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Is Law a Discipline? Forays into Academic Culture

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IS LAW A DISCIPLINE?
FORAYS INTO ACADEMIC CULTURE

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ABSTRACT

This Article explores academic culture. It addresses the reluctance in academic circles to accord law the full stature of a discipline. It forms doubts that have been raised into a series of four criticisms. Each attacks an academic feature of law, inviting the question: Is law different from the rest of the university in a way damaging its stature as an academic discipline? The Article concludes that, upon careful examination of each criticism, none establishes a difference between law and other disciplines capable of damaging law's stature.

CONTENTS

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INTRODUCTION

Robert Paul Wolff wrote that "all professional schools and professional degree-granting programs should be driven out of the university."[1] Thorstein Veblen was more specific. "[T]he law school belongs in the modern university no more than a school of fencing or dancing," Veblen wrote. "This is particularly true," he added, "of the American law schools."[2]

Veblen and Wolff were not alone in questioning law's place in the university.[3] The chorus of doubt has grown and includes the voices of a disturbing number of academic lawyers. These doubts and their consequences will be the subject of Part One.

Part Two examines three attacks made against law as an academic discipline: preferential university treatment, trade-school commercialism, and the conceptual disarray of legal scholarship. Part Three examines a fourth attack: law's publication of articles without peer review. This Article concludes that there is no difference between law and other disciplines capable of damaging law's stature as an academic discipline.

I. PART ONE: THE PROBLEM

A. Nonacceptance of Law as an Academic Discipline

George Priest wrote that it is becoming "difficult . . . to justify whether law is a subject worthy of study at all."[4] Others noted attacks on academic lawyers as "interlopers in the university,"[5] as "not really academic . . . an appendage to the university world,"[6] and as sharing little more than "the same zip code."[7] They are seen to comprise "a parasitic discipline,"[8] with "no meaning except that which it absorbs

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[1] ROBERT PAUL WOLFF, THE IDEAL OF THE UNIVERSITY 12 (1970).

[2] THORSTEIN VEBLEN, THE HIGHER LEARNING IN AMERICA 155 (Cosimo Inc. 2005) (1918). Veblen was as usual ahead of the curve. It took time for his negative opinion of law schools to gather force.

[3] As a rule, I will use the term "university" to refer generically to four-year institutions of higher education. Burton Clark reviewed terminological approaches (e.g. "university" as opposed to "college"), concluding that "[t]here is no one best way to define the boundaries." BURTON R. CLARK, THE ACADEMIC LIFE–SMALL WORLDS, DIFFERENT WORLDS 21 (1987).

[4] George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437**,** 438 (1983).

[5] Finn Makela, *Is Law an Academic Discipline?*, 50 REVUE JURIDIQUE THEMIS 433, 437 (2016). Despite similar titles, Makela's article, Dagan's article (*infra* note 9), and this article are quite dissimilar in content.

[6] TONY BECHER, ACADEMIC TRIBES AND TERRITORIES – INTELLECTUAL ENQUIRY AND THE CULTURES OF DISCIPLINES 30 (1989).

[7] Paul A. Samuelson, *The Convergence of the Law School and the University, in The American Scholar* 256, 258 (1975) ("[T]he predominant notion others in the university have of academic lawyers is that they are not really academic."). JANET GAIL DONALD, *The Commons–Disciplinary and Interdisciplinary Encounters, in* THE UNIVERSITY AND ITS DISCIPLINES: TEACHING AND LEARNING WITHIN AND BEYOND DISCIPLINARY BOUNDARIES (Carolin Kreber ed., 2009).

[8] Anthony Bradney, *Law as a Parasitic Discipline*, 25 J. L. & SOC'Y 71, 71 (1998).

from other disciplines."[9] The legal academy "faces a serious disciplinary challenge,"[10] an "existential crisis,"[11] a "profound crisis of identity."[12]

Legal scholarship underpins law's claim as an academic discipline. Assessments here are also troubling. "For the rest of the university," wrote Robin West, "legal scholarship is . . . lacking in any real—meaning academic—discipline."[13] Legal academics have called most legal scholarship "essentially atheoretical,"[14] leaving "little or no trace."[15] An intellectually-ambitious scholarly attempt often leads to "unimportance altogether,"[16] yielding "yet another clever, perhaps thoughtful, but nonetheless utterly failed contribution."[17] Legal scholars grapple with "the displacement and disintegration of the prevailing legalist creed."[18] To Edward Rubin, the "conceptual disarray of legal scholarship has become so familiar to us that we have ceased to regret it."[19] He saw "a serious question whether legal scholarship constitutes a discipline at all."[20]

B. Disappointment and Self-Doubt In The Legal Academy

Wolff's caustic recommendation has not come about and is unlikely to do so. Academic animus has not dislodged law schools from universities, but it has damaged the image of the legal academy, diminished law professors' self-esteem, and restricted them from reaching their full potential as scholars.[21]

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[9] Hanoch Dagan, *Law as an Academic Discipline, in Stateless Law: Evolving Boundaries of the Discipline* 43 (Helge Dedek & Shauna Van Praagh eds., Routledge 2015).

[10] *Id.*

[11] Justin McCrary et al., *The Ph.D. Rises in American L*aw *Schools, 1960-2011: What Does It Mean for Legal Education?*, 65 J. LEGAL EDUC. 543, 543 (2016).

[12] Stephen M. Feldman, *The Transformation of an American Discipline: Law Professors in the Past or Future (or Toy Story Too)*, 54 J. LEGAL EDUC. 471, 471 (2004).

[13] ROBIN L. WEST, TEACHING LAW – JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM 8 (2014).

[14] Priest, *supra* note 4, at 439.

[15] BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 56 (2012).

[16] Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 61 (2009).

[17] Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 167 (1990).

[18] Mark Galanter & Mark Alan Edwards, *Introduction: The Path of the Law Ands*, 1997 WISCONSIN L. REV. 375, 376. John Henry Schlegel, *Searching for Archimedes–Legal Education, Scholarship, and Liberal Ideology*, 34 J. LEGAL EDUC. 103, 103 (1984) ("[L]egal scholarship can best be described as an open scandal.").

[19] Edward L. Rubin, *The New Legal Process: The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1343, 1343 (1996).

[20] Edward L. Rubin, *Legal Scholarship, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 562 (Dennis Patterson ed., Blackwell 1996).

[21] MARY ANN GLENDON, A NATION UNDER LAWYERS–HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 108 (1994).

Those entering the legal academy from practice (still a majority[22]) usually do so with high expectations. They are drawn by attractions including flexibility, independence, and intellectual prestige.[23] This lifestyle appears increasingly attractive by comparison as traditions of legal practice continue to deteriorate.[24] William Sullivan noted: "The result of the conjunction of an increase in the supply of lawyers with a more competitive marketplace for legal services has been a desperate scramble for livelihood."[25] Cutthroat work environments, where lawyers "fear . . . being blindsided by competitors, adversaries, and even colleagues,"[26] have become commonplace. The result is a "growing sense of demoralization in legal practice."[27] It is unclear how or whether conditions will improve.[28]

These concerns influence decisions to leave law practice for the academy,[29] but academic life is seen as more than a means of escape. A stronger reason exists for joining a law faculty: the opportunity for a life of the mind.[30]

Granted, questions arising in the practitioner's work could inspire intellectual curiosity and serve as points of departure for profound thought. The problem, to paraphrase Richard Hofstadter, "is not in the character of the ideas with which" the lawyer "works but in his attitude toward them."[31] Lawyers are tied to the partisan interests of their clients. The question guiding their preparation is not "what is the right result under the law?" It is instead "what is right under the law about what my client wants?" Lawyers have no choice. They are ethically required to be advocates. "As an advocate," Anthony Kronman stated, "a lawyer . . . does not–cannot–show any . . . ambivalence or uncertainty about the client's position."[32] There is instead a rhetorical

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[22] Beginning law professors with a Ph.D. from another discipline – an increasing number (McCrary, *supra* note 11), but still a minority – are less likely to have practiced.

[23] WILLIAM M. SULLIVAN, WORK AND INTEGRITY–THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA 11–12 (2d ed. 2005).

[24] *Id.* at 6.

[25] *Id.* at 5–6. Neil Gross, *American Academe and the Knowledge–Politics Problem, in* THE AMERICAN ACADEMIC PROFESSION TRANSFORMATION IN CONTEMPORARY HIGHER EDUCATION 111 (Joseph C. Hermanowicz ed., 2011).

[26] GLENDON, *supra* note 21.

[27] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS – PREPARATION FOR THE PROFESSION OF LAW 127 (2007).

[28] For bleak assessments, see STEVEN J. HARPER, THE LAWYER BUBBLE–A PROFESSION IN CRISIS (2013); BRUCE MACEWEN, GROWTH IS DEAD: NOW WHAT?–LAW FIRMS ON THE BRINK (2013); Robert W. Gordon, *The Legal Profession, in* LOOKING BACK AT LAW'S CENTURY (Austin Sarat et al. eds., Cornell University Press 2002); and MICHAEL H. TROTTER, PROFIT & THE PRACTICE OF LAW–WHAT'S HAPPENED TO THE LEGAL PROFESSION? (1997).

[29] *See* RICHARD L. ABEL, AMERICAN LAWYERS vii (1989).

[30] *Id.*

[31] RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 27 (1962).

[32] ANTHONY T. KRONMAN, THE LOST LAWYER–FAILING IDEALS OF THE LEGAL PROFESSION 146 (1993). In contrast, "because of the economic independence of position that an academic faculty appointment confers, a law teacher is not charged with attempting to advocate a client's position

duty to extol any plausible[33] case–however weak–that the client may have. Only the judge is entitled to place law above the self-interest of the parties.[34]

In theory and often in practice, this arrangement works well. Called the adversary system, it provides the judge with an efficient means for locating the strongest arguments for each side.[35] Yet, despite professional triumphs and comfortable incomes, some lawyers find the role incomplete. They chafe at the notion of law as an indiscriminate tool for gratifying client needs. They see law instead as a source of intellectual wonder, alive with possibilities for improving society. They yearn for "the sheer satisfaction that comes from pursuing knowledge on subjects that the scholar finds interesting and important,"[36] for the chance to become "intellectuals of the law."[37] They imagine a place where they would be free to explore the farthest reaches of law, to learn, and to share their knowledge: the university.[38]

Universities invite such aspirations. They offer, in the words of Alfred North Whitehead, an "atmosphere of excitement, arising from imaginative consideration" that "transforms knowledge."[39] He continued: "A fact is no longer a bare fact: it is invested with all its possibilities. It is no longer a burden on the memory: it is energizing as the poet of our dreams, and as the architect of our purposes."[40]

Many of those joining law faculties desire and expect full membership in this exciting community,[41] only to be snubbed or ignored by those from other disciplines. Sadly, this has led legal academics to engage in prolonged self-doubt.[42] It is important

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or with generating immediately usable and saleable results." David E. Van Zandt, *Discipline-Based Faculty*, 53 J. LEGAL EDUC. 332, 333 (2003).

[33] A lawyer may not assume positions in court that are implausible in the sense that they are legally ungrounded or devoid of factual support. *See* GENE R. SHREVE ET AL., UNDERSTANDING CIVIL PROCEDURE 233–36 (2013).

[34] "An advocate is the representative of one particular interest in actual or potential conflict with others, and it is not his duty to define the collective well-being of those involved or to determine how it can be achieved." KRONMAN, *supra* note 32, at 147. William Simon similarly observed: "The lawyer is expected to represent people who seek his help regardless of his opinion of the justice of their ends," adding "whenever he takes a case, he is not considered responsible for his clients purposes." William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36 (1978).

[35] Simon, *supra* note 34, at 37.

[36] DEBORAH L. RHODE, IN PURSUIT OF KNOWLEDGE–SCHOLARS, STATUS, AND ACADEMIC CULTURE 33 (2006).

[37] David R. Barnhizer, *Prophets, Priests, and Power Brokers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 132 (1988).

[38] *Id.* at 176.

[39] ALFRED NORTH WHITEHEAD, THE AIMS OF EDUCATION AND OTHER ESSAYS 93 (Free Press 1967) (1929).

[40] *Id.*

[41] *See generally* FIONA COWNIE, LEGAL ACADEMICS–CULTURE AND IDENTITIES (2004); FRANCIS A. ALLEN, LAW, INTELLECT, AND EDUCATION (1979).

[42] Priest, *supra* note 4, at 439.

here to distinguish self-doubt from self-questioning. The latter asks *what* are we? Self-questioning provides disciplines the means for crucial introspection about their purposes, research methodologies, and knowledge claims. Such conversations within a discipline may become heated.[43] Charges of disloyalty to the discipline may be flung about, but none questions the discipline's existence. On that there is social and institutional solidarity.[44] Disciplines wish to appear as healthy and important as possible. To universities, to public and private grant-funding institutions, and to academic publishers, the message is that their discipline is, and will remain, on solid academic ground.[45]

What sets law apart is the extent to which the discipline questions *whether* it is. The legal academy continues to entertain serious discussion on the question of its own legitimacy.[46] American legal scholars have recognized numerous doubts about law's stature as an academic discipline.[47] This places them in sharp contrast to members of other disciplines who "rarely interrogate their own institutional practices, preferring self-promotion to self-criticism."[48]

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[43] *See, e.g.*, DAVID M. RICCI, THE TRAGEDY OF POLITICAL SCIENCE (1984); ANNE HENDERSHOT, THE POLITICS OF DEVIANCE (2002) (sociology); QUESTIONING GEOGRAPHY: FUNDAMENTAL DEBATES (Noel Castree et al. eds., 2005); THE INSTITUTION OF PHILOSOPHY: A DISCIPLINE IN CRISIS? (Avner Cohen & Marcelo Dascal eds., 1989); THE CRISIS IN ECONOMIC THEORY (Daniel Bell & Irving Kristol eds., 1981).

[44] Historically, disciplinary "development was not simply an organic consequence of advances in knowledge, but was also the product of institutional and societal factors." JOE MORAN, INTERDISCIPLINARITY 12 (2d ed. 2010).

[45] Rob Kelly, *Advice for Department Chairs: Six Steps for Building a Healthy Department*, FACULTY FOCUS (Sept. 17, 2013), https://www facultyfocus.com/articles/academic-leadership/advice-for-department-chairs-six-steps-for-building-a-healthy-department/.

[46] Feldman, *supra* note 12.

[47] *See* Bradney, *supra* note 8; Roger C. Cramton, *"The Most Remarkable Institution": The American Law Review*, 36 J. LEGAL EDUC. 1 (1986); Feldman, *supra* note 12; Galanter & Edwards, *supra* note 18; PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999); McCrary et al., *supra* note 11; James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527 (1994); Priest, *supra* note 4; Rubin, *supra* note 20; Schlag, *supra* note 17; TAMANAHA, *supra* note 15; WEST, *supra* note 13.

The picture seems much the same in Britain, where law faculty exhibit a "tendency towards self-denigration." BECHER, *supra* note 6, at 30. There is "a noticeable lack of intellectual self-confidence" within the British legal academy. COWNIE, *supra* note 41, at 198.

Many law professors as a consequence refrain from encounters with those from other university disciplines. It is more reassuring for them to define themselves by insular, law-school standards. For example, a recent American Bar Foundation study found that "[t]he vast majority of [law] professors reported feeling respected and comfortable in their teaching positions, with 96% feeling respected by students and 98% feeling comfortable in the classroom." AM. BAR FOUND., 2018 ANNUAL REPORT 15 (2018).

[48] CARY NELSON & STEPHEN WATT, ACADEMIC KEYWORDS: A DEVIL'S DICTIONARY FOR HIGHER EDUCATION 107 (1999). For disciplines, "[t]he quest for status is a pervasive feature of academic life" Tony Becher, *The Counter-Culture of Specialization,* 25 EUR. J. EDUC. 333, 339 (1990). This has proven an inviting target for critique and parody. *See, e.g.*, JAMES HYNES, THE LECTURER'S TALE (2001); HEINZ EULAU, THE POLITICS OF ACADEMIC CULTURE: FOIBLES, FABLES, AND FACTS (1998); DAVID LODGE, SMALL WORLD: AN ACADEMIC ROMANCE (Penguin

In short, self-doubt – even self-denigration – weakens the ability of the legal academy to be taken or to take itself seriously.[49] It erodes law professors' intellectual self-confidence and stifles their scholarly ambition. The register of academic doubt in and beyond the legal academy over the legitimacy of law as a discipline is probably stronger now than at any earlier time. It shows no signs of abating.

Such are the circumstances that occasion this Article. Let us now turn to the grounds for questioning law as an academic discipline.

II. PART TWO: THREE ATTACKS THAT FAIL

A. Does Law Receive Preferential University Treatment?

Is the legal academy a victim of disciplinary jealousy?

To be clear, law faculty have found some members of other disciplines to be congenial and supportive. Through the Law and Society Association, other organizations, or informal encounters, social science and humanities scholars have viewed academic lawyers as equals and even as collaborators.[50]

Still, academics are capable of viewing their disciplinary neighbors unkindly. For example, Tony Becher noted in his study of faculties and their interactions that botanists were thought by others to be "not necessarily the brightest," and as "people who hide behind herbarium cases and hate one another."[51] Interdisciplinary friction is common,[52] fueled by what Marjorie Garber termed "discipline envy."[53]

Law schools have been a source of irritation because, as other academics see it, they are coddled by universities.[54] A distinguished former law school dean candidly observed: "We've managed, broadly speaking, to assure the highest faculty salary

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Books 1995) (1984); F. M. CORNFORD, MICROCOSMOGRAPHIA ACADEMICA: BEING A GUIDE FOR THE YOUNG ACADEMIC POLITICIAN (Bowes & Bowes 1964) (1908); KINGSLEY AMIS, LUCKY JIM (Penguin Books USA 1976) (1954)*;* HAZARD ADAMS, THE ACADEMIC TRIBES (2d ed. 1988). A rich cultural study of academics and their disciplines appears in PIERRE BOURDIEU, HOMO ACADEMICUS (Peter Collier trans., Stanford University Press 1988) (1984).

[49] Even smaller signs are painful: For example, the suggestion that it takes the addition of Ph.D.s for a law faculty to become "discipline-based." *See* Van Zandt, *supra* note 32; Lynn M. LoPucki, *Dawn of Discipline-Based Law Faculty*, 65 J. LEGAL EDUC. 506 (2016).

[50] Examples of collaboration include Cheryl R. Kaiser & Victor D. Quintanilla, *Access to Counsel: Psychological Science Can Improve the Promise of Civil Rights Enforcement*, 1 POL'Y INSIGHTS BEHAV. & BRAIN SCI. 95 (2014); Steve J. Sherman & Joseph L. Hoffman, *The Psychology and Law of Voluntary Manslaughter: What Can Psychology Tell Us About the "Heat of Passion" Defense?*, 20 J. BEHAV. DEC. MAKING 499 (2007); William M. O'Barr & John M. Conley, *The Culture of Capital: An Anthropological Investigation of Institutional Investment*, 70 N.C. L. Rev. 823 (1992).

[51] BECHER, s*upra* note 6, at 30.

[52] *See*, *e.g.*, JERRY A. JACOBS, IN DEFENSE OF DISCIPLINES: INTERDISCIPLINARITY AND SPECIALIZATION IN THE RESEARCH UNIVERSITY 13 (2013); MORAN, *supra* note 44, at 168; ANDREW ABBOT, CHAOS OF DISCIPLINES 137 (2001); ADAMS, *supra* note 48, at 64–65.

[53] MARJORIE GARBER, ACADEMIC INSTINCTS 53 (2001).

[54] James P. White, *Legal Education in the Era of Change: Law School Autonomy*, 1987 DUKE L.J. 292, 303–04 (1987).

levels, or at least among the very highest, in the academy."[55] The resulting envy and resentment by lesser-paid academics could easily jaundice their views about the place of law schools in universities.

Yet, even if pay equity belongs in an assessment of law as an academic discipline, the issue may become moot. Salaries for law professors are almost certain to decline, narrowing the gap. The trend has begun.[56] It is occurring for two reasons. First, as the backgrounds of law professors increasingly resemble those of professors in the social sciences or humanities, it becomes more difficult to justify paying law professors more. Once, law professors were hired almost entirely from the distinguished ranks of the legal profession. To entice such persons to forgo the handsome financial rewards a continued law practice would have provided, universities usually placed law professors at or near the top of their salary scales.[57]

Recently however, hiring interests among elite law schools and others have shifted to candidates with Ph.D.s in political science, economics, history, or some other field.[58] Ph.D.s make up close to 40% of faculty recently hired at some law schools.[59] Such candidates may have law degrees but are usually uninterested in law practice. For them, the alternative to a law school appointment would be an appointment elsewhere in the university. These persons forgo no financial advantage by choosing the law-school job; therefore, the reason for paying them more disappears. Ph.D. hires may advance law schools' interdisciplinary teaching and research missions, but they undercut the argument for high salaries.

The second reason law-faculty salaries will decline is more sobering. The prosperity that American legal education long enjoyed is fast disappearing.[60] Once, law schools were more than self-supporting, covering their own expenses and creating surpluses which their universities were happy to siphon off.[61] Universities were impressed and grateful, rewarding law faculty with salaries among its most generous.[62] Now everything is changing. As Robin West observed: "The American legal academy is in a world of trouble."[63]

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[55] Gene R. Nichol, *Rankings, Economic Challenge, and the Future of Legal Education*, 61 J. LEGAL EDUC. 345, 345 (2012). *See* Van Zandt, *supra* note 32, at 334 ("noting that academic lawyers are paid "substantially more on average than our colleagues in other departments.").

[56] *See* WEST, *supra* note 13, at 175.

[57] George C. Christie, *The Recruitment of Law Faculty*, 1987 DUKE L.J. 306, 306 (1987).

[58] McCrary, *supra* note 11, at 545; Wayne S. Hyatt, *A Lawyer's Lament: Law Schools and the Profession of Law*, 60 VAND. L. REV. 385, 388 (2007).

[59] McCrary et al., *supra* note 11, at 545. LoPucki, *supra* note 49, at 507 ("[T]he overall trend remains unmistakable. Ph.D. hiring is increasing rapidly.").

[60] James Huffman, *Law Schools: Reform or Go Bust*, NEWSWEEK (Feb. 20, 2015), http://www.newsweek.com/law-schools-reform-or-go-bust-308339.

[61] Herbert M. Kritzer, *Law Schools and the Continuing Growth of the Legal Profession*, 3 OÑATI SOCIO-LEGAL SERIES 450 (2013).

[62] Paul Campos, *The Crisis of the American Law School*, U. MICH. J.L. REFORM 177, 196 (2012).

[63] WEST, *supra* note 13, at 1.

Legal education is approaching a state of financial crisis.[64] Economically vulnerable law schools have suffered the most, but the future is troubling for all but the most elite.[65] The prospect of lower salaries is only one of the worries facing law professors. Others include increased teaching loads, decreased research support, layoffs, and the collapse of their institutions.[66]

The problem is that a nation-wide drop in law school applications has caused a sharp dip in enrollments,[67] with a corresponding loss of tuition dollars. "An iron law governs law school finances," wrote Brian Tamanaha, "expenses must be paid for by the number of students multiplied by tuition."[68] Many potential applicants are avoiding law schools. Already burdened by undergraduate loan debt,[69] they are unwilling to assume the additional debt necessary for law school tuition when the legal job market remains uncertain."[70]

These difficult circumstances have altered the relationship between law schools and their universities. Once benefactors, a growing number of law schools now need

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[64] Huffman, *supra* note 60, at 2.

[65] TAMANAHA, *supra* note 15, at 132–34.

[66] *See* Gregg Toppo, *Why You Might Want to Think Twice Before Going to Law School*, USA TODAY (June 28, 2017), https://www.usatoday.com /story/news/2017/06/28/law-schools-hunkering-down-enrollment-slips/4302130 01/; Debra Cassens Weiss, *Law School Faculty Numbers Shrink 11 Percent Since 2010; Which Schools Shed the Most Full-Timers?*, A.B.A. J. (Dec. 22, 2014), http://www.abajournal.com/news/article/law_school_faculty_numbers_shrink_11_percent_since_2010_which_schools_shed; Kathryn Flagg, *The Trials of Vermont Law School*, SEVEN DAYS (Sept. 10, 2014), https://www.sevendaysvt.com/vermont/the-trials-of-vermont-law-school/Content?oid=2435029; Alicia Albertson, *New England Law Downsizing Enrollment, Faculty Size*, THE NAT'L JURIST (Nov. 11, 2013), http://www nationaljurist.com/prelaw/new-england-law-downsizing-enrollment-faculty-size.

[67] *See* Peter Schworm, *Waning Ranks at Law Schools*, BOSTON GLOBE (July 6, 2014), https://www.bostonglobe.com/metro/2014/07/05/law-school-enrollment-fails-rebound-after-recession-local-colleges-make-cuts/fR7dYqwBsrOeXPbS9ibqtN/story.html; Mark Hansen, *Law School Enrollment Down 11 Percent this Year Over Last Year, 24 Percent Over 3 years, Data Shows*, A.B.A. J. (Dec. 17, 2013), www.abajournal.com/news/article/law_school_enrollment_down_11_percent_this_year_over_last_year_data_shows; Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES (July 15, 2012), https://www nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools html.

[68] *See* TAMANAHA, s*upra* note 15, at 63; AM. BAR FOUND., *supra* note 47 ("Most law schools are heavily tuition-dependent for operating revenue.").

[69] *See* Drew Desilver, *In Time for Graduation Season, a Look at Student Debt*, PEW RES. CTR. (May 12, 2013), https://www.pewresearch.org/fact-tank/2013/05/13/in-time-for-graduation-season-a-look-at-student-debt/.

[70] *See* Karen Sloan, *Starting Salaries Continue to Slide as Big Firm Opportunities Dry Up*, NAT'L L.J. (July 12, 2012), https://www.law.com/nationallawjournal/almID/1202562736465&/; William Henderson, *The Hard Business Problems Facing U.S. Law Faculty*, LEGAL TIMES (Oct. 31, 2011), https://legaltimes.typepad.com/lawschoolreview/2011/10/the-hard-business-problems-facing-us-law-faculty.html.

extra financial assistance to cover budget shortfalls.[71] Universities are likely to condition such assistance on acceptance by law faculties of cost-cutting measures, including a freeze or reduction of faculty salaries.[72]

In short, there is increasingly less about the financial position of the law school professoriat to be envious about.

B. Is the Legal Academy Mired in Trade-School Commercialism?

Recall the opening tirades of Robert Paul Wolff (a philosopher) and Thorstein Veblen (an economist) against the presence of law schools in universities. Law schools simply had no place in the serene environment they envisioned. Cloistered, absorbed in scholarly thought, academics were expected to take little notice of the outside world. They comprised a "self-governing community" having "little to do in a regular way with the larger society," Wolff wrote, "keeping very much to its own affairs and judging its activities by the internal norms of scholarship rather than by social norms or productivity and usefulness."[73]

In contrast, these critics thought law faculties were tainted by their involvement with the outside world.[74] They could not "commit themselves or their energies to the university unconditionally, as professors in the arts and sciences regularly do."[75] Critics believed that law faculties were mired in a commercial, trade-school culture.[76] Instead of producing scholars, they produced lawyers – a dubious contribution to society.[77] Their attempts at scholarship were, as a result, inconsequential.[78]

These contrasting images of the university and of the law school were widespread, and they persist today.[79] If the images were ever accurate, they are no longer.

Stanley Aronowitz observed that universities today are "[f]ar from the image of an ivory tower where, monk like, scholars ponder the stars and other distant things."[80] In this vein, Margaret Thornton noted: "While the *idea* of the university as a community

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[71] Jack Crittenden, *The End of Independent Law Schools?*, 28 THE NAT'L JURIST 1, 4.

[72] Patricia Yollin & Jim Doyle, *Budget Squeeze Hits Hard at Public Universities*, S.F. CHRON., Jan. 10, 2009, at B1.

[73] WOLFF, s*upra* note 1, at 7.

[74] *Id*. at 13.

[75] *Id.*

[76] *Id*. at 12.

[77] GRANT GILMORE, THE AGES OF AMERICAN LAW 1 (1977) ("In most societies at most periods the legal profession has been heartily disliked by non-lawyers."). *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 226 (3d ed. 2005); FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 3 (1981); Perry Miller, *Introduction, in* THE LEGAL MIND IN AMERICA–FROM INDEPENDENCE TO THE CIVIL WAR 17 (Perry Miller ed., 1962).

[78] BECHER, *supra* note 6, at 30 ("[S]cholarly activities" of academic lawyers "are thought to be unexciting and uncreative, comprising a series of intellectual puzzles scattered among large areas of description.").

[79] *See* WEST, *supra* note 13, at 8.

[80] STANLEY ARONOWITZ, THE KNOWLEDGE FACTORY: DISMANTLING THE CORPORATE UNIVERSITY AND CREATING TRUE HIGHER LEARNING 11 (2000).

of scholars engaged in the dispassionate pursuit of truth may never have accorded precisely with the reality, any semblance of the *idea* now seems to have gone forever."[81]

To begin with, universities cannot begin to absorb into their professorial ranks as many of the Ph.D.s as they produce.[82] "In fields such as English, anthropology, history, linguistics, and physics, the job market in four-year colleges and research universities has shrunk to near vanishing point."[83] As a result, "[i]n almost every field in which one can obtain a Ph.D., studies show that a substantial number of people with that degree work at something other than faculty positions."[84] Acknowledging that many of their Ph.D.s must find work outside universities, academic disciplines provide training and placement assistance for non-university work.[85] In this way, academic disciplines function like professional schools.[86]

Universities have entered the outside world in a different, more fundamental way by embracing "education in the age of neoliberalism."[87] This development "can be broadly described as marketisation of higher education, i.e. restructuring its form and

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[81] MARGARET THORNTON, PRIVATIZING THE PUBLIC UNIVERSITY: THE CASE OF LAW 2 (2012).

[82] *See* RHODE, *supra* note 36, at 12–13; NELSON & WATT, *supra* note 48, at 51.

[83] ARONOWITZ, *supra* note 80, at 12–13.

[84] MARY MORRIS HEIBERGER & JULIA MILLER VICK, THE ACADEMIC JOB SEARCH HANDBOOK 195 (3d ed. 2001).

[85] Non-academic career opportunities figure prominently in the mission statements of most disciplines. *See*, *e.g.*, *Careers in Anthropology*, AM. ANTHROPOLOGICAL ASS'N, https://www.americananthro.org/AdvanceYourCareer/Content.aspx?ItemNumber=1783 (last visited Aug. 27, 2019); *Who We Are*, AM. ECONOMIC ASS'N, https://www.aeaweb.org/about-aea (last visited Aug. 17, 2019); *Career Diversity for Historians*, AM. HISTORICAL ASS'N, https://www historians.org/jobs-and-professional-development/career-diversity-for-historians (last visited Aug. 17, 2019); *Exploring Applied Career Options*, AM. POLITICAL SCIENCE ASS'N, https://www.apsanet.org/careers/non-academic (last visited Aug. 17, 2019); *Non-academic Career Opportunities in Psychology*, AM. PSYCHOLOGICAL ASS'N, https://www.apa.org/careers/resources/profiles/index (last visited Aug. 17, 2019); *Members include:*, AM. SOCIOLOGICAL ASS'N, https://www.asanet.org/about-asa (last visited Aug. 17, 2019).

[86] Skills reflected in the acquisition of a Ph.D. can impress potential employers outside the academy. *See* JOHN A. GOLDSMITH, JOHN KOMLOS & PENNY SCHINE GOLD, THE CHICAGO GUIDE TO YOUR ACADEMIC CAREER 223–24 (2001) (statement by John Komlos) ("Analytical thinking, clear writing skills, organizational talent, ability to communicate orally, and experience in getting along with colleagues in a bureaucratic organization are as useful in government service, the nonprofit sector, and in research organizations as they are in the business world.").

[87] William Deresiewicz, *The Neoliberal Arts: How College Sold its Soul to the Market*, HARPER'S MAGAZINE, Sept. 2015, at 25–26; DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2007) ("Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.").

content according to market models."[88] Often it seems that "[o]nly the commercial purpose now survives as a recognized value."[89] Universities have become entrepreneurs.[90]

The spread of neoliberalism in higher education is global.[91] Its features include power shifts from faculties to university bureaucracies,[92] commodification of learning,[93] treatment of students and their parents as consumers,[94] preferential treatment for professors who can attract corporate funding,[95] and replacement of full-time faculty with part-time adjuncts.[96] Institutions of higher education are thus becoming corporate universities.[97] Resulting "corporate values and corporate thinking are inexorably replacing the values and logic that once defined the liberal arts."[98]

All of the commentators noted here have understandably lamented the neoliberal turn in higher education. But it is immaterial to the present discussion whether neoliberalism is good or bad for higher education. What matters is that, even were we to assume that law schools are tainted by commercialism, that would not set them apart from universities. "Academic and corporate America are so intertwined," wrote Cynthia Crossen, "that it would take a huge effort to separate the two, if it could be done at all."[99]

Moreover, whether university law schools were ever driven by commercialism is open to question. The legal academy's distinguished academic provenance is often

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[88] Les Levidow, *Neoliberal Agendas for Higher Education*, *in* NEOLIBERALISM: A CRITICAL READER 156, 161 (Alfredo Saad Filho & Deborah Johnson eds., 2005).

[89] Deresiewicz, *supra* note 87, at 26.

[90] HANS RADDER, THE COMMODIFICATION OF ACADEMIC RESEARCH 6 (2010); Gross, *supra* note 25, at 112.

[91] THORNTON, *supra* note 81; Levidow, *supra* note 88.

[92] BENJAMIN GINSBERG, THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS 1 (2011); ARONOWITZ, *supra* note 80, at 62.

[93] MARTHA C. NUSSBAUM, NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES 48 (2010); SHEILA SLAUGHTER & GARY RHOADES, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION (2004).

[94] BILL READINGS, THE UNIVERSITY IN RUINS 11 (1996); Levidow, *supra* note 88, at 157.

[95] JENNIFER WASHBURN, UNIVERSITY INC.: THE CORPORATE CORRUPTION OF HIGHER EDUCATION xii (2005); DEREK BOK, UNIVERSITIES IN THE MARKETPLACE 106 (2003).

[96] NELSON & WATT, *supra* note 48, at 55–58; ARONOWITZ, *supra* note 80, at 12–13. "[A]bout 25 percent of faculty in community colleges, four-year colleges, and universities were part-time employees at the end of the 1970s. By the end of the 1980s, one-third of the nation's faculty members were employed part time. And, in 1993, . . . the number was officially 42 percent." ANNETTE KOLODNY, FAILING THE FUTURE: A DEAN LOOKS AT HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY 206 (1998).

[97] *See* MAGGIE BERG & BARBARA K. SEEBER, THE SLOW PROFESSOR: CHALLENGING THE CULTURE OF SPEED IN THE ACADEMY x (2016).

[98] FRANK DONOGHUE, THE LAST PROFESSORS: THE CORPORATE UNIVERSITY AND THE FATE OF THE HUMANITIES 83 (2008).

[99] CYNTHIA CROSSEN, TAINTED TRUTH: THE MANIPULATION OF FACT IN AMERICA 229 (1994).

overlooked. While the social sciences did not take shape until the late 19th century,[100] law schools were part of European universities from the medieval period. "By the late Middle Ages, . . . the term 'discipline' was being applied to professions such as medicine, law and theology."[101] Law schools played a vital role in the institutional and intellectual development of these early universities.[102] The school of civil law at the University of Bologna "became the model of university organization for Italy, Spain, and southern France."[103] Based on Justinian's *Corpus Juris Civilis*, study at Bologna "showed refinement and subtlety of legal thought analogous to that of scholastic philosophers," representing to some "the most brilliant achievement of intellect of mediaeval Europe."[104]

The intellectual aspiration notable in this early history has persisted in the legal academy. Good legal scholars today are not (as academics elsewhere may believe) mere appendages of the legal profession. Instead, and to the frustration of some critics,[105] they usually distance themselves from the workaday problems of lawyers and judges. Alfred Aman wrote that "the fundamental goal of a university law school is the creation of new knowledge."[106] In this vibrant academic culture, many legal scholars display the qualities of true intellectuals described by Richard Hofstader: "disinterested intelligence, generalizing power, free speculation, fresh observation, creative novelty, [and] radical criticism."[107]

This alone suggests a level of scholarly commitment comparable to that of other academic disciplines. Of added significance however is the legal academy's interdisciplinary turn. "[F]ashions in legal scholarship and teaching have changed," observed Paul Carrington, "as law schools have become more academic, more deeply and more intricately involved with other disciplines and with the universities of which most law schools are a part."[108] That trend demonstrates law's intellectual curiosity about and solidarity with the efforts of its disciplinary neighbors.

In short, whatever cultural or intellectual distance might have existed between universities and law schools is disappearing as they move toward each other.

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[100] Liah Greenfeld, *How Economics Became a Science: A Surprising Career of a Model Discipline*, *in* DISCIPLINARITY AT THE FIN DE SIECLE 87 (Amanda Anderson & Joeseph Valente eds., 2002).

[101] MORAN, *supra* note 44, at 4.

[102] CHARLES HOMER HASKINS, THE RISE OF UNIVERSITIES 18 (1923).

[103] *Id*.

[104] *Id*. at 48–49.

[105] *See* Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Paul D. Carrington, *Of Law and the River*, 36 J. LEGAL EDUC. 11 (1986). RICHARD POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY (2016). Richard Burst, *The High Bench v. the Ivory Tower*, 98 A.B.A. J. 50 (2012).

[106] Alfred Aman, *Protecting a Space for Creativity: The Role of a Law School Dean in a Research University*, 31 U. TOLEDO L. REV. 557 (2000).

[107] HOFSTADTER, *supra* note 31, at 27.

[108] Paul D. Carrington, *The Dangers of the Graduate School Model*, 36 J. LEGAL EDUC. 11 (1986).

Universities are involving themselves more with the outside world while law schools are directing more of their attention to scholarly activities within the university.

C. Is Legal Scholarship in Conceptual Disarray?

Edward Rubin's earlier description of the "conceptual disarray of legal scholarship"[109] poses a different challenge to law as an academic discipline. The best example of such disarray may be the furor that attended the Critical Legal Studies movement (CLS).[110] CLS scholars ("crits") and their detractors generated a great deal of legal scholarship in the late 1970s and the 1980s.

CLS had roots in the earlier Legal Realism and Critical Theory movements. Legal realists had attacked the pseudo-science and complacency of legal formalism.[111] Crits drew from the Realists their irreverence toward and abiding suspicion of legal institutions and traditions.[112] From Critical Theory, they formed (via the New Left in the 1960s) the shape of their central attack on liberal legal regimes in developed societies.

In Critical Theorist Herbert Marcuse "[t]he New Left found its master-theoretician."[113] His book, *One-Dimensional Man* (1964), had great impact. "The fundamental thesis" of the book was "that the technology of advanced industrial societies has enabled them to eliminate conflict by assimilating all those who in earlier forms of social order provided either voices or forces of dissent."[114] Duxbury explained: "Marcuse's message–that liberalism breeds false-consciousness, that the freedom which it promotes merely perpetuates capitalist domination–gave the New Left a greater sense of purpose."[115]

CLS "grew out of the New Left tradition."[116] There was what G. Edward White termed "a striking congruence"[117] between the central messages of the New Left and CLS. Crits reintroduced the thesis of the *One-Dimensional Man*, wrapping it in adjectives like indeterminate, contradictory, incoherent, oppressive, and illegitimate.

Crits delighted in "trashing" fundamental concepts of traditional legal theory including rights, freedom, progress, reason, and the rule of law. "Once trashing was

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[109] Rubin, *supr*a note 19 and accompanying text.

[110] Neil Duxbury provides an excellent history of CLS in NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 421–509 (1995). For an insider's description of the movement, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

[111] Surveys of Legal Realism appear in DUXBURY, *supra* note 110, at 65–159; LAURA KALMAN, LEGAL REALISM AT YALE: 1927–60 (1986); WILLIAM TWINING, KARL LLEWELLYN & THE REALIST MOVEMENT (1973). A representative collection of Realist scholarship appears in AMERICAN LEGAL REALISM (William Fisher III et al. eds., 1993).

[112] G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History* 40 SOUTHWESTERN L.J. 819, 819–20 (1986).

[113] DUXBURY, *supra* note 110, at 431.

[114] ALASDAIR MACINTYRE, HERBERT MARCUSE: AN EXPOSITION AND A POLEMIC 71 (1970).

[115] DUXBURY, *supra* note 110, at 432.

[116] *Id*. at 435.

[117] G. Edward White, *The Inevitability of Critical Legal Studies*, 36 STANFORD L. REV. 649 (1984).

unleashed," wrote a disgruntled observer, "it became fashionable to compete over who could compose the most vicious taunts or the most outlandish attack on a legal institution."[118]

CLS had a particularly debilitating effect on Harvard Law School. The school had previously led a relatively serene and magisterial existence.[119] CLS turned it into a "war zone."[120] Crits often displayed an air of belligerence. They condemned those failing to embrace their views and were condemned in return. Paul Carrington, then Dean of the Duke University Law School, wrote in a scathing article that crits were nihilists who had "an ethical duty to depart the law school."[121]

CLS undoubtedly plunged the legal academy into a tumultuous period. Did that challenge the discipline's existence? It helps, in answering this question, to take a broader look at academic culture.

Academic disciplines enjoy prerogatives of intellectual skepticism that have antecedents in Western antiquity, thereafter "purified, and constantly renewed" by the Enlightenment.[122] Unfortunately, academics involved in debate often "substitute contempt for argument."[123] They become polemicists, writing "not to persuade but to stiffen the spines of their supporters and irritate the stomach linings of their enemies."[124]

Acrimony among academics is legendary.[125] "Throughout history," wrote Steven Pinker, academic "battles of opinion have been waged by noisy moralizing, demonizing, hyperbole, and worse."[126] Departmental politics, jealousies, and

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[118] ARTHUR AUSTIN, THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION 86 (1998).

[119] *Cf.* HARVARD LAW SCHOOL ASSOCIATION, THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817-1917 (1918); ARTHUR E. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967 (1967).

[120] Laura Kalman, *The Dark Ages*, *in* HISTORY OF THE YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES 206 (Anthony T. Kronman ed., 2004). A vivid description of events appears in ELEANOR KERLOW, POISONED IVY: HOW EGOS, IDEOLOGY, AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL (1994).

[121] Carrington, *supra* note 108, at 227.

[122] PETER GAY, THE ENLIGHTENMENT: AN INTERPRETATION: THE RISE OF MODERN PAGANISM 127 (2d prtg. 1967).

[123] Eugene Goodheart, *Reflections on the Culture Wars*, *in* THE AMERICAN ACADEMIC PROFESSION 155 (Stephen R. Graubard ed., 2001). Thomas Kuhn lamented "the talking-through-each-other that regularly characterizes discourse between participants in incommensurable points of view." Thomas Kuhn, *Reflections on My Critics*, *in* CRITICISM AND THE GROWTH OF KNOWLEDGE 231–32 (Imre Laktos & Alan Musgrave eds., 1970).

[124] Adam Gopnick, *Bigger than Phil: When Did Faith Start to Fade?*, THE NEW YORKER, February 9, 2014, at 107.

[125] *See, e.g.*, DAVID EDMONDS & JOHN EIDINOW, WITTGENSTEIN'S POKER: THE STORY OF A TEN-MINUTE ARGUMENT BETWEEN TWO GREAT PHILOSOPHERS (2001); HAL HELLMAN, GREAT FEUDS IN SCIENCE: TEN OF THE LIVELIEST DISPUTES EVER (1998).

[126] STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 106 (2003). Neil Duxbury candidly observed: "When debunking is done well, it is frequently impossible for

frustrated ambitions exacerbate the problem,[127] creating the "sworn enemies and bitter critics long produced by academic life."[128] "Within the academic profession, fights are often intramural," wrote Charles Bernstein, "as new disciplinary and methodological projects threaten older ones, the new and the old both claiming to be victims of unprecedented dogmatism, bad faith, and a lack of intellectual or cultural values."[129]

Seen in this light, there is no real difference between conflict generated by CLS and heated intradisciplinary conflicts elsewhere: *e.g.*, conflicts between human and physical geographers;[130] between institutionalist and neoclassical economists;[131] between New Critics and poststructuralists in literature;[132] between quantitative and qualitative political scientists;[133] between biological and cultural anthropologists;[134] or between sociologists who recognize the concept of deviance and those who do not.[135]

The fact is that, debilitating or distasteful as it may be, "controversy has always been a vital part of academic life."[136] Louis Menand reminded us that "quarreling with one another" over "competing paradigms . . . is a sign of life" for the discipline.[137] "The danger for the academic profession is not that one side or the other will 'win,'" wrote Charles Bernstein. "Rather, the problem is the idea that consensus should prevail. Manufacturing consent always involves devaluing or excluding that which does not fit in the frame."[138]

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the spectator–unless the target–not to experience *Schadenfreude.* To be responsible for generating such experience must be exhilarating." DUXBURY, *supra* note 110, at 421.

[127] *See* RHODE, *supra* note 36, at 9–13.

[128] RUSSELL JACOBY, THE LAST INTELLECTUALS: AMERICAN CULTURE IN THE AGE OF ACADEME 141 (1982).

[129] Charles Bernstein, *A Blow is Like an Instrument, in* THE AMERICAN ACADEMIC PROFESSION 183 (Stephen R. Graubard ed., 2001).

[130] *See* Heather Viles, *A Divided Discipline? in* QUESTIONING GEOGRAPHY: FUNDAMENTAL DEBATES (Noel Castree et al. eds., 2005).

[131] *See* YUVAL P. YONAY, THE STRUGGLE OVER THE SOUL OF ECONOMICS: INSTITUTIONALIST AND NEOCLASSICAL ECONOMISTS IN AMERICA BETWEEN THE WARS (1998).

[132] *See* M. H. Abrams, "*The Transformation of English Studies: 1930-1995*", *in* AMERICAN ACADEMIC CULTURE IN TRANSFORMATION: FIFTY YEARS, FOUR DISCIPLINES (Thomas Bender & Carl E. Schorske eds., 1997).

[133] *See* DAVID M. RICCI, THE TRAGEDY OF POLITICAL SCIENCE: POLITICS, SCHOLARSHIP, AND DEMOCRACY (1984).

[134] *See* ROBERT H. LAVENDA & EMILY A. SHULTZ, ANTHROPOLOGY: WHAT DOES IT MEAN TO BE HUMAN? 6 (2008); SYDEL SILVERMAN, THE BEAST ON THE TABLE: CONFERENCING WITH ANTHROPOLOGISTS 228–229 (2002).

[135] *See* ANNE HENDERSHOTT, THE POLITICS OF DEVIANCE (2002).

[136] Goodheart, *supra* note 123, at 154.

[137] LOUIS MENAND, THE MARKETPLACE OF IDEAS: REFORM AND RESISTANCE IN THE AMERICAN UNIVERSITY 63 (2010).

[138] Bernstein, s*upra* note 129, at 183.

If tensions and controversies are signs of disciplinary good health, then law is a healthy academic discipline.[139]

III. PART THREE: A FINAL ATTACK–LEGAL SCHOLARSHIP WITHOUT PEER REVIEW

A. Law's Publication of Articles Without Peer Review

It would be difficult to overstate the importance of academic research and scholarship to contemporary university life. Deborah Rhode wrote that "throughout the American academy, scholarship has become the principal foundation of status."[140] To Burton Clark, higher education in the United States was "hugely based on research."[141] Jacques Barzun thought that the academy operates under "the prevailing belief . . . that research is the great justification for the whole enterprise."[142] Academic lawyers produce their share of scholarship, but critics condemn the fact that most of it is published in journals (law reviews) controlled by students rather than by professional scholars. This arrangement is an academic curiosity, apparently unique to law.[143] Paul Samuelson found it "incredible," adding that the "academic mind boggles at the thought."[144] Critics have derided student editors.[145] "Given the handicaps of ignorance, immaturity, inexperience, and inadequate incentives," wrote Richard Posner, "the wonder is not that law reviews leave much to be desired as scholarly journals, but that they aren't much worse than they are."[146]

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[139] Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CALIF. L. REV. 889, 892 (1992) ("Its boundaries are particularly permeable, its debates particularly intense, and its transformations over time particularly extensive.").

[140] RHODE, *supra* note 36, at 36.

[141] THE AMERICAN ACADEMIC PROFESSION 21 (Stephen R. Graubard ed., Transaction Publishers 2001); *accord* Rubin, *supra* note 141, at 891; MENAND, *supra* note 137, at 76; Samuelson, *supra* note 7, at 259.

[142] JACQUES BARZUN, THE AMERICAN UNIVERSITY–HOW IT RUNS, WHERE IT IS GOING 20 (1966).

[143] Cramton, *supra* note 47, at 1; Ronald D. Rotunda, *Law Reviews–An Extreme Centrist Position*, 62 IND. L.J. 1, 2 (1986).

[144] Samuelson, *supra* note 7, at 260.

[145] Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENV. L. REV. 661, 661 (1998) ("There is, in fact, quite a literature of invective – professors and others railing against the law reviews."). For example Lindgren, *supra* note 47, at 527 ("Our scholarly journals are in the hands of incompetents."); John G. Kester, *Faculty Participation in the Student-Edited Law Review*, 36 J. LEGAL EDUC. 14, 14 (1986) ("[O]ne of the few reported cases of inmates truly running the asylum."); Alan W. Mewett, *Reviewing the Law Reviews*, 8 J. LEGAL EDUC. 188, 190 (1955) ("[T]he student, as such, has no place on a law review at all."). *But see* KARL LLEWELLYN, BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 111 (Oxford University Press 2008) ("[Law reviews are] a thing Americans may well be proud of.").

[146] Richard A Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132 (1995). One suspects that some of the hostility law professors exhibit toward law reviews stems from their past experiences as law review authors. Authors rarely enjoy criticism of their manuscripts, even from professional editors. *See* John K. Paine, *Line Editing–The Art of the*

Student editors assume all functions, including decisions on what to publish. Moreover, they usually make those decisions on their own, *i.e.* unaided by the evaluations of outside experts (peer review). The absence of peer review may bear the brunt of attacks on law reviews. For example, James Lindgren complained: "Scholars elsewhere frequently can't believe that, for almost all our academic journals, we let students without advanced degrees select manuscripts. As faculty members, we must begin to take responsibility for the monster that our predecessors created."[147]

We are now at a critical juncture in our consideration whether law really is an academic discipline. We shall see that peer review is central to traditions of university scholarship. Does the lack of peer-review for most legal scholarship therefore hurt law's disciplinary claim? This challenge reflects an undeniable cultural divide between law professors and the rest of the academy.[148] It probably poses the most serious barrier to the acceptance of law as an academic discipline. The peer-review challenge will therefore receive the most attention in this Article. While that discussion will incorporate criticisms of peer review by those who have been subject to it,[149] I must stress that my purpose is not to reform peer review. It would be presumptuous of me (an outsider) to try to do so.

My argument instead is that, when one compares the particular strengths and weaknesses of law reviews with those of peer-reviewed journals, the legal academy does not suffer from the difference. This is because (1) legal scholars are subject to other forms of peer review; (2) peer review contributes less to scholarship than might first appear; (3) law reviews offer countervailing advantages.

B. The Peer-Review Requirement for Articles in Other Disciplines

Peer review pervades other academic fields. It "is embedded into the structures and processes of virtually all academic journals."[150] Clearly, "with only minor variations, peer review processes are used across the range of disciplines

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Reasonable Suggestion, *in* EDITORS ON EDITING–WHAT WRITERS NEED TO KNOW ABOUT WHAT EDITORS DO 170 (Gerald Gross 3d ed. 1993). Worse however is the indignity of receiving criticism from mere law students – the kind of persons law professors are accustomed to awing in the classroom. A veteran law review author observed half-humorously that students "edit and criticize . . . articles (and by implication, their authors)," although the authors are "their experiential and – hell! – moral superiors." James W. Harper, *Why Student-Run Law Reviews*, 82 MINN. L. REV. 1261, 1270 (1997). Students can irritate authors when they simply act like editors. Like any effective editor, they are required "to nag, to question, to probe, not to give the author the benefit of the doubt." Maron L. Waxman, *Line Editing–Drawing Out the Best Book Possible*, *in* EDITORS ON EDITING–WHAT WRITERS NEED TO KNOW ABOUT WHAT EDITORS DO 155 (Gerald Gross 3d ed. 1993).

[147] Lindgren, s*upra* note 47, at 535; s*ee also* Cramton, *supra* note 47, at 7–8 ("The claim that student editors can recognize whether scholarly articles make an original contribution throughout the domain the of law is now viewed by legal scholars as indefensible."). Van Zandt, *supra* note 32, at 332 (noting "the lack of strong norms of peer review" as a reason why "the work of many law school faculty falls short of the standards that prevail in other disciplines.").

[148] *See*, *e.g.*, Samuelson, *supra* note 7, at 260.

[149] *See infra* notes 154–200 and accompanying text.

[150] Elizabeth Wager & Tom Jefferson, *Shortcomings of Peer Review in Biomedical Journals*, 14 LEARNED PUB. 257, 257 (2001).

encompassing the sciences, arts, and humanities."[151] Ernest Boyer wrote: "What is important, regardless of the field, is that research results must be published and peer reviewed."[152] An academic journal remarked in an editorial: "Questioning peer review is like questioning the Bible, Quran, or Torah."[153]

Peer review has been described as "a process of systematically distributing, evaluating, and reaching a consensus on the merits of submitted manuscripts."[154] The practice can be traced at least to the 1665 founding of the journal, *Philosophical Transactions*, by the British Royal Society.[155] In the 20th century, when scholarship displaced teaching as the most valued function of academic life,[156] academic journals (hence peer review) assumed paramount importance.

Journals do not send all of the manuscripts they receive to peer reviewers.[157] "Editors . . . always have had the option of returning an off-topic, inappropriately formatted, or clearly uncompetitive manuscript to its author without having it sent out for review."[158] The proportion of manuscripts clearing this hurdle varies with each journal.[159] The editor sends the surviving manuscripts out for review by experts (peers) active in the same research area.[160] Peer reviewers "are generally asked to classify the paper as publishable immediately, publishable with amendments and improvements, or not publishable."[161] The degree of reliance upon reviewer recommendations varies. "Half of journal editors," by one estimate, "rely almost exclusively on reviewer recommendations when making acceptance decisions."[162]

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[151] *Id*.

[152] ERNEST L. BOYER, SCHOLARSHIP RECONSIDERED–PRIORITIES OF THE PROFESSORIATE 29 (John Wiley & Sons ed., 1990).

[153] Fiana Linkov et al., *Scientific Journals are "Faith Based": Is There Science Behind Peer Review?*, 99 J. ROYAL SOC'Y MED. 596, 597 (2006).

[154] Dale J. Benos et al., *The Ups and Downs of Peer Review*, 31 ADVANCES PHYSIOLOGY EDUC. 145, 145 (2007).

[155] Harriet Zuckerman & Robert C. Merton, *Patterns of Evaluation in Science: Institutionalisation, Structure and Functions of the Referee System*, 9 MINERVA 66, 68 (1971).

[156] *See* MENAND, *supra* note 137, at 76; SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS 279, 285–86 (University of Chicago Press 1991).

[157] *See* Cassidy R. Sugimoto et al., *Journal Acceptance Rates: A Cross-Disciplinary Analysis of Variability and Relationships with Journal Measures*, 7 J. INFORMETRICS 897 (2013).

[158] Jerry Suls & Rene Martin, *The Air We Breathe–A Critical Look at Practices and Alternatives in the Peer-Review Process*, 4 PERSP. PSYCHOL. SCI. 40, 41 (2009).

[159] Mary Biggs, *The Impact of Peer Review on Intellectual Freedom*, 39 LIBR. TRENDS 145, 147 (1990) ("ranging from less than half to nearly all.").

[160] Herbert W. Marsh & Samuel Ball, *The Peer-Review Process Used to Evaluate Manuscripts Submitted to Academic Journals*, 57 EXPERIMENTAL EDUC. 151, 152 (1989).

[161] Fytton Rowland, *The Peer-Review Process*, 15 LEARNED PUB. 247, 247 (2002).

[162] Michael L. Callaham et al., *Reliability of Editors' Subjective Quality Ratings of Peer Reviews of Manuscripts*, 280 [J]AMA 229, 230 (1998).

C. Law's Forms of Peer Review

There are at least a few faculty-edited, peer-reviewed law reviews.[163] Moreover, student editors considering a manuscript may always obtain a measure of peer review by referring it to a faculty member at their school who is knowledgeable in the field. This practice is important[164] and widely used.[165] "True, faculty members acted only by invitation," observed a former law review editor, "[b]ut the invitations were frequent, and were built into the editorial process."[166] Finally, student editors have occasionally adopted formal peer review.[167]

Law review authors often follow a practice that approximates the positive aspects of peer review. Acknowledgments in their published articles often disclose that they sent their manuscripts to colleagues for comment before submitting them to reviews. This practice can be quite beneficial, enabling authors to "receive and incorporate substantial suggestions."[168]

Peer-reviewed journals give stature to scholars and their disciplines because publication is thought to convey approval by experts.[169] The availability of this distinction however is not limited to academic journals. Peer review is similarly used

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[163] *E.g.*, American Journal of Comparative Law, Journal of Law and Economics, Journal of Legal Studies, Supreme Court Review.

[164] *See* Rotunda, *supra* note 145, at 2; Phil Nichols, *A Student Defense of Student Edited Journals: In Response to Professor Roger Cramton*, 1987 DUKE L.J. 1122, 1128 (1987); Reinhard Zimmerman, *Law Reviews: A Foray Through a Strange World*, 47 EMORY L.J. 659, 674 (1998).

[165] Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 408 (1989).

[166] Kester, *supra* note 145, at 14.

[167] *E.g.*, *Submissions*, THE UNIVERSITY OF CHICAGO LAW REVIEW, lawreview.uchicago.edu/submissions (last visited Aug. 16, 2019) ("*The Law Review* occasionally solicits feedback on submissions from scholars who are expert in their field. Please be aware that this peer review is part of the standard review process that your article may undergo.").

[168] Carol Sanger, *Editing*, 82 GEO. L.J. 513, 524 (1993).

[169] *See* Zuckerman & Merton, *supra* note 155, at 97. This might suggest that journals without peer review would be correspondingly less attractive to authors. How then does one explain why established scholars from other disciplines (who regularly appear in their own peer-reviewed journals) also publish in student-edited law reviews? For example Terence C. Halliday, *Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead*, 32 BROOK. J. INT'L L. 1081 (2007); Susan Shapiro, *If It Ain't Broke...An Empirical Perspective on Ethics 2000, Screening the Conflict-of-Interest Rules*, 2003 U. ILL. L. REV. 1299 (2003); Steven J. Sherman, *The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law*, 70 IND. L.J. 1241 (1995); Stephen Daniels, *The Supreme Court and Obscenity: An Exercise in Empirical Constitutional Policy-Making*, 17 SAN DIEGO L. REV. 757 (1980); Kathleen Daly, *Criminal Law and Justice System Practices as Racist, White, and Radicalized*, 51 WASH. & LEE L. REV. 431 (1994); Michael L. Randelet, *Capital Punishment in Colorado: 1859–1972*, 74 Colo. L. Rev. (2003).

to evaluate scholarly book proposals[170]and to evaluate applications for research grants.[171] Insofar as law professors actively compete for these opportunities (and many do), they also participate in the peer-review process.

Peer review has been touted as an incentive for authors to write better manuscripts,[172] but authors are also pressured to do their best work by the specter of reviews appearing *after* the article is published. Peer review never really ends. It continues far beyond consideration of a particular article, book, or grant proposal to address the sum of a scholar's accomplishments. Review of a candidate's published work is undertaken by "evaluators who decide on hiring, tenure, promotion, and salaries."[173] It is also crucial for obtaining endowed professorships, distinguished-lecture invitations, election to learned societies, and more.[174] Edward Rubin wrote: "One's personal reputation as a scholar is heavily, if not exclusively, determined by the evaluation of one's work"[175] – and, one could add, by successive reevaluations of the author's output (up or down) over time. As Becher and Trowler noted, "leadership is only granted on sufferance, and those who are accorded it have to continue to justify themselves as especially competent and active exponents of their discipline."[176] Again, law professors are as subject to this form of peer review as other academics.

D. Problems with Peer Review in Academic Journals

Critics rarely explain precisely how peer review would improve articles published in law reviews. Perhaps they regard this as unnecessary, since the goals of peer review are well-recognized. Along with journal editors, peer reviewers are thought to be "important gatekeepers of disciplinary norms,"[177] to be at the center of "the quality control system for academic knowledge."[178] They are expected to police their disciplines – guiding readers toward original and important scholarship while protecting them from flawed or unimportant work. They are also expected to mentor authors:

> They can . . . suggest basic revisions for improving papers. They sometimes link up the paper with other work which the author happened not to know; they protect the author from unwittingly

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[170] *See* Zuckerman & Merton, *supra* note 155, at 66; David A. Shatz, *Is Peer Review Overrated?*, 79 THE MONIST 536, 536 (1996).

[171] *See* Rowland, *supra* note 161, at 247; Biggs, *supra* note 159, at 146.

[172] *See* Michael Wood & Martyn Roberts, *The Reliability of Peer Reviews of Papers on Information Systems*, 30 J. INFO. SCI. 2, 11 (2004).

[173] Shatz, *supra* note 170, at 536.

[174] *See* Uschi Backes-Gellner & Axel Schlinghoff, *Career Incentives and "Publish or Perish" in German and U.S. Universities*, 42 EUR. EDUC. 26, 46 (2010).

[175] Rubin, *supra* note 139, at 893.

[176] TONY BECHER & PAUL R. TROWLER, ACADEMIC TRIBES AND TERRITORIES–INTELLECTUAL ENQUIRY AND THE CULTURES OF DISCIPLINES 86 (2d ed. 2001).

[177] Robert Post, *Debating Disciplinarity*, 35 YALE LAW SCHOOL, FACULTY SCHOLARSHIP SERIES 749, 753 (2009).

[178] Wood & Roberts, *supra* note 174, at 2.

> publishing duplications of earlier work; and, of course, as presumable experts in the subject, they may in effect certify the paper as a contribution by recommending its publication.[179]

This sounds good in theory. In a comprehensive survey however, only 65% of researchers were satisfied with peer review.[180] Many who have looked at peer review believe that the process remains understudied and unclear.[181] What is clear is that peer review has generated considerable dissatisfaction.[182] We will soon see how reviewer shortages, negativity bias, confirmation bias, prestige bias, conflict of interest, and

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[179] Zuckerman & Merton, *supra* note 155, at 96–97.

[180] MARK WARE, PUB. RES. CONSORTIUM, PEER REVIEW SURVEY–2015 2 (2016).

[181] *E.g.*, Michael J. Mahoney, *Publication Prejudices: A Experimental Study of Confirmatory Bias in the Peer Review System*, 1 COGNITIVE THERAPY & RES. 161, 174 (1977) ("Without further scrutiny of the purposes and processes of peer review, we are left with little to defend it other than tradition."); Callaham et al., *supra* note 164, at 229 ("Little is known about the quality of peer review."); Von Bakanic et al., *The Manuscript Review and Decision-Making Process*, 52 AM. SOC. REV. 631, 631 (1987); ("[T]here has been little research on the manuscript review and decision-making process."); Linkov et al., *supra* note 153, at 596 ("[T]he primary reason that journals have not changed is that they are 'faith based': we believe in them, we dare not question them."); Drummond Rennie, *Editorial Peer Review: Its Development and Rationale*, *in* PEER REVIEW IN HEALTH SCIENCES 1 (BMU Books ed. 2003) ("Most peer review systems and alternatives remain poorly studied."); William Clark, ACADEMIC CHARISMA AND THE ORIGINS OF THE RESEARCH UNIVERSITY 14 (University of Chicago Press 2006) (describing peer review as a "mysterious modern institution."); Marsh & Ball, *supra* note 160, at 152 ("[T]here is little research on the policy practices that define the peer review process and how well those policy practices work."); Tom Jefferson et al., *Measuring the Quality of Editorial Peer Review*, 287 J. AMA 2786, 2787 (2002) (suggesting that peer review's "true effects have not been determined, or that the aims of peer review have not been identified properly."); Arnold S. Relman & Marcia Angell, *How Good Is Peer Review?*, 321 NEW ENG. J. MED. 827, 828 (1989) ("[M]any researchers and reviewers involved in peer review have widely different perceptions of its functions and methods."); Arturo Casadevall & Ferric C. Fang, *Is Peer Review Censorship?*, 77 INFECTION & IMMUNITY 1273, 1273 (2009) ("[T]here are remarkably little data that the system works as intended.").

[182] *E.g.*, Biggs, *supra* note 159, at 146 ("[D]espite the long history supporting peer review, its value continues to be debated."); Douglas P. Peters & Stephen J. Ceci, *Peer-Review Practices of Psychological Journals: The Fate of Published Articles, Submitted Again*, 5 BEHAV. & BRAIN SCI. 187, 194 (1982) (noting "a growing concern about the adequacy of our present journal review system."); Shatz, *supra* note 170, at 536 ("[I]mportant lines of objection may be raised to peer review."); Norval D. Glenn, *The Journal Article Review Process: Some Proposals for Change*, 11 AM. SOCIOLOGIST 179, 179 (1976) (noting "apparent widespread dissatisfaction among authors with the evaluations of the papers they submit."); Suls & Martin, *supra* note 158, at 42 ("[C]riticisms of peer review abound."); Rennie, *supra* note 181, at 10 ([T]here is "growing evidence that peer review is a blunt, inefficient, and expensive tool . . . a marketing tool for journals trying to pretend that their quality control is tight."); NELSON & WATT, *supra* note 48, at 211 ("Peer reviewing needs to be peer-reviewed."); Lonnie W. Aarssen & Christopher J. Lortie, *Ending Elitism in Peer-Review Publication*, 2 IDEAS ECOLOGY & EVOLUTION 18 (2009) ("Researchers . . . remain frustrated by limitations [of the peer-review process] that continue to escape solutions."); Mahoney, *supra* note 181, at 163 ("[E]ditorials and special articles have often cited the deficiencies of current review practices."); Casadevall & Fang, *supra* note 183, at 1273 (noting "abundant evidence of imperfections in the peer review process.").

other frailties of the peer-review process have taken a toll on scholars and on their disciplines.

Part of the problem stems from the astonishing rate at which peer-reviewed academic journals have multiplied.[183] Jerry Jacobs reported in 2013 that there were "twenty-eight thousand active peer-reviewed journals."[184] Manuscript submissions have increased accordingly. "In any given year," according to one study, "[peer-reviewed] journals publish, at a conservative estimate, a million articles."[185]

This trend naturally reduces the availability of peer reviewers. "While the exponential growth of professional journals places a high premium on expert reviewers," said one observer, "the pool of qualified reviewers is quite small."[186] Demand has long outstripped the number of such experts available.[187] At least two problems have resulted.

First, the growing shortage means that it takes longer to locate reviewers willing to serve, and that (because reviewers are increasingly overworked) reviews take longer to complete. This extends the period from submission to publication, already regarded as "objectionably slow."[188] Glen Ellison noted that time for leading economics journals went from "six to nine months" in 1972 to "about two years" in 2002.[189] As Aarssen and Lortie stated, delays can be prejudicial: "it can often take more than a year to get a new idea published, by which time it may already be old – scooped by someone else."[190]

Second, the growing shortage of peer reviewers has forced many journal editors to lower their reviewer-selection standards.[191] Andrew Abbott described the situation in sociology. In all but the top journals, "most articles are reviewed not by nationally known experts in the fields they involve," he wrote, "but by people of lesser stature, indeed often by those whose scholarly judgment is hardly known at all by editors:

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[183] *See* Aarssen & Lortie, *supra* note 182, at 18.

[184] JACOBS, *supra* note 54, at 54.

[185] Carol J. Lee et al., *Bias in Peer Review*, 64 J. AM. SOC'Y FOR INFO. SCI. & TECH. 2, 4 (2013). Ken Hyland's subsequent study estimated production of "over 1.5 million peer reviewed articles each year." Ken Hyland, *Academic Publishing and the Myth of Linguistic Injustice*, 31 J. SECOND LANGUAGE WRITING 58, 58 (2016).

[186] Mohammadreza Hojat et al., *Impartial Judgment by the "Gatekeepers" of Science: Fallibility and Accountability in the Peer Review Process*, 8 ADVANCES HEALTH SCI. EDUC. 75, 85 (2003).

[187] *See* CHRIS CHAMBERS, THE SEVEN DEADLY SINS OF PSYCHOLOGY–A MANIFESTO FOR REFORMING SCIENTIFIC PRACTICE 89 (Princeton Univ. Press 2017); Biggs, *supra* note 159, at 158; Glenn, *supra* note 182, at 180.

[188] James V. Bradley, *Pernicious Publication Practices*, 18 BULL. PSYCHONOMIC SOC'Y 31, 34 (1981) [hereinafter Bradley, *Pernicious Publication Practices*].

[189] Glenn Ellison, *The Slowdown of the Economics Publishing Process*, 110 J. POL. ECONOMY 947, 948 (2002).

[190] Aarssen & Lortie, *supra* note 182, at 18.

[191] Sneha Kulkarni, *What Causes Peer Review Scams and How Can They Be Prevented*, 29 LEARNED PUBLISHING 211, 212 (2015).

graduate students, people culled from the prospective article's bibliography, people suggested by friends in answer to desperate phone calls."[192]

This worsens a related problem: editors may not be familiar enough with the subjects addressed by manuscripts to know what kind of expert to look for.[193] Peer-reviewer selection under these circumstances can amount to guesswork. James Bradley learned from the group of scholars he studied "that 53% of them had been asked to referee an article that they were incompetent to review."[194]

Unfortunately, not all who are unqualified to review articles can be trusted to decline.[195] Studies suggest that, when unqualified persons agree to peer review, they may be inclined to mask their insecurity with *negativity bias*.[196] That is,

> in an effort to preserve their self-esteem and their esteem in the eyes of observers, they may become negatively critical of the intelligence or intellectual work of others. This self-presentation . . . is based on the assumption that negative criticism is indeed perceived as more intelligent, incisive, and insightful than praise.[197]

Even knowledgeable peer reviewers may cause problems. "Peer review is a human activity: reviewers, like editors, may be partial, biased, jealous, . . . malicious, corrupt, or incapacitated by conflicts of interest."[198] Beyond these palpable reviewer shortcomings lie subtler human frailties. One of the saddest realizations emerging from a study of academic culture is how often scholars lack intellectual curiosity about views unlike their own. "In academia," Edward Rubin observed, "opinion is inescapable, and bias becomes an increasing danger as the author's viewpoint diverges from the evaluator's."[199] Attempts to communicate new ideas can be exasperating. Describing his "classic stages of a theory's career," William James confirmed this: "First, you know, a new theory is attacked as absurd; then it is admitted as true, but obvious and insignificant; finally, it is seen as so important that its adversaries claim that they themselves discovered it."[200]

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[192] ANDREW ABBOTT, DEPARTMENT AND DISCIPLINE–CHICAGO SOCIOLOGY AT ONE HUNDRED 190–91 (1999).

[193] *See* Mark D. Street et al., *Author Perceptions of Positive and Negative Behaviors in the Manuscript Review Process*, 13 J. SOC. BEHAV. & PERSONALITY 1, 4 (1998); Bradley, *Pernicious Publication Practices*, *supra* note 188, at 34; Rennie, *supra* note 181, at 5–6.

[194] Bradley, *Pernicious Publication Practices*, *supra* note 188, at 34.

[195] *See* James V. Bradley, *Overconfidence in Ignorant Experts*, 17 BULL. PSYCHONOMIC SOC'Y 82, 84 (1981) [hereinafter Bradley, *Overconfidence in Ignorant Experts*].

[196] *See* Lynne M. Cooper, *Problems, Pitfalls, and Promise in the Peer-Review Process*, 4 PERSP. ON PSYCHOL. SCI. 84, 85 (2009); Suls & Martin, *supra* note 158, at 43.

[197] Teresa M. Amabile, *Brilliant but Cruel: Perceptions of Negative Evaluators*, 19 J. EXPERIMENTAL SOC. PSYCHOL. 146, 147 (1983).

[198] Rennie, *supra* note 181, at 8.

[199] Rubin, s*upra* note 141, at 941.

[200] William James, *The Works of William James: Pragmatism*, *in* RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 51 (Univ. of Pa. Press 1982).

Peer reviewers can resist or suppress ideas because they are new, a concern expressed by many commentators."[201] This has been termed *confirmation bias*, "defined as a tendency of some reviewers to accept outcomes that agree with commonly accepted theories and to discredit those that do not."[202] The author of a leading peer review study wrote: "Confirmatory experiences are selectively welcomed and granted easy credibility. Disconfirmatory experiences, on the other hand, are often ignored, discredited, or treated with obvious defensiveness."[203] Confirmation bias harms authors. It also harms disciplines by stifling innovation.[204]

A different type of bias occurs when peer reviewers favor certain authors simply because they are well-known or reside at elite universities. Called *prestige bias*, it is considered widespread and a cause for concern.[205] Suls and Martin observed: "a wealth of experimental social psychological evidence supports the pervasive influence of halo and prestige effects. There is no obvious reason why peer reviewers would be immune to such social perceptual biases."[206]

Prestige bias afflicts journal editors as well. "If an editor receives a manuscript from an unknown man [or woman] which seems wrong, obscure, or absurd, he will normally simply reject it after one reading," explained Gordon Tullock. "The same manuscript from a prominent man [or woman]," he continued, "would be reread a number of times before the editor decided that it was really wrong, obscure, or absurd."[207] Subtle or overt, prestige bias "proves to have no validity."[208] It crowds out the work of more deserving (if less established) scholars, offering the illusion of stature at the expense of quality.

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[201] *See* Davis Trafimow & Stephen Rice, *What if Social Scientists Had Reviewed Great Scientific Works of the Past?*, 4 PERSP. ON PSYCHOL. SCI. 65, 77 (2009); Cooper, *supra* note 196 at 84; Aarssen & Lortie, *supra* note 182, at 18; Benos et al., *supra* note 156, at 147; William H. Starbuck, *Turning Lemons into Lemonade–Where is the Value in Peer Reviews?*, 12 J. MGMT. INQUIRY 344–45 (2003); Hojat et al., *supra* note 186, at 81; Rennie, *supra* note 181, at 9; NELSON & WATT, *supra* note 48, at 213; *see generally* OMAR SWARTZ, CONDUCTING SOCIALLY RESPONSIBLE RESEARCH: CRITICAL THEORY, NEO-PRAGMATISM, AND RHETORICAL INQUIRY 2 (Sage Publications 1997); Rubin, *supra* note 141, at 900; Bruce M. Smith & Pauline B. Gough, *Editors Speak Out on Refereeing*, 65 THE PHI DELTA KAPPAN 637, 639 (1984).

[202] Hojat et al., *supra* note 186, at 78.

[203] Mahoney, *supra* note 181, at 161–62. Authors of another study reported that peer reviewers displayed "a significant bias in favor of the orthodox version." K. I. Resch et al., *A Randomized Controlled Study of Reviewer Bias Against an Unconventional Therapy*, 93 J. ROYAL SOC. MED. 164, 164 (2000).

[204] *See* David F. Horrobin, *The Philosophical Basis of Peer Review and the Suppression of Innovation*, 263 [J]AMA 1438 (1990); Trafimow & Rice, *supra* note 201, at 77; Benos et al., *supra* note 154, at 147; Rennie, *supra* note 181, at 9.

[205] *See, e.g.*, Harriet Zuckerman, *Stratification in American Science*, 40 SOC. INQUIRY 235, 235 (1970); Bakanic et al., *supra* note 181, at 640; Cooper, *supra* note 197, at 85; Hojat et al., *supra* note 186, at 79; Biggs, *supra* note 182, at 148; Mahoney, *supra* note 181, at 163.

[206] Suls & Martin, s*upra* note 133, at 44.

[207] GORDON TULLOCK, *The Organization of Inquiry*, *in* 3 THE SELECTED WORKS OF GORDON TULLOCK 119 (Charles Rowlet ed., Liberty Fund 2005).

[208] Peters & Ceci, *supra* note 182, at 194.

Peer reviewers at times treat authors unkindly. They can "seem arrogant, disrespectful, even nasty."[209] Respondents in one study felt that "perhaps the most vexatious" aspect of peer review was that reviewers were "often arrogant or obnoxious."[210] One veteran described the peer review experience as "a socially approved form of intellectual sadomasochism."[211]

Reviewer hostility may be symptomatic of a more serious problem. The search for reviewers poses an inherent dilemma for journal editors. If the reviewer's expertise is distant from the subject of the manuscript, the reviewer is not competent to evaluate it. But, if the subject of the author's work is within the reviewer's expertise, the reviewer may see the author as an unwelcome rival. "This raises the possibility that limiting the dissemination of an author's findings could be in a reviewer's best interests."[212] The possibility of a reviewer's conflict of interest is well-recognized.[213]

Self-interested peer reviewers can victimize authors in different ways. They can attack the author's manuscript,[214] pilfer ideas from it,[215] block publication of an article questioning the reviewer's own work,[216] or delay publication of an article similar to one the reviewer intends to publish first.[217]

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[209] Starbuck, *supra* note 201, at 344.

[210] Bradley, *Pernicious Publication Practices*, *supra* note 188, at 34.

[211] Morris B. Holbrook, *A Note on Sadomasochism in the Review Process: I Hate When That Happens*, 50 J. MARKETING 104, 105 (1986).

[212] Suls & Martin, *supra* note 158, at 43.

[213] *See, e.g.*, Rennie, *supra* note 181 at 9; Relman, *supra* note 181, at 828; Zuckerman, *Patterns of Evaluation in Science: Institutionalization, Structure, and Functions of the Referee System*, *supra* note 155, at 97.

[214] *See* Cooper, *supra* note 196, at 85.

[215] *See* Zuckerman, *Patterns of Evaluation in Science: Institutionalization, Structure, and Functions of the Referee System*, *supra* note 155, at 97.

[216] *See* Casadevall & Fang, *supra* note 181, at 1274.

[217] *See generally* Thomas C. Chalmers et al., *Minimizing the Three Stages of Publication Bias*, 263 [J]AMA 1392 (1990).

Ambiguities of peer review enable reviewers to mask bias or untoward motives. William Starbuck explained how rejection of virtually any manuscript can be made to appear fair-minded and plausible: "Every manuscript can be said to deserve rejection. Every manuscript contains poorly phrased statements. Every manuscript fails to mention some relevant literature. Every manuscript makes arguments that could be more cleanly reasoned. Every theory overlooks some potentially important contingencies."[218] In their illuminating and entertaining article,[219] David Trafimow and Stephen Rice demonstrated how far it was possible to stretch such criticisms.[220] The authors created a series of parodies in which great scientists (including Galileo, Newton, Harvey, and Einstein) tried to introduce their famous theories by submitting papers to an academic journal.[221] In letters summarizing the negative responses of peer reviewers, the journal editor rejected the submissions of all four scientists. [222] Most intriguing in the article is how plausible empty reviewer-speak could be made to sound.

Another problem in peer review is the frequent inability of reviewers to agree. Inconsistent peer reviews have been a perennial concern.[223] The combustible nature of academic discourse contributes to this problem. As noted earlier,[224] sharp differences regularly occur within disciplines. David Papineau's observation about philosophy, that "there will always be incompatible theories to explain any given body of observational facts,"[225] applies throughout academia.

Similarly, Andrew Abbott wrote: "Disputes . . . founded on abstract knowledge" are intense, "for the plasticity of abstract argument makes the competition more

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[218] Starbuck, s*upra* note 201, at 348–49.

[219] Trafimow & Rice, s*upra* note 201.

[220] *Id.* at 65.

[221] *Id.*

[222] *Id.*

[223] *See, e.g.*, Stephen Cole et al., *Chance and Consensus in Peer Review*, 214 SCI. 881, 881 (1981) (in peer-reviewed grant applications to the National Science Foundation, "disagreement within the population of eligible reviewers is such that whether or not a proposal is funded depends in a large proportion of cases upon which reviewers happen to be selected for it"); Casadevall & Fang, *supra* note 181, at 1273 ("Chance has been shown to play an important role in determining the outcome of peer review, and agreement between reviewers is disconcertingly low"); Bakanic et. al., *supra* note 181, at 632 ("Accumulating evidence suggests that agreement among peer reviewers is the exception rather than the rule"); Suls & Martin, *supra* note 158, at 44 ("reviewers rarely agree regarding the merits of any given manuscript"); Starbuck, *supra* note 201, at 346 (a journal editor noted that only a "small fraction of the reviewers agreed with each other").

[224] *See supra* notes 124–38 and accompanying text.

[225] DAVID PAPINEAU, *Methodology: The Elements of the Philosophy of Science, in* PHILOSOPHY- A GUIDE THROUGH THE SUBJECT 154 (A.C. Grayling ed., Oxford Univ. Press ed. 1995); *accord*, Jonathan Culler, *Introduction: What's the Point?* to THE POINT OF THEORY-PRACTICES OF CULTURAL ANALYSIS, 15 (Mieke Bal & Ingre E. Boer eds., Amsterdam Univ. Press 1996) ("The nature of theory . . . is to undo, through a contesting of premises and postulates, what you thought you knew, so that there may appear to be no real accumulation of knowledge or expertise.").

fierce."[226] In this vein, George Geiger noted that "so often we think the problem 'solved' when our abstraction has so overcome our opponent's that, for a moment, he can think of no other abstraction with which to counter-attack."[227] The loose-textured nature of a theory invites a counter-theory, producing debate without definitive resolution. Disputes are not confined to theory. The author's research methodology or data interpretations may also invite attack. "Every topic of research is infinite," said Robert Frodeman, "there is no final or unimpeachable answer that does not give rise to another question."[228]

The assorted frailties of the peer-review process have taken their toll. Scholars outside the legal academy depend upon successful peer-reviewed publication for their academic survival and advancement. Without it, the author "can have little hope of either personal advancement or recognized professional contribution."[229] As sociologist Norval Glenn observed: "Who knows how many persons have failed to receive tenure, promotions, and pay raises because of patently unfair rejections of their papers–or how many promising young sociologists have given up aspirations to be productive researchers or scholars after a few experiences with the vagaries of the review process."[230]

Disciplines also suffer when peer review misfires.[231] The purpose of academic journals, to enlarge and refine disciplinary knowledge, will be frustrated.[232] Unqualified, biased, self-interested, or idiosyncratic reviewers will fail as gatekeepers because they will not direct members of their discipline to the most original or important work.[233]

E. The Bright Side of Law Reviews

How do student-edited law reviews fare when compared to peer-reviewed academic journals? Can mere law students – unaided by the judgments of professional legal scholars – serve as adequate gatekeepers for legal scholarship?

It is useful in answering this question to divide manuscripts submitted to law reviews into two categories. The first (and largest) category consists of articles on mainstream legal topics, what Richard Posner termed "doctrinal scholarship."[234] The second (and growing) category consists of interdisciplinary legal scholarship: articles engaging disciplines usually from the social sciences or humanities. Judge Posner

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[226] ABBOTT, s*upra* note 52, at 137.

[227] GEORGE R. GEIGER, *Dewey's Social and Political Philosophy*, *in* The Philosophy of John Dewey 345–46 (Paul A. Schlipp & Lewis E. Hahn eds., Open Univ. Press 3d ed. 1989).

[228] ROD FRODEMAN, *Introduction* to THE OXFORD HANDBOOK OF INTERDISCIPLINARITY xxxiv (Robert Frodemen et al. eds., Oxford Univ. Press 2010).

[229] Mahoney, *supra* note 181, at 162.

[230] Glenn, s*upra* note 182, at 181.

[231] *See* Casadevall & Fang, *supra* note 181, at 1273–74.

[232] *See id.* at 1274.

[233] *See id.*

[234] *See generally* Posner, s*upra* note 146, at 1132.

termed this "nondoctrinal scholarship."[235] For each category, would conversion to a traditional peer review make a vital difference in the quality of legal scholarship?

For all the brickbats tossed at law reviews, the answer regarding the first category appears to be no. Student law review editors are effective in evaluating doctrinal submissions.[236] As Judge Posner said of them: "Adept, albeit apprentice, doctrinalists, they could write, select, improve, and edit doctrinal scholarship."[237]

For the second category, nondoctrinal scholarship, his answer was less encouraging. "Few student editors, certainly not enough to go around," Posner wrote, "are competent to evaluate nondoctrinal scholarship."[238] He elaborated:

> How baffling must seem the task of choosing among articles belonging to disparate genres – a doctrinal article on election of remedies under the Uniform Commercial Code, a narrative of slave revolts in the antebellum South, a Bayesian analysis of proof beyond a reasonable doubt, an angry polemic against pornography, a mathematical model of out-of-court settlement, an application of Wittgenstein to Article 2 of the UCC, an essay on normativity, a comparison of me to Kafka, and so on without end.[239]

This passage illustrates how daunting manuscript selection can be for a student editor when nondoctrinal articles are added to the mix. But Posner's argument proves too much. A faculty editor would also lack expertise sufficient to evaluate *all* of the interdisciplinary articles included in Posner's list. He or she certainly could not rank them in importance. Student editors and faculty editors share the problem.[240]

Judge Posner suggested that student-edited law reviews should largely avoid publishing nondoctrinal articles.[241] Those of us who believe that interdisciplinary work is vital to the future of legal scholarship might ask: Where else could interdisciplinary legal scholarship be published? Interdisciplinary journals[242] and

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[235] *Id.* at 1133. He offered a list: "The principal nondoctrinal subfields of law are economic analysis of law, critical legal studies, law and literature, feminist jurisprudence, law and philosophy, law and society, law and political theory, critical race theory, gay and lesbian legal studies, and postmodernist legal studies."

[236] Natalie C. Cotton, Note, *The Competence of Students as Editors of Law Reviews: A Response to Judge Posner*, 154 U. PA. L. REV. 951, 958 (2006).

[237] Posner, *supra* note 146, at 1132.

[238] *Id.* at 1133.

[239] *Id.*

[240] The solution for each might be peer review. There is nothing to prevent student law-review editors from using peer review in exceptional circumstances. Posner recommended that the nondoctrinal manuscripts that law reviews did accept should be sent out for review by "one or preferably two scholars who specialize in the field to which the submission purports to contribute." *Id.* at 1136. Some student law reviews appear to be utilizing this option. *See* UNIVERSITY OF CHICAGO LAW REVIEW, *supra* note 167.

[241] Posner, *supra* note 146, at 1133–34.

[242] Including Law and Society Review, Law and Social Inquiry, and Law, Culture and the Humanities.

peer-reviewed law reviews[243] offer some opportunities, but they are too few in number and too specialized to provide enough access. Publication in journals dedicated to the nonlegal discipline would be a theoretical option, but "[h]igher status journals in any field are typically those adhering most closely to central orthodoxies."[244] Nonlegal journals would probably yield to confirmation bias, rejecting any manuscript that tainted the purity of their discipline by synthesizing it with legal analysis.[245] In his study of bias among peer reviewers, Thomas Chalmers observed: "The true quality of interdisciplinary work may be invisible to the eyes of a reviewer loyal to one field. Specialists tend to prefer their own approach and some may have difficulty appreciating the methods of another discipline."[246] For better or worse, student law reviews appear to provide the only unrestricted outlet for interdisciplinary legal scholarship.

Law reviews provide other advantages as well. They are less likely to exhibit confirmation bias[247] because "one viewpoint can never capture student edited law reviews. Every year, the editorial staff completely changes, and every two years the entire staff is completely replaced."[248] Unlike peer reviewers, student law review editors are not the author's professional rivals; therefore, they should not be motivated to react against the author from conflict of interest. Even if they wanted to, law review editors could not delay publication by sitting on an article. This is because the one-at-a-time restriction used by peer-reviewed academic journals[249] does not apply. An author is instead free to submit the manuscript to several law reviews simultaneously, and usually does so.

Multiple submissions permitted by law reviews serve to reduce publication delays associated with the peer-review process. Since the manuscript will already be under consideration elsewhere, a negative response from one law review does not require the author to restart the submission process.[250] Competition for the manuscript with other law reviews also provides an incentive for prompt review. "[S]tudent edited journals – which compete with one another for pieces – are *forced* to review pieces as

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[243] Including American Journal of Comparative Law, Journal of Law and Economics, Journal of Legal Studies, and Supreme Court Review.

[244] Andy Stirling, *Disciplinary Dilemma: Working Across Research Silos is Harder than it Looks*, THE GUARDIAN (June 11, 2014), https://www.theguardian.com/science/political-science/2014/jun/11/science-policy-research-silos-interdisciplinarity.

[245] Steven Lubert, Note, *Law Review vs. Peer Review: A Qualified Defense of Student Editors*, 2017 U. ILL. L. REV. ONLINE 1, 10 (2017).

[246] Chalmers et al., *supra* note 217, at 1394.

[247] At the same time, Student law reviews do share one of the vulnerabilities of peer-reviewed journals: prestige bias. "A former editor of one top review admitted that the school of the submitter was a major consideration in deciding what to accept. He said that manuscripts from Harvard professors had to be really poor to be turned down. Even that would require extended debate." Lindgren, *supra* note 47, at 530–531.

[248] Nichols, *supra* note 164, at 1127.

[249] Brian J. Thompson, *The Role of the Scholarly Editor*, *in* THE POLITICS AND PROCESSES OF SCHOLARSHIP 207, 208 (Joeseph M. Moxley & LaGretta L. Lenker eds., 1995).

[250] Multiple submissions also ameliorate harm that occurs in peer review when the only journal considering a manuscript unfairly rejects it.

rapidly as possible, and have elaborate processes set up to do so."[251] Ronald Rotunda has noted that this system "has allowed professors to publish quickly. And it has allowed prolific professors to publish even more."[252]

More financial and human resources are available to student law reviews than to peer-reviewed academic journals. As long as they continue to be subsidized by their law schools, law review publications need not show a profit. The large number of students serving as editors or support staff creates little expense because they are, by tradition, uncompensated.[253] In contrast, peer-reviewed academic journals must often cope with tight budget constraints[254] and are frequently understaffed.[255] Manuscripts therefore receive more time and attention at law reviews.[256] This benefits articles in two ways: the improvement of writing quality and the elimination of reference errors.

First, the quality of writing should improve. There is often room for improvement. Marjorie Garber wrote that "academics have been under attack and under surveillance for their bad language for a long time now."[257] Deborah Rhode similarly observed: "Too much academic writing is unnecessarily unintelligible."[258] Jargon can infest academic writing, making "fairly simple ideas appear complicated, if not profound."[259]

Peer reviewers should address writing problems in manuscripts but often seem uninterested in doing so. Faculty-edited journal editors are concerned but overworked. A lot of poor writing therefore slips through.[260] As James Bradley concluded his pioneering study, the peer review process "apparently does not encourage careful

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[251] Nichols, *supra* note 164, at 1127.

[252] Rotunda, *supra* note 143, at 7.

[253] Lack of compensation does not diminish the enthusiasm of law review students for hard work. This culminates in editorial responsibilities, when "for one year of their lives, student editors eat, sleep, and breathe for the law review, a luxury academics do not have." Nichols, *supra* note 164, at 1127 n.30.

[254] *See* Bernard Donovan, *The Truth About Peer Review*, 11 LEARNED PUB. 179, 180 (1998).

[255] *See* Chris R. Triggle and David J. Triggle, *What Is the Future of Peer Review? Why is There Fraud in Science? Is Plagiarism out of Control? Why do Scientists do Bad Things? Is it all a Case of: "All that is Necessary for the Triumph of Evil is that Good Men do Nothing?"*, 3 VASCULAR HEALTH AND RISK MANAGEMENT 39 (2007).

[256] Lubert, *supra* note 245, at 8.

[257] GARBER, s*upra* note 53, at 111.

[258] Rhode, *supra* note 36, at 31.

[259] William D. Lutz, *Jargon*, *in* THE OXFORD COMPANION TO THE ENGLISH LANGUAGE 544 (Tom McArthur ed., 1992); *Accord*, GERALD GRAFF, CLUELESS IN ACADEME 1 (Jeff Schier ed., 1st ed. 2003) ("academia reinforces cluelessness by making its ideas, problems, and ways of thinking *look* more opaque, narrowly specialized, and beyond normal learning capacities than they are or need to be").

[260] *See* Wager & Jefferson, *supra* note 150, at 260; John C. Roberts et al., *Effects of Peer Review and Editing on the Reliability of Articles in Annals of Internal Medicine*, 272 [J]AMA 119, 119 (July 13, 1994).

writing."[261] On the other hand, law review editors are willing and well-positioned to improve writing quality in manuscripts.

To begin with, the fact that student editors do not share the author's expertise can be an advantage. Disciplinary intimates, peer reviewers may be more interested in which side the author takes in a debate currently raging in the discipline[262] than in the quality of the manuscript. As a result, peer reviewers "often attempt to coerce the author into compliance with their strictly subjective preferences."[263]

In contrast, a student editor has no axe to grind. Like any good editor, he or she cares only about getting out the author's message, about enabling the author to communicate "as clearly, as forcefully, and as gracefully as he [or she] can."[264] Student editors follow maxims like "[r]igorous formulation need not preclude clarity"[265] and "difficulty and obscurity are not by definition the same."[266] Author-editor collaborations can be difficult yet fruitful. Richard Delgado provided an illustration. "Like many writers, over the years I have written many sentences that were perfectly clear to me, but which other people (in particular, the [law review] editors) perversely refused to understand." He continued: "Editors would insist that I reframe these sentences. I would grudgingly consent, only later realizing that I was much better off for the change."[267]

The greater time and attention that law reviews give to manuscripts produce a second benefit: virtually all reference errors (quotation errors and erroneous or incomplete source citations) are eliminated.[268]

Editorial reference checks are "rarely offered by faculty-edited journals."[269] Resulting error rates in peer-reviewed academic journals have created difficulties for readers wishing to retrieve the author's sources.[270] A study of two hundred randomly-selected references from twenty peer-reviewed articles revealed an error rate of 26%.

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[261] Bradley, *Pernicious Publication Practices*, *supra* note 188, at 34.

[262] Heated argument over the nature and importance of knowledge claims is endemic in academic disciplines. *See supra* notes 124–138.

[263] Bradley, *Pernicious Publication Practices*, *supra* note 188, at 34.

[264] Waxman, *supra* note 146, at 153.

[265] GARBER, *supra* note 53, at 119.

[266] *Id.*

[267] Richard Delgado, Note, *Eliminate the Middle Man*, 30 AKRON L. REV. 233, 233–234 (1996).

[268] Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, THE YALE LAW JOURNAL (Sept. 6, 2006), https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors. Ken Hyland wrote, "One of the most important realizations of the research writer's concern for audience is that of reporting, or reference to prior research." Ken Hyland, *Academic Attribution: Citation and the Construction of Disciplinary Knowledge*, 2013 APPLIED LINGUISTICS 341. He added: "Citation is central to the social context of persuasion as it can both provide justification for arguments and demonstrate the novelty of one's position." *Id.* at 341–42. It functions to "establish a credible writer ethos." *Id.* at 342. In addition, citation may open pathways for readers' own research.

[269] Posner, *supra* note 146, at 1134.

[270] Wager & Jefferson, *supra* note 150, at 262.

"Reference accuracy," concluded the investigators, "continues to be a substantial problem."[271]

References in peer-reviewed journals also suffer from imprecision. This occurs when the author quotes or refers to a particular part of a work but includes no specific page reference,[272] only a general citation. Readers must therefore sift through the entire source to find the related material – a frustrating imposition for articles and a maddening one for books. Such lack of consideration is particularly objectionable because the authors had the missing information at hand and could easily have provided it. Peer reviewers and their journal editors often appear to tolerate this slipshod practice.

In contrast, teams of law review students go over every reference in an article. They track down every source to confirm that (1) quotations are accurate, (2) citations are error-free and precise, and (3) the author's representation or interpretation of the source is warranted. Law review students also address mundane but important things like spelling and grammar.

This all improves the quality of articles. It also saves authors from embarrassment. Professor Delgado spoke for many of us when he candidly observed: "I personally shudder to think of the many mistakes student editors have saved me from over the years."[273]

To the extent that the strengths of peer review and law reviews are different, it is difficult to balance them precisely. Yet the legal academy appears to overall hold its own. Because (1) other forms of peer review prove available to the legal academy, (2) peer review contributes less to academic journals than might first appear, and (3) law reviews offer countervailing advantages, the peer-review attack fails in the same way as the three attacks examined earlier. None establishes a difference between law and other disciplines capable of damaging law's stature as an academic discipline.

EPILOGUE

From the standpoint of academic culture, the four attacks also suffer in a more profound sense. The discourse they engender is impoverished.

That is to say, the legal academy supposedly fell short – but short of what? What attributes of academic disciplines give them stature and legitimacy? What are their common virtues, their defining features? How might such standards best be formulated? What results would they produce in application? My view is that an attempt to determine whether law (or any other discipline) deserves academic stature that does not tackle these questions will be inconclusive.

Accordingly, I take the questions up in my forthcoming book, *Law in the Community of Disciplines – Legal Scholarship and University Culture* (Edward Elgar Publishing). The book will open with an exposition of the same matters explored in this Article. Dismissal of the four attacks will serve the book by clearing a path for more productive inquiry.

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[271] Jon R. Davids et al., *Reference Accuracy in Peer-Reviewed Pediatric Orthopaedic Literature*, 92 J. BONE JOINT SURG. AM. 1155, 1160 (2010).

[272] Termed a "pinpoint" or simply "pin" citation.

[273] Delgado, *supra* note 267, at 233.