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THE MARKET FOR "LAW-AND" SCHOLARSHIP

ROBERT C. ELICKSON*

It is fitting to begin by recounting an important episode in the history of "law-and" scholarship. The year was 1933. The United States was mired in the Great Depression. Recognizing that the country was facing problems—massive problems—a group of energetic and idealistic law professors conceived the idea of starting a new law journal. In the 1990s, this hardly seems an original idea. In the 1930s, it was. The envisioned journal would be pioneering in two respects, one procedural, one substantive. First, contrary to the custom then prevailing within law schools, the journal would be edited by professors, not students. Second, consistent with the Legal Realist movement of the 1930s, the promoters of the journal would venture beyond doctrinal analysis. For each issue they would choose a symposium topic and solicit interdisciplinary perspectives on it. They proposed to tap as authors not only law professors and practicing lawyers, but also experts unblessed by legal training. The journal’s promoters anticipated that this "law-and" strategy (not their phrase) would foster the cross-fertilization of ideas.

As the attendees of this Symposium may have guessed, the law school in question was the Duke University Law School, where the Symposium was held. The journal was Law and Contemporary Problems. The journal’s key promoter was a youthful Duke law professor, David Cavers. He was aided by a committee of five, including Lon Fuller, also a junior member of the Duke faculty.1

I refer to this episode partly to commemorate the accomplishments of our host institution. The vignette also will serve to support my analysis of the market for "law-and"

* Walter E. Meyer Professor of Property and Urban Law, Yale Law School. I thank Stephanie Stern for research assistance and Fred Shapiro for guidance.
1. The editors outline their ambitions for the journal in Forward, 1 L. & CONTEMP. PROBS. 1 (1933). The first issue was devoted to the topic of protecting consumers from unwholesome food and drugs.
scholarship, this panel’s topic. Both David Cavers and Lon Fuller subsequently accepted invitations to join the faculty of the Harvard Law School. I will contend that a professor chooses among scholarly approaches with an eye to maximizing opportunities to advance to a more prestigious appointment (such as one at Harvard, at least at that time).

The first portion of the essay marshals statistical evidence that indicates that social-scientific “law-and” approaches are on the rise. The primary schools in this social-scientific category are law and economics, law and society, and law and psychology. I provide no data on trends in the popularity of other “law-and” perspectives, such as analytical jurisprudence, law and literature, and feminism. The second portion of the essay briefly analyzes the market for legal scholarship. I argue that the demand side of this market significantly constrains any penchants for fluffiness that the law professors on the supply side may possess.

I. THE RELENTLESS RISE OF LAW-AND-SOCIAL-SCIENCE SCHOLARSHIP

Citation analysis, despite many limitations, is an objective method of revealing trends in legal scholarship. The costs of citation analysis have been plummeting during the latter half of the Twentieth Century because commercial enterprises have been providing the necessary data in increasingly accessible form. The drop in search costs has led to a boom in legal citology—the empirical study of legal citations. The data presented below have been culled from two sources: (1) Journals and Law Reviews (JLR), a Westlaw electronic database; and (2) the Institute for Scientific Information’s Social Sciences Citation Index (SSCI). The statistics presented are partial findings from a larger ongoing research project.

The next sections briefly review three strands of evidence drawn from JLR and SSCI. Each strand supports the thesis that social-scientific scholarship has steadily become more significant

in the legal academy. The trend is particularly clear for the period since 1982, when the JLR data became ample enough to be usable. However, the upward trend may have begun decades earlier, perhaps in response to the work of the Legal Realists and the young David Cavers.

A. Trends in Law Review Citations to Articles in the Flagship Journals of Various Disciplines

One method of measuring the influence of social science is to tally law-review citations to journals that publish articles with a social-scientific bent. Table 1 indicates how often articles published in selected journals have been cited in law-journal articles whose texts appear in Westlaw's JLR database.\(^5\)

As Table 1 indicates, during 1982-1996 the *Harvard Law Review* and the *Yale Law Journal* were in a nip-and-tuck race for the status of the journal most cited by authors of law review articles. In absolute terms, each was cited more often than all five of the law-and-social-science journals in Table 1 combined. Nevertheless, the figures in Table 1 are ominous for the editors of traditionally prominent student-edited law reviews. The (deflated) number of citations to the median of the three student-edited journals actually declined by 3% between 1982-84 and 1994-96. At the same time, the (deflated) number of citations to the median law-and-social-science journal increased by 26%, and to the median flagship social-science journal, by 49%. Although regression to the mean may be part of the story, Table 1 unmistakably supports the thesis that authors of law review articles increasingly cite social-scientific sources.

B. Trends in the Use of Social-Scientific Terms in Law Review Articles

A word or phrase can serve as a proxy for a form of legal analysis. Table 2 shows results of searches for particular words and phrases in articles included in Westlaw's JLR database since 1982.\(^6\)

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5. The number of articles in this database increased about fourfold between 1982 and 1996. To control for distortions that might result from variations in database size, I computed a "deflator" index and used it to adjust upward the numbers appearing in both the 1982-84 and 1988-90 columns of Table 1.

6. Again, because the JLR database swelled steadily during 1982-96, the entries in the 1982-84 and 1988-90 columns have been adjusted upward by applying a deflator index.
### TABLE 1
TREND IN THE NUMBER OF LAW-REVIEW CITATIONS TO ARTICLES PUBLISHED IN SELECTED JOURNALS

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td><strong>Selected student-edited law journals</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Harvard Law Review</td>
<td>8488</td>
<td>9212</td>
<td>8594</td>
<td>+1%</td>
</tr>
<tr>
<td>Yale Law Journal</td>
<td>8872</td>
<td>7657</td>
<td>7445</td>
<td>-16%</td>
</tr>
<tr>
<td>Columbia Law Review</td>
<td>5664</td>
<td>5975</td>
<td>5485</td>
<td>-3%</td>
</tr>
<tr>
<td>[median % change]</td>
<td>[-3%]</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Selected law-and-social-science journals</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Journal of Legal Studies</td>
<td>1570</td>
<td>1485</td>
<td>1809</td>
<td>+15%</td>
</tr>
<tr>
<td>Journal of Law &amp; Econ.</td>
<td>1466</td>
<td>1374</td>
<td>1432</td>
<td>-2%</td>
</tr>
<tr>
<td>Law &amp; Society Review</td>
<td>619</td>
<td>600</td>
<td>803</td>
<td>+30%</td>
</tr>
<tr>
<td>Law &amp; Social Inquiry</td>
<td>600</td>
<td>771</td>
<td>754</td>
<td>+26%</td>
</tr>
<tr>
<td>Law &amp; Human Behavior</td>
<td>135</td>
<td>244</td>
<td>404</td>
<td>+200%</td>
</tr>
<tr>
<td>[median % change]</td>
<td>[26%]</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Flagship journals of selected social sciences</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>American Economic Rev.</td>
<td>712</td>
<td>777</td>
<td>981</td>
<td>+38%</td>
</tr>
<tr>
<td>Amer. Political Sci. Rev.</td>
<td>269</td>
<td>290</td>
<td>363</td>
<td>+35%</td>
</tr>
<tr>
<td>Amer. Sociological Rev.</td>
<td>212</td>
<td>191</td>
<td>337</td>
<td>+59%</td>
</tr>
<tr>
<td>Psychological Rev.</td>
<td>39</td>
<td>69</td>
<td>238</td>
<td>+519%</td>
</tr>
<tr>
<td>[median % change]</td>
<td>[49%]</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Source:** Westlaw's JLR database. Numbers deflated to account for changing JLR database size. 1994-1996 = 100.
TABLE 2
TREND IN NUMBER OF LAW REVIEW ARTICLES
IN WHICH A SELECTED TERM APPEARS

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;critical legal studies&quot;</td>
<td>716</td>
<td>1,152</td>
<td>871</td>
<td>-24%</td>
</tr>
<tr>
<td>&quot;balancing&quot;</td>
<td>13,168</td>
<td>11,361</td>
<td>9,281</td>
<td>-18%</td>
</tr>
<tr>
<td>&quot;transactional cost!&quot;</td>
<td>2,429</td>
<td>2,272</td>
<td>2,644</td>
<td>+16%</td>
</tr>
<tr>
<td>&quot;table 1&quot;</td>
<td>1,090</td>
<td>1,154</td>
<td>1,693</td>
<td>+47%</td>
</tr>
</tbody>
</table>


Of the four terms appearing in Table 2, table 1, a proxy for social-scientific work of a quantitative sort, shows the strongest growth over time. Between 1988-90 and 1994-96 alone, the (deflated) number of law review articles including the phrase table 1 increased by 47%. The upward trend in the appearance of transactional cost!, a proxy for law and economics, has been more gradual and less steady. The other two terms listed in Table 2 have been in sharp decline since 1988-90. Critical legal studies boomed during the 1980s but has been going bust during the 1990s. 7 Balancing, a proxy for a popular middlebrow form of legal analysis, has trended steadily downward from its heights in 1982-84.

C. SSCI’s 1993 Ranking of Law Journals by “Impact Factor”

The Social Sciences Citation Index tallies citations appearing in over 100 law-related journals and over 1,000 social-sciences journals. Unlike JLR data, SSCI data therefore indicate how often articles published in law-related journals receive

7. Duncan Kennedy, one of the stalwarts of Critical Legal Studies, now asserts that the CLS movement is “dead.” Duncan Kennedy, Remarks at the Yale Legal Theory Workshop (December 19, 1996). Table 2 suggests that “in sharp decline” would be more accurate. But cf. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 8-10 (1997) (asserting that CLS “came apart” as a social movement in the late 1980s, but that it continues to have vitality as an academic school and a theory of law).
recognition in the general academic literature. Table 3 indicates the SSCI's "impact factor" for selected journals for 1993, the most recent year for which I obtained data. An impact factor measures how frequently an average article appearing in a recent volume of the journal in question is cited in the broad range of journals included in the SSCI database. Raw counts of journal citations favor thick journals over thin, and old journals over young. SSCI developed its impact factor as an attempt to neutralize these distortions. To an author solely seeking to maximize citations in leading law and social-scientific journals, the impact factor would be the most relevant measure of journal quality.

Table 3 includes all of the law-and-social-science journals whose impact factor was in the top thirty for law reviews in 1993. Six achieved this exalted status. Each of the six is marked with an asterisk, and the year of the journal's founding is indicated in brackets. Note that all six are relatively youthful. The sextet includes three law-and-economics journals and two law-and-society journals, including the highest ranked of the six, *Law & Social Inquiry*, published by the American Bar Foundation. *Law and Human Behavior*, the fledgling journal of law and psychology, also cracked the top thirty in 1993.

Table 3 demonstrates that articles published in law-and-social-science journals have had significant influence on the larger academic literature. Indeed, all three tables, taken in the aggregate, support the thesis that "law-and" work of a social-scientific stripe not only has established an ample niche for itself, but also continues to expand its foothold.

8. Because *Law & Contemporary Problems* is not consistently committed to a social-scientific perspective, it is not asterisked.
## TABLE 3

**"IMPACT FACTORS" OF SELECTED LAW JOURNALS, 1993**
(listed in order of decreasing rank)

<table>
<thead>
<tr>
<th>Rank</th>
<th>Journal</th>
<th>Impact Factor</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.</td>
<td>Yale Law Journal</td>
<td>5.529</td>
</tr>
<tr>
<td>4.</td>
<td>Stanford Law Review</td>
<td>5.143</td>
</tr>
<tr>
<td>5.</td>
<td>Columbia Law Review</td>
<td>4.049</td>
</tr>
<tr>
<td>12.</td>
<td>Law &amp; Social Inquiry* [1976]</td>
<td>2.636</td>
</tr>
<tr>
<td>18.</td>
<td>Law &amp; Human Behavior* [1977]</td>
<td>2.125</td>
</tr>
<tr>
<td>29.</td>
<td>Indiana Law Journal</td>
<td>1.410</td>
</tr>
<tr>
<td>56.</td>
<td>Law &amp; Contemporary Problems</td>
<td>0.614</td>
</tr>
</tbody>
</table>

*Source:* Institute for Scientific Information, Social Sciences Citation Index, Journal Citation Reports 44 (1998).

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10. During the past decade or two, authors of law-review articles have been just as likely to cite the *Yale Law Journal* as the *Harvard Law Review*. See supra Table 1. Table 3 indicates, however, that in 1993 the *Harvard Law Review*'s impact factor was the highest of all the law journals. It appears that authors of articles published in social-scientific journals weigh the Harvard signal relatively more favorably than law-review writers do.

II. THE MARKET FOR LEGAL SCHOLARSHIP

Is the continuing rise of law-and-social-science scholarship to be welcomed? To tackle the question I apply some basic principles of microeconomics. These require attention to both the supply side (the professors and other researchers who produce legal scholarship) and also the demand side (those who consume scholarship, directly or vicariously).

Conventional microeconomic analysis assumes that a supplier’s primary form of compensation is money. Money indeed is one of the important rewards for successful legal scholarship. All else equal, scholarly success brings a higher salary, fatter royalty checks, and more consulting opportunities. However, because most law professors could earn far more in law practice than they do in law teaching, nonpecuniary compensation also must play a significant role. I assert, as others have, that status rewards are an important currency in the market for legal scholarship. Like individuals in other social situations, a legal scholar typically seeks to win enhanced respect from members of relevant reference groups, especially peers in an academic specialty.

In a celebrated critique of trends in legal scholarship, Judge Harry Edwards asserted in 1992 that law professors had become overly entranced with “abstract theory” and were neglecting to produce scholarship of practical importance. If translated into economic language, Judge Edwards’s thesis would be that “imperfections” were causing the market for legal scholarship to “fail” to maximize welfare. There indeed is a plausible case that the market for legal scholarship suffers to some degree from monopoly, externalities, and other conventional market imperfections. Nevertheless, I will argue that Judge Edwards has greatly underestimated the market constraints on the supply of legal scholarship. In particular, the interests of the

15. See infra text accompanying notes 19-20.
participants on the demand side of this market are likely to limit frivolous tendencies of the professors on the supply side.

A. The Supply of Legal Scholarship

Imagine that a cluster of professors was to pioneer a new approach, law and astrology. A professor’s primary costs of producing this sort of scholarship would include any cash outlays entailed and (more importantly) the opportunity costs of the time involved in the work. These supply costs vary from individual to individual. For example, the migration of doctoral students from other academic disciplines into law teaching has shifted outward the supply curve of “law-and” scholarship connected to those disciplines.

Some academic work is more pleasurable (or arduous) than others. Because cognitive dissonance is psychically costly, it is cheaper, all else equal, for a scholar to labor on scholarly works the conclusions of which will be consistent with the scholar’s preexisting ideology. This helps explain the high incidence of ideologically driven scholarship. If the scholars in the law-and-astrology movement were fervently committed ideologues, one thus might expect them to offer a large amount of this scholarship at a low price.

The supply side of the market for scholarship, however, has characteristics that somewhat constrain supplier behavior. First, scholarly errors, once published, are highly visible. Ideas are “public goods” in the economic sense that they are not rivalously consumed. A scholar who publishes a law-and-astrology article cannot prevent critics of law and astrology from seeing it. Second, a scholar has a strong interest in building a reputation that will encourage members of his potential audience—who are increasingly overwhelmed with reading options—to bother to read the scholar’s output. Each incremental publication affects a scholar’s accumulated reputational stock. Markets therefore punish a scholar who has published a subpar article in two ways; not only do consumers of scholarship decline to confer rewards on account of the article, they also adjust downward the scholar’s prior status ranking.
B. The Demand for Legal Scholarship

Like any other entrepreneur, a scholar rarely can be self-indulgent enough to ignore demand for alternative outputs. I distinguish between two sorts of participants on the demand side: primary consumers—that is, members of the legal community who are sufficiently expert to appraise the quality of scholarship; and secondary consumers, most of whom supply factors in the production of legal services. The essential point is that secondary consumers derive their demands for legal scholarship from the tastes of primary consumers. Although far more numerous, secondary consumers of legal scholarship ultimately have less power. If primary consumers can tell good work from bad, secondary consumers, whose demand is derivative, will decline to reward self-indulgent scholarship.

1. Primary consumers

Academic peers. The key primary consumers of a scholarly publication are other scholars who labor in the same vineyard. These peers can reward a successful author with citations, conference invitations, and other indicia of professional respect. As just noted, these primary consumers also provide pivotal information to secondary consumers.

Scholarly work is intensely competitive. Academic norms strongly reward innovators who successfully challenge prevailing paradigms of analysis. American law professors, steeped in the adversary system of justice, may be especially eager to expose the limitations of prior authors and schools. Over time, the Darwinian struggle among academics tends to weed out unfruitful scholarly approaches. The process may grind slowly, of course. Marxism and Freudianism, for example, prospered for generations before being effectively contested.

Consumers of legal services. Peer review might not halt the spread of law and astrology if activists in that movement were to

succeed in infiltrating many law schools. But a second set of primary consumers of legal scholarship is not so easily co-opted. Clients value effective legal services. If law and astrology were to prove to be an ineffective method of legal analysis, clients would tend to desert law firms that specialized in that approach. As a result, those firms would have fewer jobs to offer law school graduates. In this way, the placement market would signal to law students that law-and-astrology training was not valued, and students eager for job opportunities would tend to follow scholarship and enroll in courses more useful than law and astrology.

2. Secondary consumers

The secondary consumers of legal scholarship include members of the media, employers of law school graduates (just discussed), and many others. Three categories of secondary consumers situated in academic settings warrant special discussion.

Universities and other employers of scholars. Largely on account of student, faculty, and alumni demands, universities seek to hire scholars of stature. Because knowledge is highly specialized, a university must rely heavily on members of an academic specialty to appraise candidates for a faculty position. For instance, a law school desirous of hiring a professor of bankruptcy law would derive its demand largely from the tastes of other bankruptcy scholars, the primary consumers of that scholarship. No doubt, David Cavers and Lon Fuller received offers from the Harvard Law School in part because other scholars admired what they had accomplished with Law and Contemporary Problems.

Managers of law-related journals. To ease recruitment of subscribers, authors, and staff, a law journal's editors also must seek status. To attain it, they must publish articles that appeal to the primary consumers of scholarship.

Tables 1 & 3, reproduced above, demonstrate that faculty-edited law journals have won increasing influence during the late Twentieth Century. Most of these journals circulate submitted articles for peer review, a system that enhances the influence of that group of primary consumers.

Student-edited law journals have been somewhat more susceptible to ephemeral scholarly fashions. Nevertheless,
student articles editors commonly use the eminence of an author, or of an author's home institution, as a signal of scholarly quality. When they do, their demand is derived from the tastes of others better qualified to appraise the quality of scholarship. If primary consumers were to conclude that law and astrology was a frivolous approach, an author of an article in that vein would have to anticipate difficulty in winning acceptance from a high-quality student-edited law review.

**Law students.** Aside from their role in managing legal journals, law students are an important and ultimately conservative bloc of consumers of legal scholarship. First, students exercise a (weak) form of market discipline when they apply to law schools. Suppose that a law school were to become known for its stress on law and astrology, an approach widely perceived within the profession to be unsound. This negative reputation would induce some admitted students to enroll elsewhere. Anticipating that market reaction, law school administrators, all else equal, would confer lower monetary and status rewards on scholars producing in the law-and-astrology vein.

Second, and more importantly, law students “vote with their feet” among the elective courses that law schools offer. With rare exceptions, law professors aspire to attract students to their classes and to receive favorable reactions from enrollees. If law and astrology were to be a loser, a professor who wrote and taught in that vein would risk loss of status among students. Student demand for elective courses is to a considerable extent derived from the demands of potential employers for skills. If Judge Edwards were to advise clerkship applicants that he favored students who had studied Administrative Law, his message would enhance student demand for that course. Duncan Kennedy's assertion that “Critical Legal Studies is dead” perhaps reflects a perception that there is scant student demand for it in the classroom. The conservative character of student demand for courses and faculty mentors, doubly derived through employers and clients, is an important safeguard against frolics and detours in legal scholarship.
C. Imperfections in the Market for Legal Scholarship

During a prior panel at this Symposium, economist Eric Rasmusen reviewed the imperfections that may cause a market to generate less than optimal results. Many of these imperfections may afflict, to some degree, the market for legal scholarship.

First, the supply of legal education is not perfectly competitive. Institutions such as bar associations and the Association of American Law Schools have striven to cartelize the education of new lawyers. In the absence of this cartel, a standard legal education might consume only two years, not three. Some observers might argue that the rise of "law-and" teaching and scholarship is due in part to the existence of a captive audience of law students during the superfluous third year. I give that argument little weight. Economic theory predicts that a cartel would use its power to exact higher prices, not to lower the quality of service. Competition among academic approaches to fill out the legal curriculum remains stiff.

Second, externalities may exist in academic markets. For example, if intellectual property rights do not wholly internalize the benefits of academic innovations, good ideas may be undersupplied. This potential problem, of course, is not specific to "law-and" scholarship, but pervades all intellectual endeavors. One function of informal status rewards among academics is to make up for the incompleteness of formal intellectual property rights.

Third, it might be asserted that some of the groups that consume legal scholarship, either primarily or secondarily, lack the intellectual capacity to discipline suppliers of legal pedagogy. Law students, for example, might be seen as lacking either the capacity or information to choose among law schools, law courses, and manuscripts submitted to law reviews. This is highly dubious. Law students are adults, and have strong incentives to learn from the grapevines, guidebooks, and rating services that offer relevant information. For example, the steep


decline of Critical Legal Studies 20 probably has lessened the allure of the Harvard Law School, strongly associated with CLS, to prospective law students. Similarly, enrolled law students can mimic the tastes of more sophisticated primary consumers when selecting courses and accepting manuscripts for publication.

III. CONCLUSION

In sum, although the market for legal scholarship is hardly perfect, I conclude that it works passably well—much better than Judge Edwards and other critics would have us believe. Analysts of this market should not focus exclusively on the supply side, which to be sure includes countless professors inclined to be self-indulgent. These suppliers face, on the demand side, sophisticated persons not readily duped. Although some law school faculties may occasionally succumb to unworthy fashions, the market tends eventually to punish them for doing so. In the long run, the most reliable controls on the quality of scholarly output are the demands of clients who consume legal services, and the demands of universities for faculty members who command peer esteem.

In the end, I interpret Judge Edwards's polemic as a signal by a employer of newly-minted law school graduates about the sorts of courses he would like to see on a clerkship applicant's transcript. His article is better seen not as act of repudiation of the marketplace for legal scholarship, but as an act of participation in that market.

20. See supra note 7 and accompanying text.