed, "I am not sure that we have reached the point where you could jot something down on a cocktail napkin and get it published . . . ."[80] There was a

74. *Id.* at 1013.

75. Anthony D'Amato, *Gregor Samas Replies*, 83 NW. U. L. REV. 1022, 1025 (1989).

76. Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 927 (1990).

77. AUSTIN, *supra* note 38, at 75-77.

78. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1072 (1992).

79. Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

80. Charles Rothfeld, *A Lament: Too Few Interesting Law Articles*, N.Y. TIMES, Nov. 23, 1990, at B23 (quoting John Nowak, Professor, Illinois Law School).

more significant trend; the law reviews, especially the top tier "elite" journals, became a sounding board for "push the envelope theories,"[81] advocacy, and fun. In the process they become conduits for getting notice – and currency – in the popular media.[82] In other words, a ricochet effect: from law review to mainstream media. Lasson's article proves the point; the *Washington Post*[83] and *New York Times*[84] gave his career a boost with positive profiles, paving the way for a Public Intellectual career had he wanted to commit.

"Eleven years ago, a man held an ice pick to my throat and said: 'Push over, shut up, or I'll kill you.' I did what he said, but I couldn't stop crying. A hundred years later, I jumped out of the car as he drove away."[85] This could have been a police report or the beginning of a tell-all memoir. Rather, it was the first sentence in Susan Estrich's *Yale Law Journal* article *Rape*. The violence of the encounter forced the reader to confront the author's personal experience of coping with a criminal justice system that lets its rape victims fall through the cracks into the unpardonable contradiction: "If it isn't my fault, why am I supposed to be ashamed?"[86]

Yale's flexible non-doctrinal law review attitude gave Estrich the discretion to set up – to "pose" – her critical judgments in a manner unacceptable under the protocols of "serious" scholarly journals. It is the best of two worlds – stark and brutal drama leading the reader into standard analytical evaluation. Estrich exercised the instincts of the Public Intellectual by converting the article into a book,[87] building her public persona (syndicated col-

81. Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1904 (1988) ("Contemporary legal scholars are now generally aware that their work consists of recommendations addressed to legal decision-makers, recommendations that are ultimately derived from value judgments rather than objective truth.").

82. This fact tends to push doctrinal work to lower-ranked law reviews. "What does seem clear is that doctrinal scholarship has been moving from the leading law schools to the law schools of the second and third tiers." Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1654-55 (1993).

83. Paul W. Valentine, *Md. Professor Fires Darts at Stuffy Law Reviews; Harvard Runs Critique of Legal 'Manure,'* WASH. POST, Apr. 10, 1990, at B3.

84. *See* Rothfeld, *supra* note 80.

85. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1087 (1986).

86. *Id.* at 1089.

87. SUSAN ESTRICH, REAL RAPE (1986).

umnist, radio talk show host, political advisor, and law professor)[88] to make Posner's Top 100 List – at 57th she was one above Susan Sontag: a classic ricochet success story.

B. *The Instant Public Intellectual*

The Public Intellectual produces dialogue on subjects of interest to the general public. Academics have to negotiate the narrow gates of peer-supervised journals – except for law professors who communicate through student-edited[89] journals that consciously publish material that does not address the problems of its primary constituency of lawyers and judges.[90] Problem-solving is eschewed in favor of producing work that resonates, transforms, and politicizes.[91] It is a selection policy that accounts for the instant Public Intellectual.

When the *Duke Law Journal* published Professor Madeline Morris's sociological study of rape in the military, she instantly became a nationally recognized voice on the feminization of the armed forces.[92] To explain a finding that in certain situations military rape incidents exceeded civilian rapes,[93] Morris identified cul-

---

88. *See* SUSAN ESTRICH, SEX AND POWER (2000); SUSAN ESTRICH, MAKING THE CASE FOR YOURSELF: A DIET BOOK FOR SMART WOMEN (1998).

89. While generally ignoring this problem, many faculty nevertheless agree that "student edited journals are the scandal of legal publishing . . . ." Patricia Bellew Gray, *Harvard's Faculty Stirs a Tempest With Plans for New Law Journal*, WALL ST. J., May 28, 1986, at 37.

90. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992) ("Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it."); *see also* Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 688 (1998) (demonstrating "that modern legal scholarship is losing touch with the practice of law").

91. David Barnhizer, *Freedom to Do What? Institutional Neutrality, Academic Freedom, and Academic Responsibility*, 43 J. LEGAL EDUC. 346, 354 (1993) ("The revolution in legal scholarship has not been coherent or always substantive as much as it has been political. Many law faculty are pursuing personal intellectual and political agendas beneath the umbrella of legal scholarship. In the process, intellectual curiosity and vision have often been subordinated to desired consequence.").

92. *See* Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651 (1996).

93. *Id.* at 653 (noting that "the ratio of military rape rates to civilian rape rates is substantially larger than the ratio of military rates to civilan rates of other violent crime").

tural conditions evoking and exulting masculinity as the causative source.[94] Her solution: immerse the military with the moderating effects of the female presence (including combat), eliminate the "kill the enemy" masculinist attitude, and instill "idealism and moral conviction of a shared cause."[95]

Morris's article on a new policy of cultural change for combat ignited a firefight between old line militarists, feminists, conservatives, and liberals, over the role of women in the future of the military.[96] Instead of advocating a new set of laws, Morris resonated to the public by seeking to transform the military tradition with a completely new culture. She got what every Public Intellectual relishes – attention and criticism. And she likewise got recognition as a player;[97] another ricochet success.

C. *Cross-Elasticity of Demand*

The economist views the relationship between doctrinal scholarship and Public Intellectual dialogue as an exercise in supply and demand dictated by cross-elasticity of demand.[98] As dissimilar products, a drop in the supply of legal scholarship will not affect the demand for the Public Intellectual work. Twenty years ago people who read the *Atlantic Monthly* would not gravitate to the *Harvard Law Review* if the *Atlantic* ceased publication. But in today's market, the economist would have to factor in the possibility of competition between nontraditional legal scholarship and Public Intellectual media. As proof of a growing cross-elasticity of de-

---

94. *Id.* at 701-02 ("In essence, normative standards of masculinity that emphasize aggressiveness, dominance, and independence, and that minimize sensitivity, gentleness, and other stereotypically feminine characteristics have been found to be associated with heightened propensity to commit rape.").

95. *Id.* at 753 (noting that the military should emulate "religious orders, Communist Party cells, the French resistance underground, and even Alcoholics Anonymous").

96. Hanna Rosin observed that "the military is not a faculty lounge" while wondering how the "U.S. Army [wound] up in bra-burning territory." Hanna Rosin, *Sleeping with the Enemy*, NEW REPUBLIC, June 23, 1997, at 20.

97. Morris was appointed consultant on gender issues to Togo West, Jr., Army Secretary, to which a critic said: "The entire article might be dismissed as inconsequential as well as fatuous, except that her ideological theories might become official policy through Secretary West . . . ." Elaine Donnelly, *Social Fiction in the Ungendered Military*, WASH. TIMES, Apr. 7, 1997, at A16.

98. *See* ECONOMIC ANALYSIS, *supra* note 61, at 121-24.

mand between the two markets the economist should consider the odyssey of Paul Butler's *Racially Based Jury Nullification.*[99]

Successful Public Intellectuals seize opportunity. After a series of controversial verdicts involving people such as Bernhard Goetz, William Kennedy Smith, Lorena Bobbitt, Rodney King, the Menendez brothers, and O.J. Simpson[100] – Paul Butler, a professor at the George Washington University Law School, seized on jury nullification to argue that "it is the moral responsibility of black jurors to emancipate some guilty black outlaws."[101] Assuming the adverse effects of a white-controlled capitalistic market system that compels young black men into crime and incarceration, nullification is the rational form of self-help that can temper justice with reality.[102]

One of the instant celebrity talking heads, Greta Van Susteren, said that Butler's proposal would lead to "anarchy,"[103] while a *New York Times* editorial called his arguments "troubling" and went on to comment that "[t]he criminal justice system is certainly imperfect, but this sort of wrecking is not the way to fix it."[104] Professor Randall Kennedy of Harvard Law School wrote that Butler

---

99. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

100. *See generally* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE (1994) (arguing for the abandonment of excuses and the reinstatement of personal accountability); SUSAN ESTRICH, GETTING AWAY WITH MURDER (1988) (discussing how politics is destroying the criminal justice system). These trials produced a media circus of lawyer-commentators who, according to the president of the American Bar Association "pimp their dubious talents and hustle the public." Gail D. Cox, *Bushnell: O.J. Commentators Are '$2 Hookers,'* NAT'L L.J., June 12, 1995, at A4.

101. Butler, *supra* note 99, at 679.

102. *Id.* at 693-94. Butler comments:

> Some property crimes committed by blacks may be understood as an inevitable result of the tension between the dominant societal message equating possession of material resources with success and happiness and the power of white supremacy to prevent most African-Americans from acquiring enough of those resources in a legal manner.

Id. Given economic inequalities, Butler "encourages" nullification of theft from the "very wealthy." *Id.* at 722.

103. *Burden of Proof with Greta Van Susteren* (CNN television broadcast, Jan. 15, 1996) (Transcript No. 76 on file with author).

104. *When the Jurors Ignore the Law*, Editorial, N.Y. TIMES, May 27, 1997, at A16.

"gives voice to erroneous claims, dubious calculations, and destructive sentiments."[105]

Like Estrich, Butler got maximum ricochet publication effects from the Yale piece on the way to achieving Public Intellectual status. He appeared on *60 Minutes*, jousted with the panel on Jesse Jackson's *Equal Time* and with the pugnacious host on *Geraldo,* in addition to attracting extensive newspaper coverage. According to his faculty profile he writes a monthly column for the *Legal Times* (Washington, D.C.) and is a frequent commentator on CNN and National Public Radio.[106] Perhaps most significantly, Butler demonstrated a positive level of cross-elasticity of demand between legal scholarship and Public Intellectual media by abridging his Yale article for publication in *Harper's Magazine*.[107] It was an easy transition; eliminate the footnotes and tighten the syntax to compel the audience to give it a serious reading. The unintended consequence was that Butler used the *Yale Law Journal* to undermine doctrinalism with the counterpunching subjective style of the Public Intellectual. In replying to critics Butler describes the context of his strategy:

> In the Christian faith tradition of many African Americans, preachers sometimes describe an epistemology of "knowing what you know." Knowing what you know refers to those beliefs, often emotional, that are at the core of one's being and that precede or subvert education and other formal ways of knowing . . . . Knowing what you know gives law review editors headaches because it does not lend itself to formal citation.[108]

V. THE OUTSIDER MOVEMENT

A. *Origins*

The most far reaching spike for the Public Intellectual movement in the Law Academy came from the Outsider collaboration of

---

105. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 299 (1997). For a more extensive criticism, see Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109 (1996).

106. *See* faculty profile of Paul Butler, *at* http://www.law.gwu.edu/fac/profile.asp?ID=1723 (last visited Feb. 12, 2003).

107. Paul Butler, *Black Jurors: Right to Acquit?,* HARPER'S MAG., Dec. 1995, at 11.

108. Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 143-44 (1996).

feminists and minorities. As participants in the on-going general advocacy, feminists saturated both journals and mass print with criticism of white male oppression in legal education, often focusing on the Socratic Method.[109] Their role in introducing the feminist translation of Postmodernism to legal education received certification in the 1988 Symposium, *Women in Legal Education*[110] endorsing "Feminist models which depend on teaching for empowerment . . . and sharing experiences, rather than by attack . . . ."[111] For feminism it was a major gesture, for Postmodernism it was a crack in the door. While feminists continued to speak in a linear voice in the law journals to genderize a Public Intellectual dialogue,[112] other Outsiders were exercising a strategy to subvert

---

109. Emily M. Bernstein, *Law School Women Question the Teaching*, N.Y. TIMES, June 5, 1996, at B10; *see* Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994). *See generally* Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1 (1998) (discussing findings from an observational study of law school teaching methods).

> So the answer to the question whether women and men, or students of different race or class backgrounds, are the "same" or "different" appears to be yes: they are the same in some respects and different in others – and, indeed, some of them are under given circumstances more the same or different than others.

Id. at 86.

110. Symposium, *Women in Legal Education – Pedagogy, Law, Theory and Practice*, 38 J. LEGAL EDUC. 1 (1988).

111. Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61, 81 (1988).

112. Cynthia Bowman's *Street Harassment and the Informal Ghettoization of Women*, 106 HARV L. REV. 517 (1993), exemplifies this genre. Bowman proposed fining "street harassers" $250, *id.* at 541, and to give "the target[s] of harassment," *id.* at 568, a private cause of action including punitive damages. *Id.* at 575-76. Calculated to attract attention, it did so with comments like "staring at a stranger is a well-established cultural taboo." *Id.* at 526. It produced a furor. *See, e.g.*, Joan Beck, *"Street Harassment" is Offensive, but Should it Be a Crime?*, CHI. TRIB., Mar. 11, 1993, Perspective, at 23 ("Maybe the foolish fringes of the political correctness movement have overloaded our mental circuits."); Nina Burleigh, *Tar, Feather Men Who Harass Women on Street,* TORONTO STAR, Apr. 10, 1993, at F1 ("For the guys who harass and humiliate women, there's an old response to misdemeanors: public humiliation. A few days in the stocks, being gawked at or squirming in tar and feathers while we laugh, would be rehabilitative."); Peter Calamai, *Freedom of Expression Is Always in a Perilous State*, CALGARY HERALD, Apr. 5, 1993, at A5 ("And even the worst male chauvinist would not wish a daughter, sister or wife subjected to the sort of public sexual taunts that reduce women to a piece of meat. Yet should we send people to jail – people too poor to pay a fine – for saying something that is neither overtly obscene ("Hi, gorgeous?") nor (as Bowman concedes)

what they viewed as an oppressive, exclusionary-dominant Law Academy.

The mainstream media recognized the work of Black Public Intellectuals in 1995 when the *Atlantic Monthly* compared them to the New York intellectuals of the 1930s-40s – the *Partisan Review* crowd.[113] They differ from the *Partisan* crowd in two ways; they are obsessed with race rather than socialism, and they use their university connections to "extend their influence beyond the academy."[114] Included among the list of newly-anointed was a cluster of law professors: Stephen Carter of Yale, Randall Kennedy of Harvard, Lani Guinier of Harvard, Patricia Williams of Columbia, and Derrick Bell of New York University (retired).

All five were, and continue to be, fully accredited under Posner's criteria; they use mass circulation media to address current issues to a general audience. They are succinct, "opinionated, judgmental, sometimes condescending, and often waspish."[115] For those expecting a unified Black agenda, forget about it – they offer puzzlement and discountenance. The fluster comes from a lively debate between Universalists and Authenticists.[116] The former, reflecting the views of Carter and Kennedy tend to blend reliance on the analytical, critical, and objectivity ideals of the University

---

intended to injure?"); *A Move to Protect Women from 'Street Harassment,'* N.Y. TIMES, July 2, 1993, at D19 ("Some consider it playful banter, even a form of flirtation. But to a growing number of women, there is nothing playful about sexual comments, catcalls and whistles from strangers on the street.").

113. *See* Robert S. Boynton, *The New Intellectuals*, ATLANTIC MONTHLY, Mar. 1995, at 53; Michael Hanchard, *Intellectual Pursuit*, THE NATION, Feb. 19, 1996, at 22.

114. Boynton, *supra* note 113, at 56; *see also* Bryon P. White & Ron Grossman, *Black Intelligentsia Invisible No More; African-American Scholars Are the New Media Darlings*, CHI. TRIB., Nov. 25, 1995, at 1 (discussing the interjection of black thinkers such as Lani Guiner, Stephen Carter, and Cornel West in the popular media).

115. PUBLIC INTELLECTUALS, *supra* note 2, at 35.

116. Boynton, *supra* note 113, at 56 ("Surprisingly, given their newfound prominence, a number of contemporary black thinkers who aspire to be public intellectuals find themselves in a genuine quandary. Having distinguished themselves by their analysis of racial subjects, they must now widen their scope and address broader political questions; having received accolades as academic specialists, they must now address a general audience. Secure in their place at the center of mainstream intellectual culture, they must now endure the criticisms of those who accuse them of having shed their 'authentic' minority identification and of selling out. Today's African-American public intellectuals are juggling a dizzying number of often conflicting identities and allegiances.").

culture with the shared Black ethos to seek a cross cultural dialogue. As Authenticists, Bell, Williams, and Guinier, project the presence of a unique Black experience that endows Black scholars with the exclusive right to relate important stories – "stories that cannot be sincerely told by their privileged majoritarian peers."[117]

As newcomers to legal education the Authenticists were forced to deal with a law review orthodoxy that sought to coerce them with an "either-or" option: either write on a conventional topic in doctrinal style – or hit the bricks.[118] This meant publishing in an Outsider "alternative journal" – and damage tenure chances or do what most did – play the Insider game, get tenure, and then raise hell.[119] Recognizing that they were being squeezed to the periphery and were denied the opportunity to become a valid presence in the dominant discourse, the Outsiders decided to shell shock the Law Academy with stories by people with privileged access to their culture, race, and gender.

It was Derrick Bell who surmised that capitulation to the dominant authoritarian doctrinal discourse would be fatal to the Outsider presence. "When it was over and I was walking back to my office, my only thought was: what the hell is going on? Whatever it was, it was not a law review article."[120] That is my memory of the effect of Bell's reading to our faculty an advance copy of the *Civil Rights Chronicles*, a series of allegories that the *Harvard Law Re-*

---

117. Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2038 (1991).

118. Jon Wiener, *Law Profs Fight the Power: Minority Legal Scholars*, THE NATION, Sept. 4, 1998, at 248 ("The debate is about voice . . . about making everybody speak one language . . . . The whole idea of the dominant legal discourse is to limit the range of what you can express, the range of argument you can make.") (quoting Richard Delgado).

119. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561 (1984) ("When I began teaching law in the mid-1970's, I was told by a number of well-meaning senior colleagues to 'play things straight' in my scholarship—to establish a reputation as a scholar in some mainstream legal area and not get too caught up in civil rights or other 'ethnic' subjects. Being young, impressionable, and anxious to succeed, I took their advice to heart and, for the first six years of my career, produced a steady stream of articles, book reviews, and the like, impeccably traditional in substance and form. The dangers my friends warned me about were averted; the benefits accrued. Tenure securely in hand, I turned my attention to civil rights law and scholarship.").

120. AUSTIN, *supra* note 38, at 124-25.

view published as a preface to the 1985 Supreme Court edition.[121] I put the event aside as one of those inexplicable puzzles until several years later when I read that Derrick's next allegory blew up the entire Harvard Black faculty along with President Bok.[122] Bell, as co-author of a report on minority hiring, had substituted his own allegorical version of a mysterious explosion, forcing recognition of Harvard's hiring tokenism and a system that refused to accept the uniqueness of Black scholarship. When I next encountered Bell I knew his objective: the use of narrative allegory as the symbol of racial exclusion and to portray the role of Blacks as "scapegoats."[123] It was a subject that required a "broader perspective . . . that a traditional doctrinal discussion of cases"[124] lacked, requiring the use of narrative. "[Y]ou can use illustrations that are fantastical to illustrate, and I think illustrate more effectively, that which you believe is real but not much accepted."[125]

The "either-or" ostracism by the elite student journals ceased when the *Michigan Law Review* published a symposium on *Legal Storytelling*.[126] The justification for the radical change was couched in an ironical twist of the doctrinalists thirst for logic: how can you exclude narrative work without an objective comparison? "If the objectivists account is one point of view among many (and not point-of-viewers as against other point-of-view accounts), then one needs some other account explaining why it shall be privileged, if indeed it is to be."[127] Hence the logical conclusion: systematic exclusion – "either-or" – undermines credibility.

---

121. Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

122. *See Harvard Blacks Make Unusual Plea on Hiring*, N.Y. TIMES, Oct. 30, 1988, § 1 at 27. When asked about Bok's reaction to his allegory, Bell replied:

> Derek Bok was not pleased. So we went to meet with him. And he said, "What were you trying to do?" And I said: "We were trying to help you get this affirmative action thing up on the agenda for discussion." And he said: "Well, you don't have to blow me up." Kind of missed the whole point.

Arthur Austin, *Narrative Writing as Legal Scholarship: An Interview with Derrick Bell*, IN BRIEF, CASE W. RES. L. ALUMNI MAG., Sept. 1992, at 3, 6.

123. Austin, *supra* note 122, at 4.

124. *Id.* at 3.

125. *Id.* at 4.

126. Kim Lane Scheppele, *Forward: Telling Stories*, 87 MICH. L. REV. 2073 (1989).

127. *Id.* at 2091.

This was, however, the only concession to logic. A who's-who of narrative genre authors delivered variations on the privileged Insider "we" vs. the Outsider "they" as marginalized oppressed authors. Patricia Williams introduced the story of the sausage machine to demonstrate the "word-entanglements"[128] of the oppressive privileged language. Bell reprised his explosion allegory to flush out the intransigence of white supremacy.[129] Professor Matsuda used the experience of hate speech to explain the unique relevance of Outsider Jurisprudence.[130] Richard Delgado, whose letter provoked the symposium, summed up the Outsider's prevailing objective: "The stories of outgroups aim to subvert that ingroup reality."[131]

An aggressive rebuttal came from Stephen Carter and Randall Kennedy, the two Universalist law professors included in the *Atlantic Monthly's* list of Black elite Public Intellectuals.[132] After discounting the assumed intimidating and exclusionary effects of a "majoritarian perspective,"[133] Carter invoked the hard logic and neutrality of patentability as the proper reference for evaluation of legal scholarship. Neither methodology, dialect, or style, is relevant to the ultimate issue of ratifying merit under the decree that "the argument must be new, meaning that it has not been said before"[134] and that the work "increase human knowledge."[135] The ultimate question of whether, objectively, the work is distinctive is determined by the non-obviousness of the problem or the solution to the relevant community of scholars.

By taking head-on the racial identity scholarship movement, Professor Randall Kennedy energized the debate.[136] Challenging

---

128. Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2118, 2131 (1989).

129. *See* Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989).

130. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2326 (1989).

131. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989).

132. *See* Boynton, *supra* note 113 and accompanying text.

133. Stephen L. Carter, *Academic Tenure and "White-Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065, 2075 (1991).

134. *Id.* at 2085.

135. *Id.* at 2080.

136. Warned not to publish his criticism, Kennedy replied:

> Avoiding a public challenge to the racial critiques I have focused upon facilitates acceptance of theories and styles of thought that are seriously

Bell, Delgado, and Matsuda, Kennedy rejected their core assumption that the White culture, as hegemony of "Imperial Scholars," intentionally silences minority scholarship while denying the rightful entitlement of Black scholarship as presumptuously distinctive. Expecting the standard doctrinal arguments from the Outsiders derived from facts and analysis, Kennedy instead detected "poetic license,"[137] imagination rather than facts, "mere assertion"[138] and arguments "with little specificity,"[139] rather than serious logic chopping. On the relevance of the Insider-Outsider characterization, he said:

> Rather, the point is that distance or nearness to a given subject – "outsiderness" or "insiderness" – are simply social conditions; they provide opportunities that intellectuals are free to use or squander, but they do not in themselves determine the intellectual quality of scholarly productions – *that* depends on what a particular scholar makes of his or her materials, regardless of his or her social position.[140]

Kennedy and Carter persuasively flushed out the subjective and seemingly self-serving theories of the Outsiders, a thorough response rendered with cachet as the work of two Authenticist Black Public Intellectuals. At this point, the doctrinalist could reasonably assume that the issue was settled – logic trumps narrative. Given their subsequent behavior, they did make that assumption and it was a mistake. Within the decade of the 90s, the storytelling culture would, for a convoy of reasons, re-orient legal scholarship.

While the Insiders were confidently passive, the Outsiders, incensed over the perceived disloyalty of the Kennedy/Carter ambush, initiated their own blitzkrieg. Outsider literature, in the presence of stories and critical assessments, underscored by the crusade of Richard Delgado, became a familiar refrain in the jour-

---

> flawed, detrimental in effect, but nonetheless influential within important sectors of legal academia. In this case, keeping quiet is far more damaging than taking the risk that some of my ideas will be misappropriated.

Randall L. Kennedy, *Racial Critiques in Legal Academia*, 102 HARV. L. REV. 1745, 1812 (1989).

137. *Id.* at 1763.

138. *Id.* at 1765.

139. *Id.* at 1775.

140. *Id.* at 1795.

nals. As a chorus, the Voice movement[141] adopted Public Intellectual techniques to attest to the growing audience of young Tenured Radical faculty.[142] Most importantly, the Outsider culture meshed with and reinforced Postmodernism as it infiltrated the Law Academy.

B. *Telling Stories to Subvert Ingroup Reality and "Reallocate Power"*

The Outsiders succeeded. While not with a deluge, the volume in numbers, defiance, and political instinct, was sufficient to signal the demise of the doctrinal stranglehold. When the *Duke Law Journal* published an autobiographical narrative entitled *A Hair Piece: Perspectives on the Intersection of Race and Gender*,[143] the window was cracked for the scholarship of emotion and self. Narrative was universalized: *everything* is a story and "[j]udges, as storyteller, tell their audience that something happened."[144] Thus, readers are entitled to their own deconstructed interpretation.[145] As David Lodge's fictional Morris Zapp said; "It's kind of exciting – the last intellectual thrill left. Like sawing through the branch you're sitting on."[146]

Professor Richard Epstein argued that the "new voices" of law narrative contributed "nothing to the debate" other than the "constant, repetitive assertion of their own relevance."[147] He was cor-

---

141. Voice movement refers to a presumption of black exclusivity to relate the black experience. *See* Johnson, *supra* note 117; AUSTIN, *supra* note 38, at 116-19.

142. The term "Tenured Radical" is attributed to Roger Kimball in his book TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION (1990). For a description of the Law Tenured Radical, see John Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 406-07 (1984) ("Almost all of the principals of the group came to maturity during the late sixties or early seventies. Most began teaching during these years as well, often after a stint in legal services or some other reform-oriented post, as well as participation in the antiwar movement. And while dreams of reform faded, the common politics did not; indeed, many of the principals often moved farther left in an attempt to explain what had gone wrong with earlier great hopes.").

143. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991).

144. Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 386 (1989).

145. *Id.* at 400 ("[R]eadings of judicial narratives always diverge as readers' individual imaginations push them to their own meanings.").

146. DAVID LODGE, SMALL WORLD—AN ACADEMIC ROMANCE 118 (1984).

147. Richard A. Epstein, *Legal Education and the Politics of Exclusion,* 45 STAN. L. REV. 1607, 1626 (1993). He added: "Even on the issues most relevant to

rect, but what he missed was that it was an intentional strategy. In the highly charged aftermath of the Kennedy/Carter fusillade, the Outsider community produced an extensive range of "assertions" whose objective was to interpret "relevance" as evoking a significant race and gender cultural divide issue.[148] The strategy ignited a "public controversy,"[149] cutting across multiple interest groups and generating an open invitation to a Public Intellectual dialogue.

The relevance of the Voice assertion was its use to subvert doctrinalism's Tyranny of Objectivity.[150] For example, when Milner Ball wrote that the storyteller's objective is to "nudge the language of law toward art,"[151] he was proselytizing the subjectivity of the reader response process adopted by Kathryn Abrams, a Voice colleague who posited the ukase that readers, as deconstructionists, "must teach themselves to discern the unifying threads of nonlinear argument . . . ."[152]

As doctrinalist advocates bemoaned the absence of a guiding methodology,[153] reason and analysis,[154] the Outsiders turned up the volume of the Authenticity assertions. Authenticity refers to

---

their own concerns, they lack the basic conceptual apparatus necessary for understanding." *Id.*

148. *See, e.g.*, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992); Johnson, *supra* note 117; Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992); Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39 (1991); Shauna Van Praagh, *Stories in Law School: An Essay on Language, Participation, and the Power of Legal Education*, 2 COLUM. J. GENDER & L. 111 (1992).

149. PUBLIC INTELLECTUALS, *supra* note 2, at 11.

150. *See* Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1376 (1986).

151. Ball, *supra* note 148, at 1862.

152. Abrams, *supra* note 148, at 1042.

153. Edward L. Rubin, *On Beyond Truth; A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 955-56 (1992) ("Explicit recognition of these experiences in legal scholarship, the willingness to speak in an individual, rather than a depersonalized, objective voice, could conceivably evolve into a separate method. But method, as discussed above, consists of an interlinked set of consciously articulated procedures that generates research. To date, narrative has not developed to this point; it functions as a specific technique for the presentation of substantive views, not as a comprehensive system that generates its own scholarly approach. It is not, for example, equivalent to the deconstructive arguments that character-

what Gates calls a "literary tradition . . . that ethnic or national identity finds unique expression in literary forms."[155] In other words, readers can read a book and intuitively discern the author's race or gender. Gates' article, in which he rejects the authenticity assertion,[156] confirms its status as a public controversy resonating in history[157] and sociology,[158] but most contentiously in race and gender. For women, Carol Gilligan asserts the natural and exclusive female voice of empathy and nurturing,[159] enabling them to exploit their unique intuitive experiences in scholarship.[160] In an early challenge to the law's dominant white male culture, Martha Minow said: "Feminist work has thus named the power of naming

---

ize critical legal scholarship or to the microeconomic analysis of the Chicago School.").

154. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School; An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 854 (1993) ("A legal story without analysis is much like a judicial opinion with 'Findings of Fact' but no 'Conclusions of Law.'").

155. Henry Louis Gates, Jr., *'Authenticity,' or the Lesson of Little Tree*, N.Y. TIMES, Nov. 24, 1991 § 7 (Book Review), at 26.

156. *Id.* at 30 ("No human culture is inaccessible to someone who makes the effort to understand, to learn, to inhabit another world.").

157. *See* Theodore S. Hamerow, Point of View, *Disturbing Echoes of Old Arguments About Ethnic Experience,* CHRON. OF HIGHER EDUC. Aug. 4, 1993, at A36 (In history the parallel is the doctrine of collective experience which assumes that race, sex, religion, or ethnic background endows the members of that group "with unique insights or perceptions denied to those outside the group.").

158. Robert K. Merton, *Insiders and Outsiders: A Chapter in the Sociology of Knowledge*, 78 AM. J. SOC. 9, 28 (1972) ("Important as such allowance for individual variability is for general structural theory, it has particular significance for a sociological perspective on the life of the mind and the advancement of science and learning. For it is precisely the individual differences among scientists and scholars that are often central to the development of the discipline. They often involve the differences between good scholarship and bad; between imaginative contributions to science and pedestrian ones; between the consequential ideas and stillborn ones. In arguing for the monopolistic access to knowledge, Insider doctrine can make no provision for individual variability that extends beyond the boundaries of the ingroup which alone can develop sound and fruitful ideas.").

159. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); *see also* Joan M. Shaughnessy, *Gilligan's Travels*, 7 LAW & INEQ. 1, 3-5 (1988) (describing Carol Gilligan's differentiation between male and female morality). For an update on the adverse reactions to Gilligan's work, see Emily Eakin, *Listening for the Voices of Women*, N.Y. TIMES, Mar. 30, 2002, at B9; Emily Nussbaum, *Ms. Lonelyhearts*, N.Y. TIMES, June 30, 2002, § 7 (Book Review), at 14; Margaret Taylor, *Teen Angels*, NEW REPUBLIC, July 22, 2002, at 34.

160. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

and has challenged both the use of male measures and the assumption that women fail by them."[161] Professor Matsuda identified a "new epistemological source for critical scholars," their experiences, culture, and history.[162] She was referring primarily to the lingering effects of slavery, which imbues Outsider scholarship with a distinctive passion and insight, deserving of a presumption of expertise.[163] Hence, the ongoing vitality and resonance of the Public Intellectual controversy over the legitimacy of authenticity and the capacity of writers to function as "cultural impersonators."[164]

C. *Authenticity as a Public Intellectual Theme*

> *[R]acism is an integral, permanent, and indestructible component of this society.*
>
> —*Derrick Bell*[165]

> *To speak as black, female, and commercial lawyer has rendered me simultaneously universal, trendy, and marginal.*
>
> —*Patricia J. Williams*[166]

> *Yet recall the title of this volume: The Coming Race War? The only question is whether to keep the question mark.*
>
> —*Richard Delgado*[167]

These quotes symbolize the collective motif that synchronizes the distinctive perspective of the Outsider as Public Intellectual *qua* Authenticist. They filter assertions, frustrations, harangue, and emotions through "storytelling" to educate and transform. Their technique produces work that is virtually critic-proof. To challenge an "agony experience,"[168] for example, the critic would

---

161. Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 61 (1987).

162. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987).

163. Delgado, *supra* note 119, at 561 n.15.

164. Gates, *supra* note 155, at 29 ("The distasteful truth will out: like it or not, all writers are 'cultural impersonators.'").

165. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL ix (1992).

166. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 6-7 (1991).

167. RICHARD DELGADO, THE COMING RACE WAR? xviii (1996).

168. *See* Abrams, *supra* note 148, at 1021 ("In agony narratives the author reveals a painful experience – often one whose exposure is interdicted by social taboos – in order to challenge the unapprehended harm inflicted by a practice or rule.").

be compelled to write a counter-story,[169] which if done by an Insider, would be suspect.[170] The totality of the Outsider storytelling vision, and their style of implementation, does not concur with Posner's narrow script of the Public Intellectual as rhetorician patiently using the written word to gather an audience. Instead, Bell, Williams, and Delgado, have retooled Public Intellectual techniques to change the course of legal scholarship. Their individual tactics vary, but each has had pervasive impact on the entrenched status quo of doctrinalism.

Everything Bell does is designed to agitate the Authoritarians; "making it difficult for them to respond and adjudge what is acceptable."[171] He connects the implications of his parables to his audience through confrontation; the fictional memo allegory to President Bok became a "real" story,[172] he resigned as dean of Oregon Law School over the faculty's failure to hire an Asian,[173] participated in various sit-ins at Harvard, finally going into an exile without pay over the law school's failure to hire female faculty.[174] The net effect was the creation of a form of legal storytelling Performance Art in which "fiction, personal experience, and the stories of people on the bottom illustrates how race and racism continue to dominate our society."[175]

---

169. "How can you respond critically? Tell a different story of your own?" David Sexton, *Radio Review; Should We Be Blind or Not, Prof?*, LONDON DAILY TELEGRAPH, Mar. 2, 1997, at 31.

170. *See* Delgado, *supra* note 119, at 561 n.15. Johnson sees another problem:

> Indeed, I contend that white males do not employ the narrative, storytelling style because to do so would result in their talking about their dominance and that currently is not socially acceptable discourse. Also, to emphasize their dominance and dominant position would demonstrate the fact that the meritocracy they believe in is not really a true meritocracy, but rather a system providing them with built-in advantages.

Johnson, *supra* note 117, at 2047 n.170.

171. BELL, *supra* note 165, at 143.

172. *Id.* at 125.

173. *See* Stephanie B. Goldberg, *Who's Afraid of Derrick Bell? A Conversation on Harvard, Storytelling and the Meaning of Color*, A.B.A. J., Sept. 1992, at 56.

174. When Bell exceeded the two-year absence limitation by not returning in protest of what he called a poor minority record, Harvard terminated his contract. *See* Fox Butterfield, *Professor Steps up Fight with Harvard*, N.Y. TIMES, Feb. 28, 1992, at A12; Ken Emerson, *When Legal Titans Clash*, N.Y. TIMES, Apr. 22, 1990, § 6 (Magazine), at 26 (describing the deceiving appearance of civility at Harvard Law School); Mary Jordan, *Black Harvard Law Professor Files Discrimination Complaint Against School*, WASH. POST. Mar. 3, 1992, at A15.

175. BELL, *supra* note 165, at 144.

Patricia Williams is the perfect balance to Bell's allegorical activism. She is metaphysical while he bludgeons with fire and brimstone sermons. She specializes in introspection, he prefers crisis. Above all, Williams is a storyteller *qua* storyteller, a master of apocalyptic metaphor, a *New Yorker* magazine contributor,[176] and the author of the cultish *The Alchemy of Race and Rights,* which Gates praises for "crisscross[ing] so many boundaries that you forget where they used to be."[177] Of her narrative ability, Professor Culp says: "Professor Williams requires us to see the world through her eyes; her words will not permit us the freedom to ignore her reality."[178]

The Williams career story does not follow the path of the stereotypical academic who establishes status within a discipline by specialized publication before moving on to dabble in a second, less demanding, career.[179] Williams is close to Posner's "independent" Public Intellectual, an intellectual without an academic affiliation who seeks to influence a general audience.[180] On the "academic" side of her publication ledger is a single *Harvard Law Review* article discussing a Supreme Court decision involving diversity programming in broadcasting.[181] On the other side of the ledger are her law review narratives, op-ed pieces, plus three books[182] – all

176. *See* Patricia J. Williams, *My Best White Friend*, THE NEW YORKER, Feb. 26 & Mar. 4, 1996, at 94.

177. Henry Louis Gates, Jr., *Contract Killer*, THE NATION, June 10, 1991, at 766 (reviewing PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991)).

178. Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy,* 77 VA. L. REV. 539, 545 (1991). For a negative view, see Jean Bethke Elshtain, *Alchemy and the Law: Why this Marriage Can't be Saved,* 25 U.C. DAVIS L. REV. 1171 (1992).

179. *See* Delgado, *supra* note 119, at 561.

180. PUBLIC INTELLECTUALS, *supra* note 2, at 27 ("You wrote for some more general, less expert audience than an audience of academic specialists . . . .").

181. Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC; Regrouping in a Singular Time,* 104 HARV. L. REV. 525 (1990). Her style is uniquely Williams:

> What is also troubling about this tendency is precisely the tendency to universalize individualism. In eliding singular and plural to create an abstract *Uber-market-mensch*, we diminish the notion of collectivity as a collection of various overlapping others in favor of a collective *self*—again, a plural singularity—that is both condensed yet general, multiple yet monolithic, self-contained yet presumed representative.

Id. at 531.

182. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991); PATRICIA J. WILLIAMS, THE ROOSTER'S EGG (1995); PATRICIA J. WILLIAMS, SEEING A COLOR BLIND FUTURE: THE PARADOX OF RACE (1999).

written in Orwellian tradition; "What he had mattered more from the standpoint of writing for the general public about politics; the ability to see what was before his eyes and to describe what he saw in unforgettably vivid prose."[183] As a narrativist, Williams seized the supportive terrain of the Law Academy to conduct a Public Intellectual campaign to proselytize her tradecraft. The Authenticist tradecraft transcends law, sociology, feminist studies, and the humanities, among others.

Richard Delgado worked his way into the Public Intellectual market by following his own advice; he published bread and butter doctrinal articles, taught core courses, received tenure and then, went on with his career.[184] What separates Delgado's career from that of Bell and Williams is the degree of academic "affiliation." While the latter two opted to exploit a wide non-Law Academy audience, Delgado maintained a close affiliation with law and is, as a scholar and widely circulating visiting scholar, the most influential "in-house" Outsider.[185] It was his prowess as a narrativist that gave storytelling its identity in the law journals.[186] From 1992 to 1999 he peppered the academy with sixteen *Rodrigo Chronicles* – narrative exchanges between the young and cynical yet perceptive Rodrigo, and his Bell-like mentor – all appearing in the elite journals.[187] Rodrigo indoctrinated the student editors with the insou-

---

183. PUBLIC INTELLECTUALS, *supra* note 2, at 73.

184. *See id.* at 35.

185. I confess a bias. Delgado and his wife, Jean Stefanic, served as general editors for CRITICAL AMERICA, a series of books on "the intersections of race, politics, sexual identity, and cultural studies . . . founded in critical thought and theory" published by N.Y.U. Press. *See* Press Release, New York University Press, Announcing a New Series . . . CRITICAL AMERICA (1995) (on file with author). He invited me as a conservative critic to participate, which I did (*see supra* note 38). It was a rewarding experience.

186. Delgado is a relentlessly prolific scholar; during the years 1988-92 he was the most productive author in the ten and twenty most cited law reviews. James Lindgren & Daniel Seltzer, *The Most Prolific Law Professors and Faculties*, 71 CHI. KENT L. REV. 781, 807 (1996).

187. Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (book review); Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993); Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Strategy of Race*, 81 CAL. L. REV. 387 (1993) (book review); Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) (book review); Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993); Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV.

ciant pithyism that was part of the new Postmodernism. Hence, in a post-colonial snit, he blames the European civilization for developing linear thinking, which permitted the rascals to conquer, enslave, and exterminate, any culture that stood in the way.[188] In his most perceptive tirade he went after the Saxons who "developed the hundred-page linear, densely footnoted, impeccably crafted article – saying, in most cases, very little."[189]

VI. THE NEW PUBLIC INTELLECTUAL PARADIGM

A. *Fred Rodell Returns: To a More Congenial Milieu?*

> This business of drawing historical analogies, whether by way of explaining the past or predicting the future, is always rather an exercise in rhetoric than a real search for truth; human affairs can never be conveniently reduced to simple formulae although there are folk who find intellectual comfort in trying to do so.[190]

Given his sensitivity to the subject, Rodell would first dwell on the frequency of citation to his *Goodbye to Law Reviews*[191] and puzzle over the cult mystique associated with his admonition that there are only two things wrong with legal writing – style and content.[192] The next reference to pique his interest would be the sheer

---

639 (1993); Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears – On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994); Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995); Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996); Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997); Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and the Law's Discontents*, 95 MICH. L. REV. 1105 (1997); Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275 (1997); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (book review); Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, The Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995).

188. Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1369 (1992).

189. *Id.* at 1373.

190. Fred Rodell, *Is America Going Fascist? A Symposium on John T. Flynn's Thesis*, NEW LEADER, Mar. 25, 1944, at 2.

191. *See* Rodell, *supra* note 39; Packert, *supra* note 40.

192. Rodell, *supra* note 39, at 38.

number of diatribic articles either restating his criticisms[193] – usually in "spinach" prose[194] – or declinist pieces raising hell about the lack of connection between author and the profession.[195] Too much theory, too much indeterminacy they said, while Rodell's old school (Yale) contributes to the mess by publishing popular legal culture commentary, because it's "fun."[196] The "simple formulae" from the critics is the total lack of a unifying theme. "After nearly a decade of sitting through faculty meetings and listening to my colleagues discussing scholarship," Stephen Carter admitted, "I am quite certain that there is no such animal as the 'majoritarian' perspective . . . ."[197] Ever the realist, Rodell would have to acknowledge that his reputation as an Outsider was based on a straw man: the presence of the doctrinal article as the exclusive scholarship paradigm was/is a figment of the Law Academy's collective imagination. In the real world, the market is composed of a smorgasbord of autobiography, trashing,[198] "self" indulgence writing, literary theory, and a smattering of doctrinalism.[199] To the extent that Rodell sought diversity, he was vindicated. Professor Deborah Rhode describes the prevailing scholarship landscape: "I believe that the current diversity of approaches is a healthy development, that recent theoretical, interdisciplinary, and 'outsider' perspective enrich

193. *See, e.g.*, W. Lawrence Church, *A Plea for Readable Law Review Articles*, 1989 WIS. L. REV. 739 (1989); Commentary, *Of Correspondence and Commentary*, 24 CONN. L. REV. 157 (1991); Donald H. Gjerdingen, *The Future of Legal Scholarship and the Search for a Modern Theory of Law*, 35 BUFF. L. REV. 381 (1986); George D. Gopen, *The State of Legal Writing; Res Ipsa Loquitur*, 86 MICH. L. REV. 333 (1987); David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993 (1991); Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221 (1988); Kenneth Lasson, *Scholarship Amok; Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990).

194. *See* Rodell, *supra* note 39; Packert, *supra* note 40.

195. *See* Edwards, *supra* note 90.

196. Stewart Macaulay, *Popular Legal Culture: An Introduction*, 98 YALE L.J. 1545, 1558 (1989).

197. Carter, *supra* note 133, at 2075.

198. *See* Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984) ("Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-*comic*); and then look for some (external observer's) *order* (*not* the germ of truth) in the internally contradictory, incoherent chaos we've exposed.").

199. Posner calls the "new approaches" interdisciplinary: which "will come eventually to dominate academic law." Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1317 (2002) [hereinafter *Legal Scholarship Today*].

the study of legal issues, and that these perspectives are no more ideologically driven than their predecessor."[200]

Would the prevalence of diversity of scholarship and "non-traditional"[201] standards have given Rodell different career opportunities? Unquestionably he would be called an "academostar"[202] in today's market, who, with his charisma, would be a lock to excel on the TV talk show circuit. The TV-charisma factor is, however, a problem, feeding Posner's contempt for the arrogance of the academic Public Intellectual as spoiled brat. As every productive and imaginative professor who wanders off the reservation to write an op-ed piece or gets a media byte knows, what follows is the inevitable grumbling about "wasting time on twaddle" by playing the celebrity game while ignoring classes. Moreover, all Public Intellectuals are tainted by "publicity intellectuals" who use ethically problematical tactics to get media attention.[203] The most frequent put downs are: "he does journalism," "a mere popularizer," or, worst of all, "a celebrity intellectual."[204] As Rodell learned, careers are made or broken depending on the distinction between serious peer reviewed work and "twaddle."[205]

---

200. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1329 (2002).

201. Association of American Law Schools, *Report of the AALS Special Committee on Tenure and the Tenuring Process*, 42 J. LEGAL EDUC. 477 (1992) [hereinafter *AALS Report on Tenure*].

202. Janny Scott, *Scholars Fear 'Star' System May Undercut Their Mission*, N.Y. TIMES, Dec. 20, 1997, at A1; also described as "a poster professor." *Id.* at B9.

203. Carlin Romano, *The Dirty Little Secret About Publicity Intellectuals*, CHRON. HIGHER EDUC., Feb. 19, 1999, at B5.

204. Another nasty poke: "Most public intellectuals function as quote-suppliers to legitimize the media . . . . You know, if no journalist calls for a quote, then I'm not a public intellectual; I just sit there writing my books and teaching classes." Herbert Gans, *The Future of the Public Intellectual*, THE NATION, Feb. 12, 2001, at 25.

205. The distinction became public debate when the President of Harvard University objected to the "non-scholarly" activities of Cornel West, a well-known Harvard professor and coveted Public Intellectual. The extracurricular activities included political work for Bill Bradley and recording a spoken word compact disc. "While the recording has often been described as rap, Dr. West said he preferred the Nietzschean phrase 'danceable education.'" Pam Belluck & Jacques Steinberg, *Defector Indignant at Harvard*, N.Y. TIMES, Apr. 16, 2002, at A24; *see* Sam Tanenhaus, *The Ivy League's Angry Star*, VANITY FAIR, June, 2002, at 201.

B. *Postmodernism: A Life-Cycle Cultural Change*

"But most importantly for would-be Messiahs not content with the unmessianic, unheroic roles assigned to mere law professors in American culture, pomo provided a perceived pathway to power: a 'method' for 'proving' *whatever you liked with whatever you had*."[206]

In condemning the academic Public Intellectual, Posner sounds like his Jeremiah declinist who spits anger "from contrasting an idealized past, its vices overlooked, with a demonized presence, its virtues overlooked."[207] With "reckless abandon"[208] he accuses others of debasing academics with superficial popularizing and in his frustration loses the opportunity to display a more thoughtful economic analysis of changing conditions in the legal scholarship market. According to management economics, products go through a life-cycle: introduction, growth, maturity, and decline.[209] During any cycle a range of variables determines success or failure: innovation, style changes creating or altering demand, "superior still, foresight and industry"[210] of management, amongst others. Legal scholarship fits this life cycle analysis.

Culture is in a perpetual state of life cycle permutation – a persistent process of creative destruction that revolutionizes, essentially destroying the old culture, creating a new one.[211] I suspect that Posner avoided an examination of the cultural life cycle because it involves the creative destruction of structural thought – the culture of objectivity, truth, certainty, and system;[212] a culture that he admires. The replacement is a new life cycle of

206. Dennis W. Arrow, *Spaceball (Or, Not Everything That's Left is Postmodern)*, 54 VAND. L. REV. 2381, 2385 (2001).

207. PUBLIC INTELLECTUALS, *supra* note 2, at 282.

208. *Id.* at 374.

209. THOMAS T. NAGLE & REED K. HOLDEN, THE STRATEGY AND TACTICS OF PRICING 177 (3d ed. 2002) ("A market evolves despite changes in brands and styles. A product concept is born, gradually gains in buyer acceptance, eventually attains full buyer acceptance, and is ultimately discarded for something better. The market defined by that product concept evolves correspondingly through four phases: development, growth, maturity, and decline . . . . In each of its phases, the market has a unique personality.").

210. This can rationalize monopolization. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

211. JOSEPH A. SCHUMPTER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (Harper Torch Books 1962).

212. *See* STEVEN BEST & DOUGLAS KELLNER, POSTMODERN THEORY: CRITICAL INTERROGATIONS 20 (1991).

Postmodernism, a culture that is, by definition definitionless; it "offers man everything or nothing,"[213] a world in which "reality is unordered and ultimately unknowable."[214] The Postmodern Public Intellectual is quite different from the Posner version – and more compatible with Rodell's vision.

Politics and culture coalesced in the 1970s to produce Postmodernism. For the university community it meant the rejection of hierarchy, authority, and the voice of the author.[215] Steven Conner traces the paradigm shift to the publication of Jean-Francois Lyotard's *The Postmodern Condition*, an attack on the legitimacy of science, where he argued that it is a cover for "a multitude of different, incompatible language-games, each with its own untransferable principles of self-legitimation."[216] Instead of the guiding vision of meta-narrative principles, the Postmodern condition is dominated by micro-narratives, which "flourish alongside each other . . . [without] a conversation or consensus between them."[217] "[W]e are enjoined to 'gaze in wonderment' at this linguistic diversity and to cheer the language-games on in their cellular splitting and reduplication."[218] By the 1990s heterogeneity of discourse, the rejection of walls and privilege separating disciplines, and indeterminacy, defined the academy's *zeitgeist*.[219]

It was no accident that the Public Intellectual revival occurred in conjunction with Postmodernism. An increasing demand for public commentary to cut through the new jargon triggered a surge in supply from an ambitious and rebellious crowd eager to replace the canon elders as spokesmen. Much of the vigor came from a festering discontent in recent decades at the inversion and specialization of academic life.[220] A deluge of works rationalizing the lifecycle crisis, followed by a prescription of new paradigms, each one

213. *Id.* at 7.

214. *Id.* at 9.

215. *See* STEVEN CONNOR, POSTMODERN CULTURE 7 (1989).

216. *Id.* at 32.

217. *Id.* at 34.

218. *Id.*

219. For the Devil's Dictionary of Postmodernism, see Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" For the Uninitiated*, 96 MICH. L. REV. 461 (1997).

220. *See* Janny Scott, *Thinking Out Loud: The Public Intellectual Is Reborn*, N.Y. TIMES, Aug. 9, 1994, at B1; *see also* Boynton, *supra* note 113 (discussing the resurgence of Public Intellectuals).

creating a trail of commentary as a "series of arguments"[221] Postmodern art, music, literature, or whatever, produced a new wave of Public Intellectual performers.

The market disruptions produced by the Postmodern paradigm in legal education drastically altered the role of the law academic Public Intellectual. In confirming the *fait accompli* of the new paradigm's role in legal education,[222] the *Cardozo Law Review's* Symposium[223] on deconstruction signaled the emergence of a new role for Public Intellectualism. Jacques Derrida's lead-in article provided the centerpiece with his characteristic free play; musing after forty-four pages of coherent incoherence he acknowledged: "I have not yet begun. Perhaps I'll never begin . . . except that I've already begun."[224] The follow-up testimony from the support articles demonstrated the total erosion of structure, system, and walls in legal discourse.[225] Law professors wrestled with the literary insights of deconstruction; a religion professor discussed the "law of desire"[226] while philosophers, political scientists, and English Literature academics tried to emulate Derrida's "difference."[227] More significant was the participation of a cluster of aca-

---

221. Edward Rothstein, *Moral Relativity Is a Hot Topic? True. Absolutely.*, N.Y. TIMES, July 13, 2002, at B7 (quoting Stanley Fish, Dean, College of Liberal Arts and Sciences, U. Ill. Chicago).

222. *See* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM (2000).

223. Symposium, *Deconstruction and the Possibility of Justice*, 11 CARDOZO L. REV. 919 (1990).

224. Jacques Derrida, *Force of Law: The "Mystical Foundations of Authority,"* 11 CARDOZO L. REV. 921, 945 (1990). Derrida's obscure syntax invites "freeplay;" *see* WILLIAM E. CAIN, THE CRISIS IN CRITICISM: THEORY, LITERATURE, AND REFORM IN ENGLISH STUDIES 167 (1984) ("[F]or readers with a lifetime to spare, there is also a 100-page essay by Jacques Derrida, dealing with a subject yet to be determined.").

225. Alan Hunt, *The Big Fear*, 35 MCGILL L.J. 508, 519 (1990) ("In its most general form postmodernism is anti-foundational in the sense that it denies the possibility of philosophy providing any epistemological guarantees for legal discourse, in particular, by undermining claims to tests of legal validity, rules of interpretation and the general positivistic quest for certainty, and if not certainty, then predictability.").

226. Mark C. Taylor, *Desire of Law—Law of Desire,* 11 CARDOZO L. REV. 1269 (1990).

227. HENRY SUSSMAN, HIGH RESOLUTION: CRITICAL THEORY AND THE PROBLEM OF LITERACY 46 (1989) (Difference is "a marginal zone where the particular, the unique, and the incommensurate may reside in autonomy from the broader systems that threaten to assimilate, absorb, or reduce them.").

demic Public Intellectuals[228] whose contributions to a law review symposium raises a question unique to the Postmodern Law Academy: at what point, if ever, does Public Intellectualizing cross over into the academic sphere? In other words, has the gap between Public Intellectual "puff" and "serious" scholarship narrowed – or disappeared? Regardless, what is the effect of law Public Intellectual work on tenure and status?

C. *Public Intellectual, Postmodernism, and Tenure*

Is tenure a rite of passage or a scam? Take your pick, but the bottom line is that tenure is a lifetime entitlement to privilege and *supra*-competitive wages. All it takes is the publication of two or three articles in non-peer, student-edited, law journals.[229] It is a sub-paradigm that will challenge Outsider efforts to gain enough support for the acceptance of nontraditional scholarship – including Public Intellectual work – from the Law Academy community.[230] A new perspective depends on people who are willing to make an effort to "develop it to the point where hardheaded arguments can be produced and multiplied" to justify recognition of a new paradigm.[231]

The status quo makes sense: law schools derive significant economies in getting a committed performance during the probationary tenure period at low wages. Whatever the tenure decision, the school will get the benefit of some publication exposure. Moreover, for a modest stipend, management obtains a thorough peer review of the candidate's scholarship from an outside panel of experts – it is the only formal institutional peer review a law profes-

228. Judith Butler, Jonathan Culler, Henry Louis Gates, Jr., Barbara Herrnstein Smith, and Alan Wolfe.

229. It was not until 1969 that Harvard Law School required even a single article for promotion. *See* JOEL SELIGMAN, THE HIGH CITADEL—THE INFLUENCE OF HARVARD LAW SCHOOL 126 (1978).

230. Stanley Fish argues that interpretation is, after all, restrained by the existence of "interpretive communities." STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 171 (1980). These "communities" are groups composed "of those who share interpretive strategies not for reading (in the conventional sense) but for writing texts, for constituting their properties and assigning their intentions." *Id.* at 171.

231. 2 THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 158 (Otto Neurath et al. eds., University of Chicago Press 2d ed. 1970) (1962). Moreover, "the new paradigm must promise to preserve a relatively large part of the concrete problem-solving ability that has accrued to science through its predecessors." *Id.* at 169.

sor ever experiences. Another economic benefit is that the doctrinal paradigm propagates product differentiations.[232] Law schools advertise the Tyranny of Objectivity – the casebook method, the analytical paradigm – to nurture a reputation for producing objective scholarship, thereby differentiating its mission from the mush coming from the humanities.[233] Like engineers and economists, law professors justify supra-competitive salaries on the basis of scholarship that relies on rational analysis to solve problems.[234]

Outsiders argue that the tenure system's rejection of storytelling as the legitimate voice of the minority perspective, on its face, rationalizes recognition of a flexible inclusive tenure paradigm. They argue that without this acknowledgement the Law Academy cannot claim to represent its constituency.[235] Under Professor Kuhn's notion of scientific paradigm change, this would constitute a "crisis" in which the existing system is incapable of coping with a new anomaly, for example, the presence of Outsider scholarship, justifying reliance on an alternate paradigm.[236] Outsiders

---

232. JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES 114 (1956) ("Product differentiation is propagated . . . by efforts of sellers to distinguish their products through packaging, branding . . . and sales-promotional efforts designed to win the allegiance . . . of the potential buyer."). For a discussion of Public Intellectualism as a form of product differentiation, see *infra* note 253.

233. "In a way I'm looking forward to Socratic instruction. I've heard so much about it since I applied to law school – it will at least be interesting to see what it's like." SCOTT TUROW, ONE L 24 (Warner Book ed., 1977).

234. Arthur Austin, *Law Professor Salaries: The Deobjectification of Legal Scholarship by Tenured Radicals,* 2 GREEN BAG 2d 243 (1999).

235. Alex M. Johnson, Jr., *Scholarly Paradigm: A New Tradition Based on Context and Color*, 16 VT. L. REV. 913, 921 (1992) ("On the other hand, when the scholar of color speaks to any racial issue, such as affirmative action, one can predict that she may see and evaluate that issue differently than her majoritarian colleagues. Her viewpoint will be greatly informed as a result of her different experiences in our society as a person of color. The neutral, consensus-driven paradigm for evaluating such scholarship is too narrowly circumscribed to evaluate the merit and worth of the work of scholars of color when speaking in the voice of color. A new paradigm must be employed—one that recognizes the existence and the worth of the voice of color. This new paradigm must not supplant, but must supplement the majoritarian paradigm.").

236. The shift begins when existing rules cannot solve new "puzzles." "[R]ecognized anomalies whose characteristic feature is their stubborn refusal to be assimilated to existing paradigms." KUHN, *supra* note 231, at 97. The next step is a "revolution" in which an alternate paradigm competes with existing paradigms for support within the community. "Conversions will occur a few at a time until,

have the support of the Association of American Law Schools, the Law Academy's trade association, which provided ideological support by recommending that member schools avoid "prejudice against any particular methodology or perspective used in teaching a scholarship."[237]

From a Posnerian perspective the Outsiders seek to disrupt an efficiently-run market system that uses objective criteria to produce the best products; Outsider Postmodernists view the doctrinal barrier as a replay of *The Hunger Artist* scenario of a morally corrupt individualist survival of the fittest.[238] The reality is somewhere in the middle, in the existence of a common ground – self interest – that compels a compromise. The relatively short decision time of five to six years for tenure is the key. Even with law review experience – a modest learning experience at best – young professors are not prepared for the mysteries of "The Abyss of Legal Scholarship."[239] Nevertheless, the analytical style of the doctrinal article lends itself to a quick study, and in a flush market in which each law school publishes at least three journals, a professor can jot something down on a napkin and it gets published.[240] In addition, there is normally no empirical component. Evaluation criteria, while dicey, follow a conventional discourse totally lacking in storytelling,[241] which defies analytical assessment[242] and meth-

---

after the last holdouts have died, the whole profession will again be practicing under a single, but now a different, paradigm." *Id.* at 152.

237. *AALS Report on Tenure, supra* note 201, at 505 ("When evaluating any work embodying innovative or less widely pursued methodologies or perspectives, the standard should be neither higher nor lower than the standard used for evaluating more traditional work.").

238. *See* West, *supra* note 68, and accompanying text.

239. AUSTIN, *supra* note 38, at 156-60.

240. Rothfeld, *supra* note 80, and accompanying text.

241. On quality control, Posner says:

> Doctrinal scholarship may have been (may be) dull and limited, but it is useful and it is conducted under conditions that ensure minimum quality. Those conditions – a large professional audience; a common academic culture; continuity with teaching, judging, and performance as a student; and law review editing – are missing from interdisciplinary legal scholarship; and the fact that its audience is almost entirely academic raises the issue of utility in acute form.

Legal Scholarship Today, supra note 199, at 1324.

242. Farber & Sherry, *supra* note 154, at 854 ("Unlike some advocates of storytelling, however, we see no reason to retreat from conventional standards of truthfulness and typicality in assessing stories. Nor do we see any reason to abandon the expectation that legal scholarship contain reason and analysis, as well as nar-

odological content.[243] The reality is that most candidates will follow the Delgado advice: play the doctrinal game, get a union card, and write stories.[244] It is a temporary compromise. Outsiders are placated with the knowledge that any sacrifice is worth the transient inconvenience. They are the beneficiaries of the objectification factor, which assures premium wages[245] and ultimately they will reap what they believe will be the benefits of the surging Postmodern culture. Nevertheless, as Postmodernism increases its influence, so does the ubiquity of non-traditional writing.

There are anecdotal stories suggesting that schools with a vibrant Postmodern agenda tolerate a flexible interactive tenure package that includes nontraditional work. Typically the nontraditional contribution is from the storytelling genre. It can be a risky move for a candidate since it means changing from the straightforward doctrinal linear style to a reconstruction of the author's consciousness of experience – all under the pressure of a short time frame. Moreover, even if the faculty approves tenure, the package must still pass muster with the university administration that expect traditional scholarship and would likely be puzzled over the peer evaluation of narratives.[246] "[P]erspectives come and go, but scholarship must forever *look* like scholarship."[247]

The tricky question is what weight, if any, to give Public Intellectual work – including narrative – performed during the probationary tenure period. Should op-eds, media bytes, and TV appearances, get positive references in the tenure decision discussion and the recommendation? As a practical matter, it is difficult

---

rative. A legal story without analysis is much like a judicial opinion with 'Findings of Fact' but no 'Conclusions of Law.'").

243. *See* Rubin, *supra* note 153, at 955-56.

244. Delgado, *supra* note 119, at 561.

245. *See* Austin, *supra* note 234 and accompanying text.

246. *AALS Report on Tenure, supra* note 201 ("A growing number of universities around the country have restricted the power of law faculty governance in matters of tenure on the basis of a fear of laxity of standards, particularly with regard to scholarly accomplishment. As this University enters a new era, the Law School must maintain its tradition of responsibility and excellence if it is to justifiably retain the confidence of the University's administration."); *see also* Ken Myers, *Decisions on Personnel at Pitt Prompt Staff and Student Protest*, NAT'L L.J., June 7, 1993, at 4 (discussing refusal of provost to grant tenure to faculty member despite approval of full faculty).

247. Michael Pacanowsky, *Slouching Towards Chicago*, 74 Q.J. OF SPEECH 453, 456 (1988) (relating a story about storytelling as scholarship).

for a beginner to establish a public presence. But in today's mass media world where everyone gets their fifteen minutes of notoriety, it does occur. Jonathan Turley, number 38 on "Posner's list,"[248] started a successful Public Intellectual career as a law clerk, parlaying a law review article into a local TV interview about how "televangelists like Jimmy Swaggart could be prosecuted under the RICO statute."[249] Perhaps Turley is the wave of the future, but the conventional reaction to pre-tenure Public Intellectual work is antagonistic – it is considered selfish and immature, especially by jealous non-producing colleagues, to divert time from research on tenure projects.

D. *Economics Redeems Rodell's Career*

As a sinecure, tenure creates multiple options: sloth, research, Public Intellectualism, or a combination of all three. Reflecting the "academization of intellectual life,"[250] Public Intellectualism has become an attractive option: it garners celebrity, modest remuneration and the "illusion of power,"[251] while serving to compensate for sloth. Microeconomic analysis reveals that these factors are merely part of a cluster of variables that define Public Intellectualism as an autonomous economic universe.

Like the doctrinal paradigm,[252] the academic Public Intellectual is the beneficiary of barriers to entry, a condition that affects the entry of new sellers into the Public Intellectual market.[253] The higher the barrier, the greater is the market power (over status and pricing) of established sellers. The most obvious barrier to the academic Public Intellectual market is the price of admission, or what is known as absolute cost advantages. The absolute cost bar-

248. PUBLIC INTELLECTUALS, *supra* note 2, at 209.

249. Jason Zengerle, *Turley's Gig*, NEW REPUBLIC, Dec. 7, 1998, at 18.

250. PUBLIC INTELLECTUALS, *supra* note 2, at 29 n.26.

251. *Id.* at 66.

252. *See* BAIN, *supra* note 232 and accompanying text.

253. BAIN, *supra* note 232, at 4 ("As suggested above, the condition of entry is a structural concept. Like some other aspects of market structure, it may be viewed as potentially subject to quantitative evaluation in terms of a continuous variable. This variable is the percentage by which established firms can raise price above a specified competitive level without attracting new entry—a percentage which may vary continuously from zero to a very high figure, with entry becoming 'more difficult' by small gradations as it does so. As the difficulty of entry (thus understood and evaluated) increases, some systematic variations in the behavior of established firms may be anticipated.").

riers are high: time and cost invested in a graduate degree, tenure costs, and the opportunity costs involved in publication, for instance, benefits lost from consulting, amongst others.[254] Law Academies benefit from a public regulation barrier; as lawyers they must pass the licensing requirement. Finally, independent Public Intellectuals do not have access to the academic's financial and time tenure subsidies.[255]

The distinction between academic and independent Public Intellectuals can be analyzed as an expression of product differentiation. Anything that distinguishes a product, brand, or group of items, from substitutable rivals by creating consumer allegiances, provides a seller with an edge over rivals.[256] As Posner acknowledges, the academic *imprimatur* gives the academic Public Intellectual a clear edge over the independents in credibility and frequency of use.[257] To the economic advantage of the law academic Public Intellectual, product differentiation can have dual effects: inter-industry – academics versus independent non-affiliated intellectuals, and intra-industry – law academies versus other disciplines.[258] Posner identifies the supra-differentiating characteristics of law *vis-à-vis* other fields (industries) as "the growing importance of law in American society and the growing inter-disciplinarity of academic lawyers . . . ."[259] Diverted to counting media cites, Posner passes over the opportunity for a fertile and provocative discussion of how law perpetuates its high barriers to entry by sustaining an endless supply of advertising deriva-

254. SAMUELSON, *supra* note 35, at 443 ("[S]ome of the most important costs attributable to doing one thing rather than another stem from the foregone opportunities that have to be sacrificed in doing this one thing.").

255. This is tantamount to: "established firms may be able to secure the use of factors of production, including investible funds, at lower prices than potential entrants can . . . ." BAIN, *supra* note 232, at 14.

256. *Id.* at 114.

257. PUBLIC INTELLECTUALS, *supra* note 2, at 34, 50.

258. BAIN, *supra* note 232, at 121-22 ("Product differentiation, as we have indicated, may have a dual effect: first, on the character of intra-industry competition among established firms, and second, on the condition of entry. The effect of intra-industry competition will take the form of supporting preferred market shares based on regular customer allegiances to certain sellers, of encouraging advertising and other sales promotion as competitive weapons, of permitting some sellers to obtain higher prices or lower unit selling costs than others, and so forth.").

259. PUBLIC INTELLECTUALS, *supra* note 2, at 173.

tives:[260] "Jerry Springer" type trials such as those involving O. J. Simpson, Bernhard Goetz, Heidi Fleiss, the Menendez brothers,[261] and issues such as the Clinton impeachment,[262] obscenity, terrorist detention,[263] along with a constant chorus of front page Constitutional controversy.[264]

Intra-industry product differentiation internalizes competition among law schools for student recruitment and curriculum design. Although officially disdained,[265] every law school plays the rankings game, fighting for market position in the Top 50, 25, or the "elite 10."[266] Consumer-conscious admissions people know that the vocational appeal of *The Paper Chase* and *L.A. Law* have been replaced by the *Ally McBeal*ism[267] of the Postmodern generation – a culture of entitlement, assured self-esteem, and good grades.[268] The key factor is recognition of the Napster generation's computer consciousness and their addiction to information dissemination.[269] The text has been replaced by the Internet.

---

260. Which unlike most advertising, is cost free. *See* BAIN, *supra* note 232, at 115.

261. *See* Arthur Austin, *The Jury System at Risk from Complexity, The New Media, and Deviancy*, 73 DENV. U. L. REV. 51 (1995).

262. Posner's summary: "The *emotionality* of the public intellectual, so well illustrated by the perverfid [sic] reactions of public intellectuals to the Clinton impeachment and the 2000 presidential election deadlock, stands in particularly striking contrast to the official image of the academic." PUBLIC INTELLECTUALS, *supra* note 2, at 127.

263. *See* Adam Liptak, Neil A. Lewis & Benjamin Weiser, *After Sept. 11, A Legal Battle on the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at A1.

264. PUBLIC INTELLECTUALS, *supra* note 2, at 107-21.

265. *See* Press Release, Association of American Law Schools, Association of American Law Schools Calls on U.S. News & World Report to Stop Ranking Law Schools; Study Challenges Validity of Magazine's System, (Feb. 18, 1998), *available at* http://www.aals.org/ranknews.html (on file with author); Cynthia Cotts, *Deans and Watchdogs Flunk U.S. News Law School Rankings*, NAT'L L.J., Mar. 2, 1998, at A13; Roger Parloff, *Who's Number One? And Who's Number 52, 91, and 137?* AM. LAW. Apr. 1998, at 5.

266. *See* Arthur Austin, *The Postmodern Buzz in Law School Rankings*, 27 VT. L. REV. 49 (2003).

267. Who is "constantly disappointed by life's failure to satisfy her expectations of boundless love and unqualified success." Terrence Rafferty, *That Girl*, G.Q. Feb. 1998, at 61, 64. David Kelley, who wrote and produced *Ally McBeal*, was also a writer on the *L.A. Law* series. *See id.*

268. *See* Harvey Mansfield, *To B or Not to B*? WALL ST. J., Dec. 20, 2001, at A16; Anemona Hartocollis, *Harvard Faculty Votes to Put the Excellence Back in the A*, N.Y. TIMES, May 22, 2002, at A20.

269. The Napster characterization comes from A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 909-10 (N.D. Cal. 2000). "The matter before the court

To convey a Postmodern voice, law schools have created a website universe to attract students. The interactive conversation is intended to assure the Napsters that the schools' curriculum replicates their undergraduate Club Med retirement-village-for-the-young[270] experience, and that entitlement to good grades, a "silent classroom,"[271] and indeterminacy, will continue in a new package.[272] A problem immediately surfaced as a result of the "gotta keep an eye on those rankings"[273] syndrome, leading rivals to replicate each others tactics – a classic product differentiation standoff – and possibly a social cost.[274] The solution: adopt the undergraduate tactic of the "Professor as Celebrity;"[275] compete in personality differentiation.

The law schools have literally shifted the contest from the celebrity as determined by a small group of peer scholars (the "serious" scholar celebrity) to the celebrity as determined by the public media *vis-à-vis* the student audience (the Public Intellectual celebrity). The strategy: encourage the faculty to produce a pastiche of op-eds, TV appearances, and magazine commentary supported by

---

concerns the boundary between sharing and theft, personal use and the unauthorized worldwide distribution of copyrighted music and sound recordings." *Id.* at 900. On pirating, a commentator concluded:

> Seeing themselves as more Robin Hood than Captain Hook, the loose confederation of students, university employees and software company insiders was apparently motivated primarily by ideology – a belief that products consisting purely of information are somehow different from those you can hold in your hand. Like thoughts, they should be allowed to run free.

George Johnson, *Lost in Cyberspace: If You Can't Touch It, Can You Steal It?*, N.Y. TIMES, Dec. 16, 2001, at A5; John Schwartz, *Trying to Keep Young Internet Users From a Life of Piracy*, N.Y. TIMES, Dec. 25, 2001, at C1.

270. Mark Edmundson, *On the Uses of a Liberal Education*, HARPER'S MAG., Sept. 1997, at 39, 43.

271. *See* Michiko Kakutani, *Debate? Dissent? Discussion? Oh, Don't Go There!*, N.Y. TIMES, Mar. 23, 2002, at B7 (citing student-written article entitled *Silent Classroom*).

272. And, according to an autobiography by a Harvard and a Stanford graduate, they have exceeded the Club Med lifestyle. *See* JAIME MARQUART & ROBERT EBERT BYRNES, BRUSH WITH THE LAW (2001).

273. Rachel Toor, *Princeton vs. Yale – Post-Frenzy Boredom in Admissions*, CHRON. HIGHER EDUC., Aug. 16, 2002, at B5.

274. *See* H. Michael Mann, *Advertising, Concentration, and Profitability* in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 137, 152 (Harvey J. Goldschmid et al. eds., 1974).

275. Scott, *supra* note 220, at A1 ("It's very much a part of the late 20th century, this celebrity-itis . . . . It is the academic aspect of the fascination with instant gratification, competition and races for prestige and celebrity status.").

slick up-scale alumni magazines.[276] So long as ranking dominates student recruitment, admissions people assume that Public Intellectual differentiation will exert an influence at the edges and could have an effect on the voting in the reputation category of the *U. S. News & World Report* annual college ranking.[277] For many of those who cast their votes – judges and lawyers[278] – an appearance on *The O'Reilly Factor* trumps an article in the *Harvard Law Review*. It is the Buzz game.[279] It is a situation that breeds respect from the administration because as Herbert Gans said, Public Intellectuals get publicity and if they're getting publicity, "they're getting prestige, and if they get prestige, that may help them get students or grant money."[280]

VII. A REVISED MARKET THAT IS PUBLIC INTELLECTUAL FRIENDLY

Microeconomic analysis identifies a distinct law academic Public Intellectual market protected by high barriers to entry. Website competition among schools rewards professors who engage in public dialogue. Efficiency and self-interest encourage faculty to maximize returns during the post-tenure period when they can

---

276. N.Y.U.'s magazine has been called "law porn" for its purported use as obvious sales promotion. *See* Brian Leiter, *The Law School Observer*, 3 GREEN BAG 2d 327 (2000); Terry Carter, *Rankled by the Rankings*, 84 A.B.A. J. 46 (1998).

277. A dangerous assumption. As John Wanamaker reputedly said: "I know half the money I spend on advertising is wasted, but I can never find out which half." Arthur Austin, *Antitrust Proscription and the Mass Media*, 1968 DUKE L.J. 1021, 1031-32 (1968) (quoting John Wanamaker).

278. Reputation is "[m]easured by two surveys . . . . The dean and three faculty members at each school were asked to rate schools from 'marginal' (1) to 'distinguished' (5) . . . . Lawyers, hiring partners, and senior judges rated schools . . . ." U.S. NEWS & WORLD REP., Apr. 9, 2001, at 79.

279. The Tulane strategy is typical:

> From baseball to divorce to military tribunals, Tulane Law School faculty were quoted in numerous national and regional media outlets this year, including the NEW YORK TIMES, USA TODAY, FORBES, BOSTON HERALD, US NEWS & WORLD REPORT, ESPN and National Public Radio. The increased visibility is the result of a new emphasis by Dean Lawrence Ponoroff on external relations as a means to help raise the image of Tulane Law School. The dean hired a New Orleans public relations firm and tapped Ann Salzer, assistant dean, to implement the aggressive new strategy. Salzer works closely with Mary Mouton (L '90), president of Mouton Media, to assist law faculty in the area of media relations.

20 TUL. LAW. 6 (Summer 2002).

280. Gans, *supra* note 204, at 25.

best exploit the law's extensive relevance to public issues. The net effect of these dynamics is to scramble and revise the agenda of the legal scholarship market.

In registering his disdain with the academic Public Intellectual, Judge Posner ignored the connective issue of legal scholarship and the demise of the doctrinal paradigm.[281] Initiated by new fashions – feminism, critical race ideology, and Posner's Law and Economics and its influence – the Outsider movement rides the coat tails of Postmodernism to generate substitutable products that are breaking down the walls – the old entry barriers – that formerly protected the "dominant" system. As the Association of American Law Schools implores: no prejudice against "nontraditional" scholarship is permitted.[282] But what is "nontraditional?" A generous doctrinalist may accept the credibility of an article in *Harper's* or *Atlantic Monthly* (unless it is by Stanley Fish)[283] but what about the *New Republic* or the *National Review*? Or what about: "Professor Patricia Williams and noted saxophonist Oliver Lake [appearing] in a performance piece titled 'Skin' and based on the writings of Prof. Williams?"[284]

The micro-economist can posit another market quirk: the inclusion of the clinical component as a viable participant in the revised scholarship market. As manifestly vocational, the clinic's function is to showcase the academy's commitment to teaching the practice *qua* practice of law[285] – an imitation of medicine's on-the-

281. In an article, Posner equivocates on the ultimate demise of doctrinal writing but acknowledges the growing influence of non-traditional work. *See Legal Scholarship Today*, *supra* note 199, at 1317.

282. *See AALS Report on Tenure*, *supra* note 201, at 505.

283. Stanley Fish, *Postmodern Warfare: The Ignorance of Our Warrior Intellectuals*, HARPER'S MAG., July, 2002, at 33. Whence the origin of Fish's definition of postmodernism as a "series of arguments." *See supra* note 221.

284. COLUM. L. SCH. REP., *Faculty Briefs*, Spring 2001, at 35. "'Here was this jazzy music, played by a man in dreadlocks, and prim me', Williams said, beaming at the context. 'We found that heartfelt social commentary around race is heard better when you have a good saxophonist.'" Karen R. Long, *A Genius at Pinpointing Racial Incongruities*, CLEVE. PLAIN DEALER, Oct. 22, 2000, at 1L, 3L.

285. Columbia University President Lee Bollinger, former dean at Michigan Law School, sums up the new paradigm: "They have moved from being trade schools to being serious intellectual places. The 'clinical' side is still taught, but it's a small piece of the educational experience. Medical schools, too, have undergone a change from being places of mere apprenticeship to venues of unabashed scholarly inquiry." Tunku Varadarajan, *A Matter of Degree: Which One Makes a Journalist?*, WALL ST. J., July 26, 2002, at 15 (quoting Lee C. Bollinger, President, Columbia University).

job training. Introduced to balance the theoretical abstractism of the casebook method, clinicians persevere as "dead souls" – carried on the rolls of the living but without status.[286] As non-tenured contract workers, they are stigmatized for teaching skills rather than theory.

In exchange, however, clinicians do not have to publish. Indeed, devoting time to writing law review articles would be deemed wasteful diversion from teaching vocational skills. It is a relationship involving tension on both sides – clinicians are frustrated over a lack of security, while the administration chafes at the difficulty of evaluating the performance of people teaching "how to do it." Observation by faculty is time-consuming and student evaluations are unreliable. Giving credit for Public Intellectual activity would benefit both sides. The school can evaluate the analytical and public presence of the instructor while adding to the "website package." Clinicians could earn status, and more importantly, gain bargaining leverage for security.

As a practicing declinist Judge Posner harps on the vulgarization of Public Intellectualism. As "entertainers,"[287] its contemporary practitioners are disingenuous, produce "goulash," and are given to confabulation. He especially deplores the increasing presence of unsavory academic-affiliated Public Intellectuals who use the tenure subsidy to carelessly throw out off-the-wall predictions, knowing that veracity is irrelevant in a market in which the public protects itself against defective performance "by not taking it very seriously."[288] The primary cause of the problem is the demise of the independent Public Intellectual who served a gatekeeper function, always poised to deflate academic hubris and pomposity. The ultimate consequence, the target of the Posner Jeremiah, is a breakdown in accountability: "nobody watching, nobody keeping score."[289]

---

286. *See* NICOLAI GOGOL, DEAD SOULS 1 (1857).

287. *See* Richard A. Posner, *The University as Business*, ATLANTIC MONTHLY, June 2002, at 21.

288. PUBLIC INTELLECTUALS, *supra* note 2, at 388.

289. *Id.* at 390.

Public criticism of Alan Dershowitz,[290] Jonathan Turley,[291] and Cornel West[292] for Public Intellectual excesses, Posner's own book of furious critique, plus the scolding he, in return received from critics, all suggest the inevitability of some degree of accountability.[293] But Posner's point is a valid one. There is no systematic market gate-keeping mechanism and his suggested remedy, that universities require faculty to post their "non-academic" publications on a website is too implausible to be taken seriously.[294]

It is also true that "national" Public Intellectuals are in an exclusive market with a high celebrity factor, which renders criticism largely irrelevant. In fact, as the antics of Dershowitz demonstrate, public rebuke assures repeat excesses, thereby hyping celebrity. The situation is quite different in the secondary market where an increasingly large group of young ambitious law professors get "regional" attention on local TV and radio, write op-eds, and every once in a while, make it to the "bigs" on the national media. They are a valuable asset to their institutions as the institutions scramble to improve their rankings. On a school's website the young Public Intellectuals become symbols of activism, regional celebrities capable of contributing to a school's product differentiation image. With the law schools' self-interest in nourishing these new assets so palpable, the formal institutionalization of accountability is inevitable. The informal practice of ad-

290. For a critical review of Dershowitz's "performance," see Garrow, *supra* note 12, at 344 n.14, 345 n.16.

291. *See* Zengerle, *supra* note 249. "Here are some suggestions for the upcoming federal budget deliberations. An appropriation of $500,000 to George Washington University professor and expert-on-everything Jonathan Turley not to appear on television for a year." Kim Eisler, *Goodbye James and Mary, Fred and Mort, Michael and Tony: Take the $$$ and Run*, WASH. MAG., Mar. 2002, at 9; Ruth Marcus, *Legal Opinions Offered Freely; Talk Fixture Jonathan Turley Practices the Art of Analysis*, WASH. POST, July 30, 1998, at B1.

292. *See* Belluck & Steinberg, *supra* note 205.

293. Garrow, *supra* note 12, at 345 ("Posner's failure to confront the magnitude of negative citations either stems from, or at least certainly goes hand-in-hand with, another even more basic shortcoming in *Public Intellectuals*, namely his inability to recognize the extent to which PIs do suffer serious reputational harm as a result of conspicuous inaccuracies or *oddball behavior*. Posner's assumptions are glaringly incomplete . . . . There are two equally devastating ways in which to rebut this blissful illusion. The first requires the invocation of but a single word: Dershowitz.") (emphasis added).

294. Which he acknowledges: "My proposal may be modest, but it is also bound to be controversial and I hold out no hope that it will be adopted." PUBLIC INTELLECTUALS, *supra* note 2, at 391; *see supra* note 34.

vice on outside activities will be formalized to collectivize the interest of school and professor to assure maximization of benefits. Moreover, self-policing will improve as the schools monitor each other, looking for the opportunity to expose the excesses of a rival.[295]

Whatever the socially constructed parameters, from *Fin De Siecle*[296] to the latest cultural fad, blogging,[297] Public Intellectualism will never gain uncontested credence in the Law Academy as "serious" scholarship. The Postmodern *weltanschauung* is sufficiently influential to permit exceptions through the tenure gate with "non-traditional" baggage – but tagged with an unspoken question mark after the author's name. There will always be lingering "disquiet" over work that is resistant to critical evaluations.[298] Nevertheless, Public Intellectuals know that after tenure, the issue is largely moot; henceforth the career options include shirking, "serious" doctrinal scholarship, Public Intellectualism, or various combinations.

VIII. CONCLUSION

Public Intellectualism is amassing sufficient economic and psychic benefits to make it an attractive career choice. Law professors can now have fun, vent their frustrations over whatever bothers them, settle old scores, while building a career in the revised legal education market that provides a bargaining chit for the annual salary review. In today's Postmodern culture Stephen Carter stands as the ideal: "serious" scholar turned Public Intellec-

---

295. *See, e.g.*, Lieter, *supra* note 276, at 327-28.

296. *See* Hugh Hebert, *Television: Hot Air in the Windy City*, THE GUARDIAN (LONDON), Jan. 29, 1992, at 34.

297. Stephen Levy, *Will the Blogs Kill Old Media?*, NEWSWEEK, May 20, 2002, at 52 ("A blog is an easily updated Web site that works as an online day book, consisting of links to interesting items on the Web, spur-of-the-moment observations and real-time reports on whatever captures the blogger's attention."); Howard Kurtz, *Who Cares What You Think? Blog and Find Out*, WASH. POST, Apr. 22, 2002, at C1 ("It's astounding to me." says Glenn Reynolds, a University of Tennessee law professor who launched his site (InstaPundit.blogspot.com) last August with the hope of attracting a couple of hundred readers. He hit a new record last Monday with 49,663 visits. "It's the dirty little secret of punditry being exposed, that a lot of people can do it.").

298. In praising a Williams narrative, Posner says: "Yet here at the very pinnacle of Williams's art, the careful reader will begin to feel a sense of disquiet." RICHARD A. POSNER, OVERCOMING LAW 372 (1995).

tual – who then writes a best-seller mystery novel and pockets a $4.2 million advance.[299]

299. As one critic prefaced a favorable review: "Much as I hate to, I'm going to start by talking about the damn money. I'm only doing it because almost everyone else is." Gene Seymour, *Poisoned Ivy*, THE NATION, July 22/29, 2002, at 25 (reviewing STEPHEN L. CARTER, THE EMPEROR OF OCEAN PARK (2002)); *see also* David Owen, *From Race to Chase,* THE NEW YORKER, June 3, 2002, at 50 (discussing the life of Stephen Carter).