ARIZONA
LAW REVIEW

VOLUME 32 1989 NUMBER 1

Essay

THE "CUSTOM OF VETTING" AS A SUBSTITUTE FOR PEER REVIEW

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INTRODUCTION

> I apologize to my colleagues and fellow workers in the constitutional law vineyard for submitting this Article for publication before vetting it with them. My academic habits were fully formed before the custom of vetting manuscripts with everyone in sight began. Indeed, I entered academic life thinking that only farm animals could be vetted. Thus, subject only to the inalienable defense of invincible ignorance, the author accepts full responsibility for all errors in this Article. On the other hand, should the reader find any merits herein, they need not be credited to the author's colleagues.[1]

In his sardonic "apology" for not vetting his Article, Professor Boris Bittker shows a flash of disdain, with a touch of unfriendly skepticism, for the new "custom of vetting."[2] One has to be sympathetic to an experienced writer like Mr. Bittker,[3] who is suddenly confronted with a subtle, but significant, change in the system. He is correct, however; vetting has become a widespread habit among

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1. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235 n.1 (1989).

2. As Professor Bittker notes, the word vetting comes from the practice of veterinarians examining their patients. Apparently the term became a fixture in the tradecraft vernacular of British espionage, the spymasters of M-15, and John LeCarre's George Smiley. It is now becoming a chic term, especially among politicians and commentators. If vetting continues its present rate of use by "in" people, it could well displace oxymoron as the top buzzword.

3. Mr. Bittker is a Sterling Professor, Emeritus, Yale University Law School.

writers, having achieved its status as a custom within less than a decade. More important, vetting involves much more than merely allowing colleagues to read your paper. Within the corridors of academe, vetting is a serious industry that can elevate a person's career, reputation, and salary.

Law professors have a lot going for them. They typically have light teaching schedules that would embarrass even the mangy oblomovs[4] that Mr. Sykes describes in ProfScam.[5] As professor-lawyer, they can supplement *supra* competative salaries with consulting fees that often exceed the hourly rates of partners. In a conspiracy with an oligopoly of publishers,[6] they get paid for imposing intellectually and academically suspect scissors and paste casebooks on students.[7] As an added perquisite, they can take occasional respite from law school intrigue to enjoy the considerable advantages of a university culture.

Despite the opportunity for an idyllic lifestyle, a substantial number of law professors are unhappy. The discontents are writers who aspire to be considered "serious" scholars. They fear that their aspiration for recognition is for naught because the traditional intellectual community does not consider their writing to be "legitimate."[8]

THIN SCHOLARSHIP AND THE FAMILY SKELETON

Law professors live in an uneasy and ambiguous environment where "vocationalists" co-exist with "academics."[9] Other than briefs, memoranda, and practical how-to-do-it manuals, vocationalists disdain scholarship; to them it is an

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4. Oblomov is the lead character in a Russian novel by Ivan Goncharov entitled OBLOMOV (1859). Oblomovism has been incorporated into the Russian language as a term of opprobrium, meaning sloth and moral slackness. Oblomovs "only talk about lofty strivings, consciousness of moral duty and common interests; when put to the test, it all turns out to be words, mere words. Their most sincere and heartfelt striving is the striving for repose, for the dressing-gown, and their very activities are nothing more than an *honorable dressing-down* ... with which they cover up their vapidity and apathy." Dobrolyubov, *What Is Oblomovitis?* BELINSKY, CHERVYSHEVSKY, AND DOBROLYUBOV: SELECTED CRITICISM 133, 166 (ed. R. Mailaw 1976).

5. C. SYKES, PROFSCAM (1988), is an exposure of the soft life that characterizes many parts of the academic community. For a fictional, but essentially accurate, description of the skulduggery and other habits of law school faculty, see M. LEVIN, THE SOCRATIC METHOD (1987).

6. An oligopoly that is more concentrated than it appears because West Publishing Company owns controlling interest in Foundation Press, Inc. Telephone conversation with Mr. Roger Noreen, Vice-President and Manager, West Publishing Company (Jan. 13, 1987).

7. *See* Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 SW. L.J. 903 (1988).

8. Entin, *The Law Professor As Advocate*, 38 CASE W. RES. 512, 532 (1988).

> For example, publication requirements for law professors generally are strikingly modest compared to the standards applicable to faculty in most other disciplines. Extensive outside activities divert time and energy from research, thereby reducing the quantity (and perhaps also the quality) of legal scholarship. This could reinforce the opinions of intellectual traditionalists who maintain that law schools do not belong in universities. Law schools in this view are trade schools whose primary loyalty is to the bar; their existence on campus undermines the cohesion of the academic community and detracts from the central purpose of higher education.

Id. See also Legal Scholarship: Its Nature and Purpose, 90 YALE L.J. 955 (1981) (symposium edition).

9. There is a third group, the "shirkers." Exploiting the shield of tenure, they use the law school as a mail drop while they play with computers, visit obscure parts of the world, or dabble in seducing students.

affectation by people who have never set foot in a courtroom. They esteem Edward Bennett Williams[10] over Roscoe Pound.[11] While academics shudder with contempt at Hessian vocationalists for constantly exulting and hiding behind the teaching function,[12] the best that academics can do is produce doctrinal writing consisting of description and analysis of cases and articles. The consequence of the co-existence: "By compelling true academics . . . to play out a Hessian-trainer role, and by compelling highly skilled Hessian-trainers to make believe they are legal scholars, the disease dilutes both scholarship and Hessian training to the advantage of neither."[13]

An ambitious group of academics seeks "original scholarship" through an interdisciplinary mixture. One unintended consequence is that the new interdisciplinary fad demonstrates the limited contribution of legal *qua* legal scholarship. Instead of law, it is other disciplines such as economics that provide the main contribution to the article and justify its publication.[14] Moreover, the value judgments of feminist and Critical Legal Studies tracts titillate, amuse, and offend, but are not taken seriously except by the author's coterie. It is therefore no surprise that when faculty meet, the hot topic is "Legal Scholarship: Is it Relevant?"[15]

So long as vocationalists and academics could cut and thrust each other in the privacy of faculty meetings everyone was relatively satisfied. Vocationalists traveled downtown to do what lawyers are supposed to do — practice and make money — while academics bragged to each other about publishing long-winded and heavily footnoted articles in one of the numerous law journals. The self-serving accord was washed away when the academics got the support of the university central administration who extended the traditional "publish or perish" ukase to the law school.[16] This was, however, a pyrrhic victory for the academics. As the promotion and tenure decisions were channeled through the various committees of the university system, and colleagues in other disciplines learned about law school scholarship, the family skeleton was exposed. LAW PROFESSORS ARE EDITED BY LAW STUDENTS!

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10. The late Mr. Williams was a well known trial lawyer who defended controversial people like Jimmy Hoffa. For an account of his experiences see E. WILLIAMS, ONE MAN'S FREEDOM (1962).

11. A prolific writer, Pound (1870-1964) was the dean at Harvard Law School from 1916 to 1936. *See* R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s 136-37 (1983).

12. Hessian vocationalist refers to those who practice a rigid and traditional version of the socratic method.

13. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 645 (1968). The growing importance of interdisciplinary scholarship at the expense of doctrinal and vocational writing is creating a rift between law schools and practitioners. Professor Wellington, former dean at Yale, has complained that "some law professors today are more concerned with intellectual currents among their colleagues in the arts and sciences and less concerned about law practice and the output of the bench." Metaxas, Nat'l L.J., Sept. 22, 1986, at 4.

14. Rothfeld, *What Do Law Schools Teach? Almost Anything*, N.Y. Times, Dec. 23, 1988, at 21. "The mixture of law with other fields is most prevalent at the 10 or so leading national law schools, at some of which a third or more of the professors are heavily influenced by other disciplines in their research and scholarly writing. The work of those professors regularly fills prestigious journals like The *Harvard Law Review*, which in recent years has published articles on topics like the application of Franz Kafka and nihilism to legal theory."

15. Middleton, Nat'l L.J., Jan. 9, 1989, at 1.

COPING WITH THE SKELETON

The use of student edited journals as the main outlet for legal writing is an embarrassing situation deserving the smirks of disdain it gets from colleagues in the sciences and humanities. All of the Karl Llewellyn inspired praises for "the perfect aristocracy"[17] and the rationalizations for student run law reviews cannot redeem a system that relies on students to choose, often from over 500 to 1,000 submissions,[18] what to publish and then to make critical editorial decisions. The lack of competency is compounded by the incest factor of faculty influencing their students to publish what is often trash. Competency is further threatened by "diversity" membership on law reviews, a practice elevating socio-economic background over editing skills.[19] Even if competent, third year editors are likely to opt out of work to spend most of their time trying to get the best clerkship.[20]

For ambitious academics, embarrassment devolved into humiliation when law review trashing became common, eventually spreading to the public media in diverse places such as the *Village Voice*,[21] the *Wall Street Journal*,[22] and the *New York Times*.[23] Editors are chastised for their "neophytic" judgment,[24] while critics gleefully recite "horror" stories of important articles being rejected by the "best" journals before finally getting published. According to the trashers: "Student edited journals are the scandal of legal publishing . . . ."[25] Things got worse. Academics had to fess up to a more ignominious scandal; there is no peer review system for the articles that law professors publish in law reviews. As a

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16. *See* Zenoff & Moody, *Law Faculty Attrition: Are We Doing Something Wrong?* 36 J. LEGAL EDUC. 209 (1986).

17. K. LLEWELLYN, THE BRAMBLE BUSH 107 (1930).

18. In their hysteria to get published, nontenured faculty make multiple submissions of articles, often as many as twenty. *See* Jensen, *The Law Review Manuscript Glut: The Need For Guidelines*, J. LEGAL EDUC. 383 (1989).

19. Diversity criteria "include membership in a minority group, economic hardship, physical handicap, past experience, cultural background, and 'other factors the editorial board may deem to increase diversity.'" Kornhauser, *GW Law Review Implements 'Diversity Criteria'*, Legal Times, May 15, 1989, at 6. *See* Labaton, *Law Review's Anti-Bias Program Revives Dispute*, N.Y. Times, May 3, 1989, at 10.

20. Carrington, Quinquennial Report, Duke Law School 3, 13 (1987-88).

> Nevertheless, the quality [of the Duke Law Journal] seems to some observers to be a bit uneven, and there remains an endemic problem with the Journal that some of the staff manifests no more than marginal commitment to the enterprise. . . . To some extent, the Journal may be a casualty of the enormous demands made by the placement process on the time and energy of students . . . .

Id.

21. Zion, *Burger's War*, Village Voice, Feb. 4, 1980, at 39, 41.

> It comes down to character. And the clerks come up short. No wonder. Most of them - probably all of them - were editors of law reviews at the top law schools in the country. As character builders, law reviews rank a cut above high-class bordellos. Take the cream, put them in the Supreme Court, and you end up with elitists who are not only impressed with their own importance but quite anxious to impress the important with the inferiority of their employers.

Id.

22. Barrett, *To Read This Story in Full, Don't Forget to See the Footnotes*, Wall St. J., May 10, 1988, at 1, 20.

23. Gray, *Harvard's Faculty Stirs a Tempest With Plans for New Law Journal*, N.Y. Times, May 28, 1986, at 33.

24. Jensen, *supra* note 18, at 1.

25. Gray, *supra* note 23.

consequence, their articles do not receive objective and qualified criticism — and respectability.

In the real world of scholarship, published articles are carefully sifted through a process known as peer review. The decision to publish is made with the advice and critique of "referees" — experts on the subject — who also provide anonymous comments to the writer.[26] Under these conditions, it is obvious that readers will have more confidence in articles refereed by people like Nobel winner George Stigler than a third year law student. The result is that in disciplines other than law, nonrefereed publications are usually discounted when it comes to making decisions on pay, promotion, and tenure.

THE EVOLUTION OF SUBSTITUTE PEER REVIEW

In a campaign to demonstrate a degree of respectability to colleagues in the university and deflect attention from the "skeleton," law academics began to churn out what looked like "scholarly" articles — long pieces with hundreds (sometimes thousands) of footnotes packed with references to "fugitive" sources from Tibet or Dooms, Virginia.[27] Embellished with lengthy and stylishly convoluted titles, they looked and felt like monographs. Footnote originality and differentiation became more important than the text.[28] As the scope of footnote references spread to anything that was exotic, amusing, or would impress, it became customary to thank everyone from secretary to mom and pop — and colleagues who may have made suggestions or in some manner were connected to the author.

Although no one recognized it at the time, a new form of peer review had been created. The development was incremental — first, citation of thanks to a few colleagues, then dedication to a network of vetters, and finally the standard history of the paper as it went through birth, presentation to various groups, and then a long list of vetters.

While the conventional peer review process is anonymous, involving only editor and referees, law journal vetting is public as to the identity of the vetters; prominently displayed in the first footnote — the Author's note — is a list of people who are credited with making "helpful suggestions," "comments," or providing "help." The ideal list includes the top people in the field plus someone who is known to disagree with the writer's views. Moreover, one can convey the eclecticism of a writer intimate with the field by including a few nontenured unknowns.

Over the course of time, the smirks of colleagues in other fields have been somewhat hushed as they began to understand the implications of the new vetting

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26. Professional articles are required to go through something like the proposed review before publication in the major journals in a field. My journal, the Journal of Political Economy, sends a submitted article out to one or two experts (referees) for detailed appraisal. Then the editor makes up his mind on the article's promise - the author is almost invariably asked to revise it if it is promising - and acceptance of the article requires the agreement of a second editor. The process leads to the rejection of at least nine out of every ten articles submitted, although of course some of these articles will eventually appear in some other (in our mind, lesser) journal.
G. STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 175 (1988).

27. Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131, 1147 (1987).

28. *Id.*

custom. They discerned that within a short period of time the law people successfully developed a system that provides a degree of status for their publications. The unique self-serving twist is that each writer is completely in control of the vetting. Each writer has the discretion to select and publicly identify those "referees" that can most effectively furnish creditability or some other benefit.

Authors often synergize the effect of the vetting list by acknowledging that the article has been "presented" to a group of peers. Formal conferences and presentations at overseas schools — like Oxford or Cambridge — are preferred for their prestige and because it lends credence to the impression that the paper got vigorous review. Many presentations are conducted within what Arthur Koestler called the "academic call girl" circuit where friends exchange visits and honorariums.[29] Listing a presentation does not tell us whether the audience read the paper, went to the discussion for a free lunch and to sop sherry, or went for serious and probing criticism. Nevertheless, it is an effective way to let people know that one is available for a visit.

As soon as the more perceptive non-law colleagues finally caught on to all of the advantages and uses of vetting, they became downright envious. For some, envy has turned to imitation. They can now enjoy the benefits of the usual referee system while simultaneously citing a list of vetters.

SOME COUNTERPRODUCTIVE EFFECTS OF THE CUSTOM

The compliment of imitation by nonlegal colleagues is no solace to writers who are forced to use a publication system that relies on students for vetting. Under these conditions, papers *should* be circulated among knowledgeable colleagues for critical review and editorial suggestions. This does not mean, however, that vetting should be converted into a public event of names and numbers. Indeed, the new custom of vetting can subvert that which writers so industriously seek — credibility.

Public listing of vetters invites self-serving, and hence ethically doubtful, manipulation. The vetting custom can be used by established professors to build or expand a private network of followers by gratuitously including young people in the list of vetters. The Author does not expect, or get, serious review from these people but instead exchanges recognition as a vetter for fealty. Likewise one can become part of a network of referees by citing friends, who are then honor bound to reciprocate. Similar to footnote reciprocity, it is the "academic equivalent of I'm OK, You're OK."[30] Nontenured people can grease promotion by publicizing the use of tenured colleagues as referees. This can be very helpful in soliciting the support of vocationalists, who are complimented at being included as authorities in the scholarship universe — without even having to write.

The new vetting custom can have a subversive influence on law reviews — already the subject of scorn. The commentary exchanged in the standard peer review process is an influential voice in the publication decision and thus is detailed, critical, and seen by both writer and editor. Whether law review vetting

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29. It becomes a habit, maybe an addiction. You get a long-distance telephone call from some professional busybody at some foundation or university - 'sincerely hope you can fit it into your schedule - it will be a privilege to have you with us - return fare economy-class and a modest honorarium of . . . .'
A. KOESTLER, THE CALL GIRLS 7 (1973).

30. C. SYKES, *supra* note 5, at 121.

is probing, irrelevant garbage, or a perfunctory pat on the head by an old friend, makes no difference since the editor never sees anything — except a list of the names of alleged vetters. Editors can be misled into assuming that public vetting is traditional peer review and consequently the piece has been given careful scrutiny.[31] Perhaps editors should adopt the policy of having authors furnish their vetters' commentary.[32] A long list of vetters — often as many as twenty[33] or thirty[34] — implicitly gives the impression of approval, thus putting more pressure on the review to accept. Vetting attracts more attention than footnote density.[35] Moreover, if a well known scholar is listed as a vetter, what editor wants to reject the article and take a chance on antagonizing someone into not submitting an article in the future?

Public vetting can be counterproductive to the development of young writers. The first five years are critical for learning the techniques of scholarship and competent advice often is the difference between success and failure. It has become declasse not to be part of the "custom," thus forcing young people to vett their papers to whomever will read or scan them. Moreover, nontenured people feel obligated to include colleagues, in their list, regardless of the colleagues expertise or interest in the subject. It is not unusual to list people who have not published since tenure. Futhermore, the opportunity to be a vetter invites poseurs to come out of the woodwork to dazzle newcomers with their "wisdom." The result is that the young writer is subjected to a cacophony of voices and views, creating enough static to render good advice indistinguishable from bad.

There is yet another problem: by the public disclosure of vetters, the author raises questions about originality. In effect, the vetters' list is a means of indirect recognition of co-authorship or "collaboration." The next step, if it has not already occurred, is for the ambitious to designate vetting on their resumes as a new form of collaboration.

CONCLUSION

Other than as a blatant form of academic gamesmanship, the fad of listing vetters cannot be justified. The practice is not a reasonable imitation of conventional peer review and, more important, is vulnerable to abuses that undermine the already fragile status of legal scholarship. The custom is intrinsically disingenuous. Vetting seeks to deliver a subliminal message: check this long list of vetters and notice my presentations. These people took my article seriously — so should you. Moreover, so long as the journals tolerate hucksterism they will be

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31. It would also be interesting to learn how many vetters are Ka Fu Pings. Ping is a mythical character who is listed on the masthead of Institutional Investor as the magazine's director of research. His function is to take the blame for mistakes. Cohen, *This Still Leaves Unresolved Who His Colleague Mr. Pong Might Be*, Wall St. J., Oct. 21, 1988, at B-1.

32. One editor did check.

> We know, however, that such heavyweights could not possibly 'help' or 'comment' on a fraction of the 'earlier drafts' that their colleagues claim. In this case I did some checking up. Mr. [Duncan] Kennedy never heard of the guy. Mr. [Lawrence] Tribe thought they once may have attended the same conference, at the end of which Mr. Tribe had said, 'Good luck on your project.'

Yeager, *So, You Want To Be Editor?*, Nat'l L.J., Sept. 4, 1989, at 13, 14.

33. *See, e.g.*, Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 n.1 (1989).

34. *See, e.g.*, Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification*, 63 CORNELL L. REV. 707-08 (1978).

partners in endorsing the vetting contributions of "lover,"[36] "beautiful wife,"[37] and a "good sport."[38] Private vetting by knowledgeable colleagues is still the honorable tradition.[39]

35. *See* Austin, *supra* note 27, at 1144.

36. Rothberg, *Sex, Politics & The Law: Lesbians & Gay Men Take the Offensive*, 14 N.Y.U. REV. L. & SOC. CHANGE 891 (1986).

37. Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 727 (1987).

38. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

39. There is a touch of irony in law writers blindly imitating the traditional peer review system:

> Often the basic requirement is publication in a 'refereed' journal, even though, at their worst, such journals can be like an old boys' clique, taking care of each other's career in a narrowly defined speciality, and (like some Ph.D. committees) encouraging insiders' careers while knowingly blocking those of outsiders.

Sauchs, *The Publication Requirement Should Not Be Based Solely On 'Refereed' Journals*, CHRON. OF HIGHER ED., Oct. 19, 1988, at B-2. For a study that confirms the bias of refereed journals see Mahoney, *Publication Prejudices: An Experimental Study of Confirmatory Bias In The Peer Review System*, COGNITIVE THERAPY & RESEARCH, Vol. 1, No. 2, 1977, at 161.