
OPEN ACCESS TO INFINITE CONTENT
(OR “IN PRAISE OF LAW REVIEWS”)

by
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This Article is about legal scholarly publication in a time of plenitude. It is an attempt to explain why the most pressing questions in legal scholarly publishing are about how we ensure access to an infinity of content. It explains why standard assumptions about resource scarcity in publication are wrong in general, and how the changes in the modality of publication affect legal scholarship. It talks about the economics of open access to legal material, and how this connects to a future where there is infinite content. And because student-edited law reviews fit this future better than their commercially-produced, peer-refereed cousins, this Article is, in part, a defense of the crazy-beautiful institution that is the American law review.

I.

The American Association of Law Schools has its Annual Meeting each year in January. The Meeting ostensibly operates around a series of panel sessions with eminent speakers talking on topics running the alphabet from Administrative Law to Zoological Law; but its real function is as a three day boondoggle to sample the delights of tourist destinations (usually San Francisco). It’s a little like the pharmaceutical and medical conferences that—wow, what an amazing coincidence!—happen to be run at a golf resort. No one really goes there to learn anything, or to engage meaningfully on any topic on the program; I mean, *as if*. Which is why I was amazed when, at one of the presentations at the 2005 Annual Meeting, not only did I learn something, but I also actively engaged in a topic; actively engaged to the point of picking a fight with a senior law professor.

It went like this. An eminent scholar from a top twenty law school was talking about the problems with student-edited law reviews, genuflecting at all

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the established stations of the cross: student editors have no context to comprehend what is good scholarship, they are incapable of understanding law professors, they think longer articles are necessarily better than short ones, they wear jeans and floss infrequently, and so on. As a result, said the professor, he had started a peer-reviewed journal that conformed more closely to the scientific model, with shorter articles, a narrow focus on a particular type of scholarship, and a rigid double-blind peer refereeing process. So far so good, one might say. Like motherhood and apple pie, it's hard to argue against anything that might increase the sum of human knowledge, and the prospect of another quality journal to encourage new scholarship is always welcome. But the presenter went beyond this: he argued that his commercially-produced, peer-edited journal would be better than student-edited law reviews, and that as a result it should be bought instead of student-edited reviews. He made the case to the assembled law librarians, faculty, and those who make scholarly purchasing decisions, that peer-edited journals like his should be bought in preference to student-edited law reviews.

It was at this point that I discovered something about myself that I hadn't known until this point. That deep down, I loved law student editors and the journals that they produce. Until that moment I had firmly believed in the superiority of the peer-edited model. I had cheerfully joined in when my colleagues bemoaned the problems with student-edited reviews. And I had writhed in shame when explaining to colleagues in scientific and humanities disciplines that, yes it was true, students in law really did choose, edit and publish faculty scholarship. Yes, yes, I would say, the lunatics really have taken over the asylum, ha, ha, and I wish I had the time/strength/courage/motivation/money/etc to establish my own peer-reviewed-and-edited journal. "Perhaps I will when I get tenure," I would say.

But when in San Francisco the senior professor exhorted the law librarians to avoid student reviews, I suddenly realized that I had been terribly, terribly wrong. My view about the insanity of student-run law reviews stemmed from an outdated model of publishing that assumes that a central function of publishers is to select quality content. I had assumed that it matters a lot that the material that is published in top journals should be higher quality than that which is published in lesser journals. What my epiphany in San Francisco showed me was that this assumption is profoundly wrong. That what matters these days is the opportunity for readers to find what they want in an infinity of content. Until my epiphany, I had been mistaken, because I had been assuming that scholarly publishing still operated under conditions of scarcity. But it doesn't, it operates under conditions of plenitude.

So this Article is about legal scholarly publication in a time of publishing plenitude. It is an attempt to explain why the important questions about the future of publishing are about gaining access to an infinity of content. It's an essay about open access to legal material, and how we might ensure that absolutely everyone can obtain access to infinite content in law. It talks about the economics of open access to legal material, and the role the Science Commons is playing in building-out the infrastructure of open access to legal scholarship. And because student-edited law reviews are much more likely than

their peer-refereed counterparts to produce content that is freely available to the whole world this Article will begin (and end) as a perfume-scented mash-note to law students, a love song to the crazy-beautiful publication modality that is the American law review. It will resemble nothing so much as a schmaltzy Hallmark greeting card, and will almost certainly be embarrassing to them and to me.

But saccharine-sweet or no, it is all true.

II.

Law reviews are a soft, slow-moving target for professorial browbeating. Apart from the fact that they remain an idiosyncratic response to the drive to produce academic scholarship, the editors are not in a position to defend themselves against the professor-critics who are about to assign their grades. But while some of the criticisms may be motivated by unhappiness at student judgments about the author's latest article or a general dissatisfaction with the form,¹ the structural quirkiness of law reviews does lead to concerns that appear at first blush to be reasonable: for example, the charge that law review editors are unqualified to judge the content of the material they are ostensibly assessing,² or the claims that law professors must abandon any personal style and must write in a style that conveys a "seriousness" that signals that this is an important, law review-like work,³ and so on.⁴ Richard Posner falls into a well-established canon of criticism of law reviews—although he is distinguished

¹ Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1937).

² See, e.g., James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 537–39 (1994) (labeling the law review system as profoundly broken, and listing numerous suggestions for reform of law reviews); Juan F. Perea, *After Getting to Yes: A Survival Guide for Law Review Editors and Faculty Writers*, 48 FLA. L. REV. 867, 870 (1996) (explaining the dynamic that leads to over-editing by law review editors); Leo P. Martinez, *Babies, Bathwater, and Law Reviews*, 47 STAN. L. REV. 1139, 1140 (1995) (detailing how editors become arrogant); James Lindgren, *Fear of Writing*, 78 CAL. L. REV. 1677 (1990); Roger C. Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. LEGAL EDUC. 1 (1986). *But cf.* Phil Nichols, *Note, A Student Defense of Student Edited Journals: In Response to Professor Roger Cramton*, 1987 DUKE L.J. 1122 (1987) (defending student-edited law reviews against Cramton's charges).

³ Ann Althouse, *Who's to Blame for Law Reviews?*, 70 CHI.-KENT L. REV. 81, 82 (1994) (suggesting that law professors' concern at writing in a recognizable "law review" style leads authors and editors to render the articles parodies of this style); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990).

⁴ Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 628–54 (1996) (summarizing and assessing the majority of complaints against law reviews); Arthur D. Austin, *The "Custom of Vetting" as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1, 4 (1990) (arguing that using student-edited law reviews as the primary mode of scholarship in law is deserving of the disdain it attracts from other disciplines).

both by his eminence and the fact that he can write—and like others⁵ he concludes that the answers to all our problems will be solved by showing some good old-fashioned backbone, and by introducing peer-reviewed journals to add discipline to this messy, unruly bunch.⁶ As an elderly professor once joked to me, “the difference between law reviews and the Boy Scouts of America is that the Boy Scouts have adult supervision.”

The criticisms really boil down to concerns about poor editing and poor selection. But it’s far from evident that peer-refereed journals are actually better than student-edited journals on either of these functions. Take editing first. We might suppose that professional editors will be more competent than students. However, the reality of editing in peer-refereed journals is a long way from the halcyon image projected by the term “professional editors”. Of course there are some charming mythological tales about well-known authors whose unreadable manuscripts were rescued by brilliant editors, but this is mostly an illusion; and at best the stories describe an exceptional case within trade-press fiction publishing (and at worst, are probably lies). Even if true, these stories just don’t apply to the sorts of publishing at issue here. In the peer-refereed model there is almost no professional editing of one’s work, in the sense that we usually mean when we talk about “editing,” which is to say “copy editing.” Peer-refereed journals rely on external readers for this type of editing. The reviewers of a peer-reviewed work will often generate various disagreements and complaints that the author must address within the framework of the revise-and-resubmit process. But once it gets through this stage, there is little editing to improve the quality of the writing, there is almost no proofreading of articles, and absolutely no citation checking at all. The reason for this is simple: editing costs money, and the owners of the majority of peer-refereed journals—commercial publishers like Reed-Elsevier—need to keep costs low in order to maximize profits. Large scholarly publishing houses are accustomed to posting profits above 20% per annum, and they don’t do so by overstaffing the editorial pool with sub-editors and footnote checkers.

There *is* a publishing arena where legal authors do experience serious editing: in the periodicals and newspaper markets. Law professors regularly publish in the op-ed pages of leading papers, and popular magazines fairly often publish work by law professors. *Legal Affairs* is a good example, since it featured populist, well-written, and intelligent accounts of legal issues, and some legal scholars are capable of writing to all these criteria; but it’s not unknown for law professors to publish in commercial magazine outlets like *Slate* or *The New Yorker*. The professional editors at these magazines edit

⁵ See, e.g., Gerald N. Rosenberg, *Across the Great Divide (Between Law & Political Science)*, 3 GREEN BAG 2d 267, 270–71 (2000) (describing the advantages of peer-review over student-editing).

⁶ Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132 (1996); Richard A. Posner, *Against Law Reviews*, LEGAL AFF., Nov.-Dec. 2004, available at http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp.

authors heavily, because they really care about delivering compelling material to their readership: if they don't they'll go out of business.

However, in my experience, one of the most obvious differences between popular magazines and law reviews is the magazines' commercial interest in having fewer words to express an idea, since the costs of publishing must be kept down. And these editors are usually "professional" in the sense that they have training and experience. But few authors really enjoy the experience of having a professional editor indicate that they need to "cut the word length in half" and/or "punch this up a bit." One's work is definitely different after the tenth redraft, and perhaps it is better. But professional magazine editors are very similar to student law review editors: they want to make the article better, and they want to make it read more like how they would write it. In this, law reviews and popular magazines operate in the same way, even if they have different readerships.

So if the main problem with law reviews is not found in editing then it is presumably present in the selection function. The concern with student-edited reviews is based on students' supposed inability to distinguish good from bad, and in their inability to improve the work through informed commentary. Within the peer-refereed model great weight is placed on this latter point, since expert commentary on the substance of the article is the core quality control function and the unique value proposition of peer-refereed journals. The author is often advised to revise along the lines of the referees' reports, and resubmit the piece once the problems are worked through. But an equivalent process already occurs in law review articles, through the elaborate vetting and circulating of drafts that is common in legal article publishing.⁷ In law it is unusual to see a dagger footnote that doesn't thank at least two or three or fifty colleagues for reading and commenting on the piece. This serves much the same purpose as the commentary function of the peer review process, and provides arguably more helpful commentary than peer reviews. Referee's reports often reflect the particular agenda of the referee, they are often inconsistent with other referee's reports, and might usefully be recast as "If I were writing this article, I would write it in this way. . ." Of course, this is true of responses by commentators within legal scholarship, but the difference is that law professors can usually ignore external comments if they're wildly off base. Indeed one of the great pleasures of the law review editing process is telling commentators and student editors to go to hell. Authors within the peer system (and the commercial magazine system for that matter) are not so fortunate: long are the nights and hard is the way for those benighted authors who are forced to reconcile two or more inconsistent referee's reports in order to satisfy the entry requirements of the peer-refereed journal. Beyond this, it's not clear that peer-refereed journals are actually as good as commonly thought on the one issue that they hang their hats: there is evidence that peer-reviewed articles are not actually that great at producing scientifically valid material.⁸

⁷ Austin, *supra* note 4, at 2-3.

⁸ Daniel Engber, *Quality Control: The Case Against Peer Review*, SLATE, May 19, 2005, <http://slate.msn.com/id/2116244>.

So if there is no particular magic in peer-refereed journals, then what is it about student-edited law reviews that generates so much criticism? In the end I think it's really simple: we legal scholars just hate students assessing our work. We hate asking students to consider our article. We are disgusted at our role as supplicants when we beg them for an expedited read. We detest the embarrassment at disclosing that our only offer is from a journal so low ranked that we have to spell it for the student at the other end of the line and explain that, yes, this journal is published at a law school (even if it is one that is still seeking AALS accreditation). We can hear the laughter in their voice when they ask whether our offer is from the *main* review at Podunk Law School, or one of their "specialty" journals. We could perhaps bear the rejections from *every goddamned one* of the top law reviews if we knew that Colleague X or Faculty Member Y had made this decision. In the comfort of the Faculty Lounge we routinely accuse our peers of each of the deadly sins of pride, envy, gluttony, lust, anger, greed and sloth; to say nothing of fornication, idolatry, stupidity, and bad teaching. Adding "poor academic judgment" to the list of faculty members' sins is reassuring, and takes the sting out of our friends' embarrassed expressions of condolence at the terrible placement of our last article. But to receive that appalling, thin letter, signed by student editors, that begins: "The *Harvard Law Review* receives 63,349,561 submissions a year and we can only publish a small fraction of these submissions..." Well, this is more than any writer should be forced to bear. As we patiently explain to the law review editors, this is a little like having a high school junior assessing their law school work. (At which analogy the editors of *Yale Law Journal* continue to smile wryly, politely agree, and stick by their original decision to reject our latest masterpiece.)

We take this psychic anguish at rejection and extract a broader lesson: articles which *should* be published in top reviews (i.e., my articles) are regularly *not* published there, and a number of articles that *are* published in top law reviews (i.e., your articles) do not "deserve" to be there and should be published in much lesser reviews. In short, we conclude to ourselves, law students cannot select for quality.

And here is where things become interesting. Because it turns out that this statement may be completely true, but it simply doesn't matter.⁹ That's right, it doesn't matter whether students can or cannot select for quality. It would matter a great deal if, for example, there were more articles than slots to accommodate those articles. This state of affairs applies to a greater or lesser

⁹ I actually think that this is mostly wrong, and that taken as a group law students are quite good at selecting quality. It's impossible to prove because of causational overlaps, quality assessment problems, and path dependence, but I'm sure that scholarly work published in the top reviews is objectively better than that published in the law review band ranked below these reviews. And I'm confident that one can make the same argument for each band of journals (i.e., the second-ranked band is better than the third- and fourth-ranked band, etc). In this I disagree with Mike Madison's contribution in this symposium: Michael Madison, *Open Access and the Idea of the Law Review*, 10 LEWIS & CLARK L. REV. 901, 913-14 (2006). However as I explain above, I don't think it matters who is right on this question. The changes in publication modalities remove the problem.

extent in fields like economics, or experimental psychology. As a result there are some very good articles which simply fail to be published at all, either because the piece is heretical, or difficult, or has been crowded out by work by more recognizable authors, or simply that it is perceived as not very interesting. But in law there are so many law reviews that every article can be published, and the author's only concern is whether the review making the offer is sufficiently esteemed to make publication in that journal palatable. Law may be the only discipline where authors routinely pull articles from journals which have accepted the piece, on the basis that they were really hoping for placement in a higher ranked journal, and can't yet stomach the thought of being published in *Whatsamatta U. L. Rev.*

The thesis that students can't select for quality would also matter if, once the article were published, there were profound differentials in access to the piece based on the level of the publishing journal. So for example, if 100% of law libraries bought *Harvard Law Review* but only 50% bought *Podunk Law Review* then publication in *Podunk* would affect the ability of the article to be read and for the ideas there to count. But even though *Harvard Law Review* may be more likely to be found in law libraries than *Podunk*, Westlaw and Lexis provide access to them both. So the vast majority of readers of legal articles—law students, professors, and practitioners—will have even-handed access to all legal articles whether published in *Podunk* or *Harvard*.

Of course one might argue that publication in *Harvard Law Review* still matters because there is a differential in perceived quality between articles published there and those published in *Podunk*. We might surmise that the same article published by *Harvard* will gain more attention and respect than the same article published by *Podunk*.¹⁰ If this is true then student inability to select for quality does matter a little, since there is the chance that the reception of important ideas that are published in bad journals will be degraded; and the corollary of course is that bad ideas that are published in good journals will be unfairly given undue credit. This is, I think, the strongest argument against law review editors; but even this is a weak claim. It might be true at the margins, but those reading law reviews do so for instrumental reasons, not for pleasure. Judges, professors, and attorneys preparing a case will read everything they can get their hands on, and will regularly read articles that appear in journals so low ranked that science is yet to come up with instruments capable of detecting their influence. It's true, of course, that articles in *Yale Law Journal* are more likely to be influential than articles in *Podunk Human Rights and Food Preparation Law Review*. But then the articles in *Yale* really are better than those in *Podunk*, and the halo effect of publication in a top ranked law review has little to do with the relative difference in reception.

The upshot is this: the "selection of quality" argument against student-edited law reviews is really the only meaningful argument against them; and even this argument is mostly a canard. But once again I want to be generous to the critics and accept at face value the argument that students can't select for

¹⁰ This is part of Mike's argument about prestige mattering a great deal in law review publishing. See Madison, *supra* note 9, at 914–15.

quality. Let us accept *arguendo* that this leads to problems with reception of ideas within law under the current conditions of scarcity in publication. What is really interesting here is that we are moving into an era where, even if this argument is true at the moment, the significance of placement will decline because of the way that the internet is reshaping the way that users can access content. So, as the profound changes of the “new internet” take hold, the entire argument—that students can’t select for quality and this matters somehow—collapses into irrelevancy.

III.

Publishing is changing, because our information-sharing practices are undergoing radical revision. We’ve had hundreds of years of experience with certain types of ways of sharing information, and have built elaborate regulatory edifices to ensure that information is effectively shared. Copyright is, perhaps, the most obvious of the *grands projets* that make up the regulatory architecture of information sharing. It exists to ensure that socially valuable information moves from a creator to society at large, and does so by granting property rights to generate incentives for that movement. Although it is commonly thought that the copyright incentive is aimed primarily at the author—a conception that both publishers and the Author’s Guild are keen to promulgate—the reality is that incentive operates mostly in favor of the commercial intermediaries who publish and distribute the work. After all, authors, artists and creators like to get paid for their work but they often have mixed motives: in many cases they just want their fancy prose or catchy song to get out to an audience for the validation of their undying genius, or to demonstrate that they were the first with a ground breaking public policy proposal, or to show that they are a talented artist and from this maybe get a commission to produce artwork for a magazine cover or get a gig playing at a well-paying music arena, or whatever. But for commercial firms the motivation is pretty stark: they have to make money. So if book publishers, movie studios, record labels, and other content intermediaries are to play a role in the movement of information from creator to society, then they need the commercial incentives that copyright provides.

Until recently this made perfect sense because the processes necessary to move information from the creator to society were expensive. As a result society needed commercial risk-takers—which is to say publishers and other intermediaries—to underwrite this activity, otherwise it just wouldn’t happen. Consider all of the basic processes that ensure this movement of content from the creator into society.¹¹ In order, they are as follows: creation of the content, selection of it as worthy of commercial publication, production and reproduction of the commercially-consumable content product, distribution of the product to the retail environment where it can be acquired, marketing of the product so that consumers are aware of it, and then its eventual purchase. At

¹¹ Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2005).

one point these processes all required well-capitalized intermediaries for each of them to operate effectively: print stock costs money, television cameras cost money, warehouses cost money, and so on.

But as Greg Lastowka and I have documented elsewhere,¹² these processes are now cheap and available to the creator of the work to undertake if she wants to. Consequently, the economics have fundamentally changed. The general purpose computer and the internet have meant that creation, production, distribution, and use are now only a mouse click away. We've seen this emerge over the last ten years or so, and this has driven the (dire) prognostications about the death of content industries at the hands of file-sharers. But what hasn't been recognized until recently is that the processes of selecting "quality" content for commercial publication and the marketing of that content product—two processes that would seem to be very expensive and difficult for amateur creators to do—are also being radically altered. Rather than a creator or publisher spending money pre-judging that content is valuable—which is another way of saying, selecting them for commercial exploitation—and then spending more money to promote that content, the new approach to selection and promotion operates through the creator posting her content to a vast, undifferentiated information space called the internet, and the user then undertaking the selection for herself. It works because there is now no longer any need to engage in selection *ex ante*. Cheap digital storage and transmission through distributed networks means that the cost of putting content on the network is fast moving towards zero. This releases us from the resource constraint of paper and ink and other physical resources involved in the production of the content and the medium on which the content is stored.

This is profoundly significant because it radically changes the nature of those whom we think of as "content creators." Now everyone with access to a computer and the internet becomes a creator with much the same access to society as the best capitalized content companies. Lastowka and I call these content producers "amateurs" because they lack the commercial motivations for the production of content,¹³ and Benkler estimates their current numbers at around a billion people (and rising).¹⁴ The net effect of this over the next ten years is that we can assume that amateurs will generate, for pretty much all practical purposes, infinite content. The significant resource constraint will no longer be in the production and distribution and marketing of the media or publication product, but rather will be the user's limited time to find the content that she wants. An infinite amount of content (some of which may be extraordinary, but most of which is, at best, okay) is much more frustrating for the average user than a prior set of pre-selected works (all of which are pretty

¹² *Id.*

¹³ *Id.* In calling them "amateurs" we are making no claims as to the quality of their work (in the sense that it is "amateurish") but only that the content is produced without expectation of commercial return and that therefore the motivation of the creator is non-commercial.

¹⁴ YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006).

good) because we have neither the unlimited time nor the unlimited patience to sort through the infinite content.

This is where distributed selection through “social software” emerges as a likely answer to the temporal resource constraint. One type of social software—collaborative filtering—allows an individual to note her personal preferences in relation to a particular unit of content, and then cross-index those preferences in order to provide recommendations to others who haven’t seen that unit of content before.¹⁵ An example should make the point clearer. Google ranks the relevance of any given Web site by determining the number of other sites that are linked to it. As Edward Felten has explained, “Google is not a mysterious Oracle of Truth but a numerical scheme for aggregating the preferences expressed by web authors.”¹⁶ Google filters out the vast panoply of irrelevant material by collecting relevance assessments made by other users, and in doing so finds relevant material from the almost-infinite content of the web. Of course, social software methods can be even more closely personalized than Google, in a number of different ways. In advanced collaborative filtering mechanisms, the idea is to match a person—you, for example—with people who are similar to you in meaningful ways, and who have rated or reacted to content that you might be interested in. If we can categorize you as belonging to a group—say a group that likes books with particular subjects and themes—then the book ratings or book purchases or book reviews (or whatever mechanism of expressed preference) of similar people in that group can be used to recommend new books that you will find appealing. Familiar commercial examples include Amazon’s book recommendations, and Netflix’s movie recommendations.¹⁷

This is not the only means of connecting the reader or user with material that she will like. Blogs often have “blogrolls” which indicate other blogs which the author of the blog finds useful: thus if you like the content of “The Daily Kos” or “Instapundit,” then you’re probably going to enjoy the blogs they mention in their respective blogrolls. A more sophisticated version of social recommendation is the Slashdot moderation system.¹⁸ Slashdot is the “News for Nerds” site, where users post interesting snippets of information, and the community of readers are allowed to comment on the posting. Most interesting here is not that the site provides news, reviews, and commentary, but that it also provides a rating function for the commentary. Through a very

¹⁵ The idea underlying collaborative filtering—although not the specific algorithms which are used, and which differ from implementation to implementation—is perhaps best described by the name of one of the first systems, *People Helping One Another Know Stuff* or *PHOAKS*. See PHOAKS Index, http://www.supremelaw.org/copyrite/phoaks.com/www_phoaks.com.htm. The idea is to use the preference of various folks who are like you to recommend content for you.

¹⁶ Edward W. Felten, Freedom to Tinker, *Googlocracy in Action* (Feb 3, 2004), <http://www.freedom-to-tinker.com/archives/000509.html>.

¹⁷ The systems are primarily automated, collaborative systems but have human overrides. See Lisa Guernsey, *Making Intelligence a Bit Less Artificial*, N.Y. TIMES, May 1, 2003, at G1.

¹⁸ See Slashdot, <http://slashdot.org/>; BENKLER, *supra* note 14, at 76–77.

elaborate system of voting that relies on accrued reputation of the voters, highly specific assessment of quality is made and collected.¹⁹ The reader of the site can determine what quality of content she wishes to view.²⁰ Numerous other approaches are being explored, and we are witnessing a flourishing of innovative ways of assessing quality of content after it has been created, not before.²¹ Informal methods of exchange are also obviously important: think of how you found out about your favorite Youtube videos and you can see how social arrangements and word of mouth can be coopted to drive content use.

The net effect of these changes in publication is profound. The rise of the general purpose computer, the internet, and social software methods means that we're moving into a period where there is the prospect of near-infinite digital content stored on the internet, and where the content can be found by the people who want to use it. This occurs because the means of production, dissemination and selection are in the hands of amateurs, and the means of finding interesting content is in the hands of the users. In sum, these changes signal a profound shift in our assumptions of how content is produced and how it is consumed.²² The one-to-many period of mass media production and consumption is effectively over.²³ This change will have remarkable effects on publication in general, and will require us to think about our current choices in the information policy, communication policy, and intellectual property law.

But that is a topic for another day. Here we're thinking about the nature of legal scholarship, and the implications of these foundational changes are just as remarkable as those for publication in general. First, as Larry Solum explains in detail in his contribution to this Symposium,²⁴ the categories of recognized scholarship are likely to expand, as new forms are explored and new opportunities emerge. The canonical journal format of the scholarly article arose from a particular, historically contingent set of publication conditions, beginning with correspondence between scholars.²⁵ But though the journal is

¹⁹ In fact the process is more sophisticated than this, because each comment is rated by multiple users and so ends up with a rating across a range from -1 (a highly negative rating) to +5 (a highly positive rating).

²⁰ The reader of the site can determine what level of quality she wants to view by determining the threshold of quality that is displayed: thus it's possible that she would set her threshold to -1 and see all commentary no matter how bad, or set it at +5 to see only the very highest quality material.

²¹ For example, Wikipedia assumes that content should be posted first and amended later, with a series of complex rating and assessment functions to identify high quality content. See Fernanda B. Viégas et al., IBM Research, Talk Before You Type: Coordination in Wikipedia (2007), available at http://www.research.ibm.com/visual/papers/wikipedia_coordination_final.pdf.

²² Hunter & Lastowka, *supra* note 11, at 1016–17.

²³ Which is not to say that there will be no role for mass media, just that its role as the sole/central modality of the production of expressive content is over.

²⁴ Lawrence B. Solum, *Download It While It's Hot: Open Access and Legal Scholarship*, 10 LEWIS & CLARK L. REV. 841 (2006).

²⁵ We still see echoes of their origins in journals like *Physical Letters*, which is a leading journal that can trace its lineage back to a time when it was the publication of letters exchanged between amateur scholars.

the canonical form, there is nothing sacred about the form in which scholarship is published. There are certain historical reasons why certain forms have emerged and are preferred,²⁶ but it is not hard to see the era of cheap publication and easy access changing scholarly publishing forms. And indeed we already have seen this happening: the emergence of the high energy physics arXiv.org open access repository led to the open access movement, Berkeley Electronic Press and the Social Science Research Network have changed how legal scholars communicate their latest work and how they assess the value of others' work, and blogging, short essays and other novel electronic forms are emerging as legal scholarship that is adjudged worthy of institutional recognition.²⁷

But within the subject of this Article—that is, the new internet publication modality and the nature of the law review article—the most interesting changes arise out of our understanding of selection. As noted above, it is already the case that almost every law review article can be published somewhere, since there are so many general and specialist law reviews. Unlike some other disciplines, one never hears of an excellent law review article that simply failed to find a home, the only question is whether the author is happy enough with their “placement” in *Podunk Law Review*. Which is another way of saying that the selection function within law reviews is not about selection for publication, but rather the sort of psycho-emotional concerns which I noted above, involving angry denunciations about law review editors' inability to appropriately select law professor authors who really, really want to be published in *Harvard Law Review* but only make it into *Podunk*.

The new publication modality created by the general purpose computer, the internet, and social software will not affect this; indeed we can be even more sanguine about allegedly incompetent law review editors choosing the wrong articles to publish. Richard Posner was always wrong in his criticisms of the law review selection function—he thought that it matters that law students are underqualified for their task of selection—but in the next few years he will be even more wrong. We will come to realize that *ex ante* publication-selection by the editors of, say *Yale Law Journal*, is largely irrelevant to the *ex post* use—that is, selection by other scholars for using and citing. I mentioned earlier how the problem of “selection for quality” was the only arguably meritorious claim by the critics of law reviews (although I indicated that this claim was overstated and probably misguided). But even if one accepts this claim on its face as absolutely true at the moment, as the new *ex post* selection function takes hold, we honestly don't have to care whether an article gets published in *Podunk Law Review* or *Stanford Law Review*. The article's reception, availability, and readership will not be determined by imprimaturs of quality like the brand name “Stanford,” but rather by the distributed selection

²⁶ In part this has been due to the standard type of resource scarcity that has been common in all publishing to date; that is, the form, length, and style of the article and the journal emerged to deal with the costs of publication and arose to convey the most amount of information in the most efficient way possible.

²⁷ Solum, *supra* note 24, at 865–66.

function made possible by the computer, the internet, and social software as described above.

Now I'm prepared to accept that social software will not provide a totally neutral selection function; and I'm also prepared to stipulate that the brand names of the "top" law reviews will probably always provide significant brand leverage for articles published in those journals. There are a couple of reasons to recognize this. First off, the internet doesn't flatten the significance of all content down to the same level. This was the mistake of the early internet-changes-everything boosters, who thought that the internet meant that Joe Schmoe's material would have the same visibility as the material coming from large commercial publishers. As Clay Shirky has documented in relation to weblogs, a power law exists in many internet publication forms, even in ones that are as seemingly democratic as blogs.²⁸ The attention given to the most popular blogs is dramatically greater than those given to those lower down in the food chain. And this imbalance is relatively stable over time: the blogs which became popular because of their early mover advantage often remain the top blogs for the long run. This seems to suggest those law reviews which are considered the best now are going to retain that status even as we move towards broader internet access to them.

This observation is intimately connected to the brand power and status of top ranked journals and top ranked schools. Mike Madison saliently explains elsewhere in this Symposium²⁹ the significant role that prestige plays in the legal academy, and it's certain that articles which are published in *Columbia Law Review* will continue to have greater prestige than those published in poor old *Podunk*. But it is a misreading to assume that the "power law problem" and the "prestige problem" means that the new publication environment is just the same as the old one, or to believe that this new environment is problematic. For while power and prestige will continue to matter, user selection via social software will level the playing field dramatically. The readers—law professors, judges, and attorneys—have always been able to distinguish good quality from bad quality in legal literature; but now their recommendations of quality can be propagated through the scholarly network. In the old version of scholarly publishing this is what peer reviewing was actually intended to do. We put scholarly peers in control of assessment of what is worth reading, since "what is worth reading" is the same as "what should be published" if you are suffering under the resource-scarce conditions of old-fashioned print publishing. We no longer have that problem and since the users of scholarly work are, by and large, expert scholars, *ex post* user-selection using social software performs the same basic function in the new publishing modality as peer reviewing performed in the old publishing modality.

In short then, modern practices of scholarly publishing for legal articles have the dual benefits of generating almost infinite content, as well as

²⁸ Clay Shirky, Clay Shirky's Writings About the Internet, Power Laws, Weblogs, and Inequality (Feb. 8, 2003), http://www.shirky.com/writings/powerlaw_weblog.html.

²⁹ Michael Madison, *The Idea of the Law Review: Scholarship, Prestige and Open Access*, 10 LEWIS AND CLARK L. REV. 901 (2006).

performing the same selection-for-quality function as peer reviewing. It is literally the best of both worlds: we get all content published and we get to find the stuff that matters within this infinite content.

This observation has some ramifications for how we should structure law reviews, and how the open access movement fits into the new publication modality. And since this Symposium issue is about open access to legal material, it's time to examine how open access connects to this prospect of infinite content of legal scholarship.

IV.

It is a startlingly happy accident that law reviews are so well-suited to the emerging principles of open access. Open access, as others have explained in this symposium, is the principle that scholarly publishing should be freely available to everyone, without charge, political censorship, or commercial interference.³⁰ The principle comes in many different flavors with lots of different toppings, but at its core is the principle that we should make scholarly content available on the internet, for free, in a format that allows everyone to read it without access restrictions. It is a December-May marriage of two well-suited individuals. The older party in this marriage is the ancient principle that scholarly knowledge must be shared, not only because of ethical precepts about the betterment of mankind through sharing of knowledge—it's hard to argue in favor of restricting, for private profit, access to information about a cure for cancer, or information about the laws that govern us—but also because knowledge builds on knowledge. As Newton put it, he saw as far as he did only because he stood on the shoulders of giants. The younger party in this marriage is, of course, the internet, which radically reduces the costs of production, dissemination, access and use of information, and which has consequently opened up new information possibilities for about a billion of the Earth's inhabitants.

As I've previously argued, there are a range of reasons why open access is peculiarly well-suited to law reviews.³¹ The most obvious of these, and the only one worth repeating here, is the economic argument.³² The usual argument against open access relies on the standard justification for copyright: failing to

³⁰ Bethesda Statement on Open Access Publishing (June 20, 2003), <http://www.earlham.edu/~peters/fos/bethesda.htm> [hereinafter Bethesda Statement]; Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (Oct. 22, 2003), <http://www.zim.mpg.de/openaccess-berlin/berlindeclaration.html> [hereinafter Berlin Statement]; Budapest Open Access Initiative (Feb. 14, 2003), <http://www.soros.org/openaccess/read.shtml> [hereinafter Budapest Initiative]. See Dan Hunter, *Walled Gardens*, 62 WASH. & LEE L. REV. 607, 617 (2005).

³¹ Hunter, *supra* note 30, at 624–37.

³² Those interested in both the moral arguments and other utilitarian arguments in favor of open access, as well as a fuller account of the economics, should consult *Walled Gardens*, *supra* note 30. I repeat the basics of the economics of open access here since this topic worries law review editors, and simple misunderstandings or uncertainties about the economics of law reviews can lead to editors rejecting (unnecessarily) the opportunity of open access.

grant copyrights will result in underproduction of the material because there are significant first copy costs that must be borne by the creator and publisher, and the marginal cost of the subsequent copies is close to zero. Since the audience can engage in costless copying, the creator and producer need incentives to produce the first copy and they need protection against copying. Without this protection they won't be able to profit from their efforts because they will be undercut by free-riders; thus would-be creators will engage in a rational calculus and go off to spend their time and money doing something else that has a better return on investment for them. These creators and producers might be individually better off doing plastic surgery, sweeping streets, or providing corporate tax advice, but society as a whole will be worse off because it will have lost the creative expression that they otherwise would produce if only we had given them exclusive rights in their creations in order to provide an economic incentive.³³

So goes the standard economic argument for strong protections in copyright.³⁴ But American law reviews do not conform to these economic assumptions. Law reviews are not primarily interested in a return on investment but rather on furthering the mission of the law school, either by way of a branding exercise, education for students, or contributing generally to the production of knowledge.³⁵ As Jessica Litman cogently demonstrates in this Symposium, when all the first copy costs of law review articles are compiled, numerous law schools (and one business school) are paying hundreds of thousands of dollars for the production of this issue of the *Lewis & Clark Law Review*.³⁶ If the University of Pennsylvania were looking at the issue in purely commercial terms, it is utterly impossible to justify the donation of any part of my ridiculously large salary and my remarkably generous benefit package towards this Symposium. It is also extremely difficult to make the economic case that the Law School of the College of Lewis & Clark should be publishing this Symposium, even though in some sense it is the beneficiary of the donation of my time and salary. The costs in producing this Symposium are exceedingly unlikely to be recouped by subscriptions to the hardcopy or royalties from Westlaw and Lexis. The articles in this Symposium issue are only viable because of a subsidy from the Law School's endowment, student tuition, or both. This is a subsidy I happen to think is well-spent, but any justification for the application of this subsidy is not found in the economic literature. It's generated from our sense of what is necessary for the ongoing production of knowledge and the role of universities and law schools in that process of knowledge production.

In short then, the law school publishers of law review articles are not primarily motivated by commercial considerations in producing content.

³³ BENKLER, *supra* note 14, at 70.

³⁴ And of course these arguments are increasingly subject to challenge, in arenas outside the narrow one examined here.

³⁵ See Hunter, *supra* note 30, at 625; Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS AND CLARK L. REV. 779, 780–81 (2006).

³⁶ Litman, *supra* note 35, at 788.

Further, there is no second best alternative to publishing for law schools if they were not to be granted an economic monopoly over the publication of the articles. Law schools are not going to go into the meat packing business because they fail to make an adequate profit on their journals. And finally, the markets for consumption of law reviews is split into the commercial database markets of Lexis and Westlaw, and the “non-commercial market” for scholars.³⁷ Open access content meets the needs of the non-commercial market, because this market values currency of content over citability: scholars mostly want to know what is going on now, and don’t care as much about citing the piece in the early stages. The commercial market of practicing attorneys, which values the ease of access and the citability of the Lexis and Westlaw offerings, will pay for the privilege and pass the costs onto their clients. And since these markets do not overlap much, if at all, the open access alternative is not a substitute for the Westlaw/Lexis version and so does not challenge the commercial imperatives of either Westlaw and Lexis or the law reviews that provide so much of their content. As a result of all of these factors, open access is naturally suited to law review publishing.

The observation that law reviews are a natural fit with open access led Mike Carroll, Larry Lessig and I to set up the Open Access Law Program at Science Commons; an initiative that Mike Carroll discusses in more detail elsewhere in this Symposium.³⁸ Our approach was to craft a set of open access principles that differ from the canonical open access principles developed for the Scientific, Medical and Technical (STM) arenas³⁹ by focusing on what matters to law review publishers and to legal scholarly authors. Thus, we specify relatively limited licenses for publication because this satisfies the law reviews’ need to be the first publisher as well as enabling them to place their articles in Westlaw and Lexis. Of course, a license is generally in the authors’ interest since the alternative of a copyright assignment removes the author from subsequent decisions about their work, and many authors object to the idea that someone else has agency over their work. The Science Commons approach also provides for attribution of first publication by the law review, something that is not mentioned in any of the standard accounts of open access. That is, in the event of republishing or reprinting of this Article, I warrant that I will indicate that the *Lewis & Clark Law Review* was the first publisher of this piece. This requirement satisfies the interest of law reviews in being attributed with finding and publishing the piece in the first place. Other aspects of the program deal with issues such as transparency of the dealings between the law review and the author, as well as providing a means of listing those law reviews which are

³⁷ Hunter, *supra* note 30, at 632.

³⁸ Michael Carroll, *The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 749–50 (2006).

³⁹ Bethesda Statement, *supra* note 30; Berlin Statement, *supra* note 30; Budapest Initiative, *supra* note 30.

consistent or compliant with open access principles, and those authors who will only publish with journals that are compliant with open access principles.⁴⁰

Which leads me to the subtitle of this Article, and to conclude with some discussion of why I am happy to raise my voice in praise of law reviews. The Open Access Law Project demonstrates how little needs to be done for American law reviews to move towards a wholly open access model. There are essentially no structural issues that need to be made in order for law reviews to embrace open access. Law reviews are a breath of fresh air for anyone who has confronted the almost-intractable economic problems that beset the introduction of open access into STM scholarly publishing.⁴¹ And for reasons that I advance above, law reviews fit into the future of open access, a future that promises publication plenitude, not publication scarcity.

This is not to say that the future of law reviews inevitably will become tied to the open access movement. The status quo is hard to change, and serious roadblocks emerge from the well-meaning but profoundly misguided efforts of professors to remake the law reviews in the image of the STM literature. We have so long listened to the alleged problems of law reviews that some scholars seek to introduce into law reviews the same kinds of peer refereeing and associated forms of “accountability” that we find in the STM literature. At the same time we see some universities seeking to “professionalize” law schools by encouraging the introduction of peer refereeing and oversight boards into law reviews. And some professional societies are outsourcing their publications to professional publishers, and utilizing the peer-reviewed system as their model for a “proper” journal. It is by no means an overwhelming trend, but there are indications that, with the change in publication ushered in by digital means, we may see more peer refereeing and not less in law reviews.

This would be a mistake. This “fixes” a “problem” that, as I’ve explained, has never really existed. Moreover, it is backward-looking rather than forward-looking: it is inconsistent with the new publication modality that I detail above, and so it is profoundly out of step with the changes that are happening in scholarly publishing generally. Finally, it is, I think, inconsistent with open access principles. Or more precisely, the *concept* of peer refereeing is not inconsistent with the concept of open access; but the *implementation* of peer refereeing often is inconsistent with the concept of open access. It’s perfectly possible, of course, to have an open access journal with full double-blind peer refereeing. One could imagine a law review which was exactly the same as all other law reviews except for the fact that it sent its articles out for refereeing. But what often seems to happen with the movement into peer refereeing is the assumption that it must be published by a commercial publisher who has experience with peer review. This means that commercial considerations are introduced into the publication process via the introduction of peer refereeing. The move to peer refereeing tends to carry with it a move to commercial

⁴⁰ More detailed and more current information on the Science Commons Open Access Law Program can be found at <http://creativecommons.org/science/literature/oalaw/>.

⁴¹ Hunter, *supra* note 30, at 614.

publishing, and in so doing destroys the open access opportunity that student-edited law reviews generate.

For all the reasons advanced above this is something to be resisted at almost all costs.

V.

This Article in the end is an ode to the glorious weirdness of the American law review. But this is not to suggest that we can relax and conclude that they are without problems. Both Mike Madison and Jessica Litman note elsewhere in this symposium that the Science Commons Open Access Law program has only attracted about 35 law reviews to the fold.⁴² While they suggest that this signals a problem either with the law reviews or the open access program (and to their great credit provide ways of thinking around these perceived problems) I don't read the figures in the same way. Perhaps I'm being Pollyannaish, but I think that the program is a notable success: we've managed to change the fundamental publishing approach of more than forty journals within the space of a year. The fact that we don't have more journals signed on isn't, I think, due to any profound underlying reason why law reviews cannot accept open access, but rather because student editors are in their positions for such a short time that radical changes are difficult to make. The one-year tenure of the editors means that editors see themselves as temporary safe-keepers of existing traditions, and so are naturally suspicious of radical change. This means that each law review needs individual convincing to change to open access, and unfortunately the principals of the Science Commons project only have so much time to volunteer to this project. Which is not to say that I think that there is a problem; just that it's going to take time and effort.

It is in this sense, and this sense alone, that I wish law reviews would change. I wish they would all realize that it's in their interest to embrace this opportunity without me having to make the case each time to each new board. It would make my job easier. But on the whole, law reviews are institutions that are wholly in keeping with the present and future of scholarly publishing. Part of that future is open access to every single law review article. In time everyone will have access to infinite content in law, and part of the reason for this is because of the open access efforts by numerous student law review editors, and the faculty and administration of law schools that allow them free reign. We are in your debt.

So, on behalf of the vast public who benefit from free, open access to legal scholarship in its many forms, let me give you thanks. And praise.

⁴² Madison, *supra* note 29; Litman, *supra* note 35, at 785.