STORY IS SCHOLARSHIP

*Lance McMillian**

Abstract

Story Is Scholarship *is a different kind of law review article. Professor Lance McMillian takes aims at the Law Review Industrial Complex, telling the story of his journey from working-class kid to law professor to best-selling novelist. While the Law Review Industrial Complex continues to overproduce and underdeliver, this article argues that the stakeholders of the system (law professors and the students who labor on law reviews) need not remain beholden to a stale art form, rooted in the long ago past.*

Genres exist to be busted, and Story Is Scholarship lights a torch to illuminate one possible exit from the dark tunnel that plagues the world of legal scholarship. As part of its genre-busting aspirations, the article lacks many of the adornments

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* For my Author's Note, I can do no better than to channel the spirit of Emily Dickinson:

> This is my letter to the World,
> That never wrote to Me,
> The simple News that Nature told,
> With tender Majesty,
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> Her message is committed,
> To Hands I cannot see,
> For love of Her—Sweet—countrymen,
> Judge tenderly of Me.

Dear Reader, as we embark on this journey together, please keep an open mind and judge tenderly of me. Of her only child, my mother likes to say, "He means well." Many thanks to Michael B. Kent for his thoughtful comments on an earlier draft and to my fellow Law and Literature panelists at the Southeastern Association of Law Schools Conference for their helpful thoughts: Judy Cornett, Susan Ayers, Karen Sneddon, Linda Malone, and Richard Heppner. Many thanks, too, to the editorial staff of the Charleston Law Review for their hard work in editing an article in many ways impossible to edit. The final product is mine alone, and none of that which follows should be held against the innocent.

common to law reviews. McMillian contends that the typical structure of legal scholarly writing—Introduction, Argument, and Conclusion divided by Roman numerals, A, B, C's, 1, 2, 3s, and more a, b, c's—is fundamentally uninteresting. Law professors should feel emboldened to explore alternative forms of presenting their work, all the while using the power of story to bring ideas to life.

DON QUIXOTE SPEAKS

"The most perceptive character in a play is the fool, because the man who wishes to seem simple cannot possibly be a simpleton."

–Don Quixote

Don Quixote tilted at imaginary windmills. My target is just as formidable—the Law Review Industrial Complex. Industrial complexes come in many shapes and sizes. For our purposes, here's a working definition: a system that exists for itself and perpetuates itself with little regard for its net impact on broader society.[1]

The regime of legal scholarship is one such self-perpetuating system and exists almost solely to produce more law review articles, regardless of market demand or whether all this intellectual labor serves any actual utilitarian purpose.[2] As a law

1. Wikipedia has a non-exhaustive list of various industrial complexes, from the classic military industrial complex made famous by President Eisenhower, to the prison industrial complex, to the most nefarious of all, the diaper industrial complex. *Industrial Complex*, WIKIPEDIA, https://en.wikipedia.org/wiki/Industrial_complex (last updated Mar. 1, 2024). Of this last scourge, I blame the babies, selfish to the core with no self-awareness as to how their incessant neediness affects others.

2. This observation is hardly new. *See* Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803, 806–07 (2009) ("I guess I'm afraid that many people do follow the dominant paradigm simply because . . . well, it's the dominant paradigm. It's what everybody else is doing. . . . The upshot is that legal scholarship turns out to be an exercise in imitation. Legal scholarship is whatever it is that other legal academics do. And there is not much in the way of a critical appreciation of whether 'what other legal academics do' is of value or why or how.").

professor for over fifteen years now, one question has long bugged me. Who is our audience? Not judges or practitioners. They hate the stuff.[3] Not other scholarly disciplines. They look down on law professors as the red-headed stepchildren of academia.[4] Not the general public. Slogging through *The Judicial Legitimization of Horizontal Price-Fixing Among Partially Integrated Health Care Providers: An Antitrust/Health Care Case Study* does not exactly scratch the itch of modern readers. (Full confession: I co-authored that one and rather liked it at the time. The article was even cited in the prestigious *Antitrust Law Journal*, although my name was misspelled. Twice.)[5]

What audience is left? Other law professors. In large swaths, legal scholarship is little more than a self-referential bubble of law professors talking to themselves, complete with citation counts to

3. The hostility starts at the tip top. Chief Justice John Roberts famously threw shade at legal scholarship over a decade ago:

> 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.

Jonathan H. Adler, *Chief Justice Roberts and Current Legal Scholarship*, THE VOLOKH CONSPIRACY (July 23, 2011, 11:07 am), http://volokh.com/2011/07/23/chief-justice-roberts-and-current-legal-scholarship. Neither Kant nor Bulgaria could be reached for comment.

4. *See generally* Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1205 (1981) (observing the "intellectual marginality of legal scholarship"); Stephen M. Feldman, *Can Law Be a Source of Insight for Other Academic Disciplines?*, 8 WASH. U. JURIS. REV. 151, 168 (2016) ("Law professors frequently adopt insights from their university colleagues in other departments, but those non-law school colleagues rarely borrow from legal scholarship."); Danielle K. Citron & Robin West, *On Legal Scholarship*, *in* CURRENT ISSUES IN LEGAL EDUCATION 1, 1 (2014), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1074&context=shorter_works ("University colleagues fault legal scholarship for its lack of discipline and peer review, but also, and more fundamentally, question its point.").

5. The Law Review Industrial Complex would now have me cite both to *The Judicial Legitimization of Horizontal Price-Fixing Among Partially Integrated Health Care Providers: An Antitrust/Health Care Case Study* and the article in the *Antitrust Law Journal* in which it is cited, along with pinpoint cites to the two times my name is misspelled in the latter. But let's be honest, no one cares. So, I simply refuse. As someone famous (maybe Gandhi) once said (or close enough), "Every revolution begins with one small act of civil disobedience."

keep track of how often we speak to each other.[6] The effect is . . . not good. Pierre Schlag captured the dynamic over a decade ago: "Mediocrity's pretty much the going thing. Now, not just any kind of mediocrity. There's nothing sloppy about good legal thought. It's going to be high-end mediocrity we talk about here. Rigorous mediocrity. Scholasticism-highly elaborated, carefully crafted mediocrity."[7]

Not much has changed since Professor Schlag made this scathing critique. The question is what, if anything, the legal academy can do to transform what everyone seems to agree is a sorry state of affairs.

But first, a story about how I became a best-selling novelist.

SELF-PORTRAIT OF A FUTURE LAW PROFESSOR

A little about myself. Truth be told, that I am a law professor at all is a miracle. The odds were not in my favor. Both my parents

6. *See* Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 59 (2015) ("Legal scholarship exists to be written *and cited*. Indeed, citations have become the ubiquitous unit of measurement for a number of purposes in legal scholarship. Some law school administrators collect citation statistics from their tenure-track faculty and use these numbers in their assessments as evidence of the scholarship's impact and the scholar's influence and reputation." (emphasis in original)).

7. Schlag, *supra* note 2, at 809. Professor Schlag, while no doubt the most biting (and entertaining) critic, was neither the first nor the last law professor to note the festering sickness plaguing the Law Review Industrial Complex (my term, not theirs). Yale had a symposium on the problem in 1981. Symposium, *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981). Stanford tackled the problem in 1995. Symposium, *Law Reviews*, 47 STAN. L. REV. 1117 (1995). By 2002, it was Harvard's turn. Symposium, *Law, Knowledge, and the Academy*, 115 HARV. L. REV. 1278 (2002).

Over the years, some of the biggest names in the legal academy have spoken out on the problems. *See* Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1331 (2002) ("Baldly stated, the uncomfortable fact is that too much of the legal scholarship now produced is of too little use to anyone."); Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1325 (2002) (questioning the quality and insularity of legal scholarship); Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENV. U.L. REV. 661, 661 (1998) ("There is, in fact, quite a literature of invective—professors and others railing against the law reviews."); James Boyd White, *Law Teachers' Writing*, 91 MICH. L. REV. 1970, 1970 (1993) (critiquing scholarship that shows too little respect for the work that judges and lawyers actually do).

were born in the rural South during the Great Depression. An outhouse, as opposed to indoor plumbing, was their initial lot in life.[8] Fortunately, by the time I came along, civilization had progressed enough that my parents were able to purchase the type of split-level house, running water included, that was all the rage in the 1970s.[9]

But this upward trajectory aside, my upbringing still had a blue-collar tint to it. Neither Mom nor Dad ever spent a day in college. I learned to drive at age thirteen by driving a beat-up Volkswagen bug around in the backyard. My first job was bagging groceries at Kroger for $3.65 an hour, a portion of which went to the baggers' union. I left for greener pastures when K-Mart offered me more money to be a cashier with no union dues. Other professional pit stops on the way to the legal academy included loading (and unloading) eighteen-wheelers in a non-OSHA compliant warehouse, installing residential satellite dishes, sweating a summer away in a greenhouse, and dabbling as a bowling alley mechanic.[10] My last non-legal job was throwing bags on and off Delta jets at the Atlanta airport the summer before starting law school.[11]

8. I use this anecdote to teach my students that "life is about perspective." Having enjoyed the use of indoor plumbing and electricity for the entirety of my existence, I remind myself that things could always be worse, such as having to navigate the backyard at three a.m. on a moonless, freezing night just to reach the outhouse to go to the bathroom. This practice of gratitude is a miracle drug that consistently makes the unbearable bearable. Except for faculty meetings. Those require whiskey. Straight.

9. One source pegs the boom in the popularity of split-level houses during this era to the popular *The Brady Brunch* television series. *See* Emily Medlock, *Split Level House vs. Bi-Level House: Mid-Century Modern Dreams*, HOMEDIT (May 6, 2021), https://www.homedit.com/split-level-house. Viewers never did learn the fate of Carol Brady's first husband. I think she killed him. Or maybe I'm confusing Carol Brady with Carole Baskin.

10. Bowling was my family's sport of choice. I became quite good at it and even bowled on the University of North Carolina's team. I often boast to my students that I am the best law professor bowler in America. Admittedly, it's a hard claim to verify. But like my father before me, I have bowled a perfect 300 game. Let's see anyone from the law faculty of Harvard or Yale match that.

11. Not just bags but also caskets and angry little monkeys in tiny boxes destined for the CDC as research subjects. You can imagine the noise and the smell. This pre-9/11 experience of being a baggage handler has relevance for my teaching about the War on Terror in Constitutional Law. As I explain to my students, I never once went through a security checkpoint while working for

Other aspects of my heritage include the markings of a country music song. I wrecked my first truck a month after turning sixteen. My father was married four times.[12] A great uncle on my mother's side killed a man named Punk Weaver in Texas.[13] When released from prison, he killed my great-grandfather. Decades later, after somehow being released again, Uncle Hugh would babysit me from time to time. Only long after he died did I learn that this kindly man who watched me was a double murderer. Little did I know.[14]

What's the point of this biography?

Simply this: I shouldn't be here. No doubt if you've managed to stay with me this long, you are in strong agreement. So, let's all stipulate that the gatekeepers of the legal academy fell asleep on the job the day I jumped the wall into the land of milk and honey. But once in, I was in for good. Just like birthright citizenship. The excitement of becoming a law professor made me smile more and walk straighter—the American embodiment of the working class, latchkey kid made good. Horatio Alger would be proud.

My prize for winning the law professor lottery? Writing law review articles.

Delta and could have easily placed a bomb in the bowels of a plane. (Hypothetically, of course. I don't dabble in explosives. Or mass murder.) Post-9/11, Homeland Security quickly closed this loophole.

12. By all accounts, my mother—wife number three—was his favorite.

13. Punk deserved better. To make amends, I named a character in his honor in one of my novels. Seemed the least I could do. *See* LANCE MCMILLIAN, A HARD WAY TO DIE (2022) (ebook) ("The drawl is all redneck and reminds me of certain high school buddies from my upbringing in middle Georgia—Punk Weaver being the foremost offender in my mind. Punk married the homecoming queen and opened a liquor store, only to lose both when he drank too much of his inventory.").

14. For years, my mother categorically refused to talk about the murders, despite my inquisitiveness. But in 2018, the tide turned when the two of us spent hours alone together in a car driving through Mississippi, Louisiana, and Arkansas. Mom's position was vulnerable. In constitutional law parlance, she was a captive audience. After aggressive cross-examination, she finally opened up on some of the details and gave me enough crumbs to start scouring the internet for more information. Here's the punchline: I found a 1939 press photo of my great uncle signing his confession to the first murder for sale on eBay. That moment will forever be remembered as when I lost all capacity for surprise. The picture now hangs on the wall of my home office.

LIVING THE DREAM

First, a disclaimer. You, the reader, should not misconstrue my frustration with the Law Review Industrial Complex as frustration with the job of law professor. Being a law professor is a great gig—a loophole on life even. Of all the possible jobs in the legal world, law professor is the best. I make this statement on the basis of some authority.

The Wife and I have over fifty years combined in the legal profession. Between the two of us, we have worn enough hats to stock a Lids store: law professor (me); federal law clerk (her); big-law associate (both); mid-law associate (me); big-law partner (her); small firm owner (me); state trial court judge (her); state intermediate appellate court judge (her); state supreme court justice (her); mediator (me); arbitrator (me); plaintiff's trial lawyer (me).[15]

Without a doubt, even though it is far from the most remunerative, law professor is the greatest of all these positions.[16] Flexibility. Autonomy. Control. Teaching. Mentoring. All of it. A true Big Rock Candy Mountain.[17]

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15. As a plaintiff's lawyer, I once earned the disapproval of *Overlawyered*, a prominent tort reform blog serving the monied interests of corporate America. *See* Walter Olson, *Remedy for Sending Coupons: Send More Coupons*, OVERLAWYERED (Mar. 19, 2004), https://www.overlawyered.com/2004/03/remedy-for-sending-coupons-send-more-coupons/ (detailing criticism). My only consolation for this Pearl Harbor-style attack against me was the $250,000 in attorney's fees I earned from the case.

16. The Wife would disagree. She likes being a Justice on the Georgia Supreme Court. But ask my kids—who have a front-row seat to much of the work lives of their parents—whether they would rather have Mom or Dad's job. Both would quickly answer, "Dad." Of course, neither of them has even the slightest interest in attending law school. I can't decide if this aversion reflects good or bad parenting.

17. Sing along with me:

> In the Big Rock Candy Mountains,
> there's a land that's fair and bright,
> where the handouts grow on bushes,
> and you sleep out every night,
> where the boxcars all are empty,
> and the sun shines every day,
> on the birds and the bees and the cigarette trees,
> the lemonade springs where the bluebird sings,

And, of course, writing. A large percentage of the legal academy believes that writing is the main job of a law professor.[18] No problem there. I love to write and count it as one of life's great pleasures. The thought of being paid to actually think and write about the law in the form of law review articles excited me. After being hired, I started cranking out product for the next five years.[19]

I enjoyed the work. The freedom to pick out any topic of my choice, research it, and write an article for publication beat sitting in a courtroom full of lawyers for a three-hour-long calendar call

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in the Big Rock Candy Mountains.

HARRY MCCLINTOCK, *The Big Rock Candy Mountains*, *on* HALLELUJAH I'M A BUM (Rounder Records 1928); *see generally* Brad Wendel, *The Big Rock Candy Mountain: How to Get a Job in Law Teaching*, CORNELL, http://ww3.lawschool.cornell.edu/faculty-pages/wendel/teaching.htm (last updated Oct. 8, 2010) (extolling the job of law professor).

18. *See* Jeffrey M. Lipshaw, *Memo to Lawyers: How Not To "Retire and Teach,"* 30 N.C. CENT. L. REV. 151, 162 (2008) ("It comes back to Brad Wendel's imperative: 'repeat after me, it's a writing job.'"). I'm old-fashioned enough to believe teaching should come first. Crazy, I know.

19. Lance McMillian, *The Proper Role of Courts: The Mistakes of the Supreme Court in* Leegin, 2008 WIS. L. REV. 405 (2008) (taking the Supreme Court to task for its antitrust jurisprudence); Lance McMillian, *Tortured Souls: Unhappy Lawyers Viewed Through the Medium of Film*, 19 SETON HALL J. SPORTS & ENT. L. 31 (2009) (explaining why many lawyers are miserable); Lance McMillian, *The Death of Law: A Cinematic Vision*, 32 U. ARK. LITTLE ROCK L. REV. 1 (2009) (describing Hollywood's dim view of the future of legal institutions); Lance McMillian, *All Roads Lead to Rome, Wisconsin: Judge Henry Bone, Douglas Wambaugh, and the Strange World of Picket Fences*, *in* LAWYERS IN YOUR LIVING ROOM! LAW ON TELEVISION 395 (Michael Asimow ed., 2009) (detailing lawyering and judging in a small town); Lance McMillian, *Atticus Finch as Racial Accommodator: Answering Malcolm Gladwell's Critique*, 77 TENN. L. REV. 701 (2010) (defending Atticus Finch from charges of racism); Lance McMillian, *Atticus Finch—Christian?*, 77 TENN. L. REV. 739 (2010) (analyzing the religious faith of Atticus Finch); Lance McMillian & Michael B. Kent, Jr., *The World of Deadwood: Property Rights and the Search for Human Identity,* 20 S. CAL. INTERDISC. L.J. 489, 506 (2011) (using popular culture to explore the origin of property claims); Lance McMillian, *Drug Markets, Fringe Markets, and the Lessons of Hamsterdam*, 69 WASH. & LEE L. REV. 849 (2012) (comparing illegal drug markets with legal fringe lending markets); Lance McMillian, *Adultery as Tort*, 90 N.C. L. REV. 1987 (2012) (placing civil claims stemming from marital infidelity into the broader context of tort law); Lance P. McMillian, *The Nuisance Settlement "Problem": The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221 (2007) (criticizing law and economic theories of litigation as being divorced from real life).

by a country mile. Some courts even started citing me, including Judge Richard Posner. Posner! That provided a nice thrill and jolt of validation, as if Professor Kingsfield in *The Paper Chase* found my work worthwhile.[20] Getting author copies that I could feel and caress—even smell—affirmed that I was, unlike wannabe lawyer Ulysses in *O Brother, Where Art Thou?*, "bona fide."

During this period, I read Professor Schlag's seminal *Spam Jurisprudence* article. Schlag critiqued much of legal scholarship as merely "case law journalism" composed of "legally cognizable material," the effect of which is to produce an assembly line of law review articles resembling a "perpetual law school exam."[21] The fundamental problem is one of oversupply. Describing what the law is—think a garden-variety treatise—only takes a few scholars in each field. What then should the rest of the law professors write about? The answer: what the law should be, a solution that "opened up the world of legal scholarship to the future—in fact, to all kinds of futures, ranging from the modestly improved to the wildly utopian."[22]

I felt seen.[23]

ANATOMY OF A MID-CAREER CRISIS

Five years into my career, tenure in hand, and a decent-sized body of work on the curriculum vitae, I started to wonder, "Is this it?" The work remained enjoyable enough. The craftsmanship was competent. Courts and other scholars cited me on the regular. I

20. *See* Thorogood v. Sears, Roebuck & Co., 547 F.3d 742, 745 (7th Cir. 2008) (citing me). A similar tingle occurred years later when I was cited in the same footnote as Supreme Court Justice Amy Coney Barrett in the pages of the Harvard Law Review. *See Criminal Law—Insider Trading—Second Circuit Redefines Personal Benefit Requirement for Insider Trading*—United States v. Martoma*, 894 F.3d 64 (2d Cir. 2018)*, 132 HARV. L. REV. 1730, 1736 n.62 (2019). It's the little things in life.

21. *See* Schlag, *supra* note 2, at 821–26.

22. *Id.* at 822.

23. "The phrase 'I feel seen' is sometimes thrown around in jest on social media or in casual conversation by younger generations as a[n] indication that a connection has been established with an idea, concept, or image." *The First Time I Felt Seen*, INCANDESCERE (Jan. 11, 2021), https://www.incandescere.com/post/the-first-time-i-felt-seen.

was invited to take part in a wonderful symposium.[24] Even had a law review allow me to be one-half of a thoughtful, back-and-forth dialogue about the merits of Atticus Finch on the Fiftieth Anniversary of *To Kill a Mockingbird*.[25] All great things. But a nagging whisper kept bothering me as I contemplated the future arc of my next thirty years as a legal scholar, "What's the point? Just more of the same?"

These feelings would've been easier to write off as my own idiosyncratic malaise if not for the reality that many other law professors wrestled with the same thoughts, both formally in print and in individual interactions with me. Indeed, a whole forest of trees have lost their lives to supply the paper on which law professors over the course of decades have bemoaned the state of legal scholarship. This consistent dissatisfaction has been evident since at least the early 1980s.[26]

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24. *See* Symposium, *Regulation in the Fringe Economy*, 69 WASH. & LEE L. REV. 435 (2012) (describing gathering of scholars to discuss the pros and cons of predatory lending markets).

25. *See* Lance McMillian, *Atticus Finch as Racial Accommodator: Answering Malcolm Gladwell*, 77 TENN. L. REV. 701 (2010); Judy M. Cornett, *Atticus Finch: Christian or Civic Hero? A Response to Professor McMillian*, 77 TENN. L. REV. 723 (2010); Lance McMillian, *Atticus Finch—Christian?*, 77 TENN. L. REV. 739 (2010). Malcolm Gladwell actually read my critique of his take on Atticus Finch and wrote a gracious response saying nice things about me in an email to the Editor of the *Tennessee Law Review*. That was cool.

26. In truth, law professors have been railing against legal scholarship since at least 1936. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936) ("There are two things wrong with almost all legal writing. One is its style. The other is its content."). Over the ensuing decades, subsequent critiques have come from—among many, many others—Mark Tushnet, Kenneth Lasson, Deborah L. Rhode, Shari Motro, and Jasper L. Tran. *See* Tushnet, *supra* note 4, at 1205 ("I suspect that symposia like this one are convened when it seems that something has gone wrong [with legal scholarship]. I sense that the community of legal scholars is afflicted with a vague malaise, sometimes girded about by a pretentious complacency." (footnotes omitted)); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 927 (1990) ("But for every pure scholar we have a dozen-and-a-half of the innocent ersatz, for every diamond a heap of rhinestones. Some of them are decent enough thinkers stickied-up by pedestrian prose, industrious worker-bees who—simply by virtue of the thousands of articles with which they must periodically compete—must of necessity be deemed mediocre. They are in greater part, however, competent enough teachers without anything original to write, doomed to scholarly mediocrity by academic imperative—coerced clones who are whipped into a hack's frenzy, urged to jump through hoops held up by the local promotion-

Professor Shari Motro, in the superb and personal *Scholarship Against Desire*, captures the spirit (if not the exact details) of my own growing unease about the publish-and-placement system undergirding the legal academy:

> As an aspiring law teacher on the academic job market and then as an assistant professor on the tenure track, I quickly learned that I would stand a better chance of being taken seriously if I talked law-and-economics rather than law-and-literature, if I asked questions I could solve rather than ones that merely invited a conversation, if I wrote about tax law rather than feminist theory. No one spelled this out explicitly; my institution didn't tell me what to write about and it supported many of my non-traditional experiments. But it is part of a world, a world in which law review placement is the coin of the realm. I wanted to do a good job, so I wrote in the mode most valued in this world.
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> In the beginning, making these choices didn't feel like a compromise. I enjoyed solving puzzles. I enjoyed writing about tax. And I enjoyed the benefits that came along with publishing in top law reviews.
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> Then I made tenure, and something shifted. I began to see more clearly the subtle ways in which external pressures and incentives had skewed my work. I also discovered that despite the unparalleled security that came with my new title, these influences didn't disappear. I understood the deal: If I continued to produce within the mold that got me tenure I could stay in the game—I could continue to attract prestigious speaking invitations, queries from hiring committees, and rising-star-type awards. If I tried something new, I risked squandering the platform I'd worked so hard to build. I would dilute my brand.[27]

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and-tenure committee, forced to shimmy down the chutes of the publication process."); Rhode, *supra* note 7, at 1328 ("I begin from the premise that all is not well in the state of legal scholarship."); Shari Motro, *Scholarship Against Desire*, 27 YALE J.L. & HUMAN. 115, 121 (2015) ("[P]rofessors who adhere to conventions that don't serve their deepest relationship with truth engage in a compromise that ultimately hurts not only them. It hurts students by breeding cynicism and depression. It hurts the practice of law by producing foot soldiers instead of visionary stewards. Ultimately, our compromise hurts all of society."); Jasper L. Tran, *If Research Agenda Were Honest*, 24 YALE J.L. & TECH. 317 (2022) (parody article mocking the form and pretensions of modern legal scholarship).

27. Motro, *supra* note 26, at 116–17. The real strength of *Scholarship Against Desire* is Professor Motro's weaving of her story into the broader point of

Earlier, I suggested (or remarked or argued or wagered or hypothesized or any other verb) that the audience for legal scholarship consists almost entirely of law professors. Professor Motro captures the inherent incentives that make legal scholarship an insular, dark tunnel down which countless law review articles are funneled: a hungry quest for more prestigious article placements to secure greater attention and citations, both of which can then be parlayed into "better" jobs at higher-ranked institutions (or, if nothing else, at least higher pay at home). But writing for other law professors means mimicking the norms of the profession, i.e. following the example of the ruling crowd. Risk-taking under such a system yields no professional returns.[28]

The result is that the Law Review Industrial Complex of 2023 looks remarkably like the Law Review Industrial Complex of 1980, with only more of it. Nothing ever changes.[29]

A DIFFERENT DIRECTION

Wearied by the treadmill of producing high-end mediocrity of dubious lasting value for an insular audience, I started to think outside the scholarship box once I secured tenure. Unlike the reasonable concerns expressed by Professor Motro that too much scholarly risk could be hazardous to a law professor's professional health, I did not have a lot to lose in that regard for a whole host of reasons.

First, some self-awareness. Law schools would not be beating down their doors to hire me. Too much practice experience. Too quirky. Too Southern. Both my undergraduate (UNC) and law

her article. Hold that thought.

28. It's probably no coincidence that some of the strongest voices against the Law Review Industrial Complex over the years have been leading figures with enough cachet to say whatever the hell they want. Deborah Rhode. Richard Posner. Mark Tushnet. Pierre Schlag. Lawrence Friedman. James Boyd White.

29. Politics aside, the legal academy as a collective institution is quite *conservative* in the colloquial sense of that word. Some might even say reactionary, serving to protect and perpetuate the interests of the elite, established players at the top of the food chain. To be fair, unlike say, the Military Industrial Complex, I don't necessarily think that the legal academy's bias toward the status quo is intentional and self-serving. It just is. Like a mindless machine that marches forward into eternity. Or a giant blob that keeps getting bigger and bigger after digesting new victims. Take your pick.

school (UGA) degrees are from state schools in the South. Let's just say that's not what law school hiring committees are looking for. Call it the Thirty-Sixth-Parallel Hiring Principle—an original theory I just concocted on the spot that nevertheless has all the hallmarks of truth.[30]

Second, I'm naturally contrarian, making me immune to most of the status-seeking affliction that undergirds much of the legal academy. In the parlance of the kids today, IDGAF. Now, to be clear, I'm not turning down an offer to publish in the Princeton Law Review, only that chasing prestige is not that big a deal to me. Basically, I'm just happy to be here.[31]

Finally, the Wife. When I joined the legal academy, the Wife was a big-law partner. Shortly thereafter, she became a trial judge. Today she is a justice on the Georgia Supreme Court. Here's the metaphor. Suppose our joint careers were a train. She would be the engine, and I am the caboose.[32] Translation: I'm not moving.

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30. The thirty-sixth Parallel (in terms of latitude) roughly serves as the northern boundary of the Sun Belt, covering the southern part of the United States. *36th Parallel North*, WIKIPEDIA, https://en.wikipedia.org/wiki/36th_parallel_north (last updated July 23, 2023, 18:21 UTC). Per the rules of the American Association of Law Schools, no Top 100 law school—as ranked by U.S. News—may hire as a full-time, tenure-track faculty member any person without at least one degree (preferably law) from a university north of the thirty-sixth Parallel. The latitude of Chapel Hill, North Carolina sits at 35.913200 degrees, which is bad news for me as a UNC alum. Eight miles away sits UNC's bitter rival, Duke University. The latitude of Duke is 36.001465 degrees, meaning that Duke barely qualifies for geographic acceptability—a fitting result since, spiritually, Duke is in New Jersey. Richard Nixon, for one, graduated from Duke Law School. Of his time there, Nixon said, "And I always remember, that whatever I have done in the past, or may do in the future, Duke University is responsible in one way or another." You do the math. Richard Nixon, 37th President of the United States, The Need for Leadership: An Address in Greensboro, NC, (Aug. 17, 1960) (available at https://www.presidency.ucsb.edu/documents/the-need-for-leadership-address-greensboro-nc-vice-president-richard-nixon).

31. Here's an example of my contrarian streak: despite having the grades necessary to be on law review, I chose not to do it. Why not? Because all the 2Ls and 3Ls I observed on law review appeared miserable. Who wants to sign up for that? Seemed reasonable to me at the time. The decision actually cost me a federal clerkship. True story. The lesson: the line between courageously sticking to your principles and being foolishly stubborn can be a fine one. Sometimes I'm my own worst enemy. But isn't that true for all of us? Self-sabotage is universal.

32. Fun fact: I finished with the highest-class rank of any guy in my law school class—two spots below the Wife. To reiterate, she is the engine. I am the caboose.

So, the brass ring of publishing my way into a job at a higher-ranked law school held no motivation for me. Even if I miraculously became the hottest legal scholar around—so big to make possible overcoming the otherwise insurmountable fence of the Thirty-Sixth-Parallel Hiring Principle—I was not going anywhere.

But that wasn't a bad thing. Freed from any professional or personal need to impress other people of my scholarship prowess, being tenured afforded me a blank canvas to take my scholarly journey down any road I wanted to travel. And what did I decide to do?

Tell stories.

PORTRAIT OF THE LAW PROFESSOR AS A NOVELIST

As a high school senior, I vividly remember pulling an all-nighter to devour the ending of Scott Turow's *Presumed Innocent*. A year later, I sat in my dorm room as a college freshman and read John Grisham's *The Firm* in one sitting, neglecting my Calculus homework in the process. The next day, I hurried to the legendary Intimate Bookshop on Franklin Street in downtown Chapel Hill to search for any other Grisham novels in stock. I snagged the only copy left of *A Time to Kill*, a then hard to find title and the only other story Grisham had published at that point. *A Time to Kill* took me two days to finish. You know, because calculus.

Throw in my reading of *To Kill a Mockingbird* in high school English class, and I was forever hooked on legal fiction. Long before this time I had already decided to become a trial lawyer. But now I started to realize that real-life attorneys like Turow and Grisham could do more than argue in actual courtrooms. They could also world-build in courtrooms of their own making through the power of storytelling. The seed of a dream was born.[33]

33. Before becoming a law professor, I wrote two feature-length screenplays—*Man of the House* and *The Associate*. These screenplays are now in . . . umm . . . "pre-production." Frustratingly, shortly after I finished work on *The Associate*, John Grisham published his own novel using the same name. Like he doesn't have enough money. Selfish bastard. *But see* Heinrich Bolton, *5 Philanthropist Authors Who Used Their Wealth & Fame for Good*, MANYBOOKS (Mar. 22, 2017), https://manybooks.net/articles/5-philanthropist-authors-who-used-their-wealth-fame-for-good (describing Grisham's work for charities such as

Fast forward thirty years. How should I break out of my mid-career discontent with the Law Review Industrial Complex? Write a novel. Use fiction and the power of story to say things about the legal system to a broader audience besides other law professors. While that sounds nice on a postcard, birthing the dream into reality was hard labor.

The careful examiner of my curriculum vitae will notice a sizable publication gap between 2013 and the debut of *The Murder of Sara Barton* in 2020.[34] Why? Reasons. If ever I transition into the self-help genre, I'll start with *How Not to Write a Novel*. Subtitle: *Mistakes Were Made*.

The exact date when I started my first novel remains unclear to me, but let's call it sometime between 2011 and 2013. Could've been even earlier. Years of toil—starts and stops, writing and rewriting, not writing, deleting characters, editing, chopping off 60,000 words, you name it—followed. The period can fairly be described as a soft descent into madness.[35] Sylvia Plath provides a glimpse of my feelings as I struggled through this process: "Very depressed today. Unable to write a thing. Menacing gods. I feel outcast on a cold star, unable to feel anything but an awful helpless numbness."[36]

But eventually the day arrived when I completed that precious first draft of a real-life book. Because I did not write linearly from start to finish, but rather jumped around depending on how the mood hit me,[37] the last paragraph I finished did not actually close the novel. No matter. I was able to type "The End" all the same. In

Ubuntu Africa, the Innocence Project, the African–American Teaching Fellowship, the Rebuild the Coast Fund, and "many others").

34. LANCE MCMILLIAN, THE MURDER OF SARA BARTON (2020) (ebook) (a novel with lots of murder and sex); *see* Lance McMillian & Michael B. Kent Jr., *Property and Sovereignty in HBO's Deadwood*, *in* PROPERTY AND SOVEREIGNTY: LEGAL AND CULTURAL PERSPECTIVES (James Smith ed., 2013) (describing the origins of property rights).

35. *See* Lance McMillian, *How I Write*, 21 SCRIBES J. LEGAL WRITING 5, 7 (2024) ("The twists and turns of my descent into self-hatred while mud wrestling my first novel into existence would take too long to recount.").

36. SYLVIA PLATH, THE UNABRIDGED JOURNALS OF SYLVIA PLATH 517 (Karen V. Kukil ed., 2007).

37. Bad idea that. Write linearly and save yourself a world of trouble. *See* LANCE MCMILLIAN, HOW NOT TO WRITE A NOVEL: MISTAKES WERE MADE (forthcoming).

my mind, that last paragraph remains the best paragraph I have ever written:

> The spontaneous response is pure, unfiltered, unscripted. That it escaped from my heart reveals again how little I understand myself. The old gold prospectors in north Georgia would pan for treasure by allowing rushing waters to clear the clutter of distraction and debris, leaving behind the one true thing. The river of life does the same for us by sifting the wheat from the chaff. What remains are the people who love us the most. But whether the discovery is one of gold or identifying the individuals who matter above all others, a trail of tears follows us like a cloud in the sky you can never escape.[38]

Six months later, *The Murder of Sara Barton* became the number one best-selling legal thriller in the world on Kindle for a brief spell, ahead of the latest works from John Grisham and Scott Turow (I have the screenshot to prove it).[39]

Having lived firsthand how not to write a novel for nearly a decade, I learned from my many mistakes and started writing books in a much more efficient way. Four more novels have since followed my debut.[40] So why I am back to writing law review articles such as this one? To become an evangelist for using the power of story to disrupt the ruling conventions of the Law Review Industrial Complex.

THE NOVELIST AS LEGAL COMMENTATOR

Powerful fiction can move people toward social change. *To Kill A Mockingbird* indicted a smug America over its failure to live up to its professed ideal of equality under the law.[41] One hundred

38. LANCE MCMILLIAN, THE MURDER OF SARA BARTON 335–36 (2020) (ebook).

39. This achievement currently makes the first paragraph of my obituary, although I'm hoping for greater glory in the years to come. *See* Obituary of Lance McMillian (on file with author).

40. LANCE MCMILLAN, DEATH TO THE CHIEF (2021) (ebook); LANCE MCMILLAN, TO KILL A LAWYER (2021) (ebook); MCMILLIAN, A HARD WAY TO DIE, *supra* note 13; LANCE MCMILLIAN, THE JUST AND THE UNJUST (2023) (ebook).

41. *See* Lance McMillian, *Atticus Finch as Racial Accommodator: Answering Malcolm Gladwell*, 77 TENN. L. REV. 701, 719–20 (2010) ("Stories are powerful, and the depiction of the Tom Robinson injustice struck a chord with a guilty America. The timely example set by Atticus helped the citizens of the United

years prior, *Uncle Tom's Cabin* highlighted the horrors of slavery to an indifferent nation, putting the slaveholding South on the narrative defensive.[42] Both novels put legal and social institutions on trial in ways that more theoretical, dissertation-like attacks could never have. That's the unique power of story. It draws us into the lives of characters we grow to like and care about, making us allies to their cause.[43]

Law professors writing novels is nothing new.[44] But my unofficial sense is that most who wear the dual hats of law professor and novelist draw stark lines of demarcation between the two roles, thereby branding their literary work with the scarlet letters of "Not Scholarship" (or "NS").[45] And certainly most non-

States realize the painful truth: We can do better. Forget for a moment the four corners of the novel. In real life, the character of Atticus Finch made a meaningful contribution to the cause of equality.").

42. *See* Alfred L. Brophy, *"Over and Above. . . There Broods a Portentous Shadow,—The Shadow of Law": Harriet Beecher Stowe's Critique of Slave Law in "Uncle Tom's Cabin,"* 12 J.L. & RELIGION 457, 457 (1996) ("Southern proslavery writers recognized that the powerful imagery employed by abolitionist writers such as Harriet Beecher Stowe was among the abolitionists' most potent weapons in fighting slavery.").

43. Not always, of course. But even a story filled with unlikeable characters can produce a behavioral response. For example, 83% of husbands who have read Gillian Flynn's *Gone Girl* are less likely to cheat on their wives. The other 17% carry cyanide pills in case they are ever found out.

44. Here is, almost certainly, an incomplete list: Stacey Lantagne, Kim Roosevelt, Lori Andrews, Stephen Carter, Mimi Weston, Paul Goldstein, Andrew Popper, James Boyle, Pam Jenoff, Dan Shaviro, Jed Rubenfeld, Paul Heald, Scott Gerber, John Dobbyn, Yxta Murray, George Fletcher, Todd Henderson, and even the pied piper of my scholarly discontent, Pierre Schlag. That so many law professors would gravitate toward storytelling is no surprise. Stories pervade the legal culture and the law school classroom. *See* Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 U. CINCINNATI. L. REV. 95, 164 (1994) (arguing for the incorporation of fiction into legal scholarship, noting that "[t]he call to write stories is not a call to abandon time-honored methods or approaches to academic scholarship; it is a reminder that all things evolve and that there is room for growth and experimentation in the academy").

45. For example, Pierre Schlag's novel, *American Absurd: A Work of Fiction*, does not appear in his voluminous curriculum vitae, despite the book's status as biting social satire and commentary. *See* Pierre Schlag, *Curriculum Vitae of Pierre Schlag*, UNIV. OF COLO. L. SCH., https://lawweb.colorado.edu/files/vitae/schlag.pdf (last visited Apr. 4, 2023) (not listing *American Absurd*). The first chapter of *American Absurd* even includes an encounter between the protagonist and the police. A lawyer shows up on the scene shortly thereafter. Sounds like "legally cognizable material" to me.

novelists in the legal academy would be quick to hand out NS badges to any work of fiction written by a colleague. Scholarship must look a certain way, and that's that.

My response: Not so fast. Now, if a professor's genre of choice is Paranormal Erotica (an actual category on Amazon), then maybe them fitting *that* into their scholarly agenda is a bridge too far.[46] But per se writing fiction off as non-scholarly misses the forest for the trees.[47] Being a law professor means having a privileged, authoritative platform to advocate for change, dissect the effect of law on real people, and offer commentary on legal institutions. All of these goals, however, require an audience. A scholarship regime that leads to nothing more than law professors speaking to each other is barely worth having. What's the point? Citation counts? Ugh. I, for one, want more.

For me, fiction has opened up new avenues for expressing my thoughts about the law and its impact on American life. At a basic level, my audience reach has expanded exponentially. While my success as a novelist is still relatively modest, I'm now speaking to vastly more people than I ever could with a standard law review article. That is, my ideas are out there in greater circulation, floating in the bloodstream of society. Surely, on some level, this should matter when assessing my impact as a scholar.[48]

More than mere numbers, fiction offers a creative path to express ideas in new, more accessible ways. Through the power of story, I have taken a stand against the death penalty,[49]

46. The Paranormal Erotica genre is surprisingly diverse. Subcategories on Amazon include: Alpha Males, Angels, BBW (I don't know what this means and am too scared to Google it), Bikers, Billionaires, Cowboys, Devils & Demons, Dominant Women, Ghosts, People in Uniform, Rockstars, Shapeshifters, Vampires, and Werewolves.

47. Writers should never use clichés. But I decided to leave "misses the forest for the trees" in this article as an object lesson of what not to do.

48. The biggest surprise of my publishing journey has been the success of my audiobooks. *The Murder of Sara Barton* has over 2,000 reviews on Audible and has been a Top 100 Audible Plus Best Seller on numerous occasions, one time sandwiched between *War and Peace* and *Mere Christianity* on the chart, both of which are much better books. But maybe I should not be so surprised. Based on the media consumption of folks under the age of 30, video (YouTube, TikTok) and audio (Spotify, Audible, podcasting) are the platforms of the future. Where does that leave legal scholarship?

49. Here's my main character wrestling with his growing doubts about the

highlighted the unequal treatment inherent in the criminal justice system, [50] and shone a light on the abuse of asset forfeiture.[51]

Even the Trolley Problem[52] and the famous tort case of *Christy*

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death penalty after his years as a hard-charging prosecutor:

> My taste for the death penalty waned about a year ago when I prosecuted the wrong man for murder and lost faith in myself as an instrument of justice. In the aftermath, I fled to the woods for some alone time—a lifetime's worth being the plan. Except I ended up getting married instead. But before my new wife came along, I used the downtime to do some reading, including Neil Gaiman's *American Gods*. As the hitchhiking college student Samantha Black Crow explains to the protagonist Shadow, "I believe . . . that while all human life is sacred there's nothing wrong with the death penalty if you can trust the legal system implicitly, and that no one but a moron would ever trust the legal system." For the longest time, I was that moron—at least when it came to trusting my own role in the deployment of public retribution. Now I have a more modest view of my abilities. I returned to playing the justice game but have no more room for the death penalty in my heart. A doubting Thomas makes a poor executioner.

MCMILLIAN, TO KILL A LAWYER, *supra* note 40 at 10–11.

50. Regarding the inherent unequal distribution of justice in America, my main character explains:

> Capital punishment isn't immoral. You kill, and the State may take your life in return. The rub is the criminal justice system. Innocent people wither away on death row for a variety of reasons. Tough-on-crime prosecutors seek convictions at all costs to impress voters. Police officers miss, misinterpret, or manufacture key evidence. Incompetent defense lawyers make a weak case against their clients seem foolproof. Judges demonstrate bias against the accused. Expert witnesses peddle bad science for a hefty fee. And, of course, race and economics infect the system at its operating core. The death penalty disproportionately falls on those who are black and those who are poor.

MCMILLIAN, THE MURDER OF SARA BARTON, *supra* note 34.

51. One of the great things about fiction is the opportunity to use sarcasm to express a point. While academic writing sees such a device as beneath its lofty pretensions, practices like asset forfeiture deserve to be treated with mocking contempt. Example:

> Ah, yes. Asset forfeiture. One of the great scams of law enforcement based on the premise of guilty until proven innocent. Suppose the police stop you and find tons of cash on your person. Say $15,000. The cops reason, "What honest person carries around that much green?" You must be a criminal, so they take your money. Want your cash back? Explain in detail where every cent came from. Good luck. The odds are not in your favor.

MCMILLIAN, THE JUST AND THE UNJUST, supra *note* 40.

52. The Trolley Problem's enduring relevance as a thought exercise across

Brothers v. Turnage[53] make appearances in my novels. These are but samples of the legal themes I weave throughout my stories. And all to a mass audience.

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generations and academic disciplines rests in large part on its presentation of a complex moral problem in the form of a story (albeit one that challenges students to supply the ending). I had no trouble using it in a climactic scene for my fourth book:

> In law school, a professor challenged us with the famous Trolley Problem. Suppose a runaway train will soon kill five people standing on the track. But you—an onlooker—have the ability to hit a switch and divert the train to another track where it will only kill one person. What should you do? Most philosophers opine that you are under a duty to hit the switch. The moral math is simple. The lives of five people outweigh the life of one. But I could never get comfortable with that solution—the idea that I could play God and decide that some stranger should die because his life didn't measure up in the split-second calculus of the moment. The same discomfort gives me pause now. Who am I to say that Judy's life is so worthless that I can simply discard it so that my wife can go on living? Even in her deteriorated state, Judy is a person with dignity entitled to some consideration that she still has value. Raymond himself chided the rest of his family for denying Judy's ongoing worth. But expecting moral consistency from a double murderer is bound to leave one disappointed. I stall for more time.

MCMILLIAN, A HARD WAY TO DIE, *supra* note 13.

53. 38 Ga. App. 581 (1928). How do you fit a case about a circus horse with loose bowels into a legal thriller? Like this:

> I begin with the same open-ended fishing net I've used with most of the witnesses, "Tell me everything you remember about the night of the party." The response is an unusual one.
>
> [Justice Lumpkin answers,] "*Christy Brothers v. Turnage*—a 1928 case from the Georgia Court of Appeals. A horse emptied its bowels on the lap of a female patron sitting in the front row of the circus. Can the woman recover emotional distress damages? The court said yes. You know why? Because the excrement landing on her counted as a touching. Fascinating, don't you think?"
>
> Something from law school stirs in my mind—a maxim that probably has universal application. If you don't know who the class jerk is after a week of classes, then you're the jerk. Lumpkin is the jerk.
>
> I answer, "Riveting."

MCMILLIAN, DEATH TO THE CHIEF, *supra* note 40. For the record, the Georgia Supreme Court overruled *Christy Brothers* long before this fictional conversation takes place. *See* OB-GYN Assoc. of Albany v. Littleton, 259 Ga. 663, 666 (1989) (holding negligent infliction of emotional distress requires a physical injury, not just a physical impact). But that's the beauty of fiction. A little literary license never hurt anyone.

But does my incorporation of scholarly ideas into the world of legal thrillers really move anyone to anything beyond turning to the next page? Does it actually change the world? One of the benefits in using citations as a measuring stick of quality and impact is the ability to quantify the number of citations for a given scholar. The old saying goes, "Deans cannot read, but they can count." Judging the quality of a law review article is subjective and hard; counting the number of law review articles in a professor's C.V. is not. From this perspective, citations are per se proof of impact. Someone found your work and cited it. Case closed.[54]

That type of numerical certainty will rarely, if ever, be available to writers of fiction. Sales figures would seem to be the closest proxy, but even that fails to measure whether the legal ideas floated in a novel moved anyone in any appreciable way. Maybe the author just told a good yarn without stirring the reader to action.

So what? Value exists—even if ultimately unmeasurable—in broadcasting ideas far and wide. Sure, a standard law review article provides an outlet to probe discrete issues of law in much greater depth than in the pages of a novel, where the demands of story must always take precedence. The rub is that only a small handful of people want to read traditional legal scholarship. If a law review article falls in an empty forest, does it make a sound? Is it better to be a fragmented wood chip that travels the globe or a fallen redwood in a forest too remote to reach?

Besides, it's a strange dichotomy to say commentary about the legal themes of *To Kill a Mockingbird* squarely fall under legal scholarship while the creation of those legal themes in *To Kill a Mockingbird* itself would not.

THE SCHOLAR AS STORYTELLER: UMBERTO ECO

Umberto Eco was one of the giants of 20th century scholarship in the broader academic world.[55] He also wrote fiction, most

54. Cited it in a law review article located on Westlaw, at least. Other citations—such as in court opinions, books, or articles from scholars in other fields—usually don't get counted in most of these studies, further highlighting the insularity as to what's valued as scholarship in the legal academy.

55. *See* Carolyn Kellog & Jill Leovy, *Novelist Umberto Eco Dies at 84; 'Wrote*

notably the runaway bestseller, *The Name of the Rose*, a novel about a monk investigating a murder in a monastery in the year 1327. The book is chock full of scholarly ideas and observations, prompting one critic to enthuse that it "is a kind of novel that changes our mind, replaces our reality with its own. We live in a new reality after we've read it."[56]

Why would Eco descend from the Ivory Tower of academia to the dirty streets of popular fiction? The dust jacket on the original Italian edition of *The Name of the Rose* provides a clue. There, Ludwig Wittgenstein remarks, "If he had wanted to advance a thesis, he would have written an essay (like so many others that he has written). If he has written a novel, it is because he has discovered, upon reaching maturity, that those things about which we cannot theorize, we must narrate."[57]

Exactly. Some truths can only be expressed through story.

And no one would seriously suggest that *The Name of the Rose* does not count as meaningful scholarship.[58]

JOHN GRISHAM'S TENURE APPLICATION

Suppose John Grisham started teaching on the tenure track at an American law school in 1989. Further suppose that, when up for tenure in 1995, the only publications to his credit were the novels he wrote up till then: *A Time to Kill*, *The Firm*, *The Pelican Brief*, *The Client*, and *The Chamber*. Would Grisham get tenure?[59]

Name of the Rose' and 'Foucault's Pendulum,' L.A. TIMES (Feb. 19, 2016, 8:22 PM PT), https://www.latimes.com/books/la-me-umberto-eco-20160219-story.html (describing Eco as "novelist and intellectual of worldwide renown").

56. *Id.*

57. PETER BONDANELLA, UMBERTO ECO AND THE OPEN TEXT: SEMIOTICS, FICTION, POPULAR CULTURE 189 (2005) (quoting Walter E. Stephens, *Ec[h]o in Fabula*, DIACRITICS, Summer 1983, at 51).

58. Eco's journey from renowned scholar to acclaimed novelist mirrors the earlier paths taken by C.S. Lewis (professor of English literature at Oxford and Cambridge) and J.R Tolkien (professor of Anglo-Saxon at Oxford). Today, both are most famous for the fantasy worlds they created in *The Chronicles of Narnia* (Lewis) and *The Lord of the Rings* (Tolkien). Estimated combined sales: 250 million copies.

59. Admittedly, the imagining of this whole scenario requires a massive suspension of disbelief. Grisham's undergraduate degree is from Mississippi State, and he went to law school at Ole Miss. Under the Thirty-Sixth-Parallel

With this background, Professor Grisham enters the office of Dean Vernon Wormer to discuss Grisham's application for tenure. Luckily for us, the cameras were rolling:

Dean Wormer:	The Law School has decided to deny you tenure. Publish or perish. You know how it goes.
Grisham:	I've published five books since arriving here, all of them best-sellers. They're all being turned into movies, too.
Dean Wormer:	Come now, John. Your writing hobby is cute and all. But surely you don't think your stories matter for purposes of tenure. Take a look at the work of your colleague, Professor Neidermeyer. He's done compelling research into Kant's influence on 18th century evidentiary law in Bulgaria. Real, first-rate stuff. That's what we're looking for.
Grisham:	You haven't read Niedermeyer's work, and no one else has, either. Not even Niedermeyer.
Dean Wormer:	Well, I've heard great things about it all the same.
Grisham:	My novels speak to how law operates in the trenches, the work that lawyers do. I tackle the racism that affects the legal system, the inhumanity of the death penalty, the fragile bond between attorney and client, corporate capture of our political institutions. My work has reached millions of people.
Dean Wormer:	Who cares about any of that?
Grisham:	Well, the students all love my teaching. Shouldn't that count for something?

Hiring Principle, he had no chance of finding work as a law professor. Indeed, having ever set foot in Mississippi is enough for some schools to reject otherwise qualified candidates. Flying over the state in a plane is probably okay. Probably.

Dean Wormer: Why would it? Being a law professor is a writing job. Look, John, I'm sorry. Here's hoping you land on your feet.

Grisham: I'll try to manage. By the way, in *The Pelican Brief*, one of the characters is a law professor sleeping with a student in his class. The professor dies in a car bomb. I based the character on you because, well, you know. Maybe I'll write a non-fiction book about my time in the law school. Like Scott Turow's *One L*, only from the professor's side of the fence. What do you think?

A frightened-looking Wormer stares at Grisham in disbelief, his mouth opened wide as if preparing to compete in a pie-eating contest. Grisham shrugs and makes for the door. On his way out, he says, "Don't ever call me asking for money."

End scene.

GENRES EXIST TO BE BUSTED

Conventions have value in that they set the baseline norms for a given genre. While I would never write a legal brief strictly following the traditional IRAC format,[60] first-year law students need that structure drilled into them as a foundation for their future work as legal writers. But the basics should never be mistaken as the state of art. The form is a starting point, not a straitjacket that allows little movement for creativity.

Well, except when it comes to law reviews. A law review article in 2023 appears remarkably like a law review article in 1950, only maybe longer. Why is the form of legal scholarship so stagnant? My hunch is the legal academy's temperamental conservatism and devotion to rule-following. We're literally trained to follow precedent from the first day of law school. Creativity is actively discouraged in favor of devotion to legal formalism.[61]

60. Or CIRAC, TRAC, CREAC, SHADRACH, MESHACH, and ABENAGO.

61. *See* JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS 34 (2005) (describing lawyer obsession with precedent); *id.* at 63–64 (warning against the dangers of rigid

Legendary record producer Rick Rubin—who has produced such diverse acts as Jay-Z, the Beastie Boys, Metallica, Ed Sheeran, Eminem, and Johnny Cash—explains that allowing conventions to be all controlling leads to a lack of innovation:

> Genres, in particular, come with distinct variations on rules. A horror film, a ballet, or a country album—each come with specific expectations. As soon as you use a label to describe what you're working on, there's a temptation to conform to its rules. The templates of the past can be an inspiration in the beginning phases, but it's helpful to think beyond what's been done before. The world isn't waiting for more of the same.[62]

Newsflash to the Law Review Industrial Complex: "*The world isn't waiting for more of the same*." But's that what the legal academy keeps producing, year after year after year. More of the same.

Changing the status quo is not easy. But the goal of *Story Is Scholarship* is to sound a battle cry against a stale art form and to argue that story, in its fictionalized and non-fictionalized forms, should be part of a new wave of legal scholarship. At a minimum, law professors and law review editors can learn the principles of storytelling to enhance the readability of legal scholarship. More on that later.

JESUS WAS A STORYTELLER

Consider these words from Deuteronomy 4:31: "The Lord your God is a merciful God." Nice sentiment. For all our sakes, let's hope it's true. But contrast this declaration with the Parable of the Prodigal Son. The Pharisees were blasting Jesus for eating with sinners. Jesus responds with a few stories, most prominently the parable of a son that leaves home after demanding and receiving his inheritance, effectively declaring to his father that he considers him dead. The son squanders the money, falls on hard times, and suffers from starvation. He decides to return home and begs his father for a job as a servant knowing that at least his father's servants get to eat. While the son is still far off in the distance, his

adherence to legal formalism).

62. RICK RUBIN, THE CREATIVE ACT 100 (Kindle ed. 2023) (ebook).

father sees and rushes toward him. Far from being angry (or adopting a see-I-told-you-so posture), the father throws a giant celebration. Why? Because his son that had been lost was now found.[63]

Jesus's point in telling the story to the Pharisees? The Lord your God is a merciful God. But notice how much more powerful the presentation of that idea hits in parable form than merely reciting a verse from the Old Testament. The story makes the principle personal, forcing mothers and fathers to consider how joyous they would feel if their lost child had suddenly returned home. Jesus acts much like a lawyer in deploying reasoning by analogy, using the audience's understanding of parental love to teach them the boundlessness of divine love. He persuaded by drawing on the lived experience of the audience.[64]

Stories are important teaching tools because they marry information (God is merciful) and context (a relatable fact pattern showing mercy in action). That Jesus taught mainly in parables is no accident; The need for stories is part of the human condition.

63. *Luke* 15:11–32. This parable hit home for me on June 30, 2015. That afternoon, my two children, James and Emily, were on the back of a golf cart involved in a collision with an automobile. James was bloodied literally from head to toe but otherwise okay. Emily's condition was much more uncertain, and she was life-flighted by helicopter to Children's Healthcare of Atlanta. Let me tell you, the word "life-flighted" may be the scariest in the English language. The hour-long car ride to the hospital remains the darkest hour of my existence, and I didn't know whether Emily would be alive when I arrived. She survived, and nothing else in the world mattered at all. Why? Because my daughter who had been lost (at least in my mind) had been found. But the experience changed me. It took someone else's fiction to put my feelings into words. As Craig Johnson wrote in *Dark Horse*, part of his Walt Longmire series: "We do everything we can to protect those we love, whatever it takes, and it's not enough. Unlike bone, once that illusionary magic circle of safety is broken, it can never be completely repaired and it is not stronger at the break." Emily did not die that day, but some species of innocence within me did. Not much work got done on my novel that summer.

64. *See* CHIP HEATH & DAN HEATH, MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE 204–37 (2008) (explaining the role of story in the spread of new ideas).

STORY IS SCIENCE

Every culture in human history has had its own stories. Even before the written form became possible, heroic narratives were passed down from generation to generation. *The Iliad* and *The Odyssey* existed for hundreds of years as part of a stout oral tradition. The ubiquity of stories makes sense because the thirst for captivating narrative is hard-wired into our brains and tied to our evolutionary development:

> Why *do* normally responsible adults like you and me check out of reality so completely when we're under the spell of a compelling story? That's something evolutionary biologists have been wondering about for a long time . . . . Back in the Stone Age, making it through the night was a much dicier proposition, and putting reality on hold for even a moment left you vulnerable to all sorts of pouncing predators, human or otherwise. In other words, getting lost in a story could be deadly, which is why scientists figured there had to be a damn good reason for it, or else natural selection would have weeded out those of us prone to getting lost in a story . . . .
>
> There is a damn good reason. Story was the world's first virtual reality. It allowed us to step out of the present and envision the future, so we could plan for the thing that has always scared us more than anything: the unknown, the unexpected. What better way to figure out how to outsmart those potential pouncing predators before they sneak up behind you?[65]

People need stories to survive—whether from the *Harry Potter* book series, superhero films, *Game of Thrones* on television, a true crime podcast, or even a ghost tale told around the campfire.

As legendary trial lawyer Gerry Spence explains,

> "What's the story?" is the universal question. . . .
>
> That we see our lives and all of their chapters as stories is

65. LISA CRON, STORY GENIUS: HOW TO USE BRAIN SCIENCE TO GO BEYOND OUTLINING AND WRITE A RIVETING NOVEL 11 (Kindle ed. 2016) (ebook); *see also* Megan E. Boyd, *A New Phenomenon in Legal Writing: Storytelling Complaint Introductions—Part I*, GA. BAR J., Apr. 2023, at 48 (describing the relationship between storytelling and the hardwiring of the human brain).

> genetic. If we were to retreat in time to that moment when [humans] became a member of a language-speaking species[,] we would discover that all of [our] history, all of [our] religion, [our] belief systems, [our] culture is told and handed down in story.[66]

Well, actually, not all. Academic writing in general—and legal scholarship in particular—persists in communicating knowledge in a countercultural, non-evolutionary way. But if humans have an inherent, biological need for stories, what does it say about a Law Review Industrial Complex that continues to incentivize mass-produced law review articles of a similar, monotonous, non-narrative style?

STORIES MAKE LAWYERS RICH

The folklore about law school academic performance and how it relates to a student's future legal career goes like this: "A" students become professors; "B" students become judges; "C" students become millionaires.[67]

How does such an obviously false generalization get passed around like accepted wisdom? Because it points to certain larger truths. First, good luck becoming a law professor without a strong academic record earned at one of the elite universities in the country. Second, law students at the bottom of their classes often make a killing as trial lawyers, where the gift of storytelling is a lot more important than the nuances of legal theory.[68] To the

66. GERRY SPENCE, WIN YOUR CASE: HOW TO PRESENT, PERSUADE, AND PREVAIL—EVERY PLACE, EVERY TIME 86 (2005).

67. Disclaimer: your results may vary.

68. *See generally* SPENCE, *supra* note 66, at 86 (describing the importance of storytelling for trial lawyers); JOHN EDWARDS, FOUR TRIALS (2004); Boyd, *supra* note 65, at 48 ("Good lawyers have used storytelling techniques for hundreds of years to persuade judges and juries that their clients should prevail."). Or as I explain in one of my novels:

> The tone is friendly and folksy. Raymond's renown as a storyteller is the stuff of legends. Juries warm to him not because he wows them with Aristotelian logic. Far from it. Philosophers get massacred in the courtroom. Just ask Socrates. Rather, Raymond possesses the gift common to all the great lawyers: capturing the audience's heart through the power of drama. The technique is not exactly new. Jesus taught in parables for a reason.

extent "C" students lack the elite pretensions of "A" students, that ordinariness works in their favor when trying to relate to juries full of everyday men and women. Indeed, the divide between "A" students (those hirable as law professors) and "C" students (including great lawyers who law schools would not dare touch as full-time faculty members) can be seen as a proxy for the divide between the legal academy and the legal profession.[69]

Despite the centrality of story to the everyday practice of lawyers everywhere, legal scholarship remains reluctant to embrace storytelling as an acceptable delivery mechanism for spreading knowledge about the law. "A" students' becoming law professors provides a clue as to why. Law professors hire other law professors. And what is the first thing law professors look at when serving on appointments committee? The job candidate's academic credentials: schools, grades, service on law review, and publication record producing law review articles. To be a viable job candidate means already excelling at the production of law review articles. Adherence to the Law Review Industrial Complex is baked into the design of creating law professors in the first place.

The system perpetuates itself.

BAD WRITING AND LAW REVIEW ARTICLES: A CASE STUDY

Poor Charles Grove Haines deserves better. In searching for examples of poor writing in law review articles, I had one main requirement, born out of my Southern manners. The author had to be long dead. Enter Professor Haines (1879–1948) and his article *Judicial Review of Acts of Congress and the Need for Constitutional Reform*, which appeared in the Yale Law Journal in 1936.[70] Haines was an eminent scholar of constitutional history

MCMILLIAN, A HARD WAY TO DIE, *supra* note 13.

69. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) (describing the "reality[:] that many 'elite' law faculties in the United States now have significant contingents of 'impractical' scholars, who are 'disdainful of the practice of law'").

70. Charles Grove Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform*, 45 YALE L.J. 816 (1936). I really don't remember how I landed on Professor Haines to be the bearer of all the sins of legal scholarship since time immemorial. My best recollection is that I decided that the best place

and a member of the American Academy of Arts and Sciences. He also needed a tougher editor. Behold, I give you a 111-word sentence:

> The requirement in health laws that the premises be kept in a sanitary condition, in workmen's compensation provisions that factories be rendered safe for employees, in insurance acts that a company be reliable and entitled to public confidence, and in rate regulation that undue preference be not granted to shippers,—these and a variety of other general phrases directed to administrative officers, frequently included in statutes and usually approved by the courts, mean no more than the frequent admonition in the interstate commerce acts that the Commission should determine a question "as in its judgment the public interest demands," or that it should sanction only arrangements which are "just and reasonable."[71]

But that string of words is just the warm-up act. Here, Professor Haines breaks his own record with a 115-word sentence:

> The authority assumed by Congress and the President during the World War and approved by the Supreme Court in several important instances such as the Adamson Labor Act and the acts restricting increases in rents, merely seemed to carry to its logical conclusion a line of reasoning and interpretation which began with Hamilton and which was arriving at the view that, when required by the public interest and the general welfare, any authority which may be necessary to meet an emergency, and the most important powers which are desirable to carry out the ordinary ends of governments in peace time, may be assumed by the federal government without the necessity of amending the Constitution.[72]

Mere mortals would have stopped at two such sentences, fearful that any further incursions into the land of verbosity might

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to start the search for bad writing in law reviews was with old issues of the *Yale Law Journal*. For the uninitiated, making jokes at Yale's expense is a hobby of mine. *See* MCMILLIAN, THE JUST AND THE UNJUST, *supra* note 40, at 77 ("Before he reached the big time, the voice had shades of a Southern accent. But decades in the Senate have modulated that particular tick. These days he sounds more like an Ivy Leaguer, straight out of Harvard. Or better yet, Yale.").

71. Haines, *supra* note 70, at 830.

72. *Id.* at 839–40.

irrevocably trigger the wrath of the writing gods. But not the fearless Charles Grove Haines, who unleashes another monster, 118 words in all, just because he can:

> It is a rather strange procedure for the members of the Supreme Court to express much concern regarding the fear of determination of matters by coordinate departments of the government in accordance with vague phrases involving "vagrant" powers, especially since the chief charge against the Supreme Court in many of its decisions under the due process of law and equal protection of the laws clauses of the Fifth and Fourteenth Amendments is that these phrases are in no sense standards and that the Court has nevertheless exercised by means of them for many years an effective censorship over social and economic legislation, acting as a kind of "House of Lords" for both the federal and state governments.[73]

Feel free now to take a break and stretch your legs. I think we all need a breather.

Did anyone actually read every word from all three of these excerpts? Doubtful. The flood of language is too much. Self-preservation requires us to avert our eyes and skip ahead. How do such monstrosities happen? One of two ways. Either on purpose (William Faulkner)[74] or by accident (Charles Grove Haines). Neither is recommended.[75]

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73. *Id.* at 830–31. This sentence also highlights another weakness in Haines's writing—the overuse of the phrase "it is." By my quick count, Haines uses "it is" 46 times in the article (not including when he quotes other people that also use the phrase). It is hard to read.

74. Faulkner's *Absalom, Absalom!* has a 1,266-word sentence. That abomination is as dreadful as it sounds. I read it—over six minutes by my watch—so you do not have to. The words "scuppernong" and "demijohn" make appearances, which is about everything you need to know.

75. Some writing course I studied from afar included an exercise encouraging writers to craft a sentence approaching 100 words. In a document titled *The Accidental Client* on my computer (so named for reasons long lost to me), I took a stab at channeling my inner Faulkner (with a dash of Raymond Chandler on the side):

> Imagine a man, a detective of the old school, his words few but weighty, always moving in the shadows of night, alive among hoodlums, bosses, and dangerous women, facing danger with steely resolve, always determined to do the right thing, someone demanding of himself a strict adherence to his own moral code, yet unafraid to buck the hallowed authority of the Law and those who enforce it, his distrust of the

Before leaving Professor Haines alone forever so he can go back to resting in peace, I must include one more sample from *Judicial Review of Acts of Congress and the Need for Constitutional Reform*. While this sentence does not crack the 100-word barrier (clocking in at a mere 88 words, half of which are either "of" or "for"), the ponderous prose both bores and confuses the reader:

> Chief Justice Hughes, with the application of a new version of the separation of powers theory in federal jurisprudence, demands for executive action such as that envisaged in the National Industrial Recovery Act a quasi-judicial procedure of the type of the Federal Trade Commission and of the Interstate Commerce Commission with ample provisions "for formal complaints, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the commission is taken within its statutory authority."[76]

While I believe I understand what Haines is saying here (Hughes wants procedural checks against presidential action under the National Industrial Recovery Act), this meaning took several close readings to make certain. Haines's analysis gets lost in the jungle of his own words.

But now some points in favor of Professor Haines. First, let the record reflect that Charles Grove Haines was a swell fellow (although one with an Aaron Burr-like regard for Alexander Hamilton).[77] Second, being a long-time teacher of Constitutional

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> establishment matching our own, the kind of man who inspires in all men he encounters this thought: "I wish I was more like him."

Not my best work. The lesson? Don't try to write super-long sentences. Keep it simple. Be Hemingway, not Faulkner.

76. Haines, *supra* note 70, at 835 (footnotes omitted) (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 533 (1935)).

77. As tributes to the recently departed go, this one for Professor Haines is hard to top:

> To those of us who knew him only on this campus, Professor Charles Grove Haines was a familiar figure with silvery hair, a characteristic gait, a distinctive voice and an unforgettable twinkle in his eye. But there was more to the man and the scholar than these traits. . . .
>
> Essentially an anti-Federalist, a nonconformist, and a higher critic of men and institutions, Professor Haines fought for half a century with all the powers of his intellect an incessant duel against the spirit, the

Law, I enjoyed seeing the Supreme Court in real time through the eyes of a keen analyst on the ground in 1936, a year before the Constitutional Revolution of 1937 vastly changed the conception of federal power.

Lastly, Professor Haines is but a symbol of the sickness plaguing legal scholarship. The fault lies not in the stars, but in ourselves. The problem is You. The problem is Me.[78]

ON FOOTNOTES

One persistent critique of legal scholarship is the copious amount of footnotes that populate the pages of law journals. Two thoughts. First—yes, yes, yes. The default orthodoxy that *every* idea, no matter how obvious, must have a cite supporting the proposition stifles the flow of good writing, not to mention the inherent bias of such a system against original thought. As an author, the game is exhausting and shows the hollowness of citation rankings. Many times, a citation only reflects the top results of a Westlaw search. You get your cite, do your duty by dropping it into your paper, and tread wearily to the next footnote, never really engaging with the law review article you just cited.[79]

> works and the tradition of Alexander Hamilton. By his untimely death he was spared the necessity of a final and losing round against the imposition of official orthodoxy. We shall not live to see his like again.

M.W. Graham, et al., *In Memoriam: Charles Grove Haines, 1879-1948*, UNIV. CAL: CAL. DIGIT. LIBR. (1948), http://texts.cdlib.org/view?docId=hb9p300969;NAAN=13030&doc.view=frames&chunk.id=div00009&toc.depth=1&toc.id=div00009&brand=oac4. They don't make them like Charles Grove Haines anymore.

78. To prove that I am a fair guy, here's an example of egregious law review writing from my own hand:

> Although both *NCAA* and *Indiana Federation of Dentists* were decided in favor of the plaintiffs, invalidating a price schedule and an informal limitation on services without regard for defendants' market power and specifically rejecting defense arguments that such market power was a necessary component of the rule of reason inquiry, the continuing viability of the per se rule seemed uncertain throughout the 1980s.

Too much is going on here, including a dangling modifier (or close enough). I refuse to provide a cite to this passage on the grounds that such sentence construction should never be cited (at least until I am dead). And there are plenty of other examples of my own bad writing that I could have not cited as well.

79. Here's a fun research fail on my part. I wrote two articles arguing that Atticus Finch's Christian faith had a huge impact on his actions in *To Kill a*

Second—I love footnotes. Not citation footnotes, way too many of those. Rather, the footnotes that I adore are those where the author strays a little from the main premise of the article to offer some ancillary nugget of wisdom or insight. Asides of this nature often contain large quantities of gold. Far from being frowned upon, these types of footnotes should be celebrated in that they represent the only original contribution of the legal academy to scholarly writing. Also, the unique personality of an author—long-suffocated starting with the first writing class a person takes in law school—often slips through the cracks in the footnotes, often making the writing more interesting than anything happening in the main text.[80]

In any event, legal scholarship would be much improved if all stakeholders came together and agreed that no law review article should ever have more than 100 footnotes. Much like in *Seinfeld* when a shortage of birth control sponges forced Elaine to consider whether a prospective sexual partner was "sponge-worthy," a hard cap on footnotes would force authors to be more discerning as to

Mockingbird. Years afterwards, I came upon a quote from Harper Lee herself in the pages of the *New York Times* in 1966 that goes a long way to proving my thesis: "Surely it is plain to the simplest intelligence that 'To Kill A Mockingbird' spells out in words of seldom more than two syllables a code of honor and conduct, Christian in its ethic, that is the heritage of all Southerners." Special to the New York Times, *Harper Lee Twits School Board in Virginia for Ban on Her Novel*, N.Y. TIMES, Jan. 16, 1966. But I'm not too hard on myself for this glaring oversight. I have a sinking suspicion that legal academics as a whole aren't the best researchers, at least compared to other academics. Westlaw and Lexis get their hooks into us right from the start of law school, and anything outside those databases can have a hard time penetrating the legal academy bubble.

80. Before becoming a law professor, I had a side hustle of buying, renovating, and flipping houses, starting around 2004. Around twenty-five successful flips followed. Over time, I began noticing increasing instances of irregularities in the housing market, such that I learned to detect mortgage fraud simply by reading foreclosure notices. But my understanding of the micro conditions on the ground did not extend to the macro subprime mortgage crisis brewing in the form of collateralized debt obligations. Think the movie *The Big Short*. A staggering amount of the American economy rested on the bad loans I was observing every week, and I had no idea. When the bubble burst in December 2007 causing the Great Recession, real estate investors got absolutely decimated. I started as a law professor in August 2007 and sold the last of my housing inventory the next month. Deciding to devote all my energy to my new career, I stopped buying houses. Just in time. Writing law review articles spared me hundreds of thousands of dollars in investment losses.

what footnotes they should actually jump into bed with, always asking the wannabe text: "Are you footnote-worthy?"

NO ONE WANTS TO READ YOUR SHIT

While much of what I've said here argues for a place for fiction at the legal scholarship table, obviously not everyone should drop all their other scholarly projects to write a novel. For one thing, I don't want the competition. But more than that, one need not write fiction to harness the power of story. The principles of storytelling can be deployed in any form of writing or means of communication, including law review articles.

Consider Steven Pressfield—novelist (*The Legend of Bagger Vance, Gates of Fire*), screenwriter (*King Kong Lives*, *Above the Law*),[81] writing guru (*The War of Art*).[82] Pressfield's starting point in teaching us to be writers is a sobering truth we all need to hear: *No one wants to read your shit*.

> In the real world, no one is waiting to read what you've written.
>
> Sight unseen, they hate what you've written. Why? Because they might have to actually read it.
>
> Nobody wants to read anything.
>
> Let me repeat that. Nobody—not even your dog or your mother—has the slightest interest in your [writing] . . . .
>
> It isn't that people are mean or cruel. They're just busy.
>
> Nobody wants to read your shit.[83]

Sounds harsh. But internalizing this lesson immediately makes a person a better writer because it forces an author to consider the needs of the audience, which serves as an invaluable form of quality control:

> When you understand that nobody wants to read your shit, your mind becomes powerfully concentrated. You begin to

81. Hey, it pays.

82. Everyone should read *The War of Art*. I tell my students the same, and those who actually listen thank me for the recommendation.

83. STEVEN PRESSFIELD, NOBODY WANTS TO READ YOUR SH*T: WHY THAT IS AND WHAT YOU CAN DO ABOUT IT 4 (Kindle ed. 2016) (ebook).

> understand that writing/reading is, above all, a transaction. The reader donates his time and attention, which are supremely valuable commodities. In return, you the writer must give him something worthy of his gift to you.
>
> When you understand that nobody wants to read your shit, you develop empathy.
>
> . . . You learn to ask yourself with every sentence and every phrase: Is this interesting? Is it fun or challenging or inventive? Am I giving the reader enough? Is she bored? Is she following where I want to lead her?[84]

The legal academy could do with a good dose of this type of empathy. I had to learn the hard way.

Stephen King's *On Writing* recommends chopping at least 10% off the first draft of your novel during editing.[85] While in the throes of waging war with my inaugural book, I found the suggestion fantastical. Do you realize how hard it was for me to come up with those pages in the first place? Besides, my stuff was too good to end up on the cutting room floor.

Ha.

Eventually, I learned through a lot of sweat and angst that King was right. I began butchering my draft like a madman, trimming fat and offal with gusto, always with the reader at the forefront of my mind, and asking the question: "Is this passage central to the story I want to tell?" After shedding 60,000 words that would never see the light of day, I published *The Murder of Sara Barton*.[86]

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84. *Id.* at 4–5. I remain amazed that anyone would actually take the time to read one of my novels. Truly amazed. Like someone choosing to listen to me talk about my kids for hours on end (and each book is a figurative child of mine). Incredibly humbling. Readers deserve my best (whatever level that best is) and get it.

85. *See* STEPHEN KING, ON WRITING: A MEMOIR OF THE CRAFT (Scribner, Anniversary ed. 2010) ("In the spring of my senior year at Lisbon High—1966, this would have been—I got a scribbled comment that changed the way I rewrote my fiction once and forever. Jotted below the machine-generated signature of the editor was this *mot*: 'Not bad, but PUFFY. You need to revise for length. Formula: 2nd Draft = 1st Draft – 10%. Good luck.'").

86. But aren't you the guy who just bombarded us with four long excerpts of a poorly written law review from 1936? What reader wants such nonsense? True—but nobody actually read every word of those excerpts, which was precisely

That laser-focused process of surgical excision never happened during my older days of producing traditional legal scholarship. Now, all of us edit our law review articles, of course. Writing is rewriting at the end of the day. But the form of law review articles does not meaningfully compel one to take stuff out. Whereas good storytelling demands the author subject every sentence to the rigors of a narrative filter, the classic law review article has no such overseer whipping our prose into its best version. Indeed, the perceived need to reach a certain word count to be "law-review worthy" may cause some articles to be longer than necessary on purpose, the audience be damned.[87] That's not just a lack of concern for the reader, it's a giant fuck you.

So yeah, legal scholarship lacks empathy. I'll repeat it again for those in the back: "No one wants to read your shit." Follow my example. This article was originally 53,147 words before I started chopping. You're welcome.

HOW TO WRITE BORING NON-FICTION

Fiction knows enough about itself to at least make a pass at trying to tell a good story. Non-fiction lacks the same self-awareness. Even worse, non-fiction may even come to believe that story is irrelevant to its enterprise. But without the guardrails of story, the default becomes some other stilted structure to take story's place. Back to Steven Pressfield:

> Here's the wrong way [to write non-fiction]:
>
> 1) Introduce the thesis . . . .
>
> 2) Cite examples supporting the thesis . . . .
>
> 3) Recap and sum up what you've presented so far . . . .
>
> In other words, "Tell 'em what you're gonna tell 'em, tell 'em, then tell 'em what you've just told 'em."[88]

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the point. Like an intentionally unfunny Norm MacDonald comedy routine that eventually becomes funny precisely because of its very unfunniness.

87. He whispered this part, looking around the room with nervous eyes for affirmation from his other law professors.

88. PRESSFIELD, *supra* note 83, at 163. Professor Schlag likens the monotony to a legal brief:

Sound familiar? Pressfield just described the structure of 99.99% of every law review article ever written.

For a particularly egregious (but totally normal) version of the genre, consider my article, *The Proper Role of Courts: The Mistakes of the Supreme Court in* Leegin. First up is a 327-word abstract summarizing everything to follow. Next: a table of contents filled with Roman numerals; sections starting off with A, B, & C; sub-sections numbered 1, 2, & 3; and sub-sub-sections labeled a, b, & c. Rinse and repeat, ad infinitum.[89] After that, the paper begins with a 1167-word introduction (not including the footnotes) providing a roadmap of what's ahead (just in case someone missed the directions provided by the abstract and table of contents). At the end of the article, for anyone still needing to connect the dots, a 384-word conclusion (again not counting the footnotes) summarizes what came before.

Just shoot me.

But in my defense, all I did was model the examples of legal scholarship that came before. I was a first-year law professor at the time, simply following The Way Things Must Be Done. Hell, I placed the article in the *Wisconsin Law Review*, a testament to my faithfulness to the demands of the genre. But these rules were established before any law professor now alive was even born. Long dead white guys still control (in the year 2024) the way the legal academy expresses itself. That's some serious beyond the grave power in operation right there. Charles Grove Haines must be looking down at us and laughing.

Riddle me this: Is much of legal scholarship badly written because most law professors are bad writers? Or does the expected form of legal scholarship inherently produce bad writing?

Almost certainly the latter (Charles Grove Haines excepted).[90]

> [T]he law review article (legal brief) begins by laying our claim to the reader's attention (Statement of Jurisdiction), followed by a framing of the issues (Issues Presented). We then set forth the factual context (Statement of Facts), marshal the legal arguments (Legal Argument), and end with a single normative prescription (Prayer for Relief).

Schlag, *supra* note 2, at 813.

89. *Story Is Scholarship* has no Roman numerals gracing its pages. That's a good hill to die on.

90. Bad writing in this context means uninteresting. Most law review

STORY AND THE CRAFT OF WRITING LAW REVIEW ARTICLES

What's the answer to the problem of no one wanting to read our shit? The first step is tight and interesting writing. Pressfield again:

> 1) Streamline your message. Focus it and pare it down to its simplest, clearest, easiest-to-understand form.
>
> 2) Make its expression fun. Or sexy or interesting or scary or informative. Make it so compelling that a person would have to be crazy NOT to read it.
>
> 3) Apply that to all forms of writing or art or commerce.[91]

Story forces the writer to keep these considerations in mind because weighing the needs of the audience is part of the process. A storyteller *tells* a story, which invariably involves a third party, the listener/reader. A law professor, in contrast, *writes* law review articles. A subtle distinction but one that has huge implications. Legal scholarship is about the writing, not the telling.

The similarity of most law review articles in terms of length, structure, and style is not organic but rather the consequence of authors feeling compelled to stick close to the script. But what if the script—introduction, main argument, conclusion, with lots of background and exposition in between—is itself uninteresting? Even the best writers can become bogged down when limited by an uncreative form. Try writing an interesting software licensing agreement. It cannot be done.

But law reviews need not be so constrained. One of legal scholarship's great comparative advantages (potentially) over other academic disciplines is its freedom—or better yet, anarchy. No grant requirements to satisfy. No peer reviewers to please. No experiments that need replication. We can literally choose to

writing is good in the conventional sense of being the type of work that would easily earn an "A" in graduate school, what Professor Schlag described as "high-end mediocrity." Schlag, *supra* note 2, at 809.

91. PRESSFIELD, *supra* note 83, at 4. And "by all forms of writing," Pressfield means *all forms of writing*, whether a "TED Talk, [a] sales pitch, [a] Master's thesis, [or] the 890-page true saga of your great-great-grandmother's life." *Id.* at 150.

express ourselves in whatever way tickles our fancy.[92] And yet somehow we chose *this*.

How can we flip the script? Start with story. And stories are told in three acts: the hook, the build, the payoff.[93]

Hooks are important because they serve to immediately grab the attention of the reader. Professor Lawrence Friedman in *Crime and Punishment in American History* starts off with the kind of story that would even pique the interest of a middle school boy:

> About three and a half centuries ago, there was a stir in the colony of New Haven, Connecticut. A sow had given birth to a "monstrous" piglet. In the minds of the colonists, this was no accident. Surely the misbirth was some sort of omen. Specifically, it had to be a sign of sin, a sign of a revolting, deadly crime: carnal intercourse with the mother pig.
>
> Who could have done this horrendous act? The finger of suspicion pointed to Thomas Hogg (unfortunate name). Hogg insisted he was innocent. Was he telling the truth?[94]

That's storytelling. Immediately, I am hooked and want to know the answer to the question. Did Hogg tickle a hog's fancy?

Or take Eric Muller's riveting *Lawyer, Jailer, Ally, Foe*, an excellent book that uses long form storytelling to unpack the role of lawyers in the internment of Japanese Americans during World War II. The Preface begins simple enough but in a way that

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92. "Tickles our fancy" is a cliché, and "writers should never use clichés." *See supra* note 47. On the other hand, the phrase also sounds mildly sexual, and sex sells. Tough call. Regarding the lack of imagination pervading legal scholarship, Brian Frye observes:

> [L]egal scholarship is the least creative literary genre, other than phonebooks. While legal scholars effectively have carte blanche to write whatever they like in whatever style appeals to them, they ironically lack the courage - or maybe just the inclination - to exercise that freedom, with certain rare exceptions. So, all legal scholarship is written in the same format, and the same language, with the same results.

Bryan L. Frye, Automatic Writing (Sept. 18, 2022) (unpublished manuscript) (available at https://ssrn.com/abstract=4222177).

93. PRESSFIELD, *supra* note 83, at 57, 150.

94. 1 LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY vii (1993).

captures the reader's interest right away: "The thin old lawyer in the loose-fitting suit and bolo tie inched toward me on the arm of his son."[95]

Great sentence. We immediately want to know more about this man in the bolo tie. We can see him clearly in our mind, the clothes too big, a wardrobe that used to fit but now sits on him awkwardly, his ancient body deteriorating away—the old lawyer's slow shuffle giving the waiting author plenty of time to register his impressions. All the visuals are there to allow the reader to paint a vivid picture of the scene. But Muller does not stop with the hook. In the Epilogue 251 pages later (i.e., after the build), the last sentence of the book provides the reader the payoff about the lawyer in the bolo tie. (You can read it for yourself.)

Storytelling.

But these examples are from books, where we accept the conventions of story more easily. Can the hook—build—payoff structure work in law review articles? Of course. For a sterling example, we return to Professor Shari Motro's *Scholarship Against Desire*.

THE HOOK

Professor Motro begins the article with a question followed by a story:

> "Where is your heart in this work?"
>
> I often pose this question to faculty candidates I'm interviewing after they share their scholarly agenda. A depressing proportion seems baffled by the question. One refreshingly honest candidate answered: "It's not." He had started his career writing about a topic he was passionate about, but had concluded that it hurt his marketability. So he switched, and his stock went up. "Now I'm just solving an intellectual puzzle," he said. And in the same breath: "It's business."[96]

Who is Professor Motro's main audience? Other law professors. And most law professors have at least once in their

95. ERIC L. MULLER, LAWYER, JAILER, ALLY, FOE: COMPLICITY AND CONSCIENCE IN AMERICA'S WORLD WAR II CONCENTRATION CAMPS xiii (2023).

96. Motro, *supra* note 26, at 115.

career written something from a position of "have to" as opposed to "want to." That audience is immediately hooked because Motro is writing about them.

THE BUILD

Professor Motro goes on to tell the story of her own personal scholarly journey and the pressure she felt to be inauthentic to conform to the expectations of the profession:

> During my first few years in the legal academe, I felt like an impostor. I didn't belong. I still held the ideals that led me to go to law school—I was still passionate about the rules that shape our society, I still wanted to change the world, and I wanted to do it through words, through writing. But I assumed that writing in the voice that felt natural to me had no place in a law school. So I pushed myself to assimilate, to stamp out the aspect of my identity that couldn't play the part. When the stress of this exercise threatened to overwhelm me, I blamed myself. I imagined, as minorities often do, that my pain was my well-deserved punishment for trying to "pass."
>
> Few academics who feel this way are willing to say so publicly, so it's hard to gauge how widespread the crisis of authenticity is. My intuition tells me that its proportions are large enough to merit concern, and not only because academics themselves are suffering. Students are suffering too. A shocking number of law students and lawyers devote much of their mental and emotional resources battling depression, anxiety, alcoholism, and drug abuse.[97]

The build is a chance to create dramatic tension. Here, Professor Motro does just that. Could she be both herself and a law professor?

THE PAYOFF

In the end, Professor Motro chooses herself over the demands of the Law Review Industrial Complex:

> Early in the process I realized that telling this story in a way

97. *Id.* at 143 (footnote omitted).

> that was faithful to my deepest intentions would require me to step out of the conversation, to unlearn the habits of mind and heart we absorb at the typical faculty workshop and academic conference. So I have absented myself, I have criticized, I may have offended; that has felt both hard and necessary. Sharing my perspective in rooms ruled by law-and-economics-speak can seem futile, not to mention exceedingly uncomfortable. But sometimes this is what is required. As Anne Lamott counsels in her classic advice manual for writers:
>
> > Don't worry about appearing sentimental. Worry about being unavailable; worry about being absent or fraudulent. Risk being unliked. Tell the truth as you understand it. If you're a writer, you have a moral obligation to do this.
>
> In my dreams, there is no conflict; telling the truth as I understand it doesn't have to come with these risks. In my dreams I can cross from safe circle into wilderness and I can also come back and connect both worlds.
>
> In one sense, this paper has already created a bridge.[98]

What I like about this payoff is that Professor Motro does not exactly answer the question about the compatibility of being both herself and a law professor. While she's hopeful that the answer is yes, she remains unsure whether the legal academy will play along. But the result of her journey is a letting go of caring about conformance to the dominant mode of scholarly expression that counts as legal scholarship. She chooses to be her true self, and that is enough.

Also note this lesson from Professor Motro's extraordinary work. Writing for an audience does not mean writing for the lowest common denominator to achieve maximum fan service, to tell the audience only what it wants to hear. Rather, writing for an audience means telling authentic stories in interesting, compelling ways and always speaking the truth as the author sees it. That realness is what people crave and why stories are a universal need in every culture.[99]

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98. *Id.* at 154–55 (citing ANNE LAMOTT, BIRD BY BIRD 226 (1995)).

99. Remember Steven Pressfield's emphasis on developing empathy for your audience? Professor Motro describes a similar revelation at the end of her scholarly journey:

"MOST WRITING EXISTS TO BE READ;
LEGAL SCHOLARSHIP EXISTS TO BE WRITTEN"[100]

One way to deal with the problem of no one wanting to read your shit is to assume from the outset that no one is going to read your shit. That way, no good comes from worrying about your hypothetical reader. Such a person does not exist. The focus of your work is to write, not be read. To speak, not be understood. To create another entry on the curriculum vitae, so that your Dean (who is bad at reading but good at counting) can see that you are one productive little scholarly ant.

The scholarly enterprise is too central to the educational mission of the University to allow legal scholarship to remain so stagnant and inward-looking. Law reviews came into existence in the late 1800s—before film, before audio recording, before radio, before television, before the internet. Delivering legal scholarship in written, single-bound volumes made sense in that world; it was literally the only game in town.

But the past should be a bridge to newer worlds, not a prison to keep us trapped in the old one. Based on my own work, I've argued for the embrace of fiction in the legal academy. That's only one possible fresh outlet, though. Video and audio are the future (if not the present) of how knowledge is conveyed to the masses. Don't believe me? You must not live with teenagers. In this world to come, podcasting and filmmaking—both easier to create and produce than ever—deserve a seat at the scholarship table. As does any other mode of communication that tells a story about the application of law to people. And here's the thing—because of their institutional authority, law reviews themselves can be leaders in

> When we are oblivious to glory, writing is a process of listening. When I'm in the zone, I imagine not a critic who will praise or condemn me, but a friend, a collaborator. I imagine *you*, a human being with a head *and* a heart. I imagine someone who is prepared to join me in what Martin Buber called the I-Thou—in a space in which connection trumps separation, in which disagreement does not equal war, in which we are all always learning and growing.

Id. at 155 (footnote omitted).

100. Harrison & Mashburn, *supra* note 6, at 59 (quoting a common adage describing the state of legal scholarship).

this movement to revolutionize how legal knowledge is conveyed, if they have the courage to be different.

In the contemporary era when even the concept of the University is under attack, scholars possess a duty to decamp from the Ivory Tower and speak to people where they are (and in the ways that people want to be spoken to). The work is too sacred to keep to ourselves.

Besides, each of us has a story to tell.

STORY IS SCHOLARSHIP: THE HOOK, THE BUILD, THE PAYOFF

I started *Story Is Scholarship* with the image of me, a relative nobody in Law Professor Land, in the role of Don Quixote—saddled on my horse, lance in hand, battling the indomitable target of the Law Review Industrial Complex (the hook). Next came my journey from working-class kid to winning the law professor lottery, only to discover that a lifetime of writing law review articles left me wanting more, leading to my career as a novelist (the build).

But that's an incomplete story. What is the payoff?

The payoff is you. You see, I have already escaped the Law Review Industrial Complex. Because I'm committed to creating longform fiction for the rest of my life, *Story Is Scholarship* may be the last law review article I ever write. But if I do return time to time to the pages of law reviews, my terms are non-negotiable: to be myself and to tell a story in whatever manner I see fit. And that manner will not be introduction, Roman numeral, A, B, C, 1, 2, 3, a, b, c, conclusion. Never again. I intend to live as a free man.

That choice is available to you, too. The Law Review Industrial Complex only has the power that we in the legal academy (including those students who labor on law reviews) choose to give it. But my story, Professor Motro's story, and the story of others is that we can take that power back. The payoff is whether I can convert you into joining us. And that story has yet to be written.

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