

IS LEGAL SCHOLARSHIP WORTH ITS COST?

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It is almost impossible to mention books in bulk without grossly overpraising the great majority of them. Until one has some kind of professional relationship with books one does not discover how bad the majority of them are. In much more than nine cases out of ten the only objectively truthful criticism would be “This book is worthless”, while the truth about the reviewer’s own reaction would probably be “This book does not interest me in any way, and I would not write about it unless I were paid to.” But the public will not pay to read that kind of thing. Why should they? They want some kind of guide to the books they are asked to read, and they want some kind of evaluation. But as soon as values are mentioned, standards collapse. For if one says—and nearly every reviewer says this kind of thing at least once a week—that KING LEAR is a good play and THE FOUR JUST MEN is a good thriller, what meaning is there in the word “good”?

—George Orwell, *Confessions of a Book Reviewer*¹

One of the curiosities of modern American constitutional law is that it is possible to take many of its most famous pronouncements, and re-write them to say exactly the opposite thing, with no subsequent loss of cogency or plausibility.

Take this strikingly oracular utterance authored (more or less) by Justice Anthony Kennedy:

*Liberty finds no refuge in a jurisprudence of doubt.*²

That certainly sounds impressive, and even definitive, as

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1. George Orwell, *Confessions of a Book Reviewer*, http://www.george-orwell.org/Confessions_of_a_Book_Reviewer/0.html (last visited Aug. 29, 2016) [<https://perma.cc/46CZ-VD9R>].

2. *Planned Parenthood of Se. Pa. v. Casey*, 503 U.S. 833, 844 (1992).

phrased. Still, a certain awkwardness arises if we re-phrase the matter:

Liberty finds no refuge in a jurisprudence of dogmatism.

That sounds just as good, if not better, than the canonical version now entombed in the United States Reports.

This particular game can be played with many of the Supreme Court's most celebrated opinions. For example, here is Justice Kennedy on why the Due Process Clause and the Equal Protection Clause make it unconstitutional to restrict marriage to heterosexual, at least putatively monogamous couples:

*The Constitution promises liberty to all within its reach.*³

That phrase is designed to elicit a certain warm fuzziness in the reader, which can be produced as long as one does not make the mistake of focusing on what is being asserted. Because after all:

The Constitution does not promise liberty to all within its reach.

And so on.

Robert Nagel has spent more than forty years chronicling similar absurdities, and he has done so with relentless analytical rigor and sardonic wit. This rhetorical combination can often make a reader smile, as long as he himself is not the target of the critique, and perhaps even sometimes when he is.⁴

Nagel is the American legal academy's foremost practitioner of what can be called "culturally conservative critical legal studies." That is to say, he has deployed both the intellectual methods and the contrarian sensibilities of critical legal studies—an intellectual movement that, when it was still a going concern, defined itself in self-consciously leftist terms—to critique constitutional law doctrine from a culturally

3. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

4. For example, I don't think it is too much to hope that the essay linked below elicited at least a rueful chuckle or three from both Robert Bork and Ronald Dworkin: <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4682&context=uclrev> [<https://perma.cc/P4N3-Y7FH>].

conservative perspective.

He has done this necessary and important task brilliantly, and the study of American constitutional law has been enriched in many ways by his work.

Now, in the spirit of Nagel's work, I want to raise another awkward question: Is the kind of critique Nagel, and other critically-minded students of the American legal system, provide, something that *law students* should be paying for, and, if so, how much should they be paying to support such work? (It should be unnecessary to add that this same question in turn applies with, if anything, even more force to meta-critiques such as this one.)

To put it another way, is there a certain irony to requiring law students to so heavily subsidize the production of academic texts whose primary purpose is to critique the intellectual absurdity of so much of the material those students are required to study?

I want to suggest that this is a much more difficult question than the legal academy acknowledges. To be more precise, far from being difficult, this question is simply invisible to most legal academics, who consider the fact that their students are paying for the production of legal scholarship to be so non-problematic that they generally forget that they are doing so.

Yet to answer these questions cogently, we must first establish what is being subsidized, and at what cost. In a recent article, Jeff Harrison and Amy Mashburn estimate that American law school professors are now publishing about 8,000 law review articles per year, and that the average cost of production for each of these articles is around \$30,000.⁵ Their (very conservative) estimate yields the conclusion that law review article production costs \$240 million per year. But where is the money for all this coming from?

Most law schools draw the vast majority of their operating revenue from student tuition, which means that law students—and to an increasing extent federal taxpayers—are paying to

5. Jeffery L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 84 (2015). Their estimate is conservative because they are using conservative figures for both law faculty compensation, and for how much of their employment time law faculty spend on producing scholarship.

produce this rather frightening torrent of texts.⁶ Over the past few decades, the pace of law review article production has increased markedly, both because law school faculties are much larger now (faculty-student ratios fell by half between 1978 and 2013), and because faculty members now produce much more scholarship per capita.⁷

The cost of law school attendance has also markedly increased. The following series of figures captures, in constant, inflation-adjusted dollars, just how much tuition has risen at ABA-approved law schools over the past couple of generations, starting with Harvard Law School's annual tuition and fees:

1953: \$5,669
1963: \$10,394
1973: \$13,906
1983: \$20,280
1993: \$30,905
2003: \$42,292
2013: \$54,974
2016: \$63,268⁸

However, Harvard's tuition has tended to be about 20% to 25% higher than average private law school tuition, which, expressed in constant 2016 dollars, looks like this:

1956: \$4,178
1974: \$11,232
1985: \$16,803
1995: \$26,480
2005: \$35,550

6. Frank H. Wu, *Reforming Law Schools: A Manifesto*, 46 U. TOL. L. REV. 417, 445 (2015).

7. Faculty-student ratios fell from about 27 to 1 to about 13.5 to 1 between 1978 and 2013. See *Statistics*, SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, http://www.americanbar.org/groups/legal_education/resources/statistics.html [<https://perma.cc/A275-7Q4E>] (last visited Aug. 29, 2016). I estimate that the per capita law review publication totals of law faculty roughly tripled between 1970 and 2012, based on the relationship between total law review publications and total faculty.

8. Tuition and fee totals are taken from annual editions of the Harvard Law School Catalog. HARV. L. SCH. CATALOGS (1953–2006), <http://hls.harvard.edu/library/digital-collections-and-exhibitions/harvard-law-school-catalogs/> [<https://perma.cc/8BBR-RZ2E>]. Inflation adjustments are based on the federal government's Consumer Price Index.

2015: \$45,467⁹

Over the past forty years, average public law school resident tuition has risen at an even faster rate than private school tuition, climbing from \$3,438 in 1974 (in 2014 dollars) to \$24,946 in 2014.¹⁰

A central justification for the extraordinary increase in law school tuition is that it was necessary to finance greatly expanded faculties, whose members would enjoy lower teaching loads, summer research stipends, sabbaticals, research leaves, increased travel budgets, and other incentives to produce more, and hypothetically, better scholarship.¹¹

It's clear that this revenue explosion has helped produce more legal scholarship as the number of law review articles being published annually roughly quadrupled over the past four decades.¹²

Has it all been worth it? No, at least not by any conceivably plausible metric of cost-benefit analysis. However, individual judgments will surely differ.

Defenders of the proposition argue that a ten-fold increase in tuition is justified because of the explosion of legal scholarship that it has produced. However, they invariably focus on only a tiny slice of that literature—the part of it that has arguably had some lasting intellectual or practical value.

Professor Nagel's work belongs to this exceedingly rare sub-genre of legal scholarship. The problem, of course, is precisely that it is so rare. If the typical law review article bore any qualitative resemblance to Nagel's work, then the question of whether it is justifiable to charge law students between four

9. Average private law school tuition has been derived from the following sources: for 1956, SPECIAL COMM. ON L. SCH. ADMIN. AND UNIV. RELATIONS, ASS'N OF AM. LAW SCHS., ANATOMY OF MODERN LEGAL EDUCATION 91 (1961); for 1974, John R. Kramer, *Will Legal Education Remain Affordable, By Whom and How?*, 1987 DUKE L.J. 240, 241–43 (1987); for 1985 through 2005, SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, *supra* note 7; and for 2015 from the author's calculations, based on Form 509 disclosure documents.

10. For 1974 figures, *see* Kramer, *supra* note 9, at 242–43; and for 2014 figures, *see* Matt Leichter, *Law School Cost Data (1996–)*, THE LAST GEN X AM., <https://lawschooltuitionbubble.wordpress.com/original-research-updated/the-lstb-data/> (last visited Sept. 5, 2016) [<https://perma.cc/9595-CHX6>].

11. *See* Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J. L. REFORM 177, 187–91 (2012).

12. Author's calculation, based on quantitative survey of annual law review bibliographies.

(at private schools) and eight (at public schools) times more to attend law school than it cost when Nagel joined the legal academy would be difficult and interesting. But it doesn't, and it isn't.

The overwhelming majority of legal scholarship has no intellectual or practical value. Rather, most of it goes unread and uncited by anyone beyond the author and at most a handful of his or her professional colleagues. It is completely forgotten by everyone immediately after publication, if not before.

Given the conditions under which such scholarship is produced, this is hardly a surprise. As I have pointed out elsewhere:

Recall philosophy professor Harry Frankfurt's dictum: *Bullshit is unavoidable whenever circumstances require someone to talk without knowing what he is talking about.* The "Socratic method" consists largely of people pretending to be lawyers analyzing texts written (well not actually written, but at least signed) by lawyers pretending to be historians, economists, sociologists, semioticians, moral philosophers, etc. In other words, these are almost ideally synergistic conditions for the production of bullshit masquerading as something else (a redundancy is by definition something pretending to be something it is not).

Legal scholarship is produced under pseudo-academic conditions that form a fertile breeding ground for very heavily footnoted bullshit. Consider how legal academic publication almost always takes place. People who generally possess no formal academic training beyond what they received in law school (that is, none) write "law review articles." In the vast majority of cases, these articles consist of "doctrinal analysis," i.e., treating appellate court opinions as texts that deserve to be taken seriously on their own terms. We are already, in other words, knee-deep in bullshit.

But it gets worse. Who is doing the evaluating of the supposed cogency of this analysis? Law students, that's who. So people who, incredibly enough, *are even more ignorant than law professors about the actual legal system*

are charged with undertaking the equivalent of academic peer review for the purposes of legal scholarship

Now it's true that, at our more exalted law schools, larger and larger percentages of the faculty are people with advanced degrees in fields other than law (a solid third of the tenure-track faculty at top ten law schools now hold Ph.Ds in this or that.) While this may improve the quality and broaden the subject matter of the legal scholarship produced by these faculties, it only exacerbates the sheer absurdity of constructive, or literal, (there are now several dozen law professors at top ten schools who don't hold law degrees) non-lawyers supposedly teaching people how to be lawyers, especially in a publication system in which law students are supposed to be the academic gatekeepers evaluating the latest application of behavioral economics or sociological regression analysis or literary theory to the cases and controversies they study in their law school classes.¹³

Beyond all this, the increasing tendency to treat higher education as if it were a business has created various perverse metrics for faculty evaluation, such as measuring "productivity" in terms of how much scholarship, or at least putative scholarship, professors publish. It should be obvious that publishing more, rather than less, bad scholarship is worse than worthless. It should also be obvious that having an informal, or increasingly formal, norm that every faculty member should publish a law review article every year makes about as much sense as requiring every faculty member to publish a novella every year. The former norm is no more likely to produce more good scholarship than the latter would be likely to produce good literature.

To read Professor Nagel's work is to be struck by the fact that he published something when he had something original and interesting to say. If law schools went back to something resembling the financial structure they maintained at the time Nagel entered the legal academy forty years ago, law professors

13. Paul Campos, *On Bullshit and Law Schools*, LAWYERS, GUNS & MONEY (Dec. 13, 2011), <http://www.lawyersgunsmoneyblog.com/2011/12/on-bullshit-and-law-schools> [<https://perma.cc/2SBJ-BMNV>].

would publish much less, which in turn means they would be somewhat more likely to publish only when they actually had something to say. As a consequence, what they did publish would then have a higher probability of being original, or interesting, or, occasionally, both original and interesting.

Law school would be much cheaper, and a much higher percentage of legal scholarship would be worth reading. Win/win, as they now say in both the business schools and the Chancellor's office.