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IN PRAISE OF LEGAL SCHOLARSHIP

Tamara R. Piety*

INTRODUCTION

It is commonplace to hear legal scholarship derided as out of touch, too theoretical, low quality, unread, and of little practical impact.¹ Chief Justice John Roberts reportedly asserted that he seldom reads or relies on law review articles.²

Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.³

* Professor of Law, University of Tulsa. This Essay was written in conjunction with the Symposium at Northwestern. I want to thank Marty Redish for inviting me. I also thank Northwestern University Law School for funding my participation at the event which led to this Symposium. I apologize in advance for the very many wonderful works on legal scholarship that I failed to cite here. Nothing should be read into that but running out of time and fear of taxing the good offices of the wonderful editors at the *William & Mary Bill of Rights Journal*, in particular Emily Wagman and Katherine Lennon. Thanks also to my research assistants Lauren Colpitts, Katherine Dunning, Laurie Mehrwein, and L. Glenise Williams.

¹ See, e.g., Richard Brust, *The High Court vs. The Ivory Tower*, ABA J., Feb. 2012, at 50 (legal scholarship not relevant to the practice); Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES, Oct. 21, 2013, at A15; see also Michael C. Dorf, *Justice Scalia Suggests that the Legal Academy Is out of Touch: Is He Right?*, FINDLAW (Mar. 8, 2010), <http://writ.news.findlaw.com/dorf/20100308.html> [<https://perma.cc/6ES2-NUQL>] (reporting that the consensus amongst judges at a recent judicial conference was law reviews were not of much use, reporting that one judge said of law reviews: "No one speaks of them. No one relies on them."; Dorf offers some rebuttal). But see Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 319 (1989) ("It is hard to think of completing an opinion without venturing into the literature, and ideally I like starting an opinion with good briefs and articles."); Matt Bodie, *The Delaware Chancery's Unusual Relationship with Academia*, CONGLOMERATE (Nov. 16, 2011), <http://www.theconglomerate.org/2011/11/the-delaware-chancerys-relationship-with-academia.html> [<https://perma.cc/VBJ4-MDHC>].

² See *A Conversation with Chief Justice Roberts*, C-SPAN (June 25, 2011), <https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts> [<https://perma.cc/DWF6-KMJF>] ("People ask me what the last law review article I read was, and I have to think very hard before coming up with one."); see also Liptak, *supra* note 1, at A15.

³ Liptak, *supra* note 1, at A15 (quoting Chief Justice Roberts's remarks at a judicial conference).

Judge Harry Edwards is likewise famously critical of legal scholarship. He has written a number of law review articles criticizing legal scholarship.⁴ In these articles, Judge Edwards claims that legal scholarship does not address the concerns of the profession because it has “little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner.”⁵ Perhaps most curiously, this critique

⁴ See generally Harry T. Edwards, *Another “Postscript” to “The Growing Disjunction Between Legal Education and the Legal Profession,”* 69 WASH. L. REV. 561 (1994) (addressing responses to his article on the alleged “growing disjunction” between legal education and practice); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) [hereinafter Edwards, *The Growing Disjunction*] (claiming a “growing disjunction” between legal education and the practice of law, and growth of “impractical” scholarship); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2195 (1992) (summarizing responses to his concern that law professors are not interested “in producing scholarship useful to practicing lawyers, judges, administrators, and legislators”); Harry T. Edwards, *Reflections (on Law Review, Legal Education, Law Practice, and My Alma Mater)*, 100 MICH. L. REV. 1999 (2002) (reflecting on his legal career and scholarship). For a more complete listing of Judge Edwards’s commentary on legal scholarship and legal education see generally Ronald K.L. Collins, *On Legal Scholarship: Questions for Judge Harry T. Edwards*, 65 J. LEGAL EDUC. 637 (2016).

⁵ Edwards, *The Growing Disjunction*, *supra* note 4, at 35. We might take Judge Edwards’s most recent version of this criticism with a grain of salt, however. He was co-chair of the Committee tasked with looking at forensic science, see COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) [hereinafter STRENGTHENING FORENSIC SCIENCE], and so is surely aware that there is no shortage of legal scholarship on forensic science.

For example, there is a great body of literature criticizing expert testimony on fingerprints in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the case which announced the test for the admissibility of expert evidence. 509 U.S. 579 (1993). *Daubert* purported to establish a more rigorous standard for admitting expert testimony, one that many legal scholars said testimony on fingerprints did not meet. See generally SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION (2001); Jennifer L. Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 BROOK. L. REV. 13 (2001) (discussing the relatively uncritical acceptance of fingerprint testimony and how the challenges to DNA experts may provide a roadmap to challenging fingerprint experts); Jennifer L. Mnookin, *The Validity of Latent Fingerprint Identification: Confessions of a Fingerprinting Moderate*, 7 LAW PROBABILITY & RISK 127 (2008) [hereinafter Mnookin, *The Validity of Latent Fingerprint Identification*] (arguing that forensic science professionals should do more to implement tests that provide the sort of information courts need even if they cannot do strictly “scientific” testing). Some of that literature was cited in the report produced by Judge Edwards’s committee. See STRENGTHENING FORENSIC SCIENCE, *supra*, at 142 & n.28 (citing Mnookin, *The Validity of Latent Fingerprint Identification*, *supra*, at 127). Yet fingerprint testimony continues to be an important part of the prosecutor’s toolbox.

In general, there is an overwhelming body of legal scholarship about *Daubert*, its pitfalls and problems, as well as the courts’ failure to apply the *Daubert* test as rigorously to forensic sciences as to other experts. See, e.g., JOHN M. CONLEY & JANE CAMPBELL MORIARTY, SCIENTIFIC AND EXPERT EVIDENCE 77–84 (2d ed. 2011) (discussing the scholarly criticism of *Daubert*, in particular the asymmetric application to forensic science). That work is quite

is one that academics themselves seem all too willing to embrace.⁶ Their willingness to do so may spring from a desire to do something, *anything*, (or at least to be seen as doing something) to address the return on the investment problem in legal education—something which became a crisis in the wake of the financial collapse of 2008 because law firm layoffs and declines in hiring, which were part of the fallout from that collapse, severely contracted the job market. That meant many graduates with an expensive law degree had no way to service the debt accumulated in acquiring the degree. Law schools were roundly, and in some cases justly, criticized for their marketing and admissions practices that perhaps oversold law as a career or did not do enough to discourage attendance amongst those who would not be able to find a job that paid enough to service their debt.

The criticisms of legal education (of which criticism of legal scholarship was only a small part), combined with soaring tuition and poor job prospects, had a catastrophic effect on law school enrollment.⁷ Thus, many of these criticisms of

clearly relevant to practice. Much of this work argues courts should exclude expert testimony from certain categories of forensic experts. *See Attorney General, FBI, District Attorneys Say They'll Ignore President Council's Report on Flawed Forensics*, EVIDENCE PROF BLOG (Sept. 23, 2016), <http://lawprofessors.typepad.com/evidenceprof/2016/09/recently-the-executive-office-of-the-president-presidents-council-of-advisors-on-science-and-technology-peace-issued-a.html> [<https://perma.cc/CK6N-UA2Z>] (discussing AG's commitment to continuing to rely on various experts criticized by a task force which found that they "lacked validity"). If the courts have not adopted academics' recommendations, it is probably not because they are not "relevant" to practice. It is likely there are other factors at work.

⁶ *See* Paul Campos, *Self-Congratulation and Scholarship*, 60 UCLAL REV. DISCOURSE 214 (2013); Paul Campos, *The Law-School Scam*, ATLANTIC (Sept. 2014), <http://www.theatlantic.com/magazine/archive/2014/09/the-law-school-scam/375069/> [<https://perma.cc/EYE4-Y487>]. There have been a number of blogs and blog posts criticizing legal education more generally. A lot of public criticism has come from anonymous sources and been quite scathing. *See, e.g.*, Tamara Piety, *The Utility of Scholarship—Round Two*, FAC. LOUNGE (Feb. 13, 2013), <http://www.thefacultyounge.org/2013/02/the-utility-of-scholarship-round-two.html> [<https://perma.cc/964N-897C>] (comments section).

⁷ People have various theories about what caused the catastrophic drop in enrollment, but there is no real question that the contraction in the market for legal jobs was one driver. *See, e.g.*, Noam Scheiber, *An Expensive Law Degree, and No Place to Use It*, N.Y. TIMES June 17, 2006, at BU1 (identifying a huge drop in applications between 2007 and 2009). However, another driver may have been the negative press. *See generally, e.g.*, INSIDE THE L. SCH SCAM, <http://www.insidethelawschoolscam.blogspot.com> [<https://perma.cc/GW6X-9SA6>].

Probably no one outside of legal academia has covered the law school problem more than David Segal at the *New York Times*. *See, e.g.*, David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, at BU1 [hereinafter Segal, *Is Law School a Losing Game?*]. Segal writes a column called The Haggler in which he investigates and tries to resolve consumer complaints. *See, e.g.*, David Segal, *The Haggler: A Bean Bag Blowout, and then a Deafening Silence*, N.Y. TIMES, Oct. 9, 2016, at BU3. He is an award-winning journalist, but it does not appear that he has a legal education. So it is understandable he relied on insiders who appeared to be acting as whistleblowers. *See, e.g.*, Jennifer S. Bard, *Failing Law Schools*, 33 J. LEGAL MED. 417, 419 (2012) (book review) (describing Brian Tamanaha's *Failing Law Schools* as the account of an "insider").

scholarship are taking place in that larger context, one in which legal education is treated like a product and law students like consumers.

However, most of these critiques, like Judge Edwards's own, long predate the 2008 financial collapse and the resulting decline in law school enrollments.⁸ So, the desire to respond to that crisis cannot be the whole answer for why even academics are so critical of legal scholarship. Nevertheless, the crisis has given new bite to the critique that legal scholarship is rarely relevant to practice, along with the newer claim that it is expensive to boot—far too expensive to justify at all but the richest, most prestigious institutions.⁹

Not surprisingly, however, many *other* law professors disagreed with the critics; so they were extremely critical of Segal's coverage. *See, e.g.*, Brian Leiter, *David Segal's Hatchet Job on Law Schools* . . . , BRIAN LEITER'S L. SCH. REPS. (Nov. 20, 2011), <http://leiterlaw.school.typepad.com/leiter/2011/11/another-hatchet-job-on-law-schools.html> [<https://perma.cc/V63A-HVZF>] (critiquing Segal and providing links to other critiques, including Orin Kerr, *What the NYT Article on Law Schools Gets Right*, VOLOKH CONSPIRACY (Nov. 20, 2011), <http://volokh.com/2011/11/20/what-the-nyt-article-on-law-schools-gets-right/> [<https://perma.cc/R67X-WBWX>]; Frank Pasquale, *Financial Advice: Be an Unpaid Intern Through Your 20s (Then Work till You're 100)*, N.Y. TIMES (Nov. 20, 2011), <https://concurringopinions.com/archives/2011/11/new-york-times-financial-advice-be-an-unpaid-intern-through-your-20s-then-work-till-youre-100.html>; Brad Wendel, *More on the NY Times Article*, LEGAL ETHICS F. (Nov. 21, 2011), <http://www.legalethicsforum.com/blog/2011/11/more-on-the-ny-times-article.html> [<https://perma.cc/KCD8-FP2V>]; *see also* Matt Bodie, *A Recipe for Trashing Legal Scholarship*, PRAWFSBLAWG (Nov. 20, 2011), <http://prawfsblawg.blogs.com/prawfsblawg/2011/11/a-recipe-for-trashing-legal-scholarship.html> [<https://perma.cc/KP92-LB5J>]. Perhaps the most compelling rebuttal to the claim that a law degree was not a good investment was an empirical one which itself generated a great deal of argument. *See generally* Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014); Michael Simkovic & Frank McIntyre, *Populist Outrage, Reckless Empirics: A Review of Failing Law Schools*, 108 NW. U. L. REV. ONLINE 176 (2014) (reviewing BRIAN TAMANAHA, *FAILING LAW SCHOOLS* (2012)).

I am sympathetic to Segal's consumer protection concern and I am perhaps less inclined than some to fault him for relying on legal education's critics; he had reason to think they were experts. And the critics are not wrong that there is a real value problem for some students, and generally a marketing problem, particularly when for-profit law schools are added into the mix. Segal was understandably concerned about this value problem. This Essay does not address those issues and is not meant as a defense of legal education more generally; my focus here is just on legal scholarship.

⁸ *See, e.g.*, David Hrick & Victoria Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761 (2005) (interdisciplinary incompetence, lack of relevance to the practice); Kenneth Lasson, *Commentary, Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990) (general critique); James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527 (1994) (critiquing management of law reviews by students, claiming they are "grossly unsuited for the jobs").

⁹ *See, e.g.*, TAMANAHA, *supra* note 7, at 56–57. Segal makes the dubious claim that forty percent of faculty compensation is a "subsidy" for scholarship. *See* David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1. He appears to

This is a common criticism—that everyone is trying too hard to emulate Harvard and Yale.¹⁰ Faculty at lower-ranked institutions are advised to leave the production of scholarship to those at the top—those with the intellectual firepower and financial resources to be able to indulge in an enterprise of such uncertain utility.¹¹ Similar critiques are launched in the press.¹²

In this Essay, I would like to mount a qualified defense of legal scholarship as an enterprise. I say “qualified” because it is very difficult to draw definite, causal connections about the influence of scholarship on the law and society at large; so I cannot say any of the evidence I review is conclusive or might not have another

have reverse engineered this figure from Professor Steven Smith’s claim that a faculty which did not have to produce scholarship would be forty percent less expensive. See Steven R. Smith, *Gresham’s Law in Legal Education*, 17 J. CONTEMP. LEGAL ISSUES 171, 205–06 & nn.159–60 (2008). This calculation is based on all sorts of questionable assumptions, such as that the salary difference between tenured faculty (who have the duty to produce scholarship) and non-tenured faculty (who do not), is attributable to that duty. That is not an irrational proposition, but as Smith himself notes, it may not be accurate. *Id.* For a discussion of how complex the cost attribution is see Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 141 (2008). Segal’s calculation, and his use of the term “subsidy,” are criticized in detail in the Leiter and the Bodie blog posts, see Bodie, *supra* note 7; Leiter, *supra* note 7. However, the forty percent figure overlooks that many (perhaps most) tenured faculty do not produce *any* scholarship. With the exception of small summer research grants and the like, faculty get paid the same amount whether they produce scholarship or not. And many of them do not. See Rubin, *supra*, at 142 n.12 (noting some faculty do not write at all). Of those who do, it is probably a smaller subset who dedicate forty percent of their time to it (although some devote more). Since, at least in theory, all faculty are *supposed* to produce scholarship, it would not represent any sort of “savings” if every faculty member simply stopped writing unless there was a corresponding increase in other duties, something which there is some pressure to do. Smith, *supra*, at 206 n.160 (faculty could be asked to teach more classes and do more governance administrative duties). A lively discussion of this issue took place in the comments to this post on THE FACULTY LOUNGE. Michael Risch, *What Good is Legal Scholarship?*, FAC. LOUNGE (Mar. 3, 2015), <http://www.thefacultylounge.org/2015/03/what-good-is-legal-scholarship.html> [<https://perma.cc/L7MR-Y9PL>].

¹⁰ See Segal, *supra* note 9, at A1 (“The problem is that with rare exceptions, all schools play the same scholarship-and-prestige game. Even professors in the lowest rungs churn out scholarship . . .”).

¹¹ Not surprisingly, this recommendation was not well received by professors at schools below the top twenty or so. See, e.g., Lucille A. Jewell, *Tales of a Fourth Tier Nothing, A Response to Brian Tamanaha’s Failing Law Schools*, 38 J. LEGAL PROF. 125 (2013); Jay Sterling Silver, *The Case Against Tamanaha’s Motel 6 Model of Legal Education*, 60 UCLA L. REV. DISCOURSE 50 (2012); Steve Sheppard, *Sheppard on Tamanaha ‘Failing Law Schools,’ H-NET REVS.* (Dec. 2013), <https://www.networks.h-net.org/node/16794/reviews/17311/sheppard-tamanaha-failing-law-schools> [<https://perma.cc/MNA7-J6EA>]. Indeed, it was even critiqued by some professors whose institutions presumably made the cut. See, e.g., Richard O. Lempert, *Failing Law Schools, by Brian Z. Tamanaha: A Review*, 43 CONTEMP. SOC. 269 (2014).

¹² See Segal, *Is Law School a Losing Game?*, *supra* note 7, at BU1.

reading.¹³ It is an impressionistic, not exhaustive, inquiry. But I think, taken altogether, these observations offer cogent reasons to reject the blanket dismissals of legal scholarship as worthless and irrelevant, even as an instrumental matter.¹⁴

It may be just as hard to evaluate the merits or “utility” of a law review article as it is to evaluate the merits of a piece of art or a work of literature. As Judge Posner has said, “Scholarship . . . is a high-risk, low-return activity.”¹⁵ Legal scholarship is not primarily a profit-making enterprise, although it may sometimes have commercial value (more on this later). We engage in the production of legal scholarship for all sorts of reasons—the search for the truth, professional distinction, sheer pleasure, or compulsion—but for the most part, after tenure anyway, it is rarely directly for pecuniary reward. Indeed, the incentives for producing scholarship, such as they are, do not inspire anything like universal compliance on most faculties. Thus, if scholarship has *any* value, it would seem unwise to impose more disincentives on its production. Since we can’t always tell, *ex ante*,¹⁶ which work is valuable, asking legal scholarship to “pay its way” seems likely to deprive us of valuable work. However, there are reasons to believe the reports of its worthlessness are overstated.¹⁷

I will use Professor Redish’s seminal 1971 article, *The First Amendment in the Marketplace*,¹⁸ to illustrate why many of the conventional methods for assessing scholarship’s value to the profession and to the development of the law are so inadequate and why the claims of legal scholarship’s irrelevance are overblown. To be sure, some scholarship does go unread, perhaps most of it. But there are many counterexamples. And until we can reliably distinguish which is which, beyond crude measures like institutional status of the review or author, it seems unwise to advocate for jettisoning its production. Here are some of these problems:

¹³ Moreover, as one might expect, there is a breathtaking body of work discussing the impact (or lack thereof) of legal scholarship on the law and judges, going back almost to the beginning of the institution and reflecting a wide range of viewpoints, a waxing and waning of influence. In short, there is far too much ground to cover in this tribute to Professor Redish. For a fairly comprehensive review of the literature, see NEIL DUXBURY, *JURISTS AND JUDGES: AN ESSAY ON INFLUENCE* (2001); see also Edwards, *The Growing Disjunction*, *supra* note 4, at 41 n.14 (collecting recent scholarship on legal scholarship).

¹⁴ Obviously, one could believe, as I do, that scholarship is intrinsically valuable and does not need to show it has additional “utility.” And a number of scholars have made that point. I won’t take that on here beyond saying that I agree. My point is merely that even if you think scholarship *does* need to have some instrumental value, it may be very hard to calculate that value in any reliable way.

¹⁵ Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1928 (1993).

¹⁶ This is a point Brian Leiter and others have made. See, e.g., Leiter, *supra* note 7.

¹⁷ Despite his calls for a great many law schools to stop asking their faculty to produce scholarship, Professor Tamanaha himself agrees that judges’ claims that they pay no attention to scholarship is “overblown.” See TAMANAHA, *supra* note 7, at 56.

¹⁸ Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. U. L. REV. 429 (1971).

1. Critics often overlook fairly obvious counterexamples to legal scholarship's supposed irrelevance. Professor Redish's 1971 article is a case in point, as a number of scholars credit him with substantial influence on the development of the doctrine.¹⁹
2. The criticisms rest on a false dichotomy between theory and practice. There is no such neat dividing line. Work proposing a theory is often the most influential. Professor Redish's article proposed a *theory* about whether the First Amendment should protect commercial speech, and was nevertheless influential.
3. The claim that scholarship is less relevant to practice when it draws insights from other disciplines—literature, economics, sociology, philosophy, political science, psychology—either because it is less “practical,” or because law professors lack training in those disciplines, or both, again overlooks the *many* counterexamples. And it is hard to imagine how one could engage in comment on some, very practice-oriented issues—for example, the reliability of eyewitness testimony—without resorting to research in other fields like psychology. Moreover, some of the most important contributions to legal thought have come from academics without a law degree, yet I have rarely heard those contributions criticized on the grounds that, for example, Alexander Meiklejohn did not have a law degree. Again, Redish's article is instructive because his argument builds on one made previously by economists—that advertising is valuable information—in order to argue that advertising should be constitutionally protected.

¹⁹ See, e.g., C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 272 n.33 (2011) (describing Redish as “long ago” establishing that if we characterize commercial speech as making a contribution of equal value to that made by speech in other areas, protection follows, citing the 1971 article); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1188 & n.32 (1988) (describing it as potentially “difficult” to draw a line between so-called “core speech and non-core commercial speech” and noting that Redish's 1971 article and the *Virginia Pharmacy* opinion seem animated by this same concern); John T. Valauri, *Smoking and Self-Realization: A Reply to Professor Redish*, 24 N. KY. L. REV. 585, 585 (1997) (describing Redish as “the prophet of constitutional protection for commercial speech”). These are more suggestive than conclusive, but it seems that the mere convening of this Symposium offers some support for my conclusion. In addition, Redish reports that in a talk he gave with Professor Burt Neuborne, Neuborne credited Redish with having a great influence on the ACLU's position on commercial speech. E-mail from Martin Redish to Tamara Piety (Oct. 28, 2016, 06:46 AM) (on file with author).

4. There are reasons to distrust the data. Critics and legal scholars alike are not immune to psychological, cognitive, and perceptual biases. A great deal of the criticism of scholarship is not new, but the intensity of the criticism fluctuates; perhaps criticism of scholarship may itself be a “fad.” Certainly there is evidence that the criticisms are not always data-driven.²⁰
5. If we judge by Professor Redish’s article, it may take an exceptionally long time for impact to be felt or acknowledged. Professor Redish’s seminal article, *The First Amendment in the Marketplace*, was written in 1971; but it was not until five years later that the Supreme Court appeared to adopt the views expressed therein, and several decades after that before it seemed that the courts were more fully embracing his argument.²¹ If it takes several decades for the impact of an article to be felt, it may be exceptionally difficult to tell which articles published today will still be valuable in the future. It may well be different ones than those most lauded when they were published.
6. It is also not clear how to measure “impact.” Number of citations is the tool frequently used, but it is a crude and imperfect measure of influence. And again, Professor Redish’s article is instructive: Even though the Court appeared to be adopting his argument, it did not cite to his article.
7. Finally, the charge that no one reads or relies on law reviews seems belied by the fact that there is what might be called a “market” for legal scholarship. It has recently come to light that a small, but nevertheless influential, number of law review articles have been commissioned, sponsored, or otherwise underwritten (by someone other than the law school).²² The mere existence of this market suggests that at least *someone* finds this enterprise valuable enough to underwrite it. That would hardly be the case if the sponsors really thought no one was reading it.

²⁰ For example, Judge Edwards rested some of his claims on a very limited sample. Edwards, *The Growing Disjunction*, *supra* note 4, at 42 n.15 (noting that he based his *Michigan Law Review* article on a survey of thirty former law clerks). As Judge Posner has observed, saying that this method does not produce “statistically reliable data,” Posner, *supra* note 15, at 1922 (quoting Edwards, *The Growing Disjunction*, *supra* note 4, at 42), is “an understatement,” *id.* at 1922.

²¹ See *infra* text accompanying notes 100–01.

²² See, e.g., Shireen A. Barday, Note, *Punitive Damages, Renumerated Research, and the Legal Profession*, 61 STAN. L. REV. 711, 713–24 (2008).

There are probably other arguments, but these seem sufficient to question how seriously we should take the conventional criticism of legal scholarship. The criticisms of legal scholarship were sketched out in the Introduction, but it is worthwhile to flesh them out a bit more in Part I before turning to the evidence against these assertions in Parts II and III.

I. THE CRITICISMS

There is nothing new about the critique that legal scholarship is of low value. Fred Rodell, a Professor at Yale in the early twentieth century, famously said that there are only two problems with legal scholarship, its style and its content.²³ So we might view with some skepticism the claim that it is *modern* scholarship that is unhelpful. Perhaps today's critics simply do not take the historical view. Professor Daniel Farber has reported that such struggles over the legitimacy and value of legal scholarship date almost from its inception.²⁴ How seriously should we take the modern critique?

Today the primary criticism of legal scholarship seems to be that it is of little relevance to the profession.²⁵ This is the general thrust of Chief Justice Roberts's quip,²⁶ and it makes up the greater part of the criticisms made by Judge Edwards in his many articles written on the subject.²⁷ The declining number of cites to legal scholarship is often offered as proof of this growing irrelevance.²⁸ Judge Edwards directed his first broadside to what he called "the growing disjunction"²⁹ between legal education and the practice of law. He claimed that "law schools—especially the so-called 'elite' ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy."³⁰ Although Judge Edwards claims that he does not scorn theory altogether, he writes: "Ideally, the 'practical' scholar always integrates theory with doctrine."³¹ He nevertheless finds that too few law review articles achieve the right balance, and that most are too theoretical; in particular, he singles out "mediocre interdisciplinary articles"³² for criticism.

The criticism that law is "impractical" or of little use to the profession surely is partly based on the observation that there has been a growth in the number of

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

²⁴ See generally Daniel Farber, *Back to the Future? Legal Scholarship in the Progressive Era and Today*, 100 MINN. L. REV. 1 (2015).

²⁵ See Brust, *supra* note 1; Hrick & Salzmann, *supra* note 8.

²⁶ See Liptak, *supra* note 1.

²⁷ See sources cited *supra* note 4.

²⁸ See Smith, *supra* note 9, at 204 n.154 (citing Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134 (1986); Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051 (1991)).

²⁹ Edwards, *The Growing Disjunction*, *supra* note 4, at 34.

³⁰ *Id.*

³¹ *Id.* at 35.

³² *Id.* at 36.

interdisciplinary journals and more enthusiasm for hiring people with PhDs and law degrees, or sometimes PhDs only, to teach in law school.³³ Many people have observed this phenomenon—some approvingly,³⁴ others, like Judge Edwards, less approvingly.³⁵ The objection to hiring professors without law degrees is, predictably, that they are allegedly less focused on practical concerns of lawyers (it is not clear that this is true; more on this below); but then, ironically, the principal criticism of the interdisciplinary turn in publishing is that law professors too often *lack* formal training in these disciplines, so they make egregious and embarrassing errors, and their fondness for such work is often no more than a self-indulgent whim. “Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it.”³⁶ Proponents of interdisciplinary work, the “law and” movement, “generally disdain doctrinal analysis[.]”³⁷ according to Judge Edwards. So, apparently law professors should not write interdisciplinary articles if they do not have adequate disciplinary credentials, *but* those *with* such credentials should not be hired by law schools lest they focus too little on law. This appears to be a catch-22.

Critics also accuse legal scholarship, at least as represented in the elite journals, as subject to fashions, with certain approaches seemingly in vogue at one point or another.³⁸ Presumably, the notion of “fads” in scholarship is in conflict with the idea

³³ See, e.g., Collins, *supra* note 4, at 645 (“Law schools are also hiring an increasing number of professors who have PhDs in other fields. This is not a bad development, unless PhDs come in droves and uniformly spurn any interest in the law and in the issues facing the legal profession.”).

³⁴ See, e.g., Erwin Chemerinsky & Catherine Fisk, *In Defense of the Big Tent: The Importance of Recognizing the Many Audiences for Legal Scholarship*, 34 TULSA L.J. 667 (1999); George L. Priest, *Social Science Theory and Legal Education, the Law School as University*, 33 J. LEGAL EDUC. 437, 440 (1983) (“[T]he best writing about the legal system is interdisciplinary . . .”); Neil H. Buchanan, *Why Interdisciplinary Legal Scholarship Is Good for the Law, the Academy, and Society at Large*, VERDICT (Jan. 19, 2010), <http://verdict.justia.com/2012/01/19/why-interdisciplinary-legal-scholarship-is-good-for-the-law-the-academy-and-society-at-large> [<https://perma.cc/NZW6-N6KB>]; Robin West & Danielle Citron, *On Legal Scholarship*, ASS’N AM. L. SCHS., <https://www.aals.org/current-issues-in-legal-education/legal-scholarship> [<https://perma.cc/J7XR-VAJU>].

³⁵ Some, like Judge Posner, appear to have mixed feelings about this development. Compare Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1119–29 (1981) (generally critiquing the growth of interdisciplinary focus, although noting that there is a place for this sort of work), with Posner, *supra* note 15, at 1923–28 (describing much interdisciplinary work as making a positive contribution and law being unavoidably intertwined with other disciplines).

³⁶ Edwards, *The Growing Disjunction*, *supra* note 4, at 36.

³⁷ *Id.*

³⁸ TAMANAHA, *supra* note 7, at 56 (decrying legal scholarship as “[r]iding one intellectual fad after another”).

that it should be rigorously fact-based and rational, a position many advocate.³⁹ And some critics suggest that academics do not just scorn the practice of law in their writing, but also do so in their teaching—that the lack of relevance of law review articles is a byproduct of what borders on contempt for practice on the part of most law professors.⁴⁰

Although these criticisms are too numerous to be dismissed out of hand, there are several, obvious rejoinders. To examine some of these claims and the rejoinders, I will start with what might be called the “big picture” issues raised by the first four observations I make above: There are so many counterexamples of scholarship that has influenced law that it seems that characterizing it as, in the main, worthless and exaggerated is misguided; the questionable theory/practice divide; and the special indictment of interdisciplinarity and empirical questions about the critiques. I then turn to what might be called more concrete issues: time and citation counts, and the existence of a market, as issues “on the ground.”

II. UNRELIABLE NARRATORS, THEORY, AND DISCIPLINARY COMPETENCE: THE “BIG PICTURE”

A. Counterexamples

The first rejoinder to the claim that legal scholarship is worthless and irrelevant is simply to point to the very many counterexamples.⁴¹ Indeed, coming up with the counterexamples could be something of a parlor game for lawyers since, although there are obviously a great many famous works known to most lawyers and law students (at least by repute), there are a number of less famous examples which may be known only to those who work in the area. Likewise, unless you work in the area, you may be unaware of where influence is being exerted. For example, Professor Matt Bodie, who teaches corporate law and blogs on this and other subjects on *The Conglomerate*, writes that the Delaware Chancery (the court which handles many corporate disputes for Delaware, where over half of America’s corporations are chartered) is “unusually” open to engaging with scholarly work.⁴²

³⁹ See, e.g., James Grimmelmann, *Scholars, Teachers, and Servants* (2017) (unpublished manuscript), <http://james.grimmelmann.net/files/articles/scholars-teachers-servants.pdf> [https://perma.cc/K2FP-3V6S].

⁴⁰ Edwards, *The Growing Disjunction*, *supra* note 4, at 51–52 (describing what he sees as the “disdain for law practice” as “deplorable”).

⁴¹ I listed several more examples than I deal with here in a post on The Faculty Lounge. For more examples, see Tamara R. Piety, *The Utility of Scholarship*, FAC. LOUNGE (Feb. 6, 2013), <http://www.thefacultyounge.org/2013/02/the-utility-of-scholarship.html> [https://perma.cc/G6ER-VXY6].

⁴² Bodie, *supra* note 1. Granted, Bodie characterizes this relationship as “unusual.” *Id.*

In addition to writing one of the most highly cited theoretical pieces in the Legal Realists' canon,⁴³ Felix Cohen is also credited with being “the Father of Federal Indian Law[,]”⁴⁴ whose work “has been influential in charting the path of Indian law in the federal courts through much of the twentieth century[.]”⁴⁵ And although another Legal Realist, Karl Llewellyn, is known primarily for his theoretical work and is among the most cited legal scholars,⁴⁶ he is likewise considered the driving force behind the Uniform Commercial Code (although his influence may be on the wane).⁴⁷ Professors Arthur von Mehren and Donald Trautman apparently coined the terms “general” and “specific” jurisdiction.⁴⁸ And where would corporate law be without Adolf Berle and Gardiner Means?⁴⁹

Perhaps, though, these examples only serve to illustrate Judge Edwards's point: in the old days legal scholarship was offered in service of the practice, but less so today. That seems belied, however, by more contemporary examples. As Professor Neil Buchanan points out, Elizabeth Warren's work on financial services and bankruptcy was the driving force behind the creation of the Consumer Financial Protection Bureau.⁵⁰ I teach Evidence and Expert Evidence (among other things), so some of the examples which come most readily to mind for me are in these areas. For example,

⁴³ See generally Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

⁴⁴ See, e.g., *Felix Cohen: Father of Federal Indian Law*, DEP'T INTERIOR, <https://www.doi.gov/interiormuseum/programs/Felix-Cohen> [<https://perma.cc/5NLV-BXTJ>].

⁴⁵ Kevin K. Washburn, *Felix Cohen, Anti-Semitism and American Indian Law*, 33 AM. IND. L. REV. 583, 584 (2008/2009) (reviewing DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* (2007)).

⁴⁶ Fred K. Shapiro, *The Most Cited Legal Scholars*, 29 J. LEGAL STUD. 409 (2000).

⁴⁷ See generally Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541 (2000).

⁴⁸ See Friedrich K. Juenger, *The American Law of General Jurisdiction*, 1 U. CHI. LEGAL F. 141–42 (2001) (noting that these terms “were apparently coined by von Mehren and Trautman” (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135–36, 1164–66 (1966))).

⁴⁹ ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

⁵⁰ Neil H. Buchanan, *Legal Scholarship Makes the World a Better Place*, JOTWELL 2014 CONFERENCE, <http://jotwell.com/wp-content/uploads/2014/07/Buchanan-Jotwell-Conference.pdf> [<https://perma.cc/CKZ2-RWV9>]. In response to Buchanan's piece, Professor Jeffrey Harrison objects that counterexamples are simply anecdotes and are of no use for analyzing the worth of the total investment. See Comment to *Buchanan: Legal Scholarship Makes the World a Better Place*, TAX PROF BLOG (Nov. 11, 2014), http://taxprof.typepad.com/taxprof_blog/2014/11/buchanan-legal-scholarship-.html [<https://perma.cc/T7DY-CSUC>]. His critique is applicable here as well. However, as discussed in the rest of this Essay, it is the counterexamples, combined with the length of time it takes for influence to be felt, the (sometimes) need for deep familiarity with the field in order to be able to discern influence due to the inadequacy of citation counts as a proxy for influence, that, together, suggest the characterization of scholarship as mostly wasteful and a bad investment, overblown. And the soundness of the calculation for how much it costs is another issue. See Rubin, *supra* note 9, at 202–09.

Professor Richard Friedman's work on the Confrontation Clause has informed the Court's approach to that doctrine.⁵¹ However, if I were to try to do a comprehensive survey of all the influential works, this Essay would be much longer.

Rather than doing that, I will give an example drawn from what I write about—commercial speech—to underscore how it may be necessary to know both the case law and the literature very well to see the influence of a work, particularly if it is not initially cited. Most of my writing is on the First Amendment and the commercial speech doctrine. So naturally, Professor Redish's work is one of the notable counter-examples with which I am most familiar.

1. *The First Amendment in the Marketplace*

Professor Redish's influence is not by any means limited to First Amendment law. He has made important contributions in many areas.⁵² In an ironic twist, Chief Justice Roberts himself cited one of Professor Redish's articles in an opinion on the *cy pres* doctrine.⁵³ But his influence on the First Amendment is profound. As I have stated elsewhere, *The First Amendment in the Marketplace* was one of the first, if not *the* first major scholarly article arguing that commercial advertising ought to receive full First Amendment protection on the grounds that it was "expression" of no less value than other protected speech.⁵⁴

Only a few years earlier, Yale law professor Thomas Emerson, in writing his rather grandly titled *Toward a General Theory of the First Amendment*,⁵⁵ devoted

⁵¹ See *Crawford v. Washington*, 541 U.S. 36, 51, 61 (2004) (holding that the key test for application of the Confrontation Clause is whether a statement is "testimonial" (citing Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998))).

⁵² For example, Redish is the coauthor of casebooks on both civil procedure and federal courts. See RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD E. SHERMAN & JAMES E. PFANDER, *CIVIL PROCEDURE: A MODERN APPROACH* (6th ed. 2013); MARTIN H. REDISH, SUZANNA SHERRY & JAMES PFANDER, *FEDERAL COURTS* (7th ed. 2011). He also has a dizzying number of publications in these and other areas. See Martin H. Redish, Curriculum Vitae (Mar. 9, 2006), http://www.law.northwestern.edu/faculty/assets/documents/cv-RedishMartinH_v2016-03-09;160058.pdf [<https://perma.cc/P452-TZWB>].

⁵³ *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Mem.) (Roberts, C.J., dissenting from denial of certiorari) (citing Martin H. Redish, Peter Julian, & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 653–56 (2010)).

⁵⁴ Tamara R. Piety, "A Necessary Cost of Freedom"?: *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 19 & n.94 (2012). As I discuss in this Article, there were at least two articles that predated Redish's 1971 article that advanced similar themes: a 1965 student note and a 1967 *Developments in the Law* comment in the *Harvard Law Review*. *Id.* at 19–20.

⁵⁵ Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). This title may have spawned any number of law review articles with "toward" in the title. A quick Westlaw search for articles with "toward" in the title and published in the last three years resulted in 599 documents. Although many of these articles could be

only a few paragraphs to the question of commercial speech. “[T]he problem of differentiating between commercial and other communication has not in practice[,]” he wrote, “proved to be a serious one.”⁵⁶

But ten years later, with the decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁵⁷ the seeds were sown for a transformation of the doctrine that would call into question the soundness of that breezy dismissal. Redish’s article presaged that change. The arguments the Court used to justify protection for commercial speech in *Virginia Pharmacy* were the same ones Redish argued for—the value of commercial speech to listeners and thus to market operation generally.⁵⁸ Yet the Court did not cite his article. And the *Virginia Pharmacy* opinion did not *perfectly* track his argument. Indeed, as Redish himself later argued, in crafting the intermediate scrutiny standard in *Central Hudson Gas & Electrical Corp. v. Public Service Commission*,⁵⁹ the Court built something of an “escape clause” from the full implications of Redish’s argument for treating commercial speech just like any other protected speech, and in so doing may have created a problem.⁶⁰ In any event, Redish’s seminal article offers a nice jumping off point for refuting some of the criticism of scholarship and is a way to celebrate its impact and its status.⁶¹

B. *The Utility of Theory*

What Redish offered in *The First Amendment in the Marketplace* was a *theory* about why advertising should receive First Amendment protection: He argued that listeners were also entitled to First Amendment protection as listeners and that advertising was valuable to listeners as information, indeed perhaps more valuable than speech that was ordinarily assumed to be of the highest First Amendment value

excluded because they did not use “toward” as the first word, a casual exposure to law review articles confirms this is a popular construction. Professor Steve Shiffrin rather wittily played with this title in his also justly influential article *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1984). Perhaps for psychological or semantic reasons “toward” has been rather more popular than “away” as a metaphor in law review titles; perhaps this is because moving toward something is more appealing to people than moving away from it? See generally GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980). For an explicitly utilitarian discussion of the power of word choice, see FRANK LUNTZ, WORDS THAT WORK: IT’S NOT WHAT YOU SAY, IT’S WHAT PEOPLE HEAR (2007).

⁵⁶ Emerson, *supra* note 55, at 948–49 n.93.

⁵⁷ 425 U.S. 748 (1976).

⁵⁸ *Id.* at 765.

⁵⁹ 447 U.S. 557 (1980).

⁶⁰ Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 599, 632–33 (1982).

⁶¹ Although in this Essay I recognize Professor Redish’s influence, I am, as I have discussed at length in much of my work, critical of its normative implications by the courts. See, e.g., TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2012).

like political speech. This theory ultimately was adopted by the Supreme Court. But perhaps it is an exception.

Many of the examples offered in the first section were, of course, theories. It is often said that “[i]t takes a theory to beat a theory[.]”⁶² And no less an authority than the late Justice Scalia is said to have been a proponent of this idea. He certainly was a proponent of one of the most influential theories about constitutional interpretation—“originalism.” He wrote, “It is not enough to demonstrate that the other fellow’s candidate (originalism) is no good; one must also agree on another candidate to replace him.”⁶³ It would be hard to overestimate how consequential the theories of originalism and textualism have been on the law.⁶⁴ Perhaps this is the exception proving the rule, but many of the examples already listed were influential theories. And some of the most cited legal scholars are notable primarily for their contribution to theory.⁶⁵

One does not have to think very hard or to look very long to come up with other examples of theorists who have had a profound influence on shaping the law or how we think about the law. Perhaps one of the most salient examples of legal theory that has shaped the law, given recent high profile cases⁶⁶ and the issues raised in the presidential election,⁶⁷ is Catharine MacKinnon’s proposal in her book, *Sexual Harassment of Working Women*, that sexual harassment was a compensable injury.⁶⁸ MacKinnon’s efforts were critical to the conception of sexual harassment of women (and then later all persons) as discriminatory and as a compensable tort, rather than just a burdensome, but inescapable, inequity of everyday life.⁶⁹ After MacKinnon,

⁶² Lawrence Solum, *Legal Theory Lexicon: It Takes a Theory to Beat a Theory*, LEGAL THEORY BLOG (Oct. 21, 2012), <http://lsolum.typepad.com/legaltheory/2012/10/introduction-it-takes-a-theory-to-beat-a-theory-this-is-surely-one-of-the-top-ten-all-time-comments-uttered-by-law-professo.html> [<https://perma.cc/M8C6-4TG4>] (quoting Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435, 1435 (1983)).

⁶³ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989).

⁶⁴ See generally, e.g., Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

⁶⁵ Duncan Kennedy, for example. See Shapiro, *supra* note 46, at 424 tbl. 6.

⁶⁶ See, e.g., Manuel Roig-Franzia et al., *The Fall of Roger Ailes: He Made Fox News His ‘Locker Room’—and Now Women Are Telling Their Stories*, WASH. POST (July 22, 2016), https://www.washingtonpost.com/lifestyle/style/the-fall-of-roger-ailes-he-made-fox-his-locker-room--and-now-women-are-telling-their-stories/2016/07/22/5eff9024-5014-11e6-aa14-e0c1087f7583_story.html?utm_term=.efcfce71b6b2 [<https://perma.cc/96TY-NYR8>].

⁶⁷ See Jia Tolentino, *Trump and the Truth: The Sexual-Assault Allegations*, NEW YORKER (Oct. 20, 2016), <http://www.newyorker.com/news/news-desk/trump-and-the-truth-the-sexual-assault-allegations> [<https://perma.cc/BHM7-GBAJ>].

⁶⁸ CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). MacKinnon also appears in Shapiro’s Most-Cited Legal Scholars List. See Shapiro, *supra* note 46, at 424 tbl. 6.

⁶⁹ For a discussion of the impact this work has had on the law and women’s lives, see

it was not necessary for every woman (or indeed, every person) victimized in this way to bring a lawsuit in order for her to feel vindicated; (arguably) the mere ability to name this behavior as a harm and the dawning (albeit halting) public recognition of it as such, started to be felt in changes in workplace conditions. Although, as recent events prove, we may still be far away from eradicating it.⁷⁰

In almost every substantive area of law one can find works of theory that have had profound influences on the law and how we use it. Consider Brandeis and his theory of a right to privacy;⁷¹ Charles Reich's *The New Property*, which offered a new way to think about government benefits;⁷² and Oliver Wendell Holmes, Jr. and *The Path of Law*—a way to think about what judges do.⁷³ It is not clear that even pure theory is irrelevant to practice. It just may not be immediately apparent what that relevance is.

C. Disciplinary Competence and Cross-Fertilization

Just as theory may get a bad rap, so too does interdisciplinarity. Again, there are a number of counterexamples of interdisciplinary work making significant contributions to practice. In Dean Martha Minnow's "archetypal" guide to legal scholarship,⁷⁴ while she does not create a separate category for interdisciplinary work, she lists many interdisciplinary works in several of the categories: Judge Guido Calabresi and Doug Melamed's famous work on property;⁷⁵ Russell Korobkin on bounded rationality;⁷⁶ Robert Ellickson on social norms;⁷⁷ William Forbath and his history of the labor movement;⁷⁸ and Seanna Shiffrin's work in law and philosophy.⁷⁹ Of course, one of the earliest and most significant examples of borrowing from the social sciences was Justice Brandeis's efforts on behalf of labor law reform. He

Reva B. Siegel, *Introduction: A Short History of Sexual Harassment* to DIRECTIONS IN SEXUAL HARASSMENT LAW (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

⁷⁰ See sources cited *supra* notes 68–69.

⁷¹ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁷² Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

⁷³ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

⁷⁴ Martha Minnow, *Archetypal Legal Scholarship: A Field Guide*, 63 J. LEGAL EDUC. 65, 65 (2013).

⁷⁵ *Id.* at 66 & n.7 (citing Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972)).

⁷⁶ *Id.* at 66 & n.10 (citing Russell Korobkin, *Bounded Rationality and Unconscionability: A Behavioral Approach to Policing Form Contracts*, 70 U. CHI. L. REV. 1203 (2003)).

⁷⁷ *Id.* at 67 & n.12 (citing ROBERT ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994)).

⁷⁸ *Id.* at 68 & n.28 (citing William Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989)).

⁷⁹ *Id.* at 69 & n.32 (citing Seanna Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135 (2003)).

used social science data to support legal arguments for limitations on working hours for women, and in the process gave his name to such efforts: the Brandeis brief.⁸⁰ The Brandeis brief has become a staple of advocacy before the courts, perhaps especially the Supreme Court, and such research has informed the outcomes in many famous cases such as *Brown v. Board of Education*.⁸¹

But maybe no discipline has had more influence on law than economics. In a response to Judge Edwards, Judge Posner reviewed several of these counterexamples, beginning, understandably enough, with law and economics.⁸² Posner reviews a broad range of areas which have been influenced or transformed by the application of economic thought to law: from antitrust to family law, from trusts and estates to labor and employment law, trademark law and many others.⁸³ Interestingly enough for our purposes here, Judge Posner had this to say about its influence on commercial speech: “It has contributed to the increasing judicial favor for giving commercial speech constitutional protection.”⁸⁴ Now, he *may* have had in mind the economists, like Ronald Coase,⁸⁵ who argued that advertising constituted valuable “information.”⁸⁶ And, Chicago economist Aaron Director proposed that advertising was informational to counter the idea that advertising, in particular, brand advertising, was anticompetitive.⁸⁷ However, it is at least equally likely that Judge Posner was thinking of legal scholars like Redish,

⁸⁰ Louis D. Brandeis was hired to represent Oregon in the case of *Muller v. Oregon*, 208 U.S. 412 (1908), which upheld various limitations on the hours women could be forced to work on the grounds that excessive hours could be injurious to women’s health. *Id.* at 419, 423. In support of his argument to support the state’s limitations on women’s working hours, he submitted a voluminous brief with testimony from various doctors and social scientists about the ill-effect of long working hours on women. Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605. The full brief is available at <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-brandeis-brief-in-its-entirety> [<https://perma.cc/8BYE-NTZ9>].

⁸¹ 347 U.S. 483 (1954); see Herbert Garfinkel, *Social Science Evidence and the School Segregation Cases*, 21 J. POL. 37, 40–42 (1959); see also Scott Brewer, *Scientific Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1553 (1998). But see generally Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002).

⁸² Posner, *supra* note 15, at 1925–26.

⁸³ *Id.*

⁸⁴ *Id.* at 1925.

⁸⁵ See R.H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974). Coase himself credits Aaron Director for first suggesting that the market should be treated with the same *laissez-faire* applied to speech. See *id.* at 385 (citing Aaron Director, *The Parity of the Economic Marketplace*, 7 J.L. & ECON. 1 (1964)).

⁸⁶ See, e.g., George J. Stigler, *The Economics of Information*, J. POL. ECON. 213, 220 (1961) (“Advertising is, among other things, a method of providing potential buyers with knowledge of the identity of sellers.”).

⁸⁷ See generally Director, *supra* note 85.

a fellow Chicagoan, whose work had been influenced by economic thought, since no one has been more identified with the advance of these economic views as they apply to commercial speech than Professor Redish.⁸⁸

This raises another complaint about interdisciplinary legal scholarship: Who is qualified to do it? It cannot be the case that, as with Professor Redish, the absence of formal credentials in the discipline is dispositive, because as with Redish, obviously much good work has been done by lawyers without economics degrees or psychology degrees or history degrees. But it is also surely true that the absence of formal training may make it more likely that a law professor will find himself in trouble and make an embarrassing mistake as a consequence of that lack of training. This is undoubtedly true. Moreover, the state of knowledge changes so that yesterday's obvious truth becomes today's embarrassment—ideas like eugenics come to mind. And ironically, the original Brandeis brief itself serves as a good illustration of the hazards of introducing social science research into legal argument, since it offered all sorts of dubious evidence about women's supposed special vulnerability that no longer are viewed as valid.⁸⁹

But if scholars may make embarrassing errors, courts may as well. Courts must evaluate proffered experts in a range of fields and decide whether they are “qualified.” In her work on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁹⁰ Professor Susan Haack, a professor at Miami with a dual appointment in philosophy and law, exposed the shortcomings in the Supreme Court's understanding of the philosophy of science—shortcomings that resulted in the Court making some fundamental errors and getting its Poppers and its Hempels mixed up in what she amusingly described as a *faux pas de deux*.⁹¹

Many great thinkers who have made the great contributions to knowledge, and who have made significant discoveries or contributions in multiple fields, did not necessarily do so by respecting disciplinary boundaries: Herbert Simon, Erving Goffman, Oliver Sacks, and many others. For example, Daniel Kahneman, a psychologist,

⁸⁸ Redish was also an early proponent of the proposition that the commercial speech distinction represented a kind of content discrimination, and that content discrimination more generally was part of the problem that led to disarray in First Amendment doctrine. See generally Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981). The Supreme Court has adopted strong content neutrality positions in a number of recent cases: most notably for commercial speech in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), but also *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218 (2015).

⁸⁹ See David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 9, 12 (2011). The science may not be particularly good or reliable. The research in *Brown* itself has likewise been criticized, even if not the ruling. Attempts to improve on law's understanding of expertise and matters of science have been met with limited success and some awkwardness. See generally Susan Haack, *An Epistemologist in the Bramble-Bush: At the Supreme Court with Mr. Joiner*, 26 J. HEALTH POL. POL'Y & L. 217 (2001).

⁹⁰ 509 U.S. 579 (1993).

⁹¹ See Haack, *supra* note 89, at 232.

won a Nobel Prize in economics and Bob Dylan, a musician, won one for literature.⁹² This is likewise true of law. But although critics decry incompetent law professors dabbling in fields in which they have no training, I have rarely heard the criticism in reverse for academics from other disciplines “dabbling” in law. This is a curious asymmetry. However, many scholars who have made some of the most important contributions to law, including First Amendment law, did not have law degrees.

As discussed above, Ronald Coase is a case in point. His rather off-the-cuff observation—that if a deregulatory environment worked so well in the First Amendment context and the so-called “marketplace of ideas,” why was it not equally good for the actual marketplace?—made for a rhetorically clever and compelling speech,⁹³ but was perhaps not informed by a full appreciation that it might be an oversimplification of First Amendment doctrine. Yet his viewpoint became very influential to commercial speech doctrine. If someone ever said, “What does Ronald Coase know about the First Amendment?” I am unaware of it.

Even closer to home, First Amendment-wise, one of the leading theorists of First Amendment theory, housed in a law school, Alexander Meiklejohn, was apparently not trained as a lawyer. (I learned this from Redish’s article.⁹⁴ Although I had read the article many times, I either forgot this point or had overlooked it.) Perhaps Meiklejohn’s training as a philosopher accounts for his rather austere theory of the First Amendment, one later famously championed by Judge Bork—that the First Amendment was intended to protect only political speech, a theory which had some difficulty accounting for First Amendment protection for art and literature.⁹⁵

Or perhaps not. But it is worth observing that many law schools have faculty members without law degrees. For example, Elizabeth Loftus,⁹⁶ a faculty member at U.C. Irvine, is a psychologist whose work on false memories has been extremely valuable to practicing lawyers.

D. Unreliable Narrators?

Given the judges like Leo Strine who *do* rely on scholarship, and the evidence of citation even from critics like Chief Justice Roberts, why do so many lawyers and judges seem to think legal scholarship is irrelevant? Perhaps it is an example of

⁹² *Nobel Laureates and Country of Birth*, NOBELPRIZE.ORG, https://www.nobelprize.org/nobel_prizes/lists/countries.html [<https://perma.cc/ST84-MFHB>].

⁹³ See Coase, *supra* note 85, at 384. This article memorialized Coase’s comments at the eighty-sixth annual meeting of the American Economic Association. R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 1 (1977).

⁹⁴ Redish, *supra* note 18, at 434.

⁹⁵ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (arguing the First Amendment only protected political speech).

⁹⁶ See *Elizabeth F. Loftus*, U. CAL. IRVINE SCH. L., <http://www.law.uci.edu/faculty/full-time/loftus/> [<https://perma.cc/S4VQ-WX7V>].

“narrow-minded populism that characterizes societies in their declining years.”⁹⁷ Populism and anti-intellectualism *do* seem particularly prominent in American society right now. However, a less malignant explanation may be simply the operation of psychological factors such as cognitive biases, and limitations of memory on our ability to recall examples. Or, perhaps the hostility to legal scholarship is itself a fad that waxes and wanes, generated by the well-known bandwagon effect.⁹⁸ If “everyone” agrees that legal scholarship is not very useful, then counterexamples are just a case of the exception proving the rule. There may be a lot of “exceptions,” but each one is encountered as if it were an anomaly. And when criticism comes from such distinguished members of the bench and bar, there is some influence of authority.⁹⁹ The critique may also be more salient than one’s experience because the critique gets prominent news coverage, while one’s experience may be something that is operating in the background. And any of us who have ever written can attest that we often have imperfect memories of where we first encountered an idea. In short, there is reason to think that psychological phenomena may affect our impressions.

III. TIME, CITATIONS, AND MARKET: ISSUES “ON THE GROUND”

A. Time

Obviously, one of the problems we face is defining what constitutes “impact” or relevance. But let us suppose that one aspect of its utility or relevance is its influence on legal decisions. There are just a couple of problems with trying to measure influence on legal decisions. In the first place, what is the appropriate time horizon? *The First Amendment in the Marketplace* was published in 1971. It was not until five years later, in 1976, that we see the Supreme Court in *Virginia Pharmacy* adopting a similar approach, questioning the appropriateness of a blanket exclusion of commercial advertising from First Amendment protection.¹⁰⁰ But we do not see a more

⁹⁷ Rubin, *supra* note 9, at 169.

⁹⁸ This idea that people “leap on the bandwagon” simply because they see others doing so is referred to by several names and may be due to similar, but not completely overlapping, influences. It has been discussed long ago as a possibility in economics literature. *See generally* H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers’ Demand*, 64 Q.J. ECON. 183 (1950). There may be multiple causes. One is related to social pressure, a desire to conform one’s behavior to that of one’s society. This is also labeled the Asch conformity effect. *See generally* Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31 (1955).

⁹⁹ A related phenomenon may be the tendency to defer to an authority. Milgram famously documented this effect. *See* STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974); *see also* ROBERT CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (1984) (describing various psychological phenomena such as deference to authority or perceiving that something is popular).

¹⁰⁰ *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770–72 (1976).

robust adoption of Redish's continued promotion of the proposition that subjecting commercial speech to a separate standard is a species of content discrimination until 1993, with the *City of Cincinnati v. Discovery Network, Inc.*¹⁰¹ decision.

And arguably, it is only in the last few years, say from 2010 forward¹⁰²—in a panoply of decisions that seem to wholeheartedly embrace this content-discrimination approach to questions of the regulation of both commercial speech and the status of the speaker most implicated in commercial speech, the corporate speaker—that we are witnessing perhaps the full flowering of the position first advocated by Professor Redish, even if it was later advocated by many others as well. If it takes forty-plus years for the full effect of an argument to bear fruit, that would seem to be a gestation period that far exceeds the time horizons contemplated by most observers. At the very least, it suggests that trying to measure the impact of today's scholarship may be completely speculative without a very long wait.

B. Measurement

In addition, the seemingly favorite measure of impact is citation¹⁰³—citation by courts for preference. But “although citations are often the best proxy that we have for assessing influence, they may offer an incomplete or distorted picture.”¹⁰⁴ Citations are a crude and unreliable measure of the influence of an article. In the first place, as is obvious, and as Brian Leiter and many others have pointed out, a work can be cited as an example of a misguided or wrong-headed expression of work.¹⁰⁵ If one subscribes to the theory that “any publicity is good publicity,” this may nevertheless represent “influence,” but I suspect most legal scholars, judges, and practicing lawyers would be reluctant to embrace that definition.

Even putting aside the problem of the citation of an article as a negative example, it should be obvious that raw citations do not offer much insight into the work's acceptance or influence, except perhaps at the high ends. And there may be some

¹⁰¹ 507 U.S. 410 (1993).

¹⁰² I date the emergence of a consensus on Professor Redish's approach, albeit not necessarily one that has been explicitly articulated, from the *Citizens United v. FEC* decision, 558 U.S. 310 (2010), for reasons that are discussed in the article on the *Sorrell* case. See Piety, *supra* note 54, at 17–47; see also Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16 (2010).

¹⁰³ Although there may be a significant difference in work that is cited in other law reviews and work cited by courts. See Patrick Arthur Woods, *Stop Counting (Or At Least Count Better)*, JOTWELL 2014 SYMPOSIUM, <http://jotwell.com/wp-content/uploads/2014/07/Woods-Stop-Counting.pdf> [<https://perma.cc/776R-BDDK>]. Critics are concerned primarily with citations in the courts. Law Review citation is more influential in prestige of the institution. See Alfred L. Brophy, *The Signaling Value of Law Reviews: An Exploration of Citations and Prestige*, 36 FLA. ST. U. L. REV. 229 (2009).

¹⁰⁴ DUXBURY, *supra* note 13, at 35.

¹⁰⁵ See, e.g., Leiter, *supra* note 7.

knowing suppression of articles published in lower ranked journals because they do not add prestige or have less weight in contrast to those published by prominent academics and in a top law journal.

Within the American law schools . . . the Matthew effect [the rich get richer] tends to loom large. Just as the most prestigious law schools dominate the production of the nation's law professorate, so too the law reviews of those schools are cited far more frequently by law professors than are all other academic legal publications. There is evidence that judges too, in so far as they are inclined to cite academic writings, tend to rely on the elite journals. The fact that these journals acquire the lion's share of judicial citations may well indicate that they are the academic-legal authorities which most influence the courts. Alternatively it may indicate that judges, like academics, are often attracted to badges of distinction and that, when judges rely on academic opinion, they generally prefer to be seen relying on a recognized name rather than on a relative unknown. More plausibly, the operation of the Matthew effect might in this instance be partially attributable to the initiatives of law clerks: that is, "the exceptional number of citations to the 'elite' reviews may be due, in part, to the fact that judicial clerks"—most of whom hail from the most prestigious institutions—"are likely to cite their own schools' journals."¹⁰⁶

There is an even more difficult problem. As noted previously, sometimes courts do not cite an article even though they have read it or been influenced by it.¹⁰⁷ But there is simply no way to tell this unless the judge's papers reflect it, or the judge says so. Here again we encounter the problem of memory. A judge (or anyone for that matter) may forget where they first saw something. To discern influence we may have to do a close reading.

Again, Professor Redish's article offers a good example. In 1971, *The First Amendment in the Marketplace* made an argument that commercial speech had a claim to contribute to individual and social welfare in much the same way as other protected speech, and that its exclusion from coverage could not be justified.¹⁰⁸

¹⁰⁶ DUXBURY, *supra* note 13, at 35–36 (footnotes omitted) (quoting Max Stier et al., *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467, 1474 (1992)).

¹⁰⁷ See Kaye, *supra* note 1, at 313 n.2 ("I read a great many more law review articles than I cite in my opinions . . .").

¹⁰⁸ Redish, *supra* note 18, at 432.

Although, in the article, Professor Redish did devote some attention to the argument that ad men (and presumably ad women) were engaged in expressive activities (but for which they did not usually get authorship attribution or copyright, unlike novelists),¹⁰⁹ for the most part, the arguments were directed at the value of this speech to *the listener* and society at large.¹¹⁰

Only a few years later, in 1976, when the Court decided *Virginia Pharmacy*, it too spent almost no time on speaker interests and instead focused almost exclusively on the benefits of commercial speech to listeners and society at large.¹¹¹ Of course, since it was the listeners who sued in *Virginia Pharmacy*, this was understandable. Nevertheless, much of the argument in *Virginia Pharmacy* seems to come right from *The First Amendment in the Marketplace*. One of the animating concerns in the majority opinion was that advertising should not be treated as *categorically* lacking the sort of value that other speech was thought to have:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. *It is a matter of public interest* that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.¹¹²

The Court wrote that a consumer's "interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."¹¹³

This rejection of categorical denial of protection, as well as linking First Amendment protection of commercial speech with the public interest, and focus on the listener, were all themes developed in Redish's article.

However, for whatever reason (perhaps for the simplest one, that none of the justices read it), the *Virginia Pharmacy* Court did not cite Professor Redish's article. Yet, it has been identified by many legal scholars as one of the most important pieces of scholarship, if not *the* most important, to the establishment of the modern

¹⁰⁹ For a discussion of the intellectual property and labor issues involved in advertising see, e.g., Catherine L. Fisk, *The Modern Author at Work on Madison Avenue, in MODERNISM AND COPYRIGHT* 173 (Paul K. Saint-Amour ed., 2011).

¹¹⁰ Redish, *supra* note 18, at 432.

¹¹¹ Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765–66, 768, 771–72 (1976).

¹¹² *Id.* at 765 (emphasis added) (citations omitted).

¹¹³ *Id.* at 763.

commercial speech doctrine.¹¹⁴ So a focus on citation counts, at least in Supreme Court opinions, immediately after the opinion was issued, would have missed this influence.

C. *A Market for Law Reviews?*

Finally, the last indication that the criticism of legal scholarship's worthlessness may be exaggerated is the existence of a market for it. Recently, it has come to light that some legal scholarship may have been commissioned.¹¹⁵ One way of measuring worth is to see how much someone is willing to pay. But since law reviews have not had a regular practice of financial disclosures, this information is not readily available. The absence of regular disclosure practices means we often do not know how to discover which articles may have been sponsored, let alone for what price. There is reason to believe that some articles currently in print were commissioned. For example, it appears that some scholarship related to punitive damages was sponsored by Exxon, even as Exxon's case on punitive damages was being considered by the Supreme Court.¹¹⁶ And Professors Lisa Lerman and Ron Collins report that, according to the *Washington Post*, the National Rifle Association funded scholarship that helped to shift the Court from rather more tolerance of regulation to rather less.¹¹⁷

It is surely relevant to the question of how much scholarship is worth to see how much is being offered from external sources for its production, even if this category

¹¹⁴ See sources cited *supra* note 19.

¹¹⁵ See Barday, *supra* note 22. In fact, this practice is not as new as I had originally supposed. Justice Douglas inveighed against the practice of articles written by undisclosed advocates as early as 1965. William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228–30 (1965). Justice Douglas's experience before coming on the Court was with the Securities and Exchange Commission. *Id.* at 233. He recounted that in opposing antitrust laws it appeared, from Congressional reports, that scholarly arguments had been created by "hiring professors financed by 'the defenders of price discrimination, basing-point pricing practices, and other monopolistic practices.'" *Id.* at 230–31 (quoting H.R. REP. NO. 2966, at 31 (1956)). In response to these trends, Justice Douglas proposed that the first footnote should disclose whether the author had been paid to write the article. *Id.* at 232. Almost fifty years later, the *Washington Law Review* picked up this challenge and adopted a disclosure policy, although it did not limit its disclosure requirements to the disclosure of financial interests. See, e.g., Ronald K.L. Collins & Lisa G. Lerman, *Disclosure, Scholarly Ethics, and the Future of Law Reviews: A Few Preliminary Thoughts*, 88 WASH. L. REV. 321 (2013).

¹¹⁶ See, e.g., Lee Epstein & Charles E. Clarke Jr., *Academic Integrity and Legal Scholarship in the Wake of Exxon Shipping, Footnote 17*, 21 STAN. L. & POL'Y REV. 33, 33 (2010); Thomas O. McGarity, *A Movement, A Lawsuit, and the Integrity of Sponsored Law and Economics Research*, 21 STAN. L. & POL'Y REV. 51, 51 (2010).

¹¹⁷ Collins & Lerman, *supra* note 115, at 321 & n.2 (citing Peter Finn, *How the NRA Helped Reshape Views of the Second Amendment*, WASH. POST, Mar. 14, 2013, at A1). This is a problem that is being experienced throughout higher education and in science. See, e.g., THOMAS O. MCGARITY & WENDY E. WAGNER, *BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH* (2008); JENNIFER WASHBURN, UNIVERSITY INC.: THE CORPORATE CORRUPTION OF HIGHER EDUCATION x–xi (2006).

is a small percentage of published articles. But when we look at the volume of scholarship produced in support of expansive protection for commercial speech, it is undeniable that a great deal of this scholarship has been produced by practicing lawyers who do not appear to have been writing as an entrée into law teaching or as simply a desire for self-expression, but rather to advance client interests or as business development,¹¹⁸ or by lawyers employed by think tanks, whose job is to lobby for particular positions.¹¹⁹ It is possible that these authors view publication in law reviews as the *least* relevant method of law reform; but that they bother to produce these articles at all suggests they think the value of doing so is more than zero.

CONCLUSION

The development of the commercial speech doctrine, from commercial speech as not being protected at all, to being offered limited protection, to being offered something that is fast approaching strict scrutiny or very nearly, is undeniably tied to the scholarly work which preceded it, particularly that of Professor Redish. His work suggests that the practice/theory divide is artificial, as theory often informs practice; that critics use too narrow a time frame to assess impact; that citations as a measure of influence is insufficient; that criticisms of legal scholarship, such as Chief Justice Roberts's, may be exaggerated given the obvious counterexamples; and that the concern about disciplinary competence seems likewise exaggerated. It has not checked the influence of other disciplines on the development of legal thought; and the criticism of legal scholarship's worthlessness overlooks what seems to be a small, but nevertheless discernable, market for its production.

Scholarship—doctrinal, interdisciplinary, theoretical, and every combination thereof—can be shown to have influenced the law. To be sure, the number of articles which have influenced the law are probably few in comparison to the number of articles produced. But as Judge Posner observed, we really do not know how to assess “waste” if we don't know how much needs to be produced *ex ante* to produce

¹¹⁸ See, e.g., James Bopp, Jr. & Richard E. Coleson, *The First Amendment Needs No Reform: Protecting Liberty from Campaign Finance “Reformers,”* 51 CATH. U. L. REV. 785 (2002); Bruce E.H. Johnson & Ambika K. Doran, *Amendment XXVIII? Defending Corporate Speech Rights,* 58 S.C. L. REV. 855 (2007); Charles H. Moellenberg, Jr. & Leon F. DeJulius, Jr., *Second Class Speakers: A Proposal to Free Protected Corporate Speech from Tort Liability,* 70 U. PITT. L. REV. 555 (2009). Yet other proponents of this line of argument are located in business schools. See William A. Wines & Terence J. Lau, *Can You Hear Me Now?—Corporate Censorship and Its Troubling Implications for the First Amendment,* 55 DEPAUL L. REV. 119 (2005).

¹¹⁹ See, e.g., JOHN E. CALFEE, *FEAR OF PERSUASION: A NEW PERSPECTIVE ON ADVERTISING AND REGULATION* (1997); Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech,* 54 CASE W. RES. U. L. REV. 1205 (2004); Daniel E. Troy, *Advertising Not “Low Value” Speech,* 16 YALE J. ON REG. 85 (1999).

the important work.¹²⁰ History has clearly adjudged *The First Amendment in the Marketplace* as a significant and important work of the kind that is consistent with the educational and social mission of the university. It, and the whole body of Professor Redish's work, stands as a powerful refutation of the claim that scholarship is not relevant to practice, is irrelevant to law reform, or cannot change the world. It has, and it does.

¹²⁰ See Posner, *supra* note 15, at 1928.