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## Compelling Orthodoxy: Myth and Mystique in the Marketing of Legal Education

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## Compelling Orthodoxy: Myth and Mystique in the Marketing of Legal Education

KENNETH LASSON\*

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“This little piggy went to market . . .”<sup>1</sup>

## I. INTRODUCTION

In many ways, the story of modern legal education reads like a grim fairy tale, whose moral dénouement is no less compelling, and perhaps more consequential, than its fabulist forbearers.<sup>2</sup> In this regard the marketing of legal education may aptly be illustrated by fable, such as that of *The Trees and the Bramble Bush*,<sup>3</sup> which concerns the folly of electing a king. When some beautiful trees decide to look for a leader, they offer the throne to the olive, the fig and the vine; each in turn refuses, preferring to keep to its own fruitful role. The bramble steps in and accepts, soon making threats of what will happen to those that do not accept him.<sup>4</sup>

The result is perhaps the law of unintended consequences at play, but it has implications for both the quality of legal education and the treasured

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\* Professor of Law, University of Baltimore. Many thanks to my diligent research assistant, Paulette Little, and to my colleague Richard Bourne for helping inspire this piece, which is dedicated to the memory of the late gentleman and scholar, Walter Rafalko.

1. The classic verse, first published in London around 1760, has often been adapted into modern allegories – such as that by Jules Feiffer caricaturizing contemporary American social types as (a) the little piggy who went to market (depicting a Wall Street tycoon); the one who stayed home (a poverty-stricken or homeless man); the one who ate roast beef (a porcine army general); the one who had none (an African-American child); and the one who cried “wee-wee-wee” all the way home as a rural couple reminiscent of Grant Wood’s *American Gothic*. THE OXFORD DICTIONARY OF NURSERY RHYMES 349-50 (Iona Opie & Peter Opie eds., new ed. 1997) [hereinafter OXFORD NURSERY RHYMES]. See also *This Little Piggy! Allegories of Modern Life?* ALICE M. FISHER’S BLOG (January 29, 2011), <http://alicemfisher.wordpress.com/2011/01/29/this-little-piggy/>. Any analogies to deans and law professors beyond the captions herein are left entirely to the reader.

2. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1051 (1988) [hereinafter WEBSTER’S DICTIONARY] (defining a “fabulist” as “one who writes or invents fables; also, inventor of falsehoods.”). “The fable is fictitious but not imaginary,” said George Crabbe (an English poet, 1751-1832), “for both its agents and actions are drawn from the passing scenes of life.” See *Grimms’ Fairy Tales*, NATIONAL GEOGRAPHIC, <http://www.nationalgeographic.com/grimm/index2.html> (last visited March 4, 2012) (indicating that the stories by the Brothers Grimm, when they first appeared in Germany in 1812, were capricious and cruel); see also Joan Acocella, *Once Upon A Time*, THE NEW YORKER, July 23, 2012, at 73.

3. This fable has a biblical origin. See *Judges* 9:7-15. A complete compilation of Aesop’s Fables can be found on-line. See *Aesop’s Fables*, PACIFICNET.NET, <http://www.pacificnet.net/~johnr/aesop/> (last visited March 4, 2012). For over seventy years, the leading book assigned to entering law students has been *The Bramble Bush*, by Karl N. Llewellyn, which seeks both to warn them about and prepare them for the rigors and pitfalls of the experience. See generally KARL N. LLEWELLYN, *THE BRAMBLE BUSH* (1960).

4. Like fairy tales and nursery rhymes, most fables are allegorical. The moral here: “When there is a dispute among sophisticated people, then riff-raff also try to act important.” *Aesopica: Aesop’s Fables in English, Latin & Greek*, MYTHFOLKLORE.NET, <http://mythfolklore.net/aesopica/perry/213.htm> (last visited March 8, 2012). See also STEPHEN D. GLASS, *The Morals of Aesop’s Fables*, TOGETHERWETEACH.COM, [http://www.togetherweteach.com/MoreSayings/morals\\_of\\_aesop.htm](http://www.togetherweteach.com/MoreSayings/morals_of_aesop.htm).

concept of academic freedom. Certainly, the realm of scholarship has been invaded by the image-seekers and image-makers.

Legal scholarship is unique in ways that are both interesting and problematic. It has become a phenomenon of epic proportions; the bulk of what we know of such writing emanates from the 190-plus law schools approved by the American Bar Association, which collectively produce more than 680 legal journals.

As with other learned publications, articles appearing therein largely reflect arbitrary choices by authors, editors, and law schools of data and trends they deem worthy of analysis.<sup>5</sup> The content of law journals is, in many respects, amorphous, with virtually no bounds on subject matter, unlike various other social-science disciplines, such as political science or economics. Legal academics can and do write about any topic that interests them, and the ever-expanding number of student-edited journals ensures that most manuscripts eventually find their way into print.<sup>6</sup>

This system serves as the basis for substantial professional rewards: a junior faculty member's tenure prospect, at many schools, is measurably enhanced if he or she is lucky enough to entice an offer from the student-editors at one of the "top-fifty" law reviews—and virtually assured if the piece is accepted by Harvard or Yale. This article seeks to demonstrate the negative effects that various such preoccupations with marketing have upon both scholarship and academic freedom.

## II. THE ASCENDANCY OF MARKETING OVER THE ACADEMIC ENTERPRISE

*"To market to market, to buy a fat pig,  
Home again, home again, jiggedy-jig . . ."*<sup>7</sup>

Today's law schools, as those of yesteryear, are preoccupied with their reputations—as much a survival instinct as anything else. The competition for bright students and talented faculty is more intense than ever, and mar-

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5. That's certainly the case, I think with this piece. See Olufunmilayo Arewa et al., *The Production, Consumption and Content of Legal Scholarship: A Longitudinal Analysis*, LAW SCH. ADMISSIONS COUNCIL, Dec. 2006.

6. Whether this view is simple cynicism or healthy skepticism, it has been out there for some time. See, e.g., Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936); see also Arewa et al., *supra* note 5. But see Erik M. Jensen, *The Law Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL EDUC. 383, 383 (1989). See generally Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387 (1989).

7. According to the first edition of this rhyme, in 1611, "home again" refers to "the place where children playing hide themselves." OXFORD NURSERY RHYMES, *supra* note 1, at 353. A modern version might read: To market, to market, to be a good peer, / Home again, home again, to the next tier.

keting has increasingly come to be treated as a consideration at least as important as the actual academic enterprise. Thus, administrators seek to adopt a strategic identity plan—"building the brand" in the common parlance of today's deans and administrators—in order to develop and enhance their schools' reputations.

For better or worse, "building the brand" has become the primary goal of a law school's strategic identity plan because it is inextricably bound to the annual rankings of *U.S. News & World Report*.<sup>8</sup>

The near-obsessive preoccupation with this standard, by most law school deans and faculties, has, in turn, yielded perhaps the most obtrusive contemporary intervention into legitimate legal scholarship. Whether true or not, the clear perception is that the more prestigious the institution's law review and those journals in which its faculty publishes, the higher the institution's position in the standings. At least one consequence of this fixation on prestige is that student editors feel strongly inclined to select articles based on the author's reputation or law school affiliation, rather than on an article's merits. Similar pressures may drive them to choose the type of highly theoretical, but impractical, pieces that are held in high regard by many law professors.<sup>9</sup>

The *U.S. News & World Report* rankings have come to be viewed as a benchmark, one often cited by university promotional staff as reasons why their school ought to be chosen over competitors'. The fixation on law school rankings by current and prospective law school students, administrators, faculty, and alumni continues, unabated. It is, according to one such marketing person, "the 800-pound gorilla of legal education affecting just about everything we do."<sup>10</sup>

The *U.S. News* rankings have also been compared with those of *Car and Driver*, in that both can distort data when certain variants are either not taken into account or have too much weight placed upon them.<sup>11</sup> *U.S.*

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8. See JON M. GARON, STRATEGIC IDENTITY AND THE BRANDING OF LAW SCHOOLS (January 6, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1680848](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680848).

9. For an unusually candid assessment of their effects on deans, see William Hines, *Ten Major Changes in Legal Education Over the Past 25 Years*, ASSOCIATION OF AMERICAN LAW SCHOOLS, [http://www.aals.org/services\\_newsletter\\_presAug05.php](http://www.aals.org/services_newsletter_presAug05.php). See generally Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C.L. REV. 139 (2010). The competition for *USN&WR* rankings is discussed at greater length *infra*.

10. See Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309, 326 (2006). See generally Alfred L. Brophy, *The Emerging Importance of Law Review Rankings for Law School Rankings, 2003-2007*, 78 U. COLO. L. REV. 35 (2007).

11. Malcolm Gladwell, *The Order of Things: What College Rankings Really Tell Us*, THE NEW YORKER, Feb. 14, 2011, available at [http://www.newyorker.com/reporting/2011/02/14/110214fa\\_fact\\_gladwell](http://www.newyorker.com/reporting/2011/02/14/110214fa_fact_gladwell).

*News* analyzes law schools according to a series of factors, including assessment by peers, lawyers, and judges; LSAT scores of the 25th and 75th percentiles of the class; bar-passage rates, student-faculty ratio, and expenditures per student.<sup>12</sup>

As a direct consequence of the *U.S. News* rankings, law schools tailor their admission process, expenditures, hiring—and (if not especially) their modes of reporting data to the American Bar Association to ascend in the *U.S. News* rankings. The University of Illinois, for example, tried to improve its law school ranking on student expenditures by valuing the discounted LexisNexis and Westlaw services provided them at their retail cost.<sup>13</sup> Such actions are understandable as schools scramble for ways to improve their rankings and thereby influence recruitment of prospective students and attract more alumni dollars.

By placing all schools on the same scale, the rankings give readers the impression that law schools all have the same interests and needs, but they also obscure the multiplicity of roles law schools play in the training of lawyers. Institutional goals vary significantly: some emphasize research and scholarship; others make and teach social policy; some advance corporate clients in the national and international markets; while others simply serve the needs of average citizens in both mundane and life-changing matters. The mere inclusion of numerous factors in the rankings does not acknowledge the complexity of purposes in legal education.<sup>14</sup>

Of even greater concern is that, because the single largest factor in the *U.S. News* rankings is reputation among legal academics, schools seeking to raise their stature spend substantial sums on glossy promotional publications and mailing them to legal academics and practicing lawyers.<sup>15</sup> “Tons of money,” says one dean, “not just here, but at other law schools around the country – is being spent on public relations now that was never spent before.”<sup>16</sup> A few years ago, one school, hoping to make a splash, sent a large and colorful poster with a marine motif to all law professors at Indiana University–Bloomington, and presumably many other law schools.<sup>17</sup>

In a recent survey, nine out of ten educators said that marketing was the biggest and most frustrating issue that kept them “awake at night.”

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12. Robert J. Morse & Samuel Flanigan, *The Ranking Methodology*, U.S. NEWS & WORLD REP. (Mar. 26, 2008), <http://www.usnews.com/education/articles/2008/03/26/law-methodology>.

13. Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES (July 31, 2005), <http://www.nytimes.com/2005/07/31/education/edlife/wellen31.html?pagewanted=all>.

14. See generally Jeffrey E. Stake, *The Interplay Between Law School Rankings, Reputations, And Resource Allocation: Ways Rankings Misleads*, 81 IND. L.J. 229 (2006).

15. *Id.* at 240.

16. Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L.J. 205, 211 (2006).

17. Stake, *supra* note 14, at 240.

Attracting more students was identified as the biggest challenge for the more consistently profitable schools, those which sought to create, test, and perfect marketing systems. Consulting firms claim that the most effective way to attract more students is through sophisticated advertising campaigns.<sup>18</sup>

Besides the fact that such tactics may sacrifice long-term interests for gains that will show up during a dean's tenure, one might reasonably question whether attempts to increase a school's visibility will legitimately inure to the benefit of public interest.<sup>19</sup>

The *U.S. News* rankings have other negative effects as well that are not as easily discernible. For example, they encourage students to use so-called "safety schools" as a stepping stone to transferring to those with higher rankings. One student said she thought she had "ruined her life" because she had to go to lesser school (in this case the University of Baltimore) – but was saved after attaining a 4.0 grade point average at the end of her first semester, after which she transferred to a more prestigious school (Georgetown). They seldom consider that the "better" school might be considerably more expensive, and might not have the same quality of certain programs (e.g., clinical experiences).<sup>20</sup>

In fact a school's ranking probably has little to do with the credentials of its students. *U.S. News* does not calculate the quality of a program in terms of what value it adds to students' knowledge or career prospects. All it does is speak to "reputation" as measured by things like the size of a school's faculty, endowment, and library collection. There is nothing in the rankings that intelligently reflects the value of the education provided, only what talents students may bring with them—as determined largely from LSAT scores and grade point averages.

Regardless (or perhaps because of) the rankings, law schools generally do a poor job marketing what they can offer students in terms of educational quality and cost effectiveness. For years they have hidden the type of employment they can expect to get. They rarely tout their relatively lower costs compared to more prestigious schools. Instead they seem to try to outspend one another—largely because winning the *U.S. News* sweepstakes amounts to spending more money than anyone else, not to mention playing games in order to enhance their reputations.

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18. Internet communication from Gregg Meiklejohn, EmploymentResources.com.

19. In this context one might note that decanal hypocrisy is a well-recognized phenomenon. See *infra* notes 78-88.

20. See Bruce Buckley, *The Transfer Question*, NATIONAL JURIST, Jan. 2012, at 22.

*A. Academic Freedom and Tenure: The Need for Eternal Vigilance*

“Set a man to watch all night . . .”<sup>21</sup>

The current view of tenure was established in 1940 when the American Association of University Professors (AAUP) and the Association of American Colleges (AAC) officially endorsed it as a means to preserve a faculty’s right to avoid the restraints imposed by compelling orthodoxy—that is, to ensure academic freedom. Professors were thus guaranteed the right to pursue any line of inquiry in the course of their teaching or research, without being censored, penalized, or fired by university administrators.<sup>22</sup> While courts have not universally recognized academic freedom as a Constitutional right, it has nevertheless, generally, been viewed as one that must not be violated in the evaluation of a scholar’s performance. Academic freedom has also been associated with the First Amendment right of free speech, and some courts have deemed it to be a First Amendment right in and of itself—a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. Although the two rights are not necessarily the same, they frequently and sufficiently overlap to trigger judicial scrutiny when the faculty performance-evaluation-process threatens to impinge on the First Amendment.<sup>23</sup>

Academic freedom is fundamentally the protection of intellectual diversity; it is not, of course, an open license to do or say anything one wants.<sup>24</sup> But mere dissent cannot be punished, whether in the form of public speeches, or ideas expressed in a classroom.<sup>25</sup> Thus, neither firing, nor reprimands, nor negative evaluations should be imposed upon an individual simply because of his or her political views. It is not something that need be earned—that is, one need not demonstrate genius before being given the freedom to think and speak. But, it would be a mistake to be-

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21. The original London Bridge was destroyed by Viking invaders in the first century, and has been rebuilt many times over the years since. See London bridge is falling down: Nursery Rhyme Lyrics, History and Origins, <http://www.rhymes.org.uk/london-bridge-is-falling-down.htm> (last visited March 23, 2012). This passage is the prescription in the tenth stanza of the famous nursery rhyme: “Set a man to watch all night / Watch all night, watch all night, / Set a man to watch all night, My Fair Lady,” OXFORD NURSERY RHYMES, *supra* note 1, at 319.

22. Those were the days. See Robert E. Haskell, *Academic Freedom, Tenure, and Student Evaluation of Faculty: Galloping Polls in the 21<sup>st</sup> Century*, Educ. & Pol’y Analysis Archives (U. New Eng.) (Feb. 12, 1997), at 3.

23. *Id.*

24. See Gary A. Olson, *The Limits of Academic Freedom*, CHRON. OF HIGHER EDUC., Dec. 9, 2009.

25. See generally John K. Wilson, *Myths and Facts: How Real is Political Correctness?*, 22 WM. MITCHELL L. REV. 517 (1966).



lieve that academic freedom is ever fully protected. Orthodoxies are abundant among students who feel silenced in a classroom, professors who are not hired because colleagues believe their research is unimportant, graduate students who are told to pursue less-controversial dissertation proposals, and in a multitude of other scenarios.<sup>26</sup>

### B. *Watch the Way We Do It*

*“Oh, mother dear, see here, see here . . .”*<sup>27</sup>

Since *U.S. News & World Report* began its survey of ABA-approved law-schools in 1987, it has become a major influence upon the process and production of legal scholarship. Many professors measure their worth and esteem by publication numbers—a standard that often yields a scholarly publication, whose primary appeal is to impress an audience of academic specialists. This result is unfortunate when it displaces the mentoring of students or the counseling of a public or professional constituency. Genuinely new ideas come grudgingly when faculty (either tenured or untenured) are relegated to intellectual conformity. Academic freedom and independent thinking are increasingly stifled.

It should also be noted that a major factor in the *U.S. News* rankings system is evaluation of a school by its peers, which accounts for fully 25 percent of a school’s score (more than placement success (20 percent), median LSAT score (12.5 percent), or cumulative grade point average (10 percent)). Since the primary means by which a law school can learn about another is through the publication record of its faculty, the best way to enhance peer evaluation scores is to publish the kinds of things everyone is seeing in the journals they are most likely to read.

The ultimate coercion is to deny tenure to one who doesn’t conform, even though he or she might have talent and ability. The outliers become outcasts. The process from entrance into graduate school to earning tenure can take well more than a decade, much of which is freighted with anxiety. By the time tenure is earned, the single-minded pursuit of the prize has often purged skills that might be otherwise useful.<sup>28</sup> The trail of academic

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26. *Id.*

27. Many faculties look upon themselves as sheep to be led by, or kittens to seek approval of, the dean and their peers. “Oh, mother dear, see here, see here / For we have found our mittens . . . Put on your mittens, you silly kittens, and you shall have some pie.” OXFORD NURSERY RHYMES, *supra* note 1, at 301.

28. Daniel Drezner, *Reactions: Is Tenure a Matter of Life or Death?*, CHRON. OF HIGHER EDUC. (Feb. 21, 2010), <http://chronicle.com/article/Reactions-Is-Tenure-a-Matter/64321/>.

perils that ensues is littered with ways and means by which freethinking is discouraged.<sup>29</sup>

It is a simple fact that senior law faculty and administrators expect “tenure-tracked” junior faculty to publish according to traditional criteria—that is, heavily footnoted articles in law reviews—and (nowadays almost nefariously) the more elite the journal, the better.<sup>30</sup> Strict application of such one-dimensional criteria to determine “acceptable” scholarship increasingly forces faculty to pay a high price during their pursuit of tenure and promotion.<sup>31</sup> It also serves to undermine a professor's interests in various pursuits, which should count as scholarship but, instead, are often marginalized. Moreover, requiring faculty to adhere to a rigid publish-or-perish model is not always consonant with the goals of teaching the principles of justice and professionalism.<sup>32</sup> Nor does such a model encourage the teaching of practical skills.

Protected by tradition and tenure, the legal academy faces little pressure to prepare students for actual practice—preferring instead to ponder questions of justice and legal theory. For those preferring an institutional identity geared more towards teaching students how to think like a lawyer (rather than to be lawyers), the assumption has long been that graduates would have the luxury of learning practical skills on the job, while still earning a salary high enough to pay back their educational debts. Nowadays, however, jobs are more difficult to attain, and law school alums are left in the lurch.<sup>33</sup>

### C. . . . *Tell Me What You Think of Me*<sup>34</sup>

Student evaluations have become a popular means for evaluating faculty. Evaluations first appeared during the 1960's, when a few enterprising college students decided informally to rate their professors.<sup>35</sup> They are now administered in almost all American colleges and

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29. Douglas L. Colbert, *Broadening Scholarship: Embracing Law Reform and Justice*, 52 J. LEGAL EDUC. 540, 542 (2002).

30. *Id.*

31. Dennis J. Turner, *Publish or Be Damned*, 31 J. LEGAL EDUC. 550, 553-58 (1981). See Philip F. Postlewaite, *Life After Tenure*, 48 J. LEGAL EDUC. 558 (1998); see generally Erwin Chemerinsky & Catherine Fisk, *In Defense of the Big Tent: The Importance of Recognizing the Many Audiences for Legal Scholarship*, 34 TULSA L.J. 667 (1999).

32. Colbert, *supra* note 29.

33. See Jim Secreto, *Transparency: The Cure for America's Ailing Law Schools*, NATIONAL LAW JOURNAL, April 11, 2011.

34. As in, “I'm a twinkling star,” and “I've dutifully said my A-B-C's” (the nursery rhymes, both sung to the same tune).

35. STEVEN M. CAHN, *SAINTS AND SCAMPS: ETHICS IN ACADEMIA* 37 (Rowman & Littlefield Publ., Inc., rev. ed. 1986). See generally Michael Huemer, *Student Evaluations: A Critical Review*, SPRYNET.COM, <http://home.sprynet.com/~ow11/sef.htm>.

universities, and have engendered a great deal of literature and commentary, both positive and negative.<sup>36</sup> In the popular marketing parlance, they have come to be "super-sized."

Evaluations are said to be reliable indicators of faculty performance. They also serve to improve performance, especially when (a) the professor's self-evaluation was very different from the students' evaluation, (b) the professor received professional consultation on the interpretation of the evaluations, and (c) the student evaluation forms included specific items (such as, "Professor gives preliminary overview of lecture"), as opposed to vague items such as, "How well-planned are lessons?"<sup>37</sup>

But, student evaluations have also generated substantial criticism. The most common complaint is that they are biased, in that students tend to give higher ratings when they expect higher grades in the course. This correlation is well established, and many believe that this causes rampant grade inflation.<sup>38</sup> In one survey, 70% of students admitted that their rating of an instructor was influenced by the grade they expected to receive.<sup>39</sup> A related complaint is that student evaluations encourage professors to "dumb down" their instruction in order to keep students happy with them.<sup>40</sup> Various studies have also indicated that audience ratings of a lecture are more strongly influenced by superficial stylistic matters than by content.<sup>41</sup>

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36. Perhaps a good indication of excessive scholarship is the fact that there have been nearly two thousand studies of student evaluations. See Haskell, *supra* note 22; Robin Wilson, *New Research Casts Doubt on Value of Student Evaluations of Professors*, CHRON. OF HIGHER EDUC. (Jan. 16, 1998), available at [http://www.physics.ohio-state.edu/~wilkins/osu\\_and\\_ohio/essays/evaluation.html](http://www.physics.ohio-state.edu/~wilkins/osu_and_ohio/essays/evaluation.html); see also MARTIN CAVE ET AL., *THE USE OF PERFORMANCE INDICATORS IN HIGHER EDUCATION: THE CHALLENGE OF THE QUALITY MOVEMENT* (3d ed. 1997); Sylvia d'Apollonia & Philip C. Abrami *Navigating Student Ratings of Instruction*, AMERICAN PSYCHOLOGIST 52 (1997): 1198–1208; PHILIP C. ABRAMI ET AL., *Educational Seduction*, 52 REV. OF EDUC. RES. 446, 44950 (1982).

37. Huemer, *supra* note 35.

38. See Louis Goldman, *The Betrayal of the Gatekeepers: Grade Inflation*, 37 J. OF GEN. EDUC. 97, 105 (1985).

39. Huemer, *supra* note 35 (citing John W. Gilbaugh, *Renner Substantiated*, 63 PHI DELTA KAPPA 428 (Feb. 1982)) ("360 of 518 students surveyed at San Jose State University gave the response indicated. This result may be taken with a grain of salt, as Gilbaugh reports it in a letter to the editor and does not give details as to survey methods. However, the results are more likely an underestimate than an overestimate, both because students may be reluctant to admit to what most would regard as unfair behavior on their part and because some students may be unaware of their bias."). Cf. *id.* ("[P]rofessors believe that grading leniency and course difficulty bias student ratings.")

40. In another survey, "38% of professors admitted to making their courses easier in response to [student evaluations]." *Id.* (citing James J. Ryan et al., *Student Evaluations: The Faculty Responds*, 12 RES. IN HIGHER EDUC. 317, 317–33 (Dec. 1980). One instructor candidly reported that, "having almost lost his job due to low teaching evaluations from his students . . . [h]e was able dramatically to raise his teaching evaluations and gain tenure . . . by becoming totally undemanding of his students, giving out easy grades, and teaching to the lowest common denominator." *Id.*

41. See *id.* (citing Naftulin et al., *The Doctor Fox Lecture: A Paradigm of Educational Seduction*, 48 J. OF MED. EDUC. 630, 630–50 (1973)) ("In a well-known study, a professional actor was hired to deliver a non-substantive and contradictory lecture, but in an enthusiastic and authoritative style. The audience, consisting of professional educators, had been told they would be listening to Dr. Myron Fox,

Another reason why student evaluations are widely used may be the belief that the university is a business and that the responsibility of any business is to satisfy the customer. They are, after all, a relatively accurate measure of student (customer) satisfaction. However, most students do not come to law school for entertainment; but for certification of ability to meet the standards required by the bar. A student may be happy to receive an easy “A” without having to work or learn much, but a law school that makes a policy of providing such a product will find its diplomas decreasing in value.

Student evaluations of faculty frequently infringe upon instructional responsibilities by providing a mechanism for administrative control over curricular content, grading, and teaching methodology.<sup>42</sup> They also play a significant role in current attacks on the tenure system.<sup>43</sup> However, the various alternatives to student evaluations, such as faculty workshops to improve teaching effectiveness, or personal visits by peers or superiors, deprive administrators of the leverage they may have in using evaluations as bludgeons to compel orthodoxy.

Perhaps most significant, however, is the often unrecognized negative effect that student evaluations have on academic freedom. At the very least, evaluations allow administrative intrusion into the classroom. Increasingly, they have become an instrument of intimidation, encouraging conformity to politically correct (and, often, lower) teaching standards, as well as classroom demeanor. They are partially responsible for substantial grade inflation.<sup>44</sup> Not only do they influence professors' teaching styles and grading, they may also restrict what is said in class—encouraging professors to be politically correct.<sup>45</sup> Harvard law professor, Alan Dershowitz, for example, claims that some of his students have used the power of their

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an expert on the application of mathematics to human behavior. They were then asked to rate the lecture. Dr. Fox received highly positive ratings, and no one saw through the hoax.” *But see id.* (citing Philip C. Abrami et al., *Educational Seduction*, 52 REV. OF EDUC. RES. 446, 446–64 (1982) (“However, the authors caution that these results provide little information about the validity of student ratings, in part because it is not known how much either content or stylistic factors vary among actual college professors. If, for instance, actual professors varied very little in presentation styles, then the Dr. Fox effect would not be relevant in most cases.”)).

42. See generally Haskell, *supra* note 22. Student evaluations are widely used “in promotion (86.6%) and tenure (88.2%) reviews.” *Id.* (citing Kolevzon, M. S., *Grade Inflation in Higher Education, A Comparative Study*, 15 RES. IN HIGHER EDUC. 195, 195–212 (1981)).

43. See William Scheuerman, *Public Higher Ed: Battleground in the Tenure Wars*, NEA HIGHER EDUC. J. 63, 66, available at <http://www.nea.org/assets/docs/HE/Tenure4Battleground.pdf>.

44. Anthony Greenwald & Gerald Gillmore, *Grading Leniency Is a Removable Contaminant of Student Ratings*, 11 AMERICAN PSYCHOLOGIST, 1209–17 (1997).

45. More than one author has described student evaluations as “opinion polls,” with the suggestion that they require professors to think like politicians, seeking to avoid giving offense and putting style before substance. See Wendy Williams & Stephen Ceci, *‘How’m I Doing?’ Problems with Student Ratings of Instructors and Courses*, CHANGE: 29 MAG. OF HIGHER LEARNING, 12–23 (Sept./Oct. 1997).

evaluations in an attempt to exact their political revenge for his politically incorrect teaching.<sup>46</sup>

When a class deals with controversial subject matter, professors may seek to avoid giving offense, by focusing on what others have said.<sup>47</sup> Student evaluations provide a disincentive to legitimate pedagogic goals, such as correcting students or challenging their logic. On the other hand, they reward professors who tell their students what they want to hear.

The tendency to teach in a manner that results in higher student evaluation scores is, altogether, understandable, but when utilized in determining promotions, salary raises, or continued employment, they become a potent and toxic means for manipulating faculty behavior.<sup>48</sup> Despite the fact that the original intention of student evaluations was to improve the quality of instruction, they “do not eliminate poor or below-average teachers, but instead increase poor teaching practices.”<sup>49</sup>

The limited value of student evaluations has been known for some time. A 1984 examination of evaluation forms from 156 schools showed “shocking” differences among them, and concluded that “. . . for administrative purposes, law school teacher evaluations are not taken very seriously . . . no one really believes that the process does much good.”<sup>50</sup>

As Louis Menand recently pointed out in an incisive *New Yorker* article about the theoretical value of a college education, many professors today recognize that there is little incentive for them to make their courses more rigorous. To the contrary, it is in a professor’s best interest to keep classes entertaining and assignments not too onerous. Moreover, they candidly admit that the only aspect of their teaching that matters professionally is student course evaluations—in that they figure prominently in tenure

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46. One student, who complained to Dershowitz about his teaching about rape from a civil liberties perspective, informed Dershowitz that he should expect to be “savaged” on the student evaluations at the end of the term. Several students subsequently complained on their teaching evaluations about the content of his lectures on the subject of rape, saying that they were offensive, that he should not be allowed to teach at Harvard, and so on. Dershowitz, of course, has little fear of losing his job, but less-prominent law professors, especially those who are untenured, may not feel that way. See ALAN DERSHOWITZ, *CONTRARY TO PUBLIC OPINION* (Pharos Books, 1992).

47. Huemer, *supra* note 35 (“For example, a professor may, without raising any eyebrows, teach an entire course of lectures on ethics without ever making an ethical statement, since he confines himself to making reports of what other people have said about ethics. This ensures that no one can take offense towards *him*. During classroom discussions, he may simply nod and make non-committal remarks such as “Interesting” and “What do the rest of you think about that?”, regardless of what the students say. (This provides the added “advantage” of reducing the need both for preparation before class and for effort during class, on the part of the professor.)”).

48. See Haskell, *supra* note 22, at 5 (citing J.E. Stone, *Inflated Grades, Inflated Enrollment, and Inflated Budgets: An Analysis and Call for Review at the State Level*, 3 No. 11 EDUC. POL’Y ANALYSIS ARCHIVES (1995)).

49. *Id.*

50. William Roth, *Student Evaluation of Law Teaching*, 17 AKRON L. REV. 609, 609 (1984).

and promotion decisions. Indeed, a study in the 1990s found that faculty commitment to teaching is negatively correlated with compensation.<sup>51</sup> Furthermore, a number of critics have pointed out that this mercantile philosophy of “consumerism” erodes academic standards and lowers the general quality of education.<sup>52</sup>

#### D. *Fattening the Mother Goose*

##### *Will You Love Me In December As You Do In May?*<sup>53</sup>

The most serious threat that student evaluations pose to academic freedom is when their inappropriate use results in dismissal of faculty. It is virtually impossible, of course, to ascertain data to this effect. Nor is it easy to determine, empirically, the degree to which faculty appointments are affected by, or based on, marketing. But, anecdotal evidence abounds with instances in which deans and appointment committees choose their new faculty members by how it will ultimately enhance the law school's reputation. Whether your hiring was a fairy tale appointment or a high-tension crashshoot<sup>54</sup> varies from person to person.

A diploma from an Ivy League school, however, is almost certain to get a candidate past the first pile of throwaway applications. A Supreme Court clerkship is a virtual lock for an on-campus interview and presentation. A prior publication record in noteworthy journals is persuasive, as is practical experience; both are likely trumped by race and gender.<sup>55</sup> There's more than one way to fatten the mother goose, but most of them are designed to feed the marketing image. Since *U.S. News & World Report* began its survey of ABA-approved law-schools in 1987, it has become a major influence upon the process and production of legal scholarship. These days, a dean can usually be found looking at the rankings.<sup>56</sup>

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51. Louis Menand, *Live and Learn: Why We Have College*, THE NEW YORKER (June 6, 2011) available at [http://www.newyorker.com/arts/critics/atlarge/2011/06/06/110606crat\\_atlarge\\_menand](http://www.newyorker.com/arts/critics/atlarge/2011/06/06/110606crat_atlarge_menand) (analyzing a book written by Richard Arum and Josipa Roksa, *Academically Adrift*).

52. See Haskell, *supra* note 22 (citing D. E. Benson & J. M. Lewis, *Students' Evaluation of Teaching and Accountability: Implications from the Boyer and the ASA Reports*, 22 TEACHING SOCIOLOGY 195, 195-99 (1994)).

53. Cf. Swedish proverb: *Love me when I least deserve it, because that's when I really need it.*

54. Pun intended.

55. Readers who are either candidates or members of appointment committees should be able easily to fill in here with their own evidence.

56. The dean was in his counting-house, counting his school's ranking / In U.S. News & World Report—his prayers had set him thanking / His lucky stars: his faculty was finally cause to chortle— / They'd published enough articles to rise a full half-quartile! My apologies to whoever wrote the famous rhyme, whose precise provenance is unknown. OXFORD NURSERY RHYMES, *supra* note 1, at 471.

For junior professors seeking tenure, the pressure to publish becomes a year-round preoccupation. For those who have already jumped through the scholarly hoops and achieved senior status, much of their scholarly output is encouraged by financial incentives, and special stipends to produce law review articles have become fixtures among most faculties.

*E. Hickory-Dickory, Document-Pickery*<sup>57</sup>

When a law professor nowadays relates “What I Did Last Summer,” chances are pretty good that he or she was writing a law review article under a summer research stipend. Such stipends provide a means by which faculty can obtain supplemental funding for scholarship that they are obligated to produce anyway—but they often come with stipulations that reflect administrative biases and subvert academic freedom.

Such conditions have become increasingly common and intricate. At Pace University's School of Law, for example, the base summer research grant in 2010 was \$8,000.<sup>58</sup> An additional \$6,000 was offered if a professor published an article in the primary journal of a *U.S. News and World Report* “Tier 2” or “Tier 3” school.<sup>59</sup> The bonus grew to \$10,000 if the article appeared as a main article of a “Tier 1” law review, a specialty journal at a Top-10 law school, or a peer-edited or peer-refereed journal.<sup>60</sup> The bonus was \$15,000 if either (a) the work was published in the primary journal of a Top-20 school, or (b) within a twelve-month period after the initial summer research grant is approved, the faculty member produces two or more different articles, each of which is accepted for publication in either a main journal at a Tier 1 or Tier 2 school, a specialty journal at a Top-10 law school, or in a peer-edited or peer-refereed journal.<sup>61</sup>

Although faculty members at Pace may receive summer stipends for casebooks, treatises, or substantial practice-oriented pieces, the bonuses

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The original verse reads as follows: The king was in his counting house / Counting out his money; / The queen was in the parlour / Eating bread and honey. / The maid was in the garden, / Hanging out the clothes; / When down came a blackbird / And pecked off her nose. / They send for the king's doctor, / Who sewed it on again; He sewed it on so neatly, / The seam was never seen.

57. “Pickery” is defined as “petty theft.” DICTIONARY.COM, <http://dictionary.reference.com/browse/pickery> (last visited March 11, 2012).

58. *2010 Summer Research Grants*, PACE LAW SCHOOL, <http://www.pace.edu/school-of-law/summer-research-stipend-and-assistant-policy>.

59. *Id.*

60. *Id.*

61. A professor whose proposal has been approved receives “an initial payment of \$4,000 and the balance when the piece is accepted for publication.” *Id.*

apply only to traditional law review articles,<sup>62</sup> ostensibly because the latter matter the most to *U.S. News and World Report*.<sup>63</sup>

A senior faculty member at a fourth-tier law school reports that his application for a summer research stipend was denied because the article he did the prior year had been accepted by a new interdisciplinary journal that was not yet on the Lexis-Nexis database.<sup>64</sup> The fact that his piece was particularly appropriate for this journal—which was peer-reviewed and edited—did not sway the dean or stipend committee operating under the school's market-driven guidelines.<sup>65</sup>

The dean's purported standards in order to receive a summer research stipend are yet another form of coerced orthodoxy—this one ostensibly to achieve the goals of attaining a higher ranking in *U.S. News & World Report* and inclusion in Coif. While these goals may be supportable to the marketing administrators, they should not be attained at the cost of academic freedom and the scholarly enterprise. Most simply put, we should not be told what to write about or where to publish. By requiring us to seek placement in particular journals (say, the "top 100"—however that quality can be measured), we are forced to tailor our scholarship accordingly, to write for a particular market as opposed to writing out of conviction, passion, or the search for truth or answers in areas that interest us.

It is possible that one's intellectual or scholarly interests will coincide with the market – but that does not always happen, nor should it. Under the current and proposed standards, the scholar who writes/markets for *U.S. News & World Report* or Coif is duly rewarded. The one whose scholarship pursues his or her academic interests takes his or her chances at being financially supported.

This is especially true—and substantially more stressful and damaging to younger (read: untenured) faculty who are under even greater pressure to write for a market or risk losing not only summer stipends but job security.

The tenured faculty who refuse to abide by the current or proposed standards are more likely to see their scholarship go unrewarded, or simply ignored, or be condescendingly dismissed or downgraded as not participating in the life of the school.

None of these criticisms of the system in place takes issue with the more important concerns of scholarship that is prospectively rewarded or supported by a summer research stipend but is never in fact produced.

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62. *Id.*

63. *See supra* notes 58-61 and accompanying text.

64. Should inclusion in Lexis-Nexis be a legitimate standard?

65. Source wishes to remain anonymous.



When that happens, the dean should have the authority to withhold future funding until some work actually is tendered. Even this calculation can be weighed according to different circumstances. For example, an article prevented or delayed by the birth of a child should not be treated as punitively as one that was never produced because the writer once again fell into the blue funk of writer's block or yet another spell of periodic torpor. The remedy in either of the latter two cases might be refusal of further stipends until something is actually published.

But these failures are far different from the issues surrounding coerced orthodoxy noted above—and need be much less nuanced in their ascertainment or correction: “You don’t produce the work, you don’t get paid.”

What if you do produce the work, but it’s not what the dean (or his hand-selected committee) wanted? Here the possibilities become much more myriad, subjective, and nefarious.

Say an accomplished scholar—one who publishes frequently and widely (i.e., in a variety of milieu, from traditional law-review articles to op-ed pieces to interdisciplinary journals), and speaks around the country and abroad on his or her subject matter, and spends time writing books and promoting them, and often makes appearances in the media and at professional conferences to demonstrate his or her expertise, is frequently cited in law reviews and elsewhere, and, moreover is honored and recognized for his or her intellectual body of work—decides to write a piece about the failure of journalists to abide by their own codes of professional conduct, demonstrating in the process the empirically demonstrable effects such failures have the course of events, and addresses constitutionally sound practices and processes by which such failures can be remedied. The proposal receives a summer research stipend. The article is duly researched and written, and turns out to be substantial in scope, analysis, and source references. Upon mass submission to traditional student-edited (and “top-100”) law reviews, the article receives tepid initial responses. One peer-reviewed journal, however, an interdisciplinary publication with a stellar interdisciplinary editorial board but little standing in the panoply of “top” reviews, makes an immediate offer. The professor chooses to accept that journal’s offer, and the article appears electronically and in hard cover.

Lo and behold, the professor is informed by the Summer Research Stipend Committee that you have not fulfilled his or her obligation—because the article did not appear in a mainstream law review, but in a relatively new interdisciplinary journal. One may be further told (to his or her dismay) that, had the receipt from *Espresso* been submitted – thereby proving that the article had indeed been sent around for publication in mainstream law reviews, and that the author had withheld acceptance of the offer from

the interdisciplinary journal, the requirements would likewise have been satisfied.<sup>66</sup>

Is this the kind of exceedingly strict scrutiny of our scholarship that we wish to endorse?

As it is, much of the scholarship to be found in law reviews is derivative of other documents, or expository. Little of it reflects genuinely original ideas.<sup>67</sup>

#### F. *Finding the Key to the Kingdom*

The Order of the Coif is an academic honor society for lawyers. Law schools with a Coif chapter may nominate, and elect to membership, graduating students in the top 10% of the class. The chapter may also elect voting members of the faculty to the Order of the Coif.<sup>68</sup> The Order's website lists the 81 member-schools.<sup>69</sup> According to the Order's Constitution, the purpose of the society is "to encourage excellence in legal education by fostering a spirit of careful study, recognizing those who as law students attained a high grade of scholarship, and honoring those who as lawyers, judges, and teachers attained high distinction for their scholarly or profes-

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66. Because that didn't happen, however, the professor upon whose real-life case this example is based was told that he would not be receiving a stipend for the next summer. So the professor quickly revised the proposal, indicating that last summer he had also produced a chapter in a book on genocide which was about to be published by Oxford University Press. He argued that such a contribution by itself should perhaps be worthy of consideration for a new stipend. He was then informed that a member of the committee felt that the chapter was a rehash of an article the author had written earlier. The professor tried to point out that, although the subject matter was the same, the chapter was substantially different from the article. No, it wasn't, the committee member insisted. Why? Because, as she inadvertently disclosed in an email she may have meant for someone else, she "reject[ed] [his] revised proposal for a host of other reasons" (which she did not disclose). Ultimately the professor was able to obtain a stipend nevertheless, by pointing out that another of his pieces of scholarship the prior year had been accepted as a chapter in a book to be published by Oxford University Press. *Author's files*.

67. See *infra* Section II.

68. Although the word "coif" is derived from the French "*coiffure*," or hairstyle, in the legal academy it's the equivalent of a gold key. Finding the key to the Kingdom of Honorifics is not always an easy task. Just ask deans who want to win a Coif chapter for their aspiring law schools. "Crown the king with carrot tops, / Dress him in sateen, / Give him lots of licorice drops, / With suckers in between." See *Crown with the King with Carrot Tops*, NURSERY RHYMES ONLINE, [http://www.nurseryrhymesonline.com/crown\\_the\\_king\\_with\\_carrot\\_tops-2961.php](http://www.nurseryrhymesonline.com/crown_the_king_with_carrot_tops-2961.php).

69. See THE ORDER OF THE COIF, [www.orderofthecoif.org](http://www.orderofthecoif.org). As of 2011, 81 of 199 United States law schools accredited by the American Bar Association to award the J.D. degree had Order of the Coif chapters. In that year, all but five of the top fifty law schools, as ranked by U.S. News, were member schools. The others, Boston University, Columbia, Harvard, George Mason, and Notre Dame, have never applied for a chapter, (Notre Dame and Columbia are ineligible because they do not rank the top 10% of their graduating class by grade point average). See also *Coif Worthy Law Schools and Law Reviews*, THE FACULTY LOUNGE (Feb. 04, 2011), <http://www.thefacultylounge.org/2011/02/coif-worthy-law-schools-and-law-reviews.html>

sional accomplishments.”<sup>70</sup> Law schools can apply for the creation of a “chapter” by submitting an application that describes the law school’s educational program, student body, and faculty achievements.<sup>71</sup>

A law school’s application for the creation of a chapter of the Order of the Coif must include a schedule of the articles published by faculty members in the “top 25 law reviews identified in the Washington & Lee rankings of journals” for the last 5 years, including Harvard, Yale, and Stanford Law Journals.<sup>72</sup> “These are all strong journals at strong schools, but are they really the only ones that are Coif-worthy? Should the list be expanded to include, say, specialty journals?” Law review placement should not be a true measure of article quality. “Why . . . should law review placement be an important metric to apply in evaluating faculty scholarship in connection with a school’s application for membership in Order of the Coif?” The application form for the Order of the Coif’s reflects the:

. . . disproportionate . . . weight accorded to faculty scholarship published in traditionally-conceived ‘prestige’ venues. Even if we assume that those evaluating schools’ membership applications consider publications with scholarly presses, articles in peer-reviewed journals and interdisciplinary work, the impression one gets from the application is that the Order of the Coif isn’t keeping up with trends in legal scholarship publication.”<sup>73</sup>

#### G. *The Coercive Power of Lucre*

*“That’s the way the money goes . . .”*<sup>74</sup>

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70. THE ORDER OF THE COIF, [www.orderofthecoif.org](http://www.orderofthecoif.org). The induction process varies by law school, but students are generally notified of their membership after the final class ranks at their schools are announced. A new member receives a certificate of membership, a badge of membership for wear during academic ceremonies, a Coif key, and in some cases an actual coif or a representation of one. *See id.*

71. *Id.*

72. *Id.*

73. *See Coif-Worthy Law Schools and Law Reviews*, THE FACULTY LOUNGE (Feb. 11, 2007), <http://www.thefacultyounge.org/2011/02/coif-worthy-law-schools-and-law-reviews.html>. *See generally Criteria and Procedures for Establishing A Chapter of the Order of the Coif*, THE ORDER OF THE COIF, <http://www.orderofthecoif.org/COIF-membership-app.htm>.

74. *See* OXFORD NURSERY RHYMES, *supra* note 1. The words of the original ditty (*‘Round and ‘round the mulberry bush / The monkey chased the weasel / That’s the way the money goes-- / Pop goes the weasel*) are derived from Cockney slang. Perhaps as with the lesser law schools, it was once traditional for even poor people to own a suit, which they wore as their “Sunday best”; when times were hard they would pawn the suit on Monday and claim it back for the weekend.

Although concerns have been expressed recently that the “higher education bubble” is about to burst,<sup>75</sup> law schools that invest heavily in marketing may consider themselves justified by the results.

During the 2009–2010 school year, law schools in the United States enrolled over 51,000 students.<sup>76</sup> Over the next three years, most of the students will likely spend well over \$100,000 on educational expenses and living costs, incurring significant student loan debt primarily in the form of federal Title IV loans.<sup>77</sup>

In return for this investment, many students still believe they will significantly improve their career prospects, allowing them to pursue financially lucrative and rewarding careers even though both law school applicants and those currently enrolled cannot be oblivious to the fact that legal jobs in the private sector are scarce and firms are downsizing.<sup>78</sup>

Their optimism is unwarranted. Like Hansel and Gretel, they soon become lost in the woods and are lured to a house of promise and sustenance; unlike the two fairy-tale children, they have not laid down breadcrumbs or devised another escape plan. The law schools, however, have been more than complicit. At least for the past decade, many of them have disseminated false or misleading employment statistics in order to attract students and improve their ranking. They are abetted in no small measure by various illusory surveys—such as those published by *U.S. News & World Report*, the American Bar Association, and the National Association for Law Placement—which suggest that the median starting salary for law graduates lucky enough to find jobs in the private sector was \$160,000. But the surveys invite trimming and deceptive accounting procedures, and schools finesse the data in dozens of ways.<sup>79</sup>

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75. The theory is that consumers of college degrees will soon realize that the value of their ever-increasing cost will no longer seek them in such great numbers. See, e.g., Trent Batson, *Is Higher Education Ready for “The Education Bubble?”*, CAMPUS TECHNOLOGY, June 1, 2011, <http://campustechnology.com/articles/2011/06/01/the-education-bubble.aspx>.

76. AMERICAN BAR ASSOCIATION, FIRST YEAR J.D. AND TOTAL J.D. MINORITY ENROLLMENT FOR 1971 – 2010, [http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats\\_8.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_8.authcheckdam.pdf); see also William Henderson & Andrew Morriss, *How the Rankings Arms Race Has Undercut Morality*, NATIONAL JURIST, March 2011, at 10.

77. Vivia Chen, *Law Schools Run Like Puppy Mills*, THE CAREERIST, July 20, 2010, <http://thecareerist.typepad.com/thecareerist/2010/07/young-and-dumb.html>; see also Higher Education Act of 1965, 20 U.S.C. § 1070 *et seq.* (2008).

78. In fact there has been a ten percent decline nationally in applications, but law schools still have little difficulty in filling their entering classes. Interview with admissions director at a large eastern law school, Author's files.

79. David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all>. The \$160,000 figure was what the prestigious big law firms were paying. Until 2008, that group of firms was hiring roughly a quarter of law school graduates; after the economic downturn of that year three was a steep decline in hiring. Most of the figures come from the National Association of Law Placement (NALP), which makes an annual report on statistics it gathers from both

Some deans have become experts at playing the system. In the recent past, more than one of them has been publicly taken to task for both their candor and hypocrisy. In July of 2011, the *New York Times* published a long article focusing on Richard Matasar, Dean of the New York Law School. For over a decade, Matasar has been one of the legal academy's most dogged critics, repeatedly urging both professors and fellow deans to reject the law-school-as-a-business idea in favor of putting students' interests first. "Can class size be increased without damaging quality," he asked in a 1996 *Florida Law Review* article, "without assurances that jobs will be available for the increased number of graduates . . . without also providing more staff, faculty, books and service?" The answer he gave was an emphatic "No!"<sup>80</sup>

During Matasar's tenure as dean, however, New York Law School increased its tuition to \$47,800 a year, making it higher than Harvard Law School, and its entering class by 30 percent. It also put up a new building at a cost of more than \$135 million. Asked if there was a contradiction between his prior stance against expanding class sizes and the current reality, he answered that "we exist in a market" and, when there is demand for education, "we, like other law schools, respond."<sup>81</sup>

Law schools also respond because they are very lucrative businesses. Like business schools and some high-profile athletic programs, legal education is a common cash cow—here a moo, there a moo, everywhere a moo-moo—often used to subsidize other fields in universities that can't pay their own way.<sup>82</sup> New York Law School remains a highly profitable venture.

Meanwhile, the price of a law degree continues to climb. From 1989 to 2009, when college tuition rose by 71 percent, law school tuition shot up 317 percent.<sup>83</sup> Earlier in 2011, the *New York Times* quoted Phillip Closius, former dean at the University of Baltimore School of Law, about why and how he plays the system. "There are millions of dollars riding on students' decisions about where to go to law school, and that creates real institutional pressures." He had come to University of Baltimore School of Law from the University of Toledo College of Law, where he took credit for lifting that school's *U.S. News & World Report* rankings from No. 140 to

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graduating lawyers and law firms. *Id.*; see also Joel Murray, *Professional Dishonesty: Do U.S. Law Schools that Report False or Misleading Employment Statistics Violate Consumer Protection Laws?*, BUSINESS INSIDER L. REV., June 16, 2011, at ##; "Law School Not Worth It For Many," available at <http://restoringdignitytothelaw.blogspot.com/2011/01/on-advertising-law-school-v-medical.html>).

80. Segal, *supra* note 79.

81. *Id.*

82. Obviously the institutions (like Old McDonald and this article) want to milk it for all it's worth. Among deans, the money surrendered to the administration is known informally as "the tax." *Id.*

83. *Id.*

No. 83 by, in part, shifting about 40 students with lower Law School Admission Test (“LSAT”) scores into the part-time program.<sup>84</sup>

“You can call it massaging the data if you want,” said Closius, “but I never saw it that way.” Weaker students wound up with lighter course loads, which meant that fewer flunked out. The *Times* added that, according to Closius, a dean who pays attention to the *U.S. News & World Report* rankings is not gaming the system; he’s making the school better. Unfortunately, he added, not all schools play fair.<sup>85</sup>

In truth, much of what happens at the University of Baltimore School of Law and New York Law School is standard operating procedure elsewhere as well. Few law schools would report a drop in postgraduate employment, because that would cause them to plummet in the rankings. “We ought to be doing a better job for our students and spend less time worrying about whether another school is five spots ahead,” the *New York Times* quoted David Yellen, Dean of the Loyola University Chicago School of Law. “But in the real world you can’t escape from the pressures. We’re all sort of trapped. I don’t know if anyone is out-and-out lying, but I do know that a lot of schools are hyping a lot of misleading statistics.”<sup>86</sup>

The words “hype” and “hypocritical” have similar meanings and derivation,<sup>87</sup> definitions that might have particular relevance to the way deans deal with the facts. But few of them have ever been seen sitting in the corner eating humble pie. In 2007, the Law School Admissions Council posted this statement:

The *U.S. News & World Report* rankings purport to be derived from mathematical formulae based on data common to all law schools. The “weights” attached to the variables are arbitrary and reflect only the view of the magazine’s editors. For example, according to the magazine, 40 percent of the rankings is based on each school’s “reputation.” The reputation ranking is derived from a survey of a modest number of legal academics, lawyers, and judges across the country, which asks them to rate comparatively all ABA-approved law schools. Reputation is an important factor

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84. At that time part-time students did not count in the *U.S. News and World Report* survey—the rules have since been changed. See David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, January 8, 2011, <http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all>.

85. *Id.*

86. *Id.*

87. “Hype” means “when something is advertised and discussed in newspapers, on television, etc. all the time in order to attract everyone’s interest”; “hypocritical” means a person who pretends to have virtues, moral or religious beliefs, principles, etc., that he or she does not actually possess, especially a person whose actions belie stated beliefs.” The latter is derived from the late Latin *hypocrita* and Greek *hypokritis*, a stage actor, hence one who pretends to be what he is not. DICTIONARY.COM, <http://dictionary.reference.com/browse/pickery> (last visited March 11, 2012).

in choosing a school, but schools with excellent reputations within their communities, states, or regions may not be well known in other parts of the country. None of us has adequate knowledge about more than a tiny handful of law schools so as to permit us, with confidence, to compare them with each other.<sup>88</sup>

Many law school deans signed a statement that was ostensibly designed to minimize the importance of the *U.S. News & World Report*. The same people sang a different tune, however, when the rankings were to their schools' benefit. For example, Karen Rothenberg of the University of Maryland School of Law, stated: "We moved up more places in the rankings than any other top-tier law school. . . . It's extraordinary." Thomas Mengler of the Saint Thomas School of Law was similarly elated: "We are quite pleased with this first ranking. . . . Our goal from the beginning has been to pursue our mission and deliver the best education to our students, anticipating that recognition for excellence would follow." So was Donald Polden of the Santa Clara University School of Law: "Our strong *U.S. News & World Report* ranking is just one more indication of the overall strength of Santa Clara's law school. We are gratified by the growing national recognition we are receiving."<sup>89</sup>

Other deans followed suit. Dean Lawrence Sager of the University of Texas Law School commented that, "We are pleased to be recognized once again as one of the nation's top law schools by our peers in the academy and the profession. Our sustained recognition is especially noteworthy, given a disproportionate emphasis in the poll on practitioners in the Northeast and on the West coast."<sup>90</sup>

Consumer advocates argue that law schools lure unsuspecting students with false promises of six-figure jobs, only to then abandon them to debt while cashing in on their tuition dollars.<sup>91</sup> Indeed it is hard to camouflage the fact that there are far too many newly minted attorneys hitting a much-

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88. See Gordon Smith, *Law School Deans & the U.S. News Rankings*, CONGLOMERATE BLOG: BUSINESS, LAW, ECONOMICS & SOCIETY (April 2, 2007), [http://www.theconglomerate.org/2007/04/law\\_school\\_dean.html](http://www.theconglomerate.org/2007/04/law_school_dean.html).

89. *Id.*

90. Statement posted online by University of Texas Law School, March 30, 2007, available at [http://www.utexas.edu/law/news/2007/033007\\_rankings.html](http://www.utexas.edu/law/news/2007/033007_rankings.html). Not all deans were two-faced. See Gordon Smith, Comment to *Law School Deans & the U.S. News Rankings*, CONGLOMERATE BLOG: BUSINESS, LAW, ECONOMICS & SOCIETY (April 2, 2007), [http://www.theconglomerate.org/2007/04/law\\_school\\_dean.html](http://www.theconglomerate.org/2007/04/law_school_dean.html).

91. Brian Wolfman, *Are Law Students the Victims of Their Schools Deceptive Advertising?*, PUBLIC CITIZEN CONSUMER LAW AND POLICY BLOG (March 9, 2011, 9:43 AM), <http://pubcit.typepad.com/clpblog/2011/03/are-law-students-the-victims-of-their-schools-deceptive-advertising.html>.

reduced job market, some 40,000 a year,<sup>92</sup> but law schools seldom go beyond reporting the average salaries of their graduates who are lucky enough to find employment in the profession. Nor do they note the percentage of students who respond to their surveys. Likewise, there is a paucity of data about how many graduates are working in full-time legal jobs as opposed to part-time, temporary, or non-legal jobs, perhaps because such statistics are not required by either the American Bar Association or *U.S. News & World Report*.<sup>93</sup>

And then there are the deans who go much further than gaming the system in their pursuit of ranking and reputation. Villanova University School of Law was recently censured and slapped with harsh sanctions by the American Bar Association for knowingly falsifying admissions data. The American Bar Association's Council of the Section on Legal Education and Admission to the Bar found the school's conduct "reprehensible and damaging to prospective law school applicants, law students, law schools and the legal profession [which] undermines confidence in the accreditation process." Villanova University School of Law was forced to post the public censure on its website, issue a public statement of correction approved by the American Bar Association, and hire a compliance monitor for at least two years.<sup>94</sup>

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92. I offer this contrivance here because it doesn't fit anywhere else but is pertinent to the thesis of this article: There were some old law schools (this story is true) – / They made so many lawyers, they didn't know what to do. / They gave them diplomas but led them instead /To gross unemployment, far and widespread.

93. In May of 2012, a policy watch-group named Law School Transparency (LST) called for the dean of admissions at Rutgers-Camden to resign while urging the American Bar Association to investigate a "demonstrably deceptive" recruiting campaign by the law school. LST specifically cites an email used in the campaign highlighting employment achievements by the class of 2011. It claims the email misleads students when it states "of those employed nine months after graduation, 90 percent were employed in the legal field." The email does not elaborate on what it means by "of those employed," a number that excludes 17.8 percent, or 43, non-employed graduates. Nor does the email disclose that its definition of "legal field" includes jobs such as paralegals and law school admissions officers—jobs that don't require bar passage. See *Dean Should Resign Over Misleading Job Data, Policy Group Claims*, NATIONAL JURIST, May 25, 2012; see also Paul Campos, *How Law Schools Completely Misrepresent Their Job Numbers*, THE NEW REPUBLIC, April 25, 2011, <http://www.tnr.com/article/87251/law-school-employment-harvard-yale-georgetown>.

94. Jeff Blumenthal, *American Bar Association Censures Villanova Law*, PHILADELPHIA BUSINESS JOURNAL, August 15, 2011, <http://www.bizjournals.com/philadelphia/news/2011/08/15/american-bar-association-censures.html?page=all>. While the Council condemned the school's behavior, it did not issue a fine or place it on probation because it found that Villanova Law had remedied the violations. The ABA investigation also assigned responsibility for the misreporting. It found that former Villanova Law Dean Mark Sargent, who resigned in 2009 after being linked to a prostitution ring, directed the misreporting. It also named three administrators who operated under his direction and ultimately resigned or were terminated. "The investigation determined that these four individuals acted in secret, and worked to prevent other persons in the law school and university from learning that the admissions data was being misreported to the ABA," the censure statement said. *Id.*



## III. STANDARDS OF SCHOLARSHIP

*A dillar, a dollar, a ten o'clock scholar  
What makes you 'specially nice?  
You used to write just once a year –  
And now you publish twice!*<sup>95</sup>

Various excesses in the pursuit of truth, tenure, and promotion have been amply illustrated elsewhere,<sup>96</sup> but a recapitulation is in order to demonstrate how legal scholarship has been shaped, tainted, and ultimately undermined by misguided marketing strategies.

The limitations of faculty law review articles are widespread, and begin with definitions.

Scholarship is defined simply as “a fund of knowledge and learning.”<sup>97</sup> Faculties of law have much more difficulty with the concept. They grapple with the meaning of scholarship in much the same way that Justice Potter Stewart was unable to define pornography.<sup>98</sup>

In addition, an increasing amount of scholarship appears subject to modern notions of political correctness, a phenomenon that has created a split between advocates of conventional doctrinal scholarship and nontraditional writing. The American Association of Law Schools has contributed to this schism by encouraging faculty to avoid “prejudice against any particular methodology or perspective used in teaching or scholarship.”<sup>99</sup>

For purposes of promotion and tenure, “scholarship” has been defined as written and published materials which are “analytical,” “significant,” “learned,” “well-written,” and “disinterested”<sup>100</sup>—all terms, of course, that are highly subjective.

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95. OXFORD NURSERY RHYMES, *supra* note 1, at 465. (“A dillar, a dollar, / A ten o'clock scholar / What makes you come so soon? / You used to come at ten o'clock / And now you come at noon!”).

96. See, e.g., Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 927–28 (1990); see also J. Nicholas McGrath, *Scholarship Admired: Responses to Professor Lasson*, 103 HARV. L. REV. 2085, 2085 (1990). Those readers who might remember this earlier stab at the same target will note that nothing much has changed since it was written over two decades ago. If anything the excesses not only continue unabated but have become greater. So I feel the need to repeat some of the criticisms here, with updated examples. Whether what follows sheds light on why, however, remains questionable.

97. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2031 (2002) [hereinafter WEBSTER'S DICTIONARY].

98. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“But I know it when I see it.”).

99. See Arthur Austin, *The Law Academy and the Public Intellectual*, 8 ROGER WILLIAMS U. L. REV. 243, 280–81 (2003).

100. See, e.g., UNIVERSITY OF BALTIMORE SCHOOL OF LAW, FACULTY HANDBOOK 2011-2012 at 38, 66 [hereinafter BALTIMORE FACULTY HANDBOOK]; cf. UNIVERSITY OF MARYLAND SCHOOL OF LAW, FACULTY HANDBOOK (noting that “[a] candidate for tenure is required to have engaged in significant research and to have produced a significant product or products”). An exceptionally liberal policy,

To be “analytical,” according to the bylaws of the typical faculty, “the materials must provide a detailed, well-supported and sophisticated analysis that increases our understanding of the topic, and must do more than describe a body of law or a legal problem.”<sup>101</sup>

To be “significant,” “the materials must make a significant contribution to the legal literature. They must do more than reiterate or rephrase previous analyses of the topic and they must not represent the work of others.”<sup>102</sup>

To be “learned,” “the materials must demonstrate deep familiarity with and understanding of the body of knowledge associated with the topic.”<sup>103</sup>

To be “well-written,” they “must be written in a manner appropriate to the subject matter, and must demonstrate the candidate’s ability to convey his or her ideas effectively.”<sup>104</sup>

The only objective standard is the last. To be “disinterested,” “the materials must not be published to serve the interests of any client, either paid or pro bono.”<sup>105</sup>

For some reason faculties and deans making promotion and tenure decisions focus almost solely on articles published in law reviews. Often neither briefs nor practice manuals nor casebooks nor treatises, no matter how learned or useful, are considered “scholarship.” Why should this be?

#### A. *The Law Review Mystique*

*“I don't know why she swallowed a fly – perhaps she'll die.”*<sup>106</sup>

Unlike other disciplines, which may have their own problems with objectivity and scientific method, practically all of legal scholarship is a form of advocacy, and the great bulk of it appears in law reviews.

Critics of law review scholarship are neither shy nor newly arrived. It's been seventy-five years since Yale Law School Professor Fred Rodell

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along the lines of that recommended in this Commentary, may be found in SANTA CLARA UNIVERSITY, FACULTY HANDBOOK (1987), which notes that the criteria for promotion and tenure include an evaluation of the candidate’s creative work, including “recognized accomplishment or significant production in the arts of painting, sculpture, music, drama, fiction, poetry, dance, journalism, or the like.” *Id.* ¶ 3.6.2

101. BALTIMORE FACULTY HANDBOOK, *supra* note 100, at 66.

102. *Id.*

103. *Id.*

104. *Id.* at 67.

105. *Id.* What if, however, an article written by a professor who has represented a client in the subject matter goes against the client’s interests? Or if the professor has been commissioned to do an exhaustive study? In neither case should his scholarship be discredited out-of-hand?

106. Unlike the old lady of the nursery rhyme, who eventually swallowed a horse (she died, of course), law reviews continue to proliferate apace.

made his classic statement: "There are two things wrong with almost all legal writing. One is its style. The other is its content."<sup>107</sup>

Not everything that man thinks must he say, said the wise King Solomon; not everything he says must he write; but most important not everything that he has written must he publish.<sup>108</sup>

Over the years, more specific complaints have ranged from excessive article length to an overabundance of footnotes, from over-editing by students to a tortuously lengthy publication/printing process, from an overly theoretical bias in the selection of articles to insufficient knowledge by the students who choose and edit them.

But the system has proven durable and is firmly entrenched. As prized and often permanent residents of the Ivory Tower, professors are generally valued more for their writing than their teaching.<sup>109</sup> Administrators, meanwhile, are inclined to measure scholarship by quantity rather than by quality. For junior members of the faculty, "publish or perish" is a simple reality of academic life that they are not likely to question or challenge.<sup>110</sup> The great majority of them must produce a certain number of articles within a certain number of years in order to win tenure or promotion.

This culture is a direct cause of counter-productive excess. Consider the sheer numbers involved. In Rodell's day, there were about 150 law journals; although he predicted his original critique would have no effect, could he have anticipated that his "professional purveyors of pretentious poppycock"<sup>111</sup> would have spawned so furiously and that the reviews he collectively called "spinach"<sup>112</sup> would have mushroomed into such a gargantuan soufflé of airy irrelevance?

Here we are, three-quarters of a century later, and there are no fewer than 1,672 law journals published internationally; well more than half (993) are based in the U.S. Of those, 771 are specialized reviews, 222

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107. Rodell, *supra* note 6, at 38; *see also* Lasson, *supra* note 96, at 927–28 (suggesting that little has changed over the past two decades).

108. The saying is attributed to Solomon (1033-975 B.C.) by the Talmudic scholar Yisroel Salanter (1810-1883) in KOHELES/ECCLESIASTES 202 (Artscroll Tanach Series ed. 1976). *See also Ecclesiastes* 12:12 ("The making of many books is without limit.")

109. *See, e.g.* Editorial, *OSSU Should Start Using Teachers To Do Teaching*, COLUMBUS DISPATCH (3/31/99) (noting that undergrads are subjected to large classes taught by nonfaculty).

110. "Even at liberal arts colleges that emphasize teaching, at least in their brochures, it is increasingly necessary to keep putting things in print . . . . At one time 'publish or perish' was the watchword at big research universities, but today it is the holy grail from Harvard to Podunk A & M." DENVER ROCKY MOUNTAIN NEWS, 12/24/97; Terence Monmaney, *Researchers Feel the Crunch from VA Shutdown*, LOS ANGELES TIMES (4/3/99) (describing the publish-or-perish world of international academic medicine).

111. Rodell, *supra* note 6.

112. *Id.* at 45.

general-interest.<sup>113</sup> Most appear at least three times throughout the year, each with several lead articles apiece. By a conservative estimate, that is 9000 new pieces annually. Could even a small percentage of this massive productivity which law librarians privately label the Junk Stream<sup>114</sup> be worth readers' whiles?

Nevertheless, every law school now has at least one review to call its own, each looking and reading very much like the rest despite occasional attempts by editors to distinguish their journals by theme and discipline. Besides the fundamentally fungible general-interest reviews, we can genuflect with the *Journal of Law and Religion* and the *Journal of Church and State*; let our minds wander through the *International Lawyer*, the *Journal of International Law*, the *Connecticut Journal of International Law*, the *Yale Journal of International Law*, and the *Wisconsin Journal of International Law*; and innocently find guilty pleasures in the *American Criminal Law Review*, the *Criminal Law Journal*, the *Criminal Law Bulletin*, the *Criminal Law Quarterly*, and the *Criminal Law Review*.

The list goes on and on. Law reviews are published from Auckland to Zambia. One should be forewarned that the *Asia Pacific Law Review* is not to be confused with the *Asia Pacific Journal of Environmental Law*, the *Asian American Law Journal*, the *Asian Business Law Journal*, the *Asian International Arbitration Journal*, the *Asian Journal of Comparative Law*, the *Asian Journal of Criminology*, the *Asian Journal of Law and Economics*, the *Asian Journal of WTO & International Health Law and Policy*, the *Asian Yearbook of International Law*, the *Asian-Pacific Law & Policy Journal*, or the *Asian-Pacific Journal on Human Rights and the Law*.<sup>115</sup>

Specialty journals are ubiquitous. There are seventy-five law reviews whose titles begin with *The International Journal of* and fifteen more that start with *The Journal of International*. Fifteen are *The Journal of Law and something*, and twenty-one are *Law and something else*.

Beyond this ever-proliferating scholarly stew of reviews, consider the journals themselves. The first and arguably foremost among them is the *Harvard Law Review*, which remains the most emulated, and perhaps still the toughest from which to receive an offer of publication.<sup>116</sup> Yet even

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113. *Law Journals: Submissions and Ranking*, WASHINGTON & LEE UNIVERSITY SCHOOL OF LAW, <http://lawlib.wlu.edu/lj/> (last visited Mar. 13, 2012).

114. Author's files.

115. For some reason Australia and New Zealand combine to produce five different law reviews, but Australia has seventeen of its own which ostensibly do not compete with the *Pacific Basin Law Review*, the *Samoan Pacific Law Review*, or the *Journal of Maori Legal Writing*.

116. See Barbara H. Cane, *The Role of Law Review in Legal Education*, 31 J. LEGAL EDUC. 215 (1981).

*Harvard Law Review's* goals were exceedingly modest at the beginning. This, from Volume I, Number I, which appeared in 1887:

Our object, primarily, is to set forth the work done in the school with which we are connected, to furnish news of interest to those who have studied law in Cambridge, and to give, if possible, to all who are interested in the subject of legal education, some idea of what is done under the Harvard system of instruction. Yet we are not without hopes that the *Review* may be serviceable to the profession at large.<sup>117</sup>

How serviceable the *Harvard Law Review* has been in all the years since remains open to question,<sup>118</sup> but it has supplied the overwhelming majority of the most-cited articles in the past half-century.<sup>119</sup>

Occasionally a new law reviews will come along and an old one will go, but mostly they come and stay.<sup>120</sup> It used to be that each law school had one law review to lend it distinction. Now many have multiple journals. For example, the twenty accredited law schools in California currently publish eighty-two law reviews. University of California, Berkeley's alone puts out fourteen (two behind Harvard's sixteen), while Stanford University and University of California, Hastings each produce nine.

Most reviews have very limited circulations, consisting primarily of libraries and alumni. Few in the latter group pay any attention to the esoteric titles appearing on the cover, much less to the contents inside. For all the work professors put into law review articles, one would think they would be able to attract a larger audience than the sprinkling of colleagues who skim through off-prints out of courtesy or the handful of students who wade through them because they have been assigned. Even fewer practicing attorneys read such secondary sources out of non-billable interest.<sup>121</sup>

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117. 1 HARV. L. REV. 35 (1887).

118. See McGrath, *supra* note 96, at 2085.

119. See Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540, 1549–51 (1985). In addition, *Harvard Law Review* is still the only review in America that is self-sustaining, unsubsidized by a university or bar association. See Cane, *supra* note 9, at 215.

120. The *San Fernando Valley Law Review* lasted for ten years (1967–1977); the *San Joaquin Agricultural Law Review* fired up in 1997 and is still going strong. We have yet to see the *Idaho Potato Law Review*, but can it be far behind the *Journal of Vegetable Science*?

121. Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, March 19, 2007, <http://www.nytimes.com/2007/03/19/us/19bar.html>. As Adam Liptak of the New York Times observed a few years ago, “Articles in law reviews have certainly become more obscure in recent decades. Many law professors seem to think they are under no obligation to say anything useful or to say anything well. They take pride in the theoretical and in working in disciplines other than their own. They seem to think the analysis of actual statutes and court decisions—which is to say the practice of law—is beneath them.” *Id.*

Helping to perpetuate this endless multitude of articles are the virtually inexhaustible research tools now available over the Internet and Google, supplying comprehensive cross-references and mind-boggling databases.

Unlike academic journals in other professions, law reviews are, and have long been, edited by students.<sup>122</sup> Fully 654 of the 993 American law journals are student-edited. Thus intellectual discourse about the law is significantly influenced by people with but a few years of formal legal training. Besides helping to shape the professional literature for consumption by practitioners and judges, the decisions made by student editors also play a critical gate-keeping role for the legal academy.<sup>123</sup> As noted earlier, decisions by hiring, promotion, and tenure committees are frequently influenced by the number and quality of law review articles a candidate has published and the perception of their quality measured at least in part by the journals in which they appear.<sup>124</sup> It is at least mildly ironic that law students help determine what may turn out to be their professors' most important grades.<sup>125</sup>

Although law reviews undoubtedly provide some benefits for participating students and faculty—among them a strong supplement to the students' basic legal education, increased opportunity for student-faculty interaction, and more time for professors—there are numerous criticisms as well.<sup>126</sup>

The bulk of the criticism centers on the fact that most law reviews are edited by students. Among the abiding criticisms of student-edited law reviews are that they engage in an elitist staff-selection process, that the students who are chosen lack experience in both scholarship and editing, and that they are grossly over-edited.<sup>127</sup>

The lead articles themselves are often overwhelming collections of minutiae, perhaps substantively relevant at some point in time to an individual practitioner or two way out in the hinterlands, and that almost entirely by chance. Otherwise, they are quickly relegated to oblivion, or if lucky to a passing *but see* in someone else's obscure piece.

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122. Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 763–64 (1985).

123. Max Stier et al., *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467, 1468 (1992).

124. Lasson, *supra* note 96, at 927–28.

125. Stephanie R. Heifitz, *Efficient Matching: Reforming the Market for Law Review Articles*, 5 GEO. MASON L. REV. 629, 632 (1997).

126. Nathan H. Saunders, *Student-Edited Law Reviews: Reflections of An Inmate*, 49 DUKE L.J. 1663, 1671–73 (2000).

127. *Id.* at 1665–70.

“Confusion” reigns at the top of 944 recent articles, perhaps because “hermeneutics” shows up in ninety-nine.<sup>128</sup> In fact you can find almost any word you can contemplate in a title, from “bed bugs” to “bugaboos” to “booby traps,”<sup>129</sup> from “marvelous” to “wonderful” to “fantastic,”<sup>130</sup> from “silly” to “stupid” to “ridiculous.”<sup>131</sup> Scholars who are kids at heart can read about doggies,<sup>132</sup> duckies, and moo-moos.<sup>133</sup> Even private body parts have shown up at a dozen or so times in recent years.<sup>134</sup>

The academic voice is pitched in esoterica<sup>135</sup> and resonates with arch buzz-words. According to Westlaw, “toward,” “model,” and “theory”

128. These figures come from a Lexis search conducted in May of 2012. No doubt they'd be replicated if not exceeded by broader inquiries via WestLaw or some other comprehensive database.

129. I'm inclined to say look it up yourself, but you may have better things to do with your time, and besides, this is too much fun. E.g., Frank Douma & Milda K. Hedblom, *Wireless Communication Applications for Transportation: User Boon or Booby Trap?*, 27 WM. MITCHELL L. REV. 2163, 2163 (2001); Colleen P. Murphy, *The Bedbug Case and State Farm v. Campbell*, 9 ROGER WILLIAMS L. REV. 979, 979 (2004); Matthew E. Saunders, *Florida Bar v. Went for It, Inc.: A Thirty-Day Bugaboo?*, 31 NEW ENG. L. REV. 1215, 1215 (1997); see also Grant E. Coffield, *Love Hurts: How to Stop the Next "Love Bug" from Taking A Bite Out of Commerce*, 20 J.L. & COM. 241, 241 (2001); Andrew S. Crouch, *When the Millennium Bug Bites: Business Liability in the Wake of the Y2K Problem*, 22 HAMLINE L. REV. 797, 797 (1999).

130. E.g., Bryan M. Gallo, *Barbie's Life In Plastic: It's Fantastic For First Amendment Protection-Or Is It? Mattel, Inc. V. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002), 29 DAYTON L. REV. 405, 405 (2004); Joan S. Howland, *Memorial of Caroline A. Brede: "She Was Marvelous"*, 85 A.B.A. J. 96, 96 (1999); Ronen Perry, *It's A Wonderful Life*, 93 CORNELL L. REV. 329, 329 (2008); see also *Fabulous Vacation Getaway Destinations For Busy Lawyers*, 85 A.B.A. J. 96, 96 (1999); Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending*, 88 MINN. L. REV. 518, 518 (2004); Kathleen Wallman, *A Birthday Party: The Terrible or Terrific Two's? 1996 Federal Telecommunications Act*, 51 FED. COMM. L.J. 229, 229 (1998).

131. E.g., James F. Lucarello, *The Praise of Silly: Critical Legal Studies and the Roberts Court*, 6 TOURO L. REV. 619, 619 (2010); see also Marc R. Greenberg, *Captain "Sully" Sullenberger, Charles Dickens, And The Migratory Bird Treaty Act*, 25 CRIM. JUST. 12, 12 (2010); Lauren Benton, *Colonizing Hawai'i and Colonizing Elsewhere: Toward A History of U.S. Imperial Law*, 38 LAW & SOC'Y REV. 835, 835 (2004).

132. E.g., Adam F. Scales, *How much Is That Doggy in the Window? The Inevitably Unsatisfying Duty to Monetize*, 33 FORDHAM URB. L.J. 1045, 1045 (2006); Stephanie K. Savino, *Puppy Lemon Laws: Think Twice Before Buying that Doggy in the Window*, 114 PENN. ST. L. REV. 643, 643 (2009); Katherine D. Tushaus, *Don't Buy the Doggy in the Window: Ending the Cycle That Perpetuates Commercial Breeding With Regulation of the Retail Pet Industry*, 14 DRAKE J. AGRIC. LAW 501, 501 (2009).

133. E.g., Damian C. Adams, Michael T. Olexa, Tracey L. Owens, and Joshua A. Cossey, *DÉJÀ MOO: Is the Return to the Public Sale of Raw Milk Udder Nonsense?*, 13 DRAKE J. AGRIC. L. 305, 305 (2008); Joseph Lubinski, *The Cow Says Moo, the Duck Says Quack, and the Dog Says Vote: The Use of the Initiative to Promote Animal Protection*, 74 U. COLO. L. REV. 1109, 1109 (2003); Norman Otto Stockmeyer, *To Err Is Human, To Moo Bovine: The Rose of Aberlone Story*, 24 T.M. COOLEY L. REV. 491, 491 (2007).

134. E.g., Kay L. Levine, *Women as Perpetrators of Crime: No Penis, No Problem*, 33 FORDHAM URB. L. J. 357 (2006); William W. Bedsworth, *A Criminal Waste of Space: Waiter, There's A Seal Penis in My Soup*, 43 ORANGE COUNTRY LAWYER 44 (2001); Bruce E.H. Johnson, *Is There A Constitutional Right to Bombard the Public With Penis Enlargement Proposals?*, 21 COMM. LAWYER 3, 3 (2003). Could we be moving Towards A Model Penile Code?

135. See Mitch Reid, *United States V. Dickerson: Uncovering Miranda's Once Hidden And Esoteric Constitutionality*, 38 HOUS. L. REV. 1343, 1343 (2001).

have appeared in no fewer than 13,336 titles during the past quarter-century,<sup>136</sup> making them the most popular buzzwords since “integrated” and “functional” came down the titular pike.<sup>137</sup>

The value of law reviews to students is likewise limited. The majority of reviews are exclusive clubs, closed to all but those with the highest grades or demonstrated writing ability.<sup>138</sup>

While it is no doubt true that a good many professors can benefit from researching and writing within their chosen fields of interest and discipline—in the process stimulating their involvement and dissipating that particular inertia which often permeates the Ivory Tower—the limited value of legal scholarship as it appears in law reviews is largely outweighed by its costs. The proliferation of research and writing tends more to increase quantity than quality. One article is no longer good enough for promotion. An aspirant must demonstrate “maturation as a scholar and a continuing commitment to scholarship as a central element of his or her responsibilities as a professor.”<sup>139</sup>

Professorial purposes can be accomplished better than through *omphaloskepsis*, a law-review-quality Greek term for “contemplation of the navel.” Others have called it “sesquipedalian tergiversation,” meaning multi-syllabled evasiveness. But belly button gazing should be a luxury allowed only those few whose writing is deemed both incisive and succinct. The rest should be encouraged to more logical productivity as teachers and community leaders.

Meanwhile, the impact of law reviews on the judiciary is diminishing.<sup>140</sup> For example, there were 164 citations to law reviews in California Supreme Court opinions during the 1970s, but only six during

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136. Search of Westlaw's journal database as of July 2011. A similar search of the broader Social Science Research Network (covering both business and law reviews) yielded a total of 18,752 titles containing “toward(s),” “model,” or “theory.”

137. E.g., LeRoy Paddock, *An Integrated Approach to Nanotechnology Governance*, 28 UCLA J. ENVTL. L. & POL'Y 251, 251 (2010); Amy J. Schmitz, *Ending A Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 123 (2002). Legislative analysis frequently turns into law-review manure. Do we really need 571 separate articles on waste-disposal laws? If only the promulgators of scholarship patterns recognize the dimensions of their own garbage-removal problem. Garbage in scholarship, of course, is not the exclusive province of the law reviews. A panel proposed for an academic conference in 1999 was entitled “The Economy of Excrement in English Renaissance Studies,” in which literary scholars were invited to reflect upon the “tropes and representations of excrement and/or excretion in literature” and waste management and the social order.” THE NEW REPUBLIC (April 12, 1999); see also William Penny, *The Municipal Solid Waste Landfill Presumptive Remedy*, 13 NATURAL RESOURCES & ENVIRONMENT 471 (1999).

138. See JOEL SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 183–85* (1978).

139. See, e.g., BALTIMORE FACULTY HANDBOOK, *supra* note 100, at 68; see also Roger C. Cramton, “The Most Remarkable Institution”: *The American Law Review*, 36 J. LEGAL EDUC. 1, 11 (1986).

140. See Liptak, *supra* note 121; see also Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313 (1989).



the past five years despite the fact that the number of reviews has tripled in that period.<sup>141</sup>

Both law professors seeking tenure and law students seeking employment at elite law firms eagerly fill these volumes. But who reads them now? "Surely not the judges who decide the law," says former Santa Clara dean Gerald Uelman, "and not practicing lawyers either."<sup>142</sup>

Largely because of the drawn-out editing process for law review articles, much of what they offer has a built-in obsolescence. Literature in the scientific community, by contrast, is of considerably greater utility and immediacy. That may explain why articles in medical journals are generally much shorter, contain fewer footnotes, and are often grist for the popular media.<sup>143</sup>

Various observers have noted that supposedly analytical commentaries are predominantly descriptive and mildly plagiaristic;<sup>144</sup> that those published during pending litigation interfere with the judicial process;<sup>145</sup> that the scholarly voice lacks factual discipline;<sup>146</sup> and that objectivity is impossible because of lawyers' inalienable commitment to advocacy.<sup>147</sup> Supreme Court Justice William O. Douglas said that law review articles are written by paid hacks espousing the views of their clients.<sup>148</sup> Others see the proliferation of published articles as "harmful for the nature, evaluation, and accessibility of legal scholarship."<sup>149</sup> They "lack originality, are boring, too long, too numerous, and have too many footnotes, which also are boring and too long."<sup>150</sup>

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141. See John H. Merryman, *Toward a Theory of Citations*, 50 S. CAL. L. REV. 381 (1977); Gerald F. Uelman, *The Wit, Wisdom, and Worthlessness of Law Reviews*, available at [www.callawyer.com/story.cfm?eld=909875&evid=1](http://www.callawyer.com/story.cfm?eld=909875&evid=1) (June 2010).

142. Uelman, *supra* note 141.

143. See Arthur D. Austin, *Footnotes As Product Differentiation*, 40 VAND. L. REV. 1131, 1152 (1987).

144. E.g., John E. Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 322-23 (1985).

145. See *GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 1018 (9th Cir. 1976) (Chambers, J., concurring and dissenting).

146. See Julius G. Getman, *Voices*, 66 TEX. L. REV. 577, 580-81 (1988).

147. Arthur S. Miller, *The Myth of Objectivity in Legal Research and Writing*, 18 CATH. U. L. REV. 290, 294-95 (1969).

148. See William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 229-31 (1965).

149. Cramton, *supra* note 137, at 8. For another intelligent critique, see Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 7-8 (1986); see also Mike Antoline, *The New Law Reviews: A Burst of Specialty Alternatives*, STUDENT LAWYER, May 1989, at 26-30 (discussing the proliferation of "alternative journals"); Jensen, *supra* note 6, at 384 (mentioning a "glut" of legal articles); Leibman & White, *supra* note 6, at 418 (describing a "flood of paper and ink at the medium- and high-impact journals"); Miller, *supra* note 145, at 294-95.

150. Elyce H. Zenoff, *I Have Seen The Enemy And They Are Us*, 36 J. LEGAL EDUC. 21 (1986) (footnotes omitted); see also Daniel A. Farber, *Gresham's Law of Legal Scholarship*, 3 CONST. COMMENTARY 307, 309 (1986) (suggesting that the principle of "adverse selection" operates in legal scholarship to ensure that "law review literature will be dominated by articles taking silly positions").

But these criticisms are few and far between and, perhaps also because they are published in law reviews themselves, widely ignored.

B. *If the Footnote Fits, Wear It . . .*<sup>151</sup>

Scholarship is no different from any other writing in its basic function: communication. But the geometric growth of footnote density is fundamentally at odds with that purpose.<sup>152</sup>

Legal research is at once objective. There are a finite number of sources to be gathered and culled and an open-ended art form. With the advent of computerized data banks such as Lexis-Nexis and Westlaw, gleaning all the cases on point is as easy as playing Trivial Pursuit.

Yet the number of notes in an article is still deemed a measure of its erudition: the longer the note, supposedly the greater the breadth of its author's knowledge. The more numerous the references, the more comprehensive his treatment of the subject matter.<sup>153</sup>

Another common conceit is to write rambling distinctions laced with "fugitive" sources—exotic references, rare books, or "letters or documents on file with the author." Incomprehensible law-and-economics graphs and diagrams have also been in for some time.<sup>154</sup>

Even traditionalists recognize the criticism that footnotes have become "a serious embarrassment to legal scholarship."<sup>155</sup> Others have called them "phony excrescences,"<sup>156</sup> "a means of concealment,"<sup>157</sup> "hedged against

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For an especially thoughtful, well-articulated—and unheeded—piece, see Robert L. Bard, *Scholarship*, 31 J. LEGAL EDUC. 242, 244–45 (1981).

151. . . . And if it doesn't, use it anyway. Like the old woman who lived in a shoe, the law-review scholar usually has so many sources he/she does not know what to do, and often end up citing to excess. While I too slave away in footnoting tedium under a hot July sun (and a summer stipend), at once cynical and self-satisfied, languorous and vainglorious – I wonder aloud if anyone will read this article, much less this note. To those whose glazed eyes have fallen this far, I offer an autographed reprint free of charge.

152. See Austin, *supra* note 141, at 1144–45.

153. The current individual record-holder is Arnold S. Jacobs, Esq., who drew his readers away from the text no fewer than 4,824 times, easily eclipsing the former mark held by Dean Jesse Choper (1,611) as well as the group title (3,917) held by the Georgetown Law Journal staff. See Oser, *Numerous Notes No Shot in Foot*, NAT'L L.J., Jan. 16, 1989, at 35, col. 1. Even the shortest article in law-review history contained two footnotes totalling 109 words. Erik M. Jensen, *The Shortest Article in Law Review History*, 50 J. Leg. Educ. 1 (2000). The most-cited law review article of all time (at last count, with 8,407,309 citations) was one by Gerald F. Uelmen, entitled *Id.*, which included an instruction that it could be cited simply by title, without any reference to author, volume, or page numbers. Gerald F. Uelmen, *Id.*, 428 BYU L. REV. 333 (1992).

154. See, e.g., Lason, *supra* note 94, 927–28.

155. Austin, *supra* note 140, at 1133.

156. Abner Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 647 (1985) (quoting Professor Rodell).

157. DAVID MELINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* 94 (1982).

forthright statements in the text,”<sup>158</sup> and a “foible [that] breeds nothing but sloppy thinking, clumsy writing, and bad eyes.”<sup>159</sup> Various judges have complained that footnotes “cause more problems than they solve,” represent “dubious erudition,” and are an “abomination.”<sup>160</sup>

It’s hard enough to keep track of a modern scholar’s train of thought without having to jump back and forth from text to note. “If footnotes were a rational form of communication,” said one judge, “Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane.”<sup>161</sup> Or as Noel Coward put it, encountering a footnote “‘is like going downstairs to answer the doorbell while making love.’”<sup>162</sup>

### C. Undergoing Analysis

#### *Come, Now, Let Us Reason Together*<sup>163</sup>

Every Promotion & Tenure Committee requires that, for scholarship to pass muster, it must be “analytical.” But the term can be mind-boggling, and appears to defy definition.

The term “analysis” is defined as “separation of a whole into its component parts” and/or “an examination of a complex, its elements, and their relations.”<sup>164</sup> Consider again the attempt made by the typical faculty manual noted earlier: to be analytical, “[t]he materials must provide a detailed, well-supported and sophisticated analysis that increases our understanding of the topic, and must do more than describe a body of law or a legal problem.”<sup>165</sup> Thus we have classic tautology: to be analytical, the materials must provide an analysis!

In virtually every case, determination of whether an article increases our understanding of the topic or does anything more than describe a body of law or a legal problem depends almost entirely on subjective factors.

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158. *Id.*

159. Rodell, *supra* note 6, at 41.

160. See Austin, *supra* note 140, at 1153 (“In today’s publish or perish environment, footnote trashing is the slothful tenured establishment’s last refuge of snobbery.”).

161. Mikva, *supra* note 153, at 647–48.

162. Paul M. Barrett, *To Read This Story in Full, Don’t Forget To See the Footnotes*, WALL ST. J., May 10, 1988, at 25, col. 2.

163. Isaiah 1:18. For some reason “The Wise Old Owl” comes to mind: A wise old owl lived in an oak / The more he saw, the less he spoke / The less he spoke the more he heard / Why can’t we all be like that wise old bird? Similarly apropos might be these lines from “The Owl and the Pussycat”: And there in a wood / A piggy-wig stood / With a ring at the end of his nose / “Dear pig, are you willing / To sell for one shilling / Your ring?” Said the Piggy, “I will!” See OXFORD NURSERY RHYMES, *supra* note 1, at 394.

164. See WEBSTER’S DICTIONARY, *supra* note 95, at 77.

165. BALTIMORE FACULTY HANDBOOK, *supra* note 98, at 66.

The more familiar the reader with the subject matter, the less analytical the article; the more the reader favors a candidate, the better the analysis; and if the reader dislikes the candidate for any of many reasons, he can discreetly dismiss the analysis as wanting.

(This can be done in all manner of obfuscatory language. For example, a tenured associate generally regarded as an effective teacher was recently denied a promotion, largely based on a committee report stating that his work “did not disprove an accepted understanding of what the law is or how it works”; it did not provide “a fresh conceptual framework”; it did not “break new ground.”)

The true measure of an article’s quality should be how well it describes the subject, how tautly it is written, and how cogent we think the opinion -- even if we disagree. A more honest approach would begin by conceding the semantic truism that practically everything is analytical to a degree, and by making our sincere and subjective judgment based on how well we like it (or its author).

#### D. *Into the Oven*

*“Pat It, and Prick It, and mark it with a T . . .”*<sup>166</sup>

It may be hard to say whether good writers are born or made, but it’s painfully obvious that few of them are legal scholars. Law-review prose is predominantly bleak and turgid. Moreover, it seems to be self-perpetuating. The brightest students, should they become teachers, are still browbeaten into writing what has been called a “wonderful profusion of humbug.”<sup>167</sup> Many observers have noted the apprehension with which the law school elite regard a student or professor who resists legalese and insists on simple prose in writing and speech. The scholarship of such rare beasts is often regarded as suspect.<sup>168</sup>

The way law-review articles are written may be the primary reason they are so widely unread. The legal scholar’s standard prose has been criticized as everything from “patronizing”<sup>169</sup> and “pompous patois”<sup>170</sup> to

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166. Cf. OXFORD NURSERY RHYMES, *supra* note 1, at 404. *Patty-cake, patty-cake, baker’s man, / Bake me a cake as fast as you can, / Pat it, and prick it, and mark with a T, / Put it in the oven for baby and me.* This is one of the oldest and most widely known English nursery-rhymes. See OXFORD NURSERY RHYMES, *supra* note 1. The writer could find no evidence to support the urban law-school legend that the “T” in the third line stands for “Tenure.”

167. Shenefelt, *Disposable Scholarship*, WASHINGTON POST, Sept. 12, 1989, at A21, col. 1.

168. Rodell, *supra* note 6, at 289; see also Wright, *Goodbye to Fred Rodell*, 89 YALE L.J. 1455 (1980) (observing Rodell’s belief that he was denied an endowed chair because he wrote for non-academic publications).

169. See Getman, *supra* note 143, at 581.

unintelligible “gibberish.”<sup>171</sup> Its long sentences, awkward syntax, and overweening commitment to noncommittal buzzwords are at once impressive-sounding and useless.<sup>172</sup>

The reasons behind such poor writing may have as much to do with the perceived purpose of legal scholarship – indeed the scholar’s understanding of the purpose of law itself, as with an inability to follow basic rules of grammar, syntax, and style.

All too frequently the language of scholars is “far removed from the emotions, language, and understanding of the great majority of human beings,”<sup>173</sup> and the law they seek to analyze, criticize, explain, or change is lost in a sea of verbal molasses.

But let us suppose further that there is value in scholars discoursing among themselves, that it is easier and more efficacious for them to use the specialized terminology familiar to those in the discipline. A central problem here is that such highly technical or narrowly targeted articles frequently appear in the general-interest law-reviews. The tension between necessary jargon and editorial clarity, between influencing a small audience and accommodating a broader one, is overwhelming if not impossible. The lay lawyer reading a scholarly legal essay is hard put to understand it, much less see its search for Truth. Its length, style, and substance all too often combine to yield a soporific result: the eyes glazeth over.

Communicating clearly, however, even about complex legal ideas, should not be an impossible task.

Students who may be naturally predisposed to avoiding difficult legal concepts will surely avoid coming to grips with the nebulous ideas presented in a great many law-review articles. The scholarly voice invites analysis by generalities and lacks the discipline demanded by empirical research. It requires students to learn a new, complex language that will probably be irrelevant to their future careers.

If good writing is a reflection of clear thinking, the poobahs of scholarship are either a bunch of bumbleheads or a barrelful of bad writers. The weight of the evidence points to the latter. The point is this: if our

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170. See Rodell, *supra* note 6 at 289.

171. See Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 520-22 (1984-1985).

172. Liptak, *supra* note 119 (as Adam Liptak of the New York Times observed a few years ago, “Articles in law reviews have certainly become more obscure in recent decades. Many law professors seem to think they are under no obligation to say anything useful or to say anything well. They take pride in the theoretical and in working in disciplines other than their own. They seem to think the analysis of actual statutes and court decisions—which is to say the practice of law—is beneath them.”).

173. Getman, *supra* note 144, at 580.

purpose as scholars is to explain and persuade, we are most likely to succeed if we write simply and clearly.<sup>174</sup>

A final word about motivation: Besides promotion and tenure, for many a professor image is easily as important as substance. To treat the arcane in traditional academic prose is to impress one's colleagues. To be published, even cited, in an Ivy League journal is considered to be a feather in one's professional cap. On the other hand, to be spurned by the *Appalachian Journal of Nursery Rhyme Law and Literature* is ignominy most bitter (and usually suffered alone, without informing even one's spouse).

Scholarship thus becomes inalterably bound up in politics. It was a wise professor who said the reason academic politics are so sordid is that the stakes are so low.

Mere advancement on the faculty, of course, is not the only factor motivating professors to publish in law reviews of elite stature. Appearance in a journal of elevated prestige often serves as a proxy for influencing the perception of quality scholarship. Their length too is deemed a measure of quality, even though few students or practitioners read lengthy articles outside of their own fields of interest. Thus a young scholar who publishes an article on tax law in the *Harvard Law Review* will often garner the respect of people who may know nothing about the field but assume its high quality merely because of the journal's inherent reputation and selectivity. In addition to the gratification this respect is likely to bring, it is of obvious importance to scholars looking for entry into or a lateral position within the teaching profession.

The cost of producing a law-review article is not inconsiderable. One estimate suggests that, factoring in salary and benefits for a tenured professor at a high-paying school, who spends between 30 and 50 percent of his or her time on scholarship and publishes one article per year, it takes upward of \$100,000 for a professor at a top law school to write a single piece.<sup>175</sup>

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174. There are, of course, a number of examples of good, clear writing by law professors. See, e.g., DAN SUBOTNIK, *TOXIC DIVERSITY: RACE GENDER, AND LAW TALK IN AMERICA* (2005) (it should come as no surprise that this book supports a number of arguments made in this article).

175. Debra C. Weiss, *What Is the Cost of a Law Review Article by a Top Prof? Estimate Is 100K*, ABA J., Apr. 21, 2011, available at [http://www.abajournal.com/news/article/what\\_is\\_the\\_cost\\_of\\_a\\_law\\_review\\_article\\_by\\_a\\_top\\_prof\\_estimate\\_is\\_100k/](http://www.abajournal.com/news/article/what_is_the_cost_of_a_law_review_article_by_a_top_prof_estimate_is_100k/) (quoting comments by Hofstra Law Professor Richard Neumann at a Future Ed conference). The estimate took into account the costs of bonus stipends and research assistants. See Kenneth Anderson, *The Cost of A Law Review Article?*, THE VOLOKH CONSPIRACY, (Apr. 22, 2011, 11:02 AM), <http://volokh.com/2011/04/22/the-cost-of-a-law-review-article/>. I'd be happy to write a law-review article for the discounted rate of \$90,000, no questions asked, if anyone wants to make an offer. The most I've ever been paid before is \$10,000, in the form of a summer research stipend.

One study from 2005 indicates that the top five percent of law-review articles receive fifty percent of all citations, the top seventeen percent get seventy-nine percent of citations – and some forty percent (almost half) never get cited at all. If these figures are anywhere near accurate, one might conclude that half of the money spent on publishing articles is a waste, and that professors' time might be more efficiently spent on teaching.<sup>176</sup>

The counterpoints to this argument – that teaching may be very important at many schools but not to the exclusion of other activities; that writing is an objective way to demonstrate to colleagues the extent and depth of one's grasp of the material; and that as in other disciplines only a small portion of what is published is influential or important, but a lot of small contributions can collectively make a difference – still beg the question of whether the effort is worth the expense. Still others point out that cost and value are two different things, and that the value of having published what one has written is worthy in and of itself.<sup>177</sup>

If one agrees that the primary purpose of law schools is to produce lawyers, and that the primary role of law professors is in the classroom, to what extent does their scholarship contribute to their value? Does publishing an article make one's teaching any better than simply researching the issues and passing along what's learned to students?<sup>178</sup>

A related question: If scholarship has a value unto itself, who should foot the bill? Is it fair to have students' tuition applied to anything other than what they actually receive in the classroom? Why should they support enhancement of reputation? The cost of a law school education is high enough; students should not have to pay for scholarship whose primary benefits inure to the professors themselves and to the image of the law school on whose faculty they serve.<sup>179</sup>

Other critics point out that academia cares more about a professor's writing than his reading. The writing is deemed most important for the young faculty member's evolution into a tenured position. It is paradoxical that new hires are generally the teachers with less knowledge and time to

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176. Anderson, *supra* note 173. The figures of articles that are submitted but never published are understandably unavailable.

177. See Benjamin Davis, Comment to *The Cost of A Law-Review Article?*, THE VOLOKH CONSPIRACY (Apr. 22, 2011, 12:10 PM) <http://volokh.com/2011/04/22/the-cost-of-a-law-review-article>; Allan, Comment to *The Cost of a Law Review Article?*, THE VOLOKH CONSPIRACY (Apr. 22, 2011, 12:52 PM), <http://volokh.com/2011/04/22/the-cost-of-a-law-review-article>.

178. Allan, *supra* note 175.

179. *Id.*

read. They, instead, have to plan their courses, which takes much more time during the early years. Research and writing is an added burden.<sup>180</sup>

The problem might not be with the value of the scholarly enterprise, which is arguably considerable, but with the expectations placed on junior faculty members. As one senior professor puts it:

[P]art of the solution rests in having no publication expectations from new faculty until, say, three years after one begins teaching. Those years are for in-depth reading and class preparation. Once the new faculty member has had a chance to familiarize herself with the academic literature and case law, her ideas are likely to be better developed and better written. Simply put, there would be significantly less scholarship and better scholarship.<sup>181</sup>

The true value of law reviews to students is perhaps even more limited. Most students read them only when an article is assigned. Few judges or practitioners have the time or inclination. They're occasionally cited by appellate courts, and are rarely if ever referred to at the trial level. Those who understand the stilted academic voice in which articles are generally written may get something out of them. Their widespread accessibility therefore means practically nothing.<sup>182</sup>

A more cynical view is that law schools are in the business of selling credentials rather than providing strong educations, and that professors focus on self-advancement and/or an ideological agenda rather than on teaching and/or students.<sup>183</sup>

Similarly cynical is the perspective that the law-reviews' primary value is to provide a signal to future employers as to the better students, and may equip students to deal with the mindless drudgery of being a young associate at a large firm.<sup>184</sup>

But this view is flawed. The process goes more or less like this: After their first year of law school, during which students have been informed that they must reconstruct their thought processes, a few of them are chosen to participate on law-review. They are promptly assigned to write a

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180. Harry, Comment to *The Cost of a Law Review Article?*, THE VOLOKH CONSPIRACY (Apr. 22, 2011, 12:54 PM), <http://volokh.com/2011/04/22/the-cost-of-a-law-review-article>.

181. *Id.*

182. Federal Dog, Comment to *The Cost of a Law Review Article?*, THE VOLOKH CONSPIRACY (Apr. 22, 2011, 2:02 PM), <http://volokh.com/2011/04/22/the-cost-of-a-law-review-article>.

183. Arthur Kirkland, Comment to *The Cost of a Law Review Article?*, THE VOLOKH CONSPIRACY (Apr. 22, 2011, 2:29 PM), <http://volokh.com/2011/04/22/the-cost-of-a-law-review-article>.

184. Ioki13, Comment to *The Cost of a Law Review Article?*, THE VOLOKH CONSPIRACY (Apr. 22, 2011, 1:12 PM), <http://volokh.com/2011/04/22/the-cost-of-a-law-review-article>. Law review also enables students to differentiate between signals like *Cf.* and *But cf.* – which some believe cannot be done by rational minds. See Lasson, *supra* note 94.



detailed, insightful, exhaustive analysis or development of a novel (and preferably important and complex) point of law (the “casenote”). Soon after they are expected to edit articles of greater complexity and insight submitted by professors and practicing lawyers. A few of those articles are worthwhile contributions to the body of learning. Most are not.

One law-review alumnus, now a hiring partner at a big firm, noted that his interviews with applicants generated a sense that their professors had reduced their office hours, discouraged after-class exchanges with students, or focused myopically on their willingness to serve as research assistants. He suggests that this phenomenon is a result of the increased emphasis on written scholarship:

Bylines appear to be perceived as a route to improved institutional rankings, individual advancement in the academy, research funding, lucrative consulting or private practice engagements, and prestige. . . . Faculty devotion to careers (rather than to students or teaching) causes my school to subject law students to adjunct professors not only in small, specialized, practical courses but also in large, general core courses. I believe law schools (which seem relatively impervious to recognizing, let alone addressing, long-term problems until they reduce the number of applicants to a point that generates an empty seat in a first-year classroom) and students suffer from these developments. I suspect these developments are negative for many law professors, too.<sup>185</sup>

#### IV. A PENNY FOR YOUR THOUGHTS:

##### A. *Selling the Wares*

*Simple Simon met a pieman going to the fair;  
Said Simple Simon to the pieman "Let me taste your ware"*

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185. Arthur Kirkland, Comment to *The Cost of a Law Review Article?*, THE VOLOKH CONSPIRACY (Apr. 22, 2011, 1:20 PM), <http://volokh.com/2011/04/22/the-cost-of-a-law-review-article> (“I do not claim to be an expert in this field, or to have many answers to the questions surrounding law reviews. Against the background I have observed, however, I consider the costs of the current law review system to be no more worthwhile than I considered them during law school, when I quit law review. Twice.”).

*Said the pieman to Simple Simon "Show me first your penny"  
Said Simple Simon to the pieman "Sir, I have not any!"<sup>186</sup>*

When it comes to law review articles, there's certainly enough pie for everyone – plenty of pieces, plenty of places to put them. But going to the market can be a tricky business.

Submitting a completed article to law-reviews used to be an extremely lengthy and tedious process. There once was a strict rule against “simultaneous submissions,” that is, sending an article to more than one review at a time.<sup>187</sup> Some publishers still want to have the exclusive right of first refusal, and will not accept an article that has been submitted elsewhere.<sup>188</sup> Obviously, this creates a hardship on authors who do not wish to wait weeks or months before placing their pieces, especially if the subject matter is time-sensitive.

Nowadays, marketing law-review articles might still be considerably easier than picking a peck of pickled peppers, but probably a bit harder to get an offer of publication. The submission process has been made substantially facilitated by the introduction of a relaxed simultaneous-submission policy, so that an author can ply his or her scholarly wares to any number of journals at once. The postage to do this, of course, would still generate substantial costs. Today most of that expense can be avoided by way of electronic submissions, which themselves can be streamlined by use of services like those provided by ExpressO.<sup>189</sup>

If a writer is lucky enough to receive an early offer, he or she can request an “expedited review,” asking the more-favored journals for a prompt response. The process can become something like an auction, particularly when a scholar wants to hold out for publication in an elite law-

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186. The marketplace for law review articles resembles a giant fair. In the days before convenience stores, fairs were very popular places to sell goods. Their tradition and history dates back to Medieval England. See *Simple Simon Poem*, [http://www.rhymes.org.uk/simple\\_simon.htm](http://www.rhymes.org.uk/simple_simon.htm). In the days before ExpressO, marketing law review articles was a tedious task.

187. The term is sometimes confused with “multiple submissions,” which means sending more than one piece to the same publication. Probably wouldn't make much difference to many law journals, which are so inundated with articles that they quickly send out form-letter rejections that are barely disguised as personal responses. The standard letter reads something like this: “*Dear Professor Plish-bottom, Thank you for submitting your article, Idaho Potato Law in the 21<sup>st</sup> Century. While we found it very interesting and well-written, we regret that we cannot extend you an offer at this time. We receive many worthy submissions, and our space is limited. We wish you success in placing your article elsewhere, and hope you will consider us in the future. Sincerely, The Editors.*”

188. A number of major newspapers and magazines still have this policy.

189. See ExpressO, <http://law.bepress.com/expresso/> (last visited Aug. 10, 2012). The service makes submissions fast and easy. Manuscripts can be delivered to the author's choice of 550+ law reviews, including all of the top 100, simply by uploading an electronic file of the article to ExpressO's site – thereby effectively avoiding the costs and hassles and expenses of photocopying, assembling, and mailing.

review. Many deans actively encourage their faculties to do so, in order that their publication placements enhance their schools' *U.S. News & World Report* rankings.<sup>190</sup>

Writers of specialized pieces, however, must nevertheless confront a distinct bias against interdisciplinary journals and in favor of general law reviews. This creates obvious problems for the authors in such areas as taxation or law and economics, where the specialty journals would be a more appropriate forum for their work. They must consider whether a piece like this one might fit more snugly in the *Journal of Legal Education* than in the *Montana Law Review*.<sup>191</sup> Should the *Journal of Legal Education* be considered interdisciplinary? Is there a qualitative difference between law and economics, and law and anti-semitism?

On the other hand, it is likely that placement in a satellite law-review of a big-name school would be looked upon more favorably than the general law-review of an outlier. Most deans would prefer that their professors be published in the *Harvard Journal on Racial and Ethnic Justice* than in the *Ave Maria Law Review*. So would the professors.

### B. *Gilding the Lily*<sup>192</sup>

Some schools have competitions for the “best” published scholarly paper. At some, the selection is done by the dean or associate dean, or determined on the basis of its placement in a review put out by a school with a high *U.S. News & World Report* ranking.<sup>193</sup>

A preferable process would be to have the choice made by outside reviewers, who would minimize the appearance of bias, would not raise problems presented by *US News* rankings, or replicate those inherent in the law-review article-selection process, such as comparisons of specialty journals to flagship journals, and comparative “rank” of symposium placements vs. competitive placements.<sup>194</sup>

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190. See, e.g., *Strategic Plan*, Univ. of S. C. Sch. of Law, [http://law.sc.edu/administration/strategic\\_plan/](http://law.sc.edu/administration/strategic_plan/).

191. Perhaps a more pertinent question is whether an article like this, which may be viewed as ungratefully biting the hand that feeds the author, would qualify for a summer stipend – unless, of course, it were accepted by an Ivy-League law review. The irony does not escape the author that one of his earlier pieces (*Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*) appeared in the *Harvard Law Review* (103 HARV. L. REV. 926 [1990]) and engendered a great deal of positive reader response. See *Responses to Prof. Lason*, *supra* note 94.

192. The phrase is from Shakespeare's King John, and refers to wasteful or unnecessary excess. See *Gild the lily*, The Phrase Finder, <http://www.phrases.org.uk/meanings/gild-the-lily.html>.

193. Bridget Crawford, *Rewarding Faculty Scholarship*, THE FACULTY LOUNGE (Jan. 24, 2011, 3:49 PM), <http://www.thefacultylounge.org/2011/01/rewarding-faculty-writing.html>.

194. *Id.* To further insure fairness, outside evaluators may be asked to do blind reviews, without knowing the author's name or institutional affiliation.

Some professors report cash rewards of up to \$5000 for placement in a top journal, which practice may avoid the administrative problem of picking the best article but has the obvious fault of favoring placement over quality. There may also be a subject-matter bias, as well the fact that professors are strongly inclined to prefer articles that agree with their own views, so that the nomination of outside reviewers will strongly influence which papers get picked for rewards.<sup>195</sup>

There also seems to be increasing evidence that female faculty, for whatever reason, tend not to be as successful in gaining entry to the more elite journals.<sup>196</sup>

Similarly puzzling is why neither treatises nor professional presentations are treated with considerably less esteem than law-review articles.<sup>197</sup>

### C. *The Law of Unintended Consequences*<sup>198</sup>

The trickle of unintended consequences that ensue as a law school attempts to climb in the “rankings” soon becomes a river and then a stream.

At first, deans and faculties seek to lure scholars with little if any practical experience, assign them the mission of writing theoretical articles, and urging them to publish in the highest-ranking law-review that will extend an offer. In turn, student editors feel pressured to select increasingly esoteric essays, preferably written by professors at the highest-ranking law schools, so as to enhance both the journal's and the institution's reputation among their competitors. Faculties more readily grant promotion and tenure to professors who have published several such theoretical articles in ranking reviews. Practical pieces are disfavored. Less attention is paid to colleagues who may have proven themselves effective teachers or produced practical scholarship or otherwise engaged in any activity that may in fact be more useful to the profession.<sup>199</sup>

Many others in the profession have commented critically on the decreasing utility of law-reviews to the bench and bar.<sup>200</sup> Even their noted

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195. Orin Kerr, Comment to *Rewarding Faculty Scholarship*, THE FACULTY LOUNGE (Jan. 24, 2011, 9:55 PM), <http://www.thefacultylounge.org/2011/01/rewarding-faculty-writing.html>.

196. Jacqueline Lipton, Comment to *Rewarding Faculty Scholarship*, THE FACULTY LOUNGE (Jan. 24, 2011, 8:11 AM), <http://www.thefacultylounge.org/2011/01/rewarding-faculty-writing.html>.

197. John Doyle, *The Law Reviews: Do Their “Paths of Glory Lead But to the Grave”?* 10 J. APP. PRAC. & PROCESS 179, 180 (2009).

198. See OXFORD NURSERY RHYMES, *supra* note 1, at 252 (where it appears that “[a]ll the king's horses, [a]nd all the king's men, [c]ouldn't put Humpty together again.”).

199. Newton, *supra* note 9, at 143.

200. James B. Levy, *The law review is dead; long live the law review: a closer look at the declining judicial citation of legal scholarship*, LEGAL SKILLS PROF BLOG (Feb. 20, 2011), [http://lawprofessors.typepad.com/legal\\_skills/2011/02/art.html](http://lawprofessors.typepad.com/legal_skills/2011/02/art.html) (“I haven't opened up a law review in

defenders, who often contend that such scholarship nonetheless serves important purposes within the legal academy, do not dispute their growing irrelevance.<sup>201</sup>

Nevertheless, there are nearly 1000 law reviews in the United States, the vast majority of them student-edited, and the number is growing. Together they yield somewhere around 4000 articles (roughly 200,000 pages) per year.<sup>202</sup> The law-review remains the most prevalent form of legal scholarship, and an important if not the primary criterion for determining promotion and tenure. Such is not the case with other disciplines, especially those in the humanities, whose faculties consider books the highest form of scholarship and the measure by which they typically judge their peers.<sup>203</sup>

Needless to say, a lot of the articles are written in turgid prose and have little practical relevance. Although this failure of utility became noticeable as early as the middle of last century,<sup>204</sup> the journals have continued to proliferate through its end and into this one. During recent decades, particularly at highly ranked law schools, the content of law-review articles has changed from being primarily practical or doctrinal – that is, discussing cases, statutes, or administrative regulations using traditional tools of legal analysis – to being mostly abstract or theoretical and often interdisciplinary.<sup>205</sup>

In a 2007 study, editors of the *Cardozo Law Review* analyzed articles published in five of the most-cited journals (*California*, *Columbia*, *Harvard*, *New York University*, and *Yale*) for the years 1960, 1980, and 2000. The editors classified the articles as “practical,” “theoretical,” or “both practical and theoretical.” Their study found that, in 1960, the five reviews published a total of forty-eight “practical” articles, thirty-six that were “both practical and theoretical,” and twenty-one that were primarily “theoretical.”<sup>206</sup> By 2000, things had changed; in that year the same journals published six “practical” articles, forty-five “both practical and theoretical,” and sixty-eight that were “theoretical.”<sup>207</sup>

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years,” said Chief Judge Dennis G. Jacobs of the Federal Appeals Court in New York. “No one speaks of them. No one relies on them.”)

201. Newton, *supra* note 9, at 116–17 (referring to Dean Erwin Chemerinsky of University of California, Irvine School of Law).

202. *Id.*

203. *Id.* at 114.

204. See Rodell, *supra* note 6, at 38.

205. David Hricik & Victoria S. Salzman, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761, 767 (2005).

206. Carissa Alden et al., *Trends in Federal Judicial Citations and Law Review Articles*, Appendix D (Mar. 8, 2007), available at [http://graphics8.nytimes.com/packages/pdf/national/20070319\\_federal\\_citations.pdf](http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf).

207. *Id.*

Leading members of the bench took notice. Supreme Court Justice Stephen Breyer put it sardonically: “There is evidence that law review articles have left *terra firma* to soar into outer space.”<sup>208</sup> Judge Richard Posner was similarly harsh: “In recent years legal scholarship has undergone changes so fundamental as to suggest the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution.”<sup>209</sup>

Law professors who address legal “theory” often use the term in non-traditional ways. In most fields, a theory presents a hypothesis that is testable – that is, subject to proof. Although some legal scholarship is legitimately theoretical, in that it competently employs analytical tools from the social sciences to test theories about relevant legal issues that may in fact serve a practical need of the bench and/or bar, many law professors treat “theory” as something they consider deep and original, but not testable.<sup>210</sup>

More likely to be useful to policymakers, judges, and practitioners, however, is scholarship that addresses case law, statutes, or administrative regulations using traditional legal analysis in the context of current and controversial legal problems. Such analyses form the bulk of the daily grind of the bench and bar. Legal scholarship “is more likely to be relevant and useful if its author has a real-world understanding of the context in which the law applies.”<sup>211</sup>

With respect to most legal theory, the current system of law-review scholarship is built to fail, largely because of the general reliance upon students to select and edit articles for publication. Most such novice editors are ill-equipped to perform these tasks when it comes to interdisciplinary scholarship. Traditional doctrinal scholarship, on the other hand, involves analysis of case law and statutes, a skill at which good students become reasonably proficient by their second year of law school.<sup>212</sup>

The voluminous number of submissions to law-reviews in the electronic era, and the huge number of interdisciplinary articles being written, exacerbates the problem. Student editors quite understandably are influenced by the stature of the law school at which an author is employed, or from which he/she has graduated, in assessing an article's quality.<sup>213</sup>

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208. Stephen G. Breyer, Response of Justice Stephen G. Breyer, 64 N.Y.U. Ann. Surv. Am. L. 33, 33 (2008) (emphasis added) (criticizing some modern legal scholarship as decreasingly relevant to the legal profession). See Newton, *supra* note 9, at 120.

209. Newton, *supra* note 9, at 120.

210. *Id.* at 121.

211. *Id.*

212. *Id.* at 122.

213. Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 ALB. L. REV. 565, 584 (2008) (editors use author credentials extensively to determine which articles to publish).

That is why professors submitting articles electronically are encouraged to include a cover letter and curriculum vitae with their entries.<sup>214</sup>

Making matters worse is the current common practice of routinely requesting “expedited reviews,” so that authors may “trade up” to a higher-ranked journal after a lesser review has made an offer of publication. Though such a non-rigorous selection method can seriously affect the careers of some legal academics, particularly at more highly ranked law schools, it flies in the face of the standards used by professionally edited journals in other disciplines.<sup>215</sup>

That is why critics such as Judge Posner are moved to propose that law-reviews be controlled and edited by faculty, and that articles be peer-reviewed.<sup>216</sup>

But the most salient and significant weakness of the system currently in place, a failure often overlooked in the debate about law-reviews, may be that little modern legal scholarship serves any meaningful pedagogical purpose with respect to training law students to become competent lawyers. Even for those few members of the student body who win the intense competition to “make” a law-review’s editorial staff, there is arguably only a marginal benefit conferred. They may master the intricate minutiae of citation form, gain some experience in-line editing, and be incidentally exposed to some substantive law about which they are not tested, but such knowledge and skills could be more efficiently, inexpensively, and universally taught in another manner.<sup>217</sup>

Similarly, although the professorial authors themselves may gain more substantive expertise as teachers when they research and write law-review articles, such is likely not to be superior to practical experience – for example, actually litigating cases rather than just reading and writing about them.<sup>218</sup>

#### D. “Research and Development” Committees

“This is the farmer sowing his corn . . .”<sup>219</sup>

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214. See FAQ for Authors, *Questions about the submission process*, ExpressO, [http://law.bepress.com/expresso/faq\\_authors.html#submit-1](http://law.bepress.com/expresso/faq_authors.html#submit-1).

215. Cameron Stratcher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52 N.Y.L.SCH. L. REV. 349, 351 (2007–2008).

216. Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1124 (1981).

217. Newton, *supra* note 9, at 125. See Joshua Baker, *Relics or Relevant?: The Value of the Modern Law Review*, 111 W. VA. L. REV. 919, 930–31 & nn.83–89 (2009).

218. Newton, *supra* note 9, at 125.

219. Some skeptics compare R & D Committees to those who perpetuate poorly-built houses, as in “This Is The House That Jack Built.” See OXFORD NURSERY RHYMES, *supra* note 1, at 272 (“This is

A marketing mentality also pervades many so-called “research and development” committees, which are often charged by their deans with putting on showy presentations as well as encouraging faculty to place their scholarship in the most visible publications.

Thus the faculty R&D Committee at one large eastern law school has the following information posted on its own website: “Advice and Directions on Writing and Publishing” (including Internet links to a *Guide to Publishing Articles in Law Reviews & Journals*, *Writing for and Publishing in Law Reviews*, *Tips on Publishing*, and the *ExpressO Website*); “How to Help Locate and Choose Law Reviews (including the *Washington & Lee Law School, Most-Cited Legal Periodicals* and the *LexisNexis On-Line Directory of Law Reviews & Scholarly Legal Periodicals*); “Recent SSRN Papers on Law Reviews;”<sup>220</sup> and “Materials on Scholarship from Past AALS Workshops for New Law Teachers” (including *Archetypal Legal Scholarship — A Field Guide* (2006) by Harvard's Martha Minow, *Delivering The Ideas: Comments for New Legal Scholars* (2005) by Wake Forest's Ronald F. Wright, *Scholarship I: Finding a Topic, Setting an Agenda* (2004), by North Carolina's Marion Crain, and *The Nuts and Bolts of Scholarship, or the “New” Rules for Legal Scholars* (2004), by Vermont's Cheryl Hanna).

The advice is always, as perhaps it should be, to shoot for the top. Then, as the old Danish proverb goes, “If you cannot get the bird, get one of its feathers.”<sup>221</sup>

## V. SUMMARY AND CONCLUSION

Marketing strategies have gained unwarranted ascendancy in the mission of many law schools. While balancing budgets is important, the primary goal of should be sound education, not making a healthy profit or (its

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the farmer sowing his corn / That kept the cock that crowed in the morn / That waked the priest all shaven and shorn / That married the man all tattered and torn / That kissed the maiden all forlorn / That milked the cow with the crumpled horn / That tossed the dog that worried the cat / That killed the rat that ate the malt / That lay in the house that Jack built!”).

220. UNIV. BALT. SCHO. OF LAW, <http://law.ubalt.edu/template.cfm?page=689>. The list also includes Allen K. Rostron, “Information for Submitting Articles to Law Reviews & Journals” (October 3, 2007); Leah M. Christensen and Julie A. Oseid, “Navigating the Law Review Article Selection Process: An Empirical Study of Those With All The Power – Student Editors,” (August 2007); Ronen Perry, “The Relative Value of American Law Reviews: A Critical Appraisal of Ranking Methods,” (November 2005)[also published at: 11 VIRGINIA JOURNAL OF LAW AND TECHNOLOGY (2006), and reworked as “The Relative Value of American Law Reviews: Refinement and Implementation,” 39 CONNECTICUT LAW REVIEW 1 (2006)]; and Alfred L. Brophy, “The Relationship Between Law Review Citations and Law School Rankings,” (December 2005) [also published at: 39 CONNECTICUT LAW REVIEW 43 (November 2006)].

221. See Proverbs, GIGA QUOTES, [http://www.gigausa.com/quotes/topics/proverbs\\_t202.htm](http://www.gigausa.com/quotes/topics/proverbs_t202.htm).



contemporary corollary) moving a notch up in the rankings. Teaching should be regarded at least in the same light as scholarship. Both should be looked upon as more essential than enhancing reputation or filling the coffers.

Honest scholarship relies upon an atmosphere of complete academic freedom. Choice of subject matter or placement of articles should not be compelled as a function of marketing brand or placement in the rankings. Law schools should be accordingly inclusive as to what they count as scholarship, so long as the writing offers original insights and ideas about the law. There is no to writing that is unclear or inaccessible. Any article that makes a significant, original contribution to knowledge should be regarded as legitimate scholarship, regardless of whether it is doctrinal or theoretical.<sup>222</sup> Law school faculties should accommodate members who do both and, in fact, are likely to be enriched by the diversity of scholarly endeavors. No distinction should be made among them except the extent of their authors' creativity and original analysis.

Likewise, books written for a wide audience, such as judicial biographies or examinations of Supreme Court decisions, can also be considered to have made an original contribution to the literature of the law.

The choice of what to write about, the voice employed, and matters to emphasize are all acts within an author's sole province, and should be respected as such. Faculty members should not be denied their autonomy as authors. Coercing writers to be orthodox in their scholarship is fundamentally at odds with the academic enterprise. When those who do so are motivated primarily by marketing strategy instead of honest pedagogical principles, both students and the professors who teach them suffer negative consequences.

Finally, those whose demonstrated skills are more in teaching than writing should not be compelled to produce unrealistic amounts of published scholarship. Rather than being cloned, law professors should be picked as position players – teachers, writers, community activists. While all should be able to demonstrate proficiency in the classroom, they should also be encouraged toward and rewarded for their strengths.

A fabulist would have a field day. The moral of the story may be this: Both law students and faculty members are rabbits in the carrot patch, but the professors, for mostly rightful reasons, are protected by tenure. Elmer Fudd's shotgun is in the form of money-making market strategies, aimed primarily at the tuition-paying students, whose primary protection should be accurate information that is honestly purveyed. They should be given to

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222. Erwin Chemerinsky & Catherine Fisk, *In Defense of the Big Tent: The Importance of Recognizing the Many Audiences for Legal Scholarship*, 34 TULSA L.J. 667 (1999).

understand that, although a legal education may be eminently worthwhile, it is not a guarantee of lawyerhood.

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Biting the hand that feeds can be very satisfying for one who is both smug and snug, protected by both tenure and academic freedom. But the point of this piece is to focus some light on how the marketing of legal education has a negative effect on scholarship and teaching. Let us move away from prizing the former over the latter, and give due reward to both. Let's recognize good writing as valuable, even if it's not in an academic journal, and promote service to the community at least every bit as much as journal scholarship of questionable worth. Let us not require proof of professionalism by way of intellectual coercion or passage through the publication chute. Surely there are better ways to measure quality.

As with at least several of my earlier efforts, I write these words fully recognizing my own knowing participation in the process, completely aware that whatever few readers are out there may indeed view my scholarly production as little more than the pretentious stuff I so roundly criticize. Even then, I suppose I have some reservations, although I take some comfort in Clarence Darrow's dictum that "doubt is the beginning of wisdom."<sup>223</sup>

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223. Darrow is also said to have become an attorney primarily to advocate on behalf of those whose moral consciousness needed a voice: "Just by watching a man hang, without speaking up, you helped kill him." See Jill Lepore, *Objection*, THE NEW YORKER, May 23, 2011. Note, however, that I am in a no-lose situation. If I attract a lot of flack for my failure to understand decanal overreaching or appreciate somebody else's scholarly prose, at least I will have finally provoked a thoughtful (or outraged) response to my work. And if this article is cited, I can add another footnoted feather to my modest cap, and the dean can add my efforts to his marketing data. On the other hand, if I get no responses—well, that proves at least some of my points once again, doesn't it?