YESTERDAY ONCE MORE: SKEPTICS, Scribes AND THE DEMISE OF LAW REVIEWS

by

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I. DÉJÀ VU

They said it was inadvisable.

There was nothing to be gained from the radical publishing reform that the new technology permitted. Allowing anyone with the appropriate hardware to publish scholarship would result in actually losing the value added to works as they moved through the existing system of scholarly communication. Without experts supervising the production process in the usual way, spelling and other errors would disfigure academic texts. Without the usual

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reviewers pre-vetting scholarly output, basic quality control would be lost. Readers would bend and eventually break under the weight of unprecedented and unmanageable amounts of dubious information. Abandoning traditional scholarly outlets would deprive authors of a critical means of gaining personal prestige. Cutting neophytes out of the publication structure would deprive them of a crucial educational experience. In any event, advocating reform was a waste of time: entrenched academic elites would block any fundamental alteration of the scholarly modus operandi, especially while the benefits of progress could be secured — and most of its costs avoided — by simply turning the new technology over to established publishers.

Readers of the present collection of commentaries in this Special Issue of the Akron Law Review will recognize these points. They are all criticisms of the system of electronic self-publication that I proposed in my Web-posted article Last Writes? Re-assessing the Law Review in the Age of Cyberspace. But they are also recognizable from another context. Five hundred years ago, every one of them was leveled at the scholarly proponents of commercial printing.

The printing press and the remarkable publishing opportunities it offered European scholars from the mid-fifteenth century onwards were not universally acclaimed. In some quarters, fear, shortsightedness and misapprehension prompted outright attacks either on the new technology or on its more adventuresome applications. More than a few academics believed there was nothing to be gained by handing scholarly publishing over to ordinary entrepreneurs like Johann Gutenberg; they preferred to trust the strictly-learned scribal system of scholarly communication that had kept important books in circulation for centuries and that had lately spawned factory-like scriptoria capable of limited mass production. One late fifteenth century Dominican


2. "[I]ntellectuals were thrown into complete disarray by the arrival of a medium they did not understand . . ." Martin Lowry, The World of Aldus Manutius: Business and Scholarship in Renaissance Venice 35 (1979).

3. Gutenberg himself started out as a goldsmith. In general "the printing industry [grew] up too quickly for the regulations which normally controlled medieval crafts to grow with it. Becoming a printer, wrote Erasmus acidly, was a great deal easier than becoming a baker. This freedom of access probably does much to explain the bewildering variety of people who were involved in printing . . ." Id. at 8-9.

friar, Filippo di Strata, actually said that “the world has got along perfectly well for six thousand years without printing, and has no need to change now.”

Fra Filippo and his sympathizers were concerned that scholars turning to commercial printers would lose the benefits of scribes’ editorial expertise, not to mention their direct physical control over individual manuscripts: they worried that printing would permit spelling mistakes, typographical errors and other technical faults that might mar hundreds of copies of a single scholarly work. Speaking of the threat to good spelling in a tract appropriately entitled In Praise of Scribes, a German Abbot named Johannes Trithemius concluded “[p]rinted books will never be the equivalent of handwritten codices .... The simple reason is that copying by hand involves more diligence and industry.”

The critics of commercial printing similarly believed that it threatened to undermine the substantive quality of published scholarship by enabling material that was not commissioned or pre-approved by the traditional (generally religious or aristocratic) authorities to be widely marketed. Without prior restraints, unscrupulous or unschooled printers were bound to unleash a veritable flood of information, much of it inaccurate, and some of it dangerous. Fra Filippo accused the printers of “vulgarizing intellectual life.” He claimed that the Italian city-state of Venice had already become “so full of books that it was hardly possible to walk down a street without having armfuls of them thrust at you ‘like cats in a bag’ for two or three coppers.” These texts were “hopelessly inaccurate,” having been prepared by “ignorant oafs;” they tempted “uneducated fools to give themselves the airs of learned doctors.”

In the absence of pre-certification, critics of commercial printing moreover regarded that as a threat to their prestige. With less (or no) need of sponsors and patrons to underwrite their work and afford them professional and social status, how would they advance their careers or reputations? Commercial printing additionally deprived the young monk or aspiring Doctor of what Trithemius and others considered the “conspicuous” educational benefits of copying manuscripts: “his time, a most precious commodity, is productively put to use; his mind, while he writes, is illumined; his

5. Supra note 2, at 27.
6. JOHANNES TRITHEMIUS, IN PRAISE OF SCRIBES 65 (Klaus Arnold ed., 1974).
7. Trithemius wrote: “[i]f you ask which texts monks are to copy, the answer is simple: whatever their superiors ask of them under obedience. It is for the abbot or prior to assign tasks to the individual scribe.” Id. at 73.
9. Id.
10. “In relationships of patronage and dependence, the client would present manuscripts upwards, either as a bid for reward or an expression of gratitude, and would dutifully copy texts transmitted downwards, especially if they were composed or approved of by the patron.” Harold Love, Scribal Publication in Seventeenth-Century England 179 (1993).
sentiments are enkindled to total surrender; and after this like he will be crowned with a special reward . . . . And as he is copying the approved texts he is gradually initiated into the divine mysteries and miraculously enlightened." If printing were to be done, it were better done by experienced, educated scribes in monasteries and established scriptoria. So long as they remained in charge of publishing, scholars could take advantage of print’s production capacities without having to assume the risks inherent in operating outside the traditional editorial system.

Animated by these and other arguments, concerned professors and churchmen tried to corral commercial printing on numerous occasions in the 1400s and 1500s. In an effort to impose old standards on the new technology, they lobbied for laws requiring booksellers to obtain the permission of university and/or clerical review boards before printing any work whatsoever. In 1471, for example, an Italian classicist, Niccolo Perotti, asked the Pope to impose pre-publication censorship to ensure that printed editions of classical works were properly checked for errors. In 1533, the Sorbonne went even further, asking the French Crown to formally order the printing presses to shut down. In the short run some of these initiatives succeeded, but as we now know, they all failed in the long run. Meanwhile, many critics of commercial printing continued to do academic business in the old, familiar way. They wrote manuscripts and made copies, perpetuating a scribal tradition that survived on the margins of print culture until roughly the end of the seventeenth century.

In some superficial respects, of course, the critics of commercial printing were absolutely right. Many early printers did make spelling and other technical errors, some of which were very serious. The ability of print authors to circumvent the traditional sponsorship system meant that inferior material — especially religious propaganda and "pornography" (plus ça change . . .) — was produced in greater amounts and reached a wider audience

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11. Trithemius, supra note 6, at 61.
15. In 1476, for instance, the Italian scholar Francesco Filelfo wrote to Cardinal Marco Barbo complaining that the Roman printer of his De Jesu Christi sacerdoti had corrupted it so much that it was incomprehensible. William Caxton, the first English printer, openly acknowledged his own technical limitations and humbly asked: "theym that shal fynde faute to correcte it & in so dyoyng they shal deserue thankinges & I shal praye god for them." Buhler, supra note 13, at 50-51 (quoting Caxton).
16. Much of this material was associated with printings of classical love-poetry, especially
then it had previously. By making copying largely superfluous, printing disrupted ancient monastic and scholarly routines.

In more fundamental respects, however, the critics were wrong. First, they were wrong in their underlying conviction that commercial printing would compromise scholarship per se. Print's early editorial and quality-control problems were soon overcome. Sometimes hiring scribes to assist them, commercial printers developed proofreading and review systems that internalized and in some ways improved upon the checking and control procedures associated with manuscript publication. In conjunction with scholars, they developed and implemented indexing and cataloguing practices that, despite the rush of printed information, made good learning more accessible than ever. Second, the critics of commercial printing were wrong in thinking that it would undermine scholarly prestige. Insofar as commercial printing provided an independent means of securing a return on one's intellectual labor, the financial support of prominent persons became less important, but that did not prevent print-oriented scholars from continuing to solicit sponsorship and enjoy its monetary and status rewards. In the long run, commercial printing also made it possible to gain scholarly status in new ways, i.e. through the standing of the publisher who chose to distribute a book, and/or the extent of a book's success in the marketplace. Third, the critics were wrong in their belief that commercial printing would compromise clerical education. Monks and theological students who no longer did copywork soon found — or were directed towards — other pedagogically or spiritually worthwhile activities. Far from suffering in the transition, many were doubtless glad of it. Fourth, the critics of commercial printing were wrong in believing that established scribal institutions could control print publishing just as they had controlled manuscript production. Some monasteries, scriptoria, and individual scribes did experiment with print, but they had limited capital, time, manpower and incentive to develop the new technology.

the works of Ovid. In 1497, in an effort to stem the pornographic "tide", the Patriarch of Venice ordered two printers to remove woodcuts of "naked women, phallic deities, and other unclean objects" from the pages of a forthcoming edition of Metamorphoses. Such publications were deemed to be especially objectionable as they might be seen by children. LOWRY, supra note 2, at 27, 33.

17. BUHLER, supra note 13, at 47.


19. "Copying a complete codex by hand was physically demanding and could require months of intensive labor by one or more scribes. Manuscripts occasionally allude to the copyist's plight .... In at least one monastery of the Middle Ages penances were imposed on scribes who were negligent in the performance of their duties: 130 genuflections to the monk who disregarded the correct spelling, accentuation, and punctuation of the manuscript he was copying, but only thirty for one who broke his pen in a fit of anger!" BARBARA A. SHAILOR, THE MEDIEVAL BOOK 19 (1991).

20. See, e.g., HIRSCH, supra note 4, at 54; "[t]he establishment of a press was ... expensive.
Many gave up, or voluntarily assumed supporting roles in a commercialized and secularized printing industry. Ultimately, the success of commercial printing proved its critics so wrong that we can scarcely credit their arguments today. Indeed, except for those arguments that were put into print (often by others), their rhetorical legacy has largely disappeared.

Five centuries later, the actors have changed but the old roles remain. Advocating — among other things — democratization and the speedy mass distribution of learning, proponents of the electronic self-publication of legal scholarship stand in the place of the commercial printers and their early academic supporters. Opposing them are a number of skeptical academics (including most of the commentators in this Special Issue) who by offering justifications for the traditional law review would unwittingly follow the ex-

Few monasteries had the connections to market the products of a press successfully. It is therefore easy to understand why their number was small and their output not significant when contrasted with the entire production of the period.” It has also been suggested that “the mere act of setting up a press in a monastery or in affiliation with a religious order was a source of disturbance, bringing ‘a multitude of worries about money and property’ into a realm previously reserved for meditation and good works.” Elizabeth L. Eisenstein, *From Scriptoria to Printing Shops: Evolution and Revolution in the Early Book Trade*, in BOOKS AND SOCIETY IN HISTORY 29, 34-35 (Kenneth E. Carpenter ed., 1983). On the (low) proportion of scribes who made the transition to print, see Sheila Edmonds, *From Schoeffer to Verard: Concerning the Scribes Who Became Printers*, in PRINTING THE WRITTEN WORD: THE SOCIAL HISTORY OF BOOKS, CIRCA 1450-1520 (Sandra L. Hindman ed., 1991) (noting, at 40, that “the number of identifiable professional scribes who were once engaged in making manuscript books and who subsequently went into printing would represent approximately 4 to 6 percent of the probable total number of printers who worked before 1500.”).


22. A prominent exception to this “rule” was Abbot Trithemius himself, who (despite some of his comments on printing in general) had *In Praise of Scribes* printed in order to spread its ideas as far as possible. See NOEL L. BRANN, THE ABBOT TRITHEMIUS (1462-1516): THE RENAISSANCE OF MONASTIC HUMANISM 148 (Heiko A. Oberman ed., 1981).

23. Perhaps not surprisingly, the commentators cover a spectrum of positions, and are therefore somewhat difficult to characterize as a whole. Howard Denemark and David Rier appear to be categorically opposed to the idea of electronic self-publishing. Tom Bruce is troubled by it. Henry Perritt sees it as an option that might precede, rather than replace formal law review publication. Richard Delgado doubts its workability as a general proposition, but thinks that “the idea of [occasionally] publishing one’s work directly on the Internet is a fine one.” Richard Delgado, *Eliminate the Middle Man?*, 30 A K R O N L. R E V. 233, 233 (1996). William Ross believes that self-publishing would be appropriate only for scholarship dealing with ephemeral subjects, or otherwise having limited readerships. Trotter Hardy voices concerns, but describes himself as “sympathetic” and concludes his comment by saying that “I confess that I think that web publication will become the publication of the future, so my heart is with [Hibbitts]”. Trotter Hardy, *Review of Hibbitts's Last Writes*, 30 A K R O N L. R E V. 249, 254 (1996). Gregory Maggs — notably the youngest of the legal commentators, not to mention a former co-chair of the Harvard Law Review — feels that while law reviews may yet have an ancillary contribution to make to the production of legal scholarship, “self-publishing on the Internet will almost certainly become a reality.” Gregory Maggs, *Self-Publication on the Internet and the Future of Law Reviews*, 30 A K R O N L. R E V. 237, 237-38 (1996).
ample of the late medieval scribes and scholars who either rejected new technology outright or — if they ostensibly accepted it — refused to recognize or hesitate to endorse its capacity for structural reform. Concerns about the appearance and substantive quality of printed scholarly texts that led some fifteenth and sixteenth-century intellectuals to demand that commercial printers get academic permission before publishing now prompt their modern legal counterparts to call for the perpetuation and even enhancement of traditional editorial anc peer review procedures on the Internet. Worries about the future of scholarly prestige in a world without patronage now represent themselves in alarms at the prospect of legal academics losing the chance to place their works with "elite" law reviews at Harvard, Yale and other "premier" law schools. Fears for the plight of monks and theological students deprived of the educational opportunities inherent in copying manuscripts now reverberate in the arguments of law professors reciting the pedagogical "costs" to law students of going without the vaunted law review experience. Assumptions about the ability of Renaissance church and state to resist religious, political and social reforms fueled by the presses now revive in assertions that conservative law school faculties and administrations will successfully stymie any Internet-facilitated deviations from the established channels of scholarly communication. Calls to confine printing to responsible monasteries and scriptoria now find an echo in appeals for the organization of student- or faculty-edited electronic law journals to absorb the future scholarly output of legal academics and (in the process) extend the power of modern legal publishers into a new medium.

The striking similarity between the present controversy over electronic self-publishing and the long-settled battle over commercial printing suggests prima facie that the arguments against my proposal in Last Writs? are overdrawn. The majority of commentators in this Special Issue are undoubtedly disturbed by the prospect of sweeping, technologically-facilitated change (the course of which never did run smooth). Like their fifteenth and sixteenth-century forebears, however, they have mistakenly presumed that the academic enterprise itself cannot prosper without the benefit of existing structures — in this instance, the law review. Having forgotten history, they may have doomed themselves to repeat it.

II. THE RHETORIC OF REACTION

In 1991, Princeton social scientist Albert Hirschman wrote a well-received book entitled The Rhetoric of Reaction in which he sorted into separate rhetorical categories the principal arguments which were deployed to counter such major post-Enlightenment reforms as the recognition of individual human rights, the universalization of the franchise, and the creation of
the Welfare State. My proposal for the electronic self-publication of legal scholarship in the age of cyberspace obviously pales against the sweeping significance of these changes, but in its own way and in its own sphere it is nonetheless novel. At the same time, by his own admission, Hirschman’s rhetorical genres “are not, of course, the exclusive property of ‘reactionaries.’ They can be invoked by any group that opposes or criticizes new policy proposals . . . .” In this context, Hirschman’s work offers a highly-suggestive structure within which to analyze — and, as appropriate, rebut — the specific counter-arguments advanced by the skeptics contributing to this collection.

Those counter-arguments can be distilled into five Hirschman-style “Theses”: first, the “Denial Thesis” (in this instance, denying that electronic self-publication will secure significant scholarly benefits); second, what Hirschman calls the “Perversity Thesis” (in this instance, holding that electronic self-publication will worsen the very conditions it purports to improve); third, what Hirschman calls the “Jeopardy Thesis” (in this instance, the argument that by putting established publication procedures in jeopardy, electronic self-publication will incur costs); fourth, what Hirschman calls the “Futility Thesis” (in this instance, holding that electronic self-publication is an unachievable goal); and fifth, the “Alternatives Thesis” (in this instance, asserting that most if not all of the purported benefits of electronic self-publication could be achieved by making other less drastic changes to the existing system of scholarly communication in law). In the remainder of this section I examine — and explode — each of these Theses in turn.

A. The Denial Thesis

In its present articulation, the Denial Thesis takes two forms. First, some commentators skeptical of the electronic self-publishing proposal seem to believe that there is nothing fundamentally wrong with the existing law review system, and that there is thus no need or demand for change which could justify adopting my alternative: that it is, in David Rier’s words, “a solution in search of a problem.” In 1996, however, it is all but impossible to argue that there is nothing rotten in the state of Denmark. The output of literature as-


25. Id. at 7.

26. It is not, however, the only such structure available. At a less specific level, the skeptics’ case against electronic self-publishing could also be examined in light of the now-classic analysis of scientific resistance to “paradigm shifts.” THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2nd ed., 1970).


28. Unless, o’ course, you’re not Danish. In this context it’s interesting that Rier, who of all the contributors to the current collection is the one most opposed to electronic self-publishing, and in some ways the one most comfortable with the existing law review system
sailing law reviews in the last five years in particular has been nothing short of prodigious, and the flood shows no signs of abating.\textsuperscript{29} It has no parallel in any other academic discipline. Many law professors who write for law reviews are unhappy because the reviews make arbitrary judgements, mangle prose, delay publication and otherwise make it difficult for professors to get their academic messages across in an accurate, effective and satisfying fashion. These grievances deserve to be taken seriously, especially as "law reviews are published primarily in order that they may be written."\textsuperscript{30} But law review writers are not the only complainers. Many lawyers, judges and even some law professors who use law reviews (even if they do not "read" them cover to cover like one "reads" a magazine or newspaper) are unhappy because the leading legal journals are providing them with what they regard as inappropriate content: in particular, an excess of theory at the expense of doctrinal or practical information.\textsuperscript{31} In the context of such wide-ranging dissatisfaction on the part of both producers and consumers of legal literature, there is obviously something deeply wrong with law's existing system of scholarly communication.

The second and comparatively more credible version of the Denial Thesis holds that electronic self-publication would secure no meaningful benefits, i.e. that regardless of any alleged "problem" with the existing publication system, my proposal has nothing new and really desirable to offer legal scholars. For the most part, this is an argument from silence — a number of those skeptical of electronic self-publication give virtually no consideration to what such a system might have to offer them as writers or readers of scholarly work. This facile dismissal of the potential advantages of change suits these skeptics rhetorically, especially when they go on to recite a litany of alleged costs\textsuperscript{32} to the proposal, thereby tipping their scales heavily against reform. If the cost-benefit analysis they would undertake is not to be disingenuous, however, the benefits of my proposal must be acknowledged and evaluated.

\footnotesize{[even if he would reform it in certain respects — see infra notes 156-59 and accompanying text], is a medical sociologist who does not have to publish in law reviews.}

\textsuperscript{29} Bernard J. Hibbitts, \textit{Last Writes?: Re-assessing the Law Review in the Age of Cyberspace}, (Version 1.1, June 4, 1996), <http://www.law.pitt.edu/hibbitts/lastrev.htm>, paras. 2.15-2.27 [all particular references to "Last Writes?" in this article are to numbered paragraphs in Version 1.1, rather than to locations in the unpaginated Version 1.0; as regards any material quoted herein, the texts of Version 1.1 and Version 1.0 are identical]. Most recently, see \textit{Symposium on Trends in Legal Citation and Scholarship}, 7 CHI.-KENT L. REV. 748 (1996).


\textsuperscript{32} See infra Section II C.
The benefits accruing to legal scholars from electronic self-publication derive both from self-publication *per se* and from Web publication as a general proposition. The benefits of self-publication pertain primarily to authorial control. Unburdened by arbitrary editorial constraints and prejudices, legal scholars putting work directly online can write on virtually any subject without considering what particular law reviews might or might not like. We can write in whatever format we consider best suits our message, be that analysis, story, dialogue or even poetry. For the first time in centuries, we can publish in whatever layout we prefer, repainting the canvas of the traditional "page" as we deem appropriate. We can express our ideas using our own styles and our own words, without having styles, words (and all too often, errors) imposed upon us. We can edit and polish our work when we have the opportunity to give those tasks the care they deserve, as opposed to when law review editors meeting a production schedule demand that they be done. We can disseminate our articles immediately upon completion, without waiting for them to be reviewed and printed by others; we can even withhold them until just the right moment to ensure their maximum impact and utility. In the wake of online publication in particular, we can conveniently revise, update, improve (and, if necessary, correct) our work without having to seek the assistance or approval of any middleman. Because we have self-published, we can readily retain copyright in our own work, allowing us to authorize the reprinting or reproduction of our papers free from the frequently annoying and


34. Ironically (given the Internet's global scope), this may prove particularly valuable for scholars writing articles about subjects of local interest: in normal circumstances these pieces might have difficulty getting placed in law reviews seeking national readerships, and in some instances, they might not find an academic home at all. On the general value of this kind of work, see Howard Denemark, *How Valid is the Often-Repeated Assertion That There Are Too Many Legal Articles and Too Many Law Reviews?*, 30 *Akron L. Rev.* 215 (1996).

35. The fact that under the present regime most legal articles — regardless of subject — will eventually find a home somewhere is cold comfort to authors who understand that all law reviews are not created equal, and that failing to write on topics attractive to the major reviews will almost certainly doom their work to remain unread and unrecognized.

36. "Arrangement in a self-published document in the information age demands that an entire document be carefully considered, ordered, and designed. In the information age, the total published piece must be perceived as not only the form in which a message is presented but also the message itself. In self-published documents, encoders’ rhetorical considerations encompass the entire spectrum of writing and illustrating, as well as that of managing technology, publishing, printing and information." MacLelland, *supra* note 33, at 73.

37. This capacity should not, however, be used as an excuse to post material online that is still "raw" or unpolished. Unless there is an academically-legitimate reason for doing otherwise, a writer owes his earliest online reader what we would currently term a "publishable" piece (if he does not provide one, he should be publicly censured — see the discussion of quality control via reader comments, *infra* notes 46-48 and accompanying text).
counter-productive restrictions which have traditionally been imposed by journals and presses publishing for us.\textsuperscript{38} Such radical author empowerment promises to enhance the quality and creativity of legal scholarship, not to mention the job-satisfaction of legal scholars.\textsuperscript{39}

The benefits of the Web as a specific self-publishing platform are by definition somewhat more technical, but they too are extremely significant. On the Web, legal scholars can construct documents in hypertext, making direct, potentially non-linear connections between sources and ideas which are difficult if not impossible to make using print citations.\textsuperscript{40} On the Web, we don’t have to pay or depend upon publishers for reprints of our own work: we can provide all our readers with electronic documents that each one of them can view, save, print and even annotate\textsuperscript{41} for later use.\textsuperscript{42} On the Web, we can

\begin{footnotesize}
38. Unlike publishers who wish to give only paying customers access to their published information, scholars (for the most part) want to have their ideas disseminated to as broad an audience as possible. See Stevan Harnad, Implementing Peer Review on the Net: Scientific Quality Control in Scholarly Electronic Journals, in SCHOLARLY PUBLISHING: THE ELECTRONIC FRONTIER 105 (Robin P. Peek and Gregory B. Newby eds., 1996) [hereinafter SCHOLARLY PUBLISHING] (“The scholar/scientist . . . wants to reach his peers’ eyeballs so as to influence the contents of their minds; his interest is not in the contents of their pocketbooks.”).

39. As regards the last of these, the benefits of electronic self-publishing obviously go far beyond saving legal scholars “the humiliation of the occasional rejection.” Delgado, supra note 23, at 235.

40. While accepting that hypertext will avoid certain citational complexities, Trotter Hardy suggests that citation (and perhaps even the Bluebook itself) will survive in a Web-based publishing environment. Hardy, supra note 23, at 253-54. I’m not so sure. In a few circumstances Web authors might wish to make explicit reference to the source of a hypertext link in the text of one’s own document, but in most instances I imagine that citation would be (and, to enhance document legibility, perhaps should be) implicit or embedded. For instance, instead of writing and highlighting “Ethan Katsh, Rights, Camera, Action: Cyberspatial Settings and the First Amendment, 104 YALE L.J. 1681 (1995)” or some such technical formula designating a recent article by Ethan Katsh, authors would highlight a word or words in their text (perhaps quoting Katsh) which would then lead the interested reader directly to the relevant paragraph of Katsh’s article. In this context readers would still be able to tell where they were going before they went, but that information would be yielded in some standard form by their browsers (today, for instance, Netscape would report the URL for Katsh’s article if I passed my mouse over a hypertext link to it).

41. Thanks to the capacities of the Web, one might even envisage an interested reader re-posting an annotated article online as a highly particular form of publicly accessible reader comment. Some listserv e-mail postings already display this structure as writers quote and then systematically reply to specific points in a previous message. Far from being a rhetorical novelty, this type of document would in fact be the twenty-first century equivalent of the published “commentaries” (e.g., Coke on Littleton) that performed similar ancillary functions in law and other scholarly fields in the medieval and early modern periods. Might its development herald “the [re]birth of the reader”? See Laurence J. Victor, Travel Guide to Cyberspace 2020: Simulated Instructions, 6 J. CONTEMP. LEGAL ISSUES 435, 457-58 (1995) (“Readers will attach comments and create links. Paths of readers will weave tours for others to follow. Champion readers will become as authors.”).

42. The ability of readers to retain and manipulate copies of web-posted documents has led a few legal scholars (albeit none contributing to this collection) to suggest that Web-based
write and present in color, enriching and enlivening our articles while developing new ways of organizing our messages. On the Web, we can use multimedia to full effect, deploying graphics, audio and video not only to make our scholarship more striking, more memorable and even more accessible, but to open up for investigation visual and aural aspects of legal process which have largely been invisible (or inaudible) to print. On the Web, we can expedite the distribution of our work by sidestepping the delays of mail distribution. On the Web, we can reach an international and interdisciplinary audience, profoundly expanding the range of our scholarly influence. Finally, thanks to the Web’s capacity to carry e-mail, we can conveniently elicit and receive reader reactions to our work that we may answer, attach as a source of information for future readers, and/or use as a basis for revision and improvement. As scholar speaks electronically unto scholar, we have the opportunity to develop the dialogue and debate that, although rarely realized

self-publishing might prove to be a bonanza for plagiarists and pirates. However sincere these concerns, they overlook the critical fact that the Web also makes detection of unauthorized uses easier than ever: “Just type into one of the many search services a couple of sentences of a [paper], and you will be able to discover any pirated [or plagiarized] version of the piece.” The Property of the Mind, THE ECONOMIST, July 27, 1996, at 57, 59. It might also be mentioned that electronically self-published articles are no more vulnerable to plagiarizing and pirating than articles posted to the Web by established journals.

43. “One of the most effective of all the visual elements, color is expensive to produce on the written page. . . . [But color] affects people physically. Red raises blood pressure, increases appetite and raises body temperature. Pink can have a calming effect, as can green. . . . Color also . . . can serve to connect related ideas within a text (and across multi-volume works) in some discourses. . . .” MacLelland, supra note 33, at 121.

44. Numerous studies have suggested that multimedia presentation dramatically enhances recall. One recent survey suggested that although people retain only 10% of what they read, they retain 20% of what they hear, and 30% of the images they see. Using text, speech and images together is even more mnemonically effective. Victor Dwyer, Surfing Back to School, MACLEAN’S Aug. 26, 1996, at 42.

45. “Because it places more emphasis on sounds and images, multimedia publications offer dyslexic readers another avenue for learning. . . . And younger [readers], raised on television and MTV, are more adept at acquiring information visually and aurally than their parents. For coming generations, multimedia is a natural.” Rob French, Where is Publishing Headed?, ADOBE MAG. May/June, 1996, at 34, 37. Even more fundamentally, multimedia presentation might make formal scholarship (and legal scholarship in particular) more attractive, more engaging and more fulfilling for members of gender, racial and ethnic groups which because of prejudice, historically-limited educational opportunities and comparatively-low literacy levels have been marginalized in the dominant print (i.e. text-based) culture of the academy. See generally Bernard J. Hibbitts, The Interface is the Message, WIRED, Sept. 1996, at 130.

46. “Instead of being dead-on-arrival, every article we write on the Web can be a living creature, capable of interactivity, growth and evolution.” Hibbitts, supra note 29, at para. 4.6. See also Abdul Paliwala, From Academic Tombstones to Living Bazaars: The Changing Shape of Law Reviews, 1 J. INFO., L. AND TECH. (Jan. 31, 1996), <http://elj.warwick.ac.uk/elj/jilt/issue1/1abdul/).

47. Might this “dialogue and debate” degenerate into the chaos of some electronic bulletin boards and listserves? Evidence from established groups seems to suggest that if the topic of debate is limited to, say, the virtues of a specific scholarly article (as opposed to the contents
in recent practice, has historically and theoretically been regarded as the test and foundation of sound scholarship.48

The many benefits of electronic self-publication are not hypothetical; they are actual. They are being enjoyed today not only by individual scholars in law, but by entire disciplines — most notably physics, which since 1991 has relied on an archive of self-published “pre-prints” run by Paul Ginsparg at Los Alamos National Laboratory in New Mexico.49 Thousands of physicists worldwide have already contributed to this resource; tens of thousands use it every day. The Los Alamos archive has in practice superseded the traditional physics journals as the primary locus of scholarly communication in the physics field. If electronic self-publishing had no benefits as a scholarly strategy, this simply would not have happened.

To the (limited) extent that adherents of the Denial Thesis do evaluate what I consider to be the benefits of electronic self-publication, they tend to argue that those benefits are in truth neither positive nor significant. Most notably, David Rier asserts that the ability of self-published scholars to instantaneously disseminate their completed research over the Web would do little for them or for their readers. Unfortunately, Rier fails to appreciate the implications of instant — or, for that matter, delayed — dissemination. Take the present law review system. The lag between acceptance of an law review article and its formal publication is all-too-often a year or more. Given how fast law changes these days,50 such a lag can prove academically fatal: a new statute or a new precedent can render an analysis obsolete or inapplicable very shortly after (or even before) it appears. Less obviously, even the standard

of an entire field or sub-field, with no pre-set agenda), discussion is much more likely to be responsible, on point, and (ultimately) useful. *See generally* Andrew Odlyzko, Untitled, <http://www.mathematik.uni-trier.de:8080/literatu/odlyzko.html> visited September 9, 1996.; Andrew Odlyzko, *Tragic Loss or Good Riddance? The Impending Demise of Traditional Scholarly Journals*, 42 INT’L J. HUM.-COMPUTER STUD. 71, 91-93 (1995).

48. “This [dialogue] could continue indefinitely, even a hundred years after the initial submission... A research paper would be a living document, evolving as new comments and revisions were added. This process by itself would go a long way toward providing trustworthy results.” Andrew Odlyzko, *Tragic Loss or Good Riddance? The Impending Demise of Traditional Scholarly Journals*, in SCHOLARLY PUBLISHING, supra note 38, at 91, 97.


50. As Trotter Hardy reminds us in this very collection, “We are no longer a legal community of common law courts, gradually evolving, in piecemeal fashion, over the course of decades. We are a world of statutes and regulations, coming out with startling speed.” Hardy, *supra* note 23, at 252. *See also* Frank H. Easterbrook, *Comment: Discovery as Abuse*, 69 B.U. L. REV. 635, 644 (1989); (“By most accounts, the pace of legal change (legislative and judicial) has never been greater.”). In the age of cyberspace, law is likely to change even faster. *See also* Robert A. Stein, *The Future of Legal Education*, 75 MINN. L. REV. 945, 963 (1991) (“[N]etworks of scholars and practitioners working in common specialty areas and joined by computers will immediately share knowledge about the use and success of novel legal theories and procedures, vastly increasing the pace of change in the law.”).
months-long lag between acceptance and publication all but ensures that by the time other law professors comment on a published piece (by letter or e-mail), the original author has already completed a follow-up piece or has moved on to another subject. In these circumstances most of the benefit of the commentary is lost before it is offered — which helps to explain why so few law professors offer post-publication commentary on others’ papers. The problem is only compounded if a law professor responds to another in print. In this situation, it is often two years or more (from original submission) before the original author or the observing legal academy gains enlightenment from the “exchange,” presuming they are even aware of it having occurred. These realities inevitably discourage the dialogue and debate which I’ve already identified as so important to the scholarly enterprise.

In an electronic self-publication system, however, the pace of scholarly communication is considerably accelerated. “Instant dissemination” of legal scholarship permits publication on the heels of completion, and therefore greatly increases the likelihood that an article will appear in time to matter. Instant dissemination of legal scholarship also has the potential of provoking instant reader responses which can reach a legal author directly, can reach her while her mind is still on her subject, and can reach her while she can still react and/or make revisions in light of comments received. The fact that comments can have a considerable impact in these altered circumstances will only encourage more of them to be made, which will give scholars more impetus to rethink and revise, which will in turn provoke more comments, etc., etc.  

51. Given the shortcomings of contemporary indexing, an article printed in one journal responding to an article that initially appeared in another may not be found by the author of the first piece or other interested readers until long after the response is printed.

52. Publishing delays have the same consequences in science. See David Green, Death of an Experiment, INT’L SCI. AND TECH., May 1967, at 83 (“No one argues a point in a journal if it takes a year from the time of submission of a manuscript to the time of publication.”)

53. See generally id. at 84 (“Anything which leads to or accelerates the solution of problems is in the best scientific interest.”).

54. In this context, psychologist Stevan Harnad has suggested that the pace of scholarly exchange over the Internet will approach the “speed of thought”: “Whatever ideas could have been generated by minds interacting at biological tempo are forever lost at paper-production temps. Scholarly skywriting [Harnad’s term for the electronic dialogue I discuss in the text] promises life for more of these potential brain children, those ideas born of scholarly intercourse at skyborne speeds, progeny that would be doomed to stillbirth at the earthbound speeds of paper communication.” Harnad, supra note 38, at 114. In the physics preprint archive, “everyone mentions how beneficial it has been to get constructive criticisms from the most interested readers within days (or hours) . . . .” E-mail from Paul Ginsparg to Bernard Hibbitts (Sept. 30, 1996).

55. “T]exts produced through on-line conferences reflect a more authentic scholarly dialogue: distinctions between authors and readers become blurred as participants function in both roles, their voices represented as distinct even as their particular contributions get woven into synthetic and emergent products.” Teresa M. Harrison & Timothy Stephen, Computer Networking, Communication and Scholarship, in COMPUTER NETWORKING AND SCHOLARLY
By permitting immediate reaction, instant dissemination of legal scholarship also makes it more likely that third party readers will have the benefit of seeing an article critically discussed and evaluated while it is still relevant and still familiar.

This Special Issue of the Akron Law Review ironically proves my points on reader response. Because Last Writes? was a self-published article instantly disseminated over the World Wide Web, it became available for comment much sooner than if it had gone through the standard law review system. The fact that I received electronic and written comments — including Rier's — within hours, days, and weeks of my actual completion of the paper (at least in its initial version), instead of a year or so down the line after one or more rounds of formal print-based publication, has allowed me to derive much more practical benefit from them. By cutting in half the normal "lag time" between print publication and print response, the instant online dissemination of Last Writes? has also helped to ensure that the readers of this collection will see those comments when it will do them the most good, i.e. while the article prompting them is still very topical.

B. The Perversity Thesis

Taken to extremes, the Denial Thesis — asserting no benefit from electronic self-publishing — transmutes into Hirschman's Perversity Thesis: in this instance, that electronic self-publishing will actually make the scholarly situation worse instead of better. 56 In effect, this is one of the arguments of Trotter Hardy, 57 who alleges that Web self-publication might draw law professors into the technical quagmire of hypertext and multimedia, slowing down rather than speeding up the pace of scholarly exchange. Scholars creating high-tech enhancements would also incur an intellectual opportunity cost insofar as their time would not have been "devoted to substantive legal thinking." 58

Like other historical articulations of the Perversity Thesis which have granted the transformative potential of reform but have purported to reveal that as a danger, Hardy's argument seems neat in theory, but in practice it is

56. See generally Hirschman, supra note 24, at 11-42.

57. Henry Perritt also advances a form of the Perversity Thesis in claiming that "implementation of Professor Hibbits' proposal is likely to make the quality of the Web worse, and to exacerbate the most important of the problems prompting criticisms of student-edited law reviews — poor quality." Henry Perritt, Reassessing Professor Hibbits' Requiem for Law Reviews, 30 Akron L. Rev. 255, 255 (1996). In this article, however, I will consider the quality control point under the rubric of the Jeopardy Thesis (i.e. as a specific "cost" to be incurred), which is how the majority of the skeptics approach it.

58. Hardy, supra note 23, at 250.
exaggerated. Incorporating hypertext, video and audio components into Web documents is — as a matter of technology — already very simple, and is getting easier all the time. I know; I’ve been working with hypertext and multimedia for months. As I write this, a microphone and an inexpensive video camera sit on my computer console. It would take me less than five seconds to program a hypertext link in HTML (and that’s in raw code, without an HTML “editor”), less than two minutes to record an short audio segment and code that into a given Web document, and probably less than three minutes to record and incorporate a brief video segment. If a picture (or a sound, or a hyperlink to a picture, a sound or even another text) is “worth a thousand words” that’s not a bad investment of time. Even leaving aside the cliché, programming a hyperlink and recording particular audio or video segments may take less time than it already takes most of us to craft a good paragraph, or sometimes even a good sentence. In this context, it’s virtually impossible to credit the contention that using these technological options will take so much time and energy that they would seriously slow the pace of scholarly production and exchange. On the contrary, Web-based multimedia might ultimately speed that process up (and otherwise enhance it) by allowing legal academics to substitute immediate depiction for lengthy second-hand description. Of course, none of this is to say that academic authors (or anyone else, for that matter) should employ multimedia in Web documents simply “because they’re there.” Rather, the fact that multimedia are quick and easy gives electronic self-publishers the freedom to use them appropriately. Instead of having to leave them out solely because incorporating them would take too long, we can include them whenever we conclude that they would make a document or a point more comprehensible and more memorable.

But what about hypertext and multimedia as conceptual constructs? Now here’s the rub. Trotter Hardy suggests that hypertext and multimedia require “new ways of thinking” and implies that adjusting to them will take time and effort that might otherwise be invested in the intellectual content of legal scholarship. Making the transition to hypertext and multimedia will certainly take a while and might not be easy for everyone (indeed, for some,

59. The time involved will depend on what is meant by “transition.” Using hypertext and multimedia as technical tools in traditionally-styled articles (e.g., Last Writs?) is but the first step in the process. Re-organizing scholarly “writing” in a way which overtly favors hypertext and multimedia is the second step. Re-conceiving the nature of law in light of what hypertext and multimedia facilitate and reveal is the third step. So far, only a very few legal scholars have taken the first step, none (to my knowledge) have as yet taken the second, and only a handful are even contemplating the third. For suggestive but still very preliminary “third-step” analyses, see Ronald K. Collins & David M. Skover, Paratexts, 44 Stan. L. Rev. 509 (1992); Bernard J. Hibbitts, Making Motions: The Embodiment of Law in Gesture, 6 J. Contem. Legal Issues 51 (1995); Ethan M. Katsh, Electronic Media and the Transformation of Law (1989); Ethan M. Katsh, Law in a Digital World (1995).
it might prove to be impossible), but I doubt that it will have the necessarily-compromising effect on scholarship that Hardy seems to fear. Consider a situation that he himself describes: "many [legal] authors do not do a wonderful job of organizing their material in linear, old-fashioned text as it is."\(^{60}\) Hardy seems to feel that these authors are simply lacking in ability,\(^{61}\) but what if they are merely running up against organizational or cognitive obstacles imposed by the currently-dominant scholarly medium, i.e. text? Perhaps these scholars would do better communicating with the aid of hypertext and multimedia\(^{62}\) — far from slowing them down intellectually, using such non-linear forms might speed them up, and improve the quality of their scholarly products into the bargain. Many scholars who are relatively more comfortable with linearity may not find hypertext and multimedia quite so liberating, but they may nonetheless discover that those tools give them rhetorical options which more than compensate for the effort put into mastering them. On a more general level, I'm not sure that we should draw a sharp "zero-sum" distinction between using media and thinking about law. The one process arguably informs and opens up new horizons onto the other. Writing, for instance, has influenced the agenda and attitude of Western jurisprudence for hundreds of years.\(^{63}\) Deploying hypertext and multimedia will likely have similarly-significant consequences for substantive legal thought; far from imposing an opportunity cost on over-enthusiastic legal scholars, such deployment might inspire insights into dimensions of law and law-making that might never have been prompted by direct analysis.\(^{64}\)

C. The Jeopardy Thesis

Most of the counter-arguments advanced in this collection against my proposal for electronic self-publication are instances of what Hirschman calls the "Jeopardy Thesis:"\(^{65}\) they assert that adopting my proposal would jeopardize legal scholarship, legal scholars and law students by eliminating academic and pedagogical benefits bestowed by the current law review structure. In other words, electronic self-publishing would incur costs, and that makes it unacceptable.

The very premise of the Jeopardy Thesis is dubious. The existence of costs \textit{per se} does not provide enough reason to reject any given reform proposal. By definition, all reforms — as changes — come with costs of some

\(^{60}\) Hardy, \textit{supra} note 23, at 250.

\(^{61}\) "One shudders to think what these authors would make of the multi-dimensional organizational schemes facilitated — indeed required — by hypertext!" \textit{Id.}

\(^{62}\) See \textit{supra} note 45.

\(^{63}\) See generally KATSH, \textit{supra} note 59.

\(^{64}\) \textit{Id.}

\(^{65}\) See generally HIRSCHMAN, \textit{supra} note 24, at 81-132.
sort (a point which, by the way, reveals the Jeopardy Thesis to be extremely reactionary, so much so as to be pre-emptively against any change). To take an historical example, commercial printing incurred costs. We have already seen that in the short term, printers made editorial and technical errors and had problems with quality control; in the long term, printing deprived many copyists of their occupations, if not their livelihoods. Additionally, print made scholars technologically dependent on the members of a trade. Its mechanical limitations disfavored images, color and fine handwriting. Its finality rendered textual corrections difficult and expensive to make. Printing nonetheless triumphed over manuscript production because its advantages — speed, mass production, standardization, general low cost — outweighed those liabilities. The same logic applies to my proposal for the electronic self-publication of Web scholarship. It would doubtless incur certain costs (most obviously, taking the time to learn the relevant — if simple — computer skills), but it should nonetheless be adopted as a scholarly strategy because those losses are outweighed by the considerable benefits it would bring.

This favorable balancing of accounts is all the more probable insofar as the adherents of the Jeopardy Thesis have radically over-estimated the costs that electronic self-publishing would entail. Like Chicken Little, these anxious scholars would have us believe that the sky is falling. First, they assert that electronic self-publishing would necessarily incur a loss of the “value added” to individual scholarly articles as they move through the current law review production system. Second, they insist that electronic self-publishing would inevitably lead to a loss of quality control over legal literature as a whole, resulting in a proliferation of poor scholarship. Third, they say that electronic self-publishing would entail a loss of prestige for authors who would no longer be able to claim the glory of good placements in reputable legal journals. Fourth, they argue that electronic self-publishing would deprive law students of the critical educational opportunities currently afforded them by their editing of current law reviews. Fifth and finally, they contend that electronic self-publishing would rob the same students of a credential they need to get good professional and academic jobs after graduation. As we shall see, none of these claims is justified.

1. Value Added

Consider the “value added” argument. As articulated primarily by

66. In the late fifteenth century, Abbot Trithemius astutely reminded his readers that the manuscript copyist “does not suffer constraint under contract with a printer, but is free, and by his office will take pleasure in the sweetness of his liberty.” See BRANN, supra note 22, at 157.

67. “[P]rinting generally neglects orthography and various other types of embellishments characterizing manuscripts.” Id. at 158 (quoting Trithemius).

68. See supra Section II A.
Richard Delgado, Henry Perritt and Tom Bruce, it holds that without formal law review publication, legal articles would be deprived of the value added to them when law review staffers edit their texts, verify their sources, standardize their forms, register their release (establishing “intellectual priority”), distribute and publicize them, associate them with other good or related articles in “issues,” preserve them for posterity and/or make them eventually citable and locatable. This case against publishing one’s own legal scholarship online sounds overwhelming, but it has two rather fundamental weaknesses.

To begin, it implicitly overstates the quality of the various values added to articles by the current law review system. For example, law review redaction of legal scholars’ submitted drafts is problematic. Because authors’ mistakes slip by unnoticed and because mistakes are often introduced into a manuscript by law review editors themselves, spelling and style errors frequently show up in printed articles. Richard Delgado correctly69 points out that in Version 1.0 of Last Writes? I misspelled “accommodate”70 (now amended in Version 1.1), but a WESTLAW search indicates that in the past fourteen years, for one reason or another, well-established law reviews have done likewise 947 times71 (and those misspellings notably remain uncorrected72). Self-publishers also have no monopoly on stylistically-awkward sentences: Richard chides me for one rather “Germanic” structure (also since amended), but he fails to acknowledge that law reviews themselves “have become nursing homes for hobbled sentences and confused syntax.”73 Law review copy-editing has in fact become so bad that it has lately led to litigation: in 1994, a student at the Fordham Law School sued the student-edited Fordham International Law Journal for mangling his Note.74 Although the suit was dismissed on summary judgment for failing to disclose a cause of action in federal law, the Journal nonetheless acknowledged its editorial errors and proposed to print an errata sheet. Verification of sources by law

69. Incorrectly, he also claims that I misspelled “subtly” as “subtly.” Webster’s Third New International Dictionary indicates that the latter spelling is an acceptable variant.

70. Specific errors in the prototype Web version of Last Writes? should not be necessarily associated with electronic self-publishing as a genre, which can be organized to avoid them. See infra note 82 and accompanying text.

71. Search of WESTLAW, TP-ALL file (Apr. 5, 1996). When I obtained this result I initially suspected that the high figure was the product of inputting errors at West, but in every instance when I checked the database against the print original, the error was there as indicated.


review staff members is sometimes no better than law review redaction. As William Ross notes elsewhere in this collection, “all too many law reviews perform citation checks neglectfully, negligently, or incompetently.” In any event, American legal scholars should not fetishize editorial verification when many scholarly journals in the arts, humanities and sciences (not to mention book publishers, and legal journals in most other countries) cope very well without it, relying on the good faith and reliability of scholarly authors. Even the law review’s role in standardizing legal scholarship is conceptually and practically problematic. Standardizing a text has traditionally required freezing it, thereby ensuring (short of a later reprinting in a book) that it cannot reflect new developments or new sources. In more than a few instances, standardization has had the undesirable side-effect of propagating and preserving the editorial errors I mentioned earlier.

Other “values” supposedly added by current editorial and publishing procedures have similarly been overstated. Having articles published in law reviews is a common way of registering them for credit and recognition within the legal academy, but the registration process is very inexact: not only are articles often printed months after their “official” publication dates, but as far as establishing intellectual priority goes, it’s virtually impossible to tell whether one article in a “Fall 1995” issue of one journal actually predated (or post-dated) another on the same subject in the “Fall 1995” issue of a second. Law reviews’ distribution and publicization of articles is likewise problematic. True, publishing an article in the Harvard Law Review or the Yale Law Journal may bring it to the attention of readers both inside and even outside the legal community, but most other legal journals are neither actively marketed nor generally distributed on law school routing lists. Their contents (i.e. 99% of the legal articles produced) are therefore never adequately distributed or otherwise “publicized”: in the face of this depressing fact, most legal scholars are compelled to “self-distribute” and “self-publicize” by sending reprints directly to desired readers. Given that law reviews usually provide authors with only 50 free reprints, this “self-distribution”/“self-publicization” practice can get rather expensive. In this context legal scholars are not only doing without a “value” allegedly added by law review publication, but they are literally paying for its absence.


76. Id. at 263-65.

77. Given that law reviews usually provide authors with only 50 free reprints, this “self-distribution”/“self-publicization” practice can get rather expensive. In this context legal scholars are not only doing without a “value” allegedly added by law review publication, but they are literally paying for its absence.

78. “Journals help to ‘create [a] . . . sense of unity among scholars by connecting people . . . isolated geographically, politically, economically.’ They also provide a sense of community where authors share ideas and readers see what their peers are working on.” MARCEL C.
the faintness of reflected glory, that may mean little in practical terms.\textsuperscript{79} Physical association of articles may actually be dysfunctional as it often imposes unwanted material on (not infrequently, paying) readers and may create the false impression that a given field is comprehensively covered.\textsuperscript{80} In any event, many legal scholars read legal articles on their own as either reprints, photocopies or online documents, totally oblivious to what else is in a particular journal number. The success of (especially printed) law reviews in preserving legal scholarship for posterity should also not be taken for granted. In libraries across the country, thousands of law review volumes are disintegrating thanks to the "slow burn" of acid in their pages. Some law reviews now use acid-free paper, but even that cannot protect legal scholarship against the potentially-devastating ravages of fire, vandalism and normal reader "wear" (the last two of which can actually make the most famous of articles the hardest ones to find in readable condition). Finally, publishing an article in a law review which can be formally cited in, say, the \textit{Index to Legal Periodicals}, hardly ensures that it will be found when needed. Categorization in print-based (or even certain electronic) legal indexes can be quite misleading. Even if an article is properly indexed under the current system, there is no guarantee that the printed law review containing it will be on the shelf, actually available for consultation.

The other fundamental problem with the "value added" argument is that it overlooks the virtual certainty that the values alleged to be "lost" by electronic self-publishing will simply be secured in the new system by other means — means which will work just as well as (if not better than) their print-based/law review-based antecedents. For instance, self-publishing scholars who desire the benefits of good editing — and who wouldn't?\textsuperscript{81} — will probably place greater reliance on computerized spelling and grammar


\textsuperscript{79} Take, for instance, articles appearing in the \textit{Law and History Review}. "Medievalists" are likely to read its articles on English legal history, and "Americanists" are likely to read its American oriented articles. The co-presence of both types of article in a single journal will in practical terms be irrelevant to many, if not most members of both groups.

\textsuperscript{80} Readers of the \textit{Law and History Review} and its counterpart, the \textit{American Journal of Legal History}, will therefore tend to assume that they are "keeping up" with the legal history field. This is certainly true to some extent, but the very existence of these publications, combined with the fact that good articles on legal history are regularly published in other journals in law and in history (where they can easily be overlooked), inevitably distorts the prevailing perception of where exactly "the field" is. Precisely because of this, the organizers of the H-Law electronic discussion list for legal history have begun to post references to relevant articles not appearing in the primary legal history journals. \textit{See H-Law: Law Journals-Table of Contents}, <http://h-net2.msu.edu/~law/journal.reviews/> (visited Oct. 24, 1996).

\textsuperscript{81} As initially advanced in \textit{Last Writs}?, my electronic self-publishing proposal was designed to allow legal scholars to sidestep law review editing; I never meant to suggest that editing \textit{per se} was undesirable or unnecessary.
checkers, taking advantage of the very computer technology which enables them to self-publish in the first place. At least in the short term, they will probably also arrange to have their work thoroughly checked by research assistants who, unlike law review staffers, could be hand-picked for their academic backgrounds in particular areas, would be directly responsible to a scholarly author for the quality of their editing, and would lack the technical wherewithal to set their own mistakes in print. Scholars wishing to have the form and substance of their citations verified could pursue similar alternatives, relying on a combination of software citation-checkers \(^3\) and research assistants. Scholars wanting to give various readers the opportunity to examine a set text of their work without having to “freeze” it would merely need to support the current version of their documents with previous versions: given the capacities of electronic storage, nothing would have to be thrown away. For example, Version 1.0 of *Last Writs*? — now superseded by Version 1.1 — is still stored on my own Web site, and is still available for downloading on demand. Not only would such storage enable other scholars to ensure that they were all citing, quoting or consulting the same version of a particular text (a point that especially concerns Trotter Hardy\(^5\)), but it might provide useful insight into an authoring scholar’s thought process over time.

In an electronic self-publishing system, registration, distribution/publicization, association, preservation, citation and location would likewise be achieved in new ways. Work would be informally registered with the legal community by posting a precisely dated version of it online. In a developing Internet culture, lawyers and legal academics would overlook online postings at their peril (attorneys on various e-mail discussion lists have al-

\(^{82}\) It almost goes without saying that absent the “net” of law review staffs, electronic self-publishers will also be more careful in editing their own work. To this extent, suggestions that self-published scholarship will resemble the less-than-editorially-perfect drafts of work that often arrive in today’s law review offices are off the mark; they fail to recognize that eliminating the law reviews would not merely remove an element of the current editorial process, but would change the entire editorial equation.

\(^{83}\) Although most legal academics are still unaware of them, these have been on the market since 1986; their quality has improved considerably since then, and is continuing to improve. See Mark J. Welch, *Software Reviews*, 1 HIGH TECH. L.J. 527 (1986).

\(^{84}\) A somewhat more speculative variation on one or more of these strategies might involve the eventual conversion of existing law school “word processing centers” into in-house line-editing and bluebooking operations (albeit probably staffed by personnel hired from editorial as well as secretarial backgrounds). Arguments in favor of this include the increasing superfluity of traditional word-processing in an electronically more sophisticated workplace, and the convenience of having rote editing and formatting functions assigned to trained long-term employees rather than to transient students. Arguments against the notion include the cost to students of altogether removing them from the editorial process and the risk of occasional delays in publication when multiple faculty members seek editorial and formatting assistance at the same time.

already suggested that not consulting the Internet on certain legal matters may amount to malpractice). Alternatively, formal registration of self-published articles might be achieved by listing them with, adding them to, and/or having them “digitally time-stamped” (along the lines of the physics model) by a central Website/databank of electronically self-published legal scholarship, perhaps run (as I proposed in Last Writes?86) by the Association of American Law Schools.87 Self-published legal scholarship would be electronically distributated (or, perhaps more accurately, made distributable) to an international and interdisciplinary public potentially far larger than the readership of any current subscription-based law review. Organizing a central scholarly databank would make it possible to publicize legal articles by general (perhaps even regular) e-mail announcements of new works in particular areas or by particular authors.88 Electronically self-published articles (and their authors) would be associated with one another through their joint appearance on subject-based e-mail notification lists from the databank, through their copresence in databank sub-directories of scholarship in particular subject-areas (e.g. “Constitutional Law”), or in the results of computerized rank-based searches of the database or the Net as a whole.89 Somewhat more ambitiously, individual scholars wishing to keep up to date with writing in their fields but not willing to spend a lot of time searching for online resources in an ever-expanding database or waiting for centralized notifications could use “intelligent agents” — computerized research assistants carefully programmed by their users and released onto the Internet — to not only find and report back on all existing materials fitting a certain disciplinary profile (and only that profile), but to alert their programmers to all new relevant postings.90 Works

86. See supra note 29, at para.4.10.

87. In Last Writes? I referred to this central databank as an “archive.” On reflection, I prefer the former term, as the root metaphor of a “bank” suggests that the central site holds objects that (thanks to revisions and, as we shall see infra, comments) are dynamic and will increase in value over time, rather than objects that are finished and are put away solely for preservation.

88. A regular e-mail notification service might be the electronic equivalent of the present law review “issue” insofar as many legal scholars use those for notification more than for reading. On the importance of the “issue” concept, see Thomas Bruce, Swift, Modest Proposals, Babies, and Bathwater: Are Hibbitt’s Writes Right?, 30 AKRON L. REV. 243, 246-47 (1996).

89. To the (limited) extent that legal journals provide their readers with a sense of “community” (see supra note 78), “community” in a self-publishing system would be (re-)created by the dynamics of the self-publishing enterprise; on a day-to-day basis, a given legal scholar’s “community” would be the readers who commented on a particular piece, and the authors of those other pieces who have chosen to hypertextually link their own work to it. Ultimately, a given self-publishing legal scholar might belong to multiple self-generating communities of this sort, rather than having to adopt (not to mention having to pay for membership in) the relatively artificial communities provided by journal subscription lists.

of self-published legal scholarship would be preserved electronically at their own sites and/or in the (presumably more secure) central databank: safe from many physical ravages that affect paper, backed up and even "mirrored" as appropriate, they could remain intact and legible indefinitely. Finally, electronically self-published articles might not be cited in the traditional print-based indices, but they would nonetheless be locatable through subject-, author- and/or keyword searches of the general Internet indices (e.g., Yahoo, Altavista, Hotbot) which many law professors and attorneys are already using or, less circuitously, through similar searches of the anticipated central databank and/or its sub-directories. Alternatively (or additionally), electronically self-published articles could be traced through a new generation of subject-specific Internet search engines (e.g. Hieros Gamos, Web-Cite) which instead of replicating restrictive, journal-only print indices, seek out both self-published and journal-published electronic materials. As Trotter Hardy notes, certain Internet addresses might occasionally prove problematic, but given

allow people to spend less time searching for information — and more time utilizing or analyzing 'good' information that is 'auto-retrieved'.” In a sense, scholarly journals are very dumb (i.e. non-programmable, insufficiently-selective) “intelligent agents” in their own right.

91. The physics preprint archive at Los Alamos will shortly be duplicated at 20 mirror sites all over the world. E-mail from Paul Ginsparg to Bernard Hibbitts (Sept. 30, 1996).

92. “[T]he HD-ROM recording technology, developed at Los Alamos [National Laboratory, the site of the pre-print physics archive], can attain storage densities over 100 times those of current CD-ROMs, and, by using materials such as stainless steel or iridium, can guarantee stability for tens of thousands of years, and provide resistance to fire, water damage, rats, and other disasters that can destroy paper data.” Andrew Odlyzko, On the Road to Electronic Publishing <http://math.albany.edu:8800/hm/emj/papers/read> (visited Sept. 2, 1996). See also Andrew Treloar, Scholarly Publishing and the Fluid World Wide Web, <http://www.deakin.edu.au/~atp/www95/apwww95.html> (visited Sept. 2, 1996): “The durability of Web documents is unknown, but there are no technological reasons for their life to be limited in any way.”


95. The technical basis of current Internet citation — the Uniform Resource Locator, or URL — stands in need of revision. It locates material not by its inherent content characteristics, but rather by its specific physical location on the Net. As Clifford Lynch explains, “[t]his is like citing a printed work by referring to the holdings of a specific library, stored in a specific place in the stacks of that library.” Clifford A. Lynch, Integrity Issues in Electronic Publishing, in SCHOLARLY PUBLISHING, supra note 38, at 136. The consequences of this system are obvious: move a file to another location, and it is “lost” until its new URL is determined and/or existing hyperlinks to it are corrected. By itself, however, this somewhat awkward arrangement need not undermine my proposal for the co-ordinated electronic self-publication of legal scholarship. In the short term, URL changes can be publicly reported and “follow-up” links to new sites provided by Web posters (as is done already); in the long term, the URL system as a whole will likely be replaced by an alternative, “portable” system of citation centered on so-called “URN”’s (Uniform Resource Names) or “URC”’s (Uniform Resource Characteristics). See generally Clifford A. Lynch, Uniform Resource Naming: From Standards
current Web-authoring customs, the chances of getting a bad (and, more importantly, untraceable) address would in practice be much less than the chances of finding that a particular printed law review is "out," is being bound, or is otherwise unavailable. Electronically self-published papers might not have page numbers to direct readers to particular areas of text, but (like Version 1.1 of Last Writest) they would have unobtrusive paragraph-numbers which would actually allow for much more exact citation. In these and other ways, the electronic self-publication of legal scholarship would not in practice require giving up the "value added" by present publication procedures; indeed, legal scholarship would likely emerge from the self-publishing process with its own value considerably enhanced.

2. Quality Control

The second article of the Jeopardy Thesis asserts that by displacing law reviews, electronic self-publishing would precipitate the collapse of quality control. Richard Delgado, Henry Perritt, Trotter Hardy and David Rier all claim or at least suspect that with no editorial boards to impede anyone from publishing anything, over-enthusiastic legal scholars would mar legal literature and complicate legal research by flooding the legal academy with junk.97

In a sense, this quality control point is but an especially-contentious particularization of the value-added point — it posits that the law reviews currently contribute a specific value (in this instance, quality screening and certification) to the literature without which it would mushroom and deteriorate. As is the case with other values, however, the worth of the current quality control system is overstated. In particular, the concept of law students exercising quality control over legal scholarship borders on the oxymoronic.98 Student law review editors are second and third year apprentices in a sometimes-learned, sometimes not-so-learned profession. Yes, there are a few

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96. As of this writing (September 2, 1996), it is unfortunately (and perhaps ironically) impossible to trace Trotter Hardy's own Journal of Online Law from its original site on the Cornell server (<http://www.law.cornell.edu/jol/jol.html>) to its new site at William and Mary (<http://warthog.cc.wm.edu/law/publications/jol/> (on the re-location and its problematic consequences for a hypertext connection in Version 1.0 of "Last Writest", see Hardy, supra note 23, at 257). Not only is there no "follow-up" link on the Cornell site, but there is no mention of the move, leaving visitors unaware that the old site has been superseded.

97. See, e.g., Delgado, supra note 23, at 235 ("Internet publishing could easily wind up like TV, with a mass of indigestible material with a few gems thrown in.").

98. It is noteworthy in this connection that law is the only discipline in which students are given this kind of academic authority. The thought of even Ph.D. candidates in the Arts and Sciences (many with 5-10 years experience in their specific disciplines) overseeing scholarly publication in their respective fields would be considered preposterous.
areas about which they may know something (e.g. constitutional law, generally a required course in second- and sometimes first-year), but there's a great deal of legal and non-legal ground about which they know nothing. However hard they may work at it, they have taken on an evaluative task for which they are simply not prepared:99 in these circumstances, much of what they prefer to publish turns out not to be what is academically best or innovative or remarkable, but what is recognizable (to them), what is “safe” or alternatively fashionable, what is written by familiar “names,” what catches their fancy on stylistic grounds, or what will cause them the fewest hassles at cite-checking time. The fact that good articles do appear in the “best” student-run law reviews does not gainsay this point. Many good articles also appear in “lesser” student journals, and many articles that run in the “best” student journals are (dare I say) not that good.100

If quality control by students is problematic, however, traditional quality control by peers may not be that much better. Although only a marginal phenomenon in legal scholarship, “peer review” in general suffers from many well-documented shortcomings: poorly- or arbitrarily-selected reviewers,101

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99. A number of commentators in the present collection acknowledge this point. See e.g., Hardy, supra note 49, at 251 (“students are often not qualified to assess an article’s merits or contribution to the field”). See also Ross, supra note 75, at 262, discussing (in light of his own experience as a legal historian) student difficulties in determining whether a submitted article makes a unique contribution to the legal literature or has been “pre-empted” by an article published elsewhere (“one law review editor informed me... that my 38-page article on the legal career of John Quincy Adams was pre-empted by another article on the very same subject. When I asked for the citation to this supposed pre-emptive piece, the editor directed me to a two-page ABA Journal article about the legal career of Adam’s father, John Adams.”).

100. To the extent there is a discernible general difference between articles in top-ranked student-edited journals and articles in bottom-ranked student-edited journals it must be remembered that even in a multiple-submission system, publication fora are to some degree self-selected by law faculty. In other words, articles in the Harvard and Yale law reviews may on average be better than articles appearing in the law review of **** law school, but that's because law professors are more likely to send their best (or at least more of their work to the former journals, and only their less impressive products (if any) to the latter.

101. On editorial arbitrariness, see, e.g., Steve Fuller, Cybermaterialism, or Why There Is No Free Lunch in Cyberspace, 11 INFO. SOCIETY 325, 331 (1995) (“[A]ny intellectually current editor will know to whom manuscripts should be submitted, depending on whether the editor wants a favorable or unfavorable... assessment.”).
reviewer anonymity, \footnote{102} partiality, \footnote{103} fallibility, \footnote{104} or overwork, \footnote{105} a systemic bias against innovation; \footnote{106} lengthy delays; unavailability of reviews to general readers; and even occasional editorial dismissals of peer verdicts. \footnote{107} In prac-

\footnote{102} Malcolm Atkinson, Regulation of Science by Peer Review, 25 STUD. HIST. AND PHI\L. SCI. 147, 155 (1994) ("In reality the cloak of anonymity, concealing uncertain 'peer' status and possible vested interest, confers licence to indulge whims and express opinions that the referee might not care to defend publicly."). \textit{See also} Alexander Berezin at el., \textit{Lifting the Pernicious Veil of Secrecy}, NEW SCIENTIST, Feb. 11, 1995, at 46 ("in all others areas of human endeavour [sic] (the arts, sports, politics) criticism, even the most harsh, is invariably open."). In this connection it is curious that anonymous peer review has taken hold at all in a legal community where formal allegations must be made by identifiable sources before being considered credible in court.


\footnote{104} See, e.g., Michael E. Peskin, Reorganization of the APS Journals for the Era of Electronic Communication, <http://golub.riv.csu.edu.au/~94013332/project/project_two/jnl/18.htm> (visited Sep. 2, 1996) ("this system is prone to breakdown . . . . [J]ournals often publish incorrect papers, which we uncover in compiling bibliography, in answering our students misperceptions, and in refereeing new papers based on these results."). Multiplying the number of reviewers in the hopes of reducing the likelihood of error does not necessarily solve the problem. A former editor of the \textit{New England Journal of Medicine} conducted a study which revealed that the possibility of two different referees agreeing was only slightly better than chance. \textit{See} Benjamin D. Singer, The Critical Crisis of the Academic World, 59 SOC. INQUIRY 127, 133 (1989). A former editor of a Canadian historical journal encountered an even more concrete difficulty at one point: "I sent [a manuscript] out to two well-published scholars whom my journal had dealt with before. One replied that the manuscript was the best thing he had ever read on the subject . . . . The other reader replied that the manuscript was of such poor quality that it would not even be acceptable as a chapter in a mediocre MA thesis." Brett Fairbairn, The Present and Future of Historical Journals, 27 J. SCHOLARLY PUBLISHING 59, 62 (1996).

\footnote{105} See, e.g., Singer, supra note 104, at 133 ("there is a constant overload of papers and too few reviewers available . . . the best reviewers often are overloaded and refuse to take on additional assignments so that, by default, persons with little experience may determine what is published.").

\footnote{106} Examples from the sciences are disconcertingly legion. "The work of S.A. Berson, MD, and Yalow on radioimmunoassay, which . . . eventually led to a Nobel Prize, was initially rejected for publication . . . . Requests for funding for research on in vitro fertilization were repeatedly turned down by the peer review process. Steptoe and R. Edwards, Ph.D., funded the research personally and as everyone knows it ended in practical success." David Horrobin, The Philosophical Basis of Peer Review and the Suppression of Innovation, 262 J. AM. MED. ASS'N 1438, 1440 (1990) (listing 16 other instances). \textit{See also} Berezin, supra note 102, at 46 ("[I]n the 1960s the Canadian chemist John Polyanl had his paper on molecular reactions rejected by Physical Review Letters as having no scientific interest. . . . [I]n 1986 he won a Nobel Prize for Chemistry for the work."). Robert Matthews, Storming the Barricades, NEW SCIENTIST June 17, 1995, at 38, 40 ("Brilliant but unorthodox papers can be rejected for years, a fate that famously befell the work of American biologist Lynn Margulis on the origin of eucaryotic cells in the late 1960s, and the American theorist Mitchell Feigenbaum's seminal work on chaos theory ten years later.").

tice, it lets in much of the "dubious data and poor prose"\textsuperscript{108} it is supposed to screen out; precisely because of this, much scientific literature in particular is comprised of well-deserved trashings of other scientists' published work. Growing appreciation of peer review's problems has recently led Nobel Prize winners,\textsuperscript{109} journal editors\textsuperscript{110} and many rank and file scholars in various fields\textsuperscript{111} — not to mention some prominent lay observers\textsuperscript{112} — to call for its reformation or outright elimination. Those who still consider peer review an academic sacred cow tend to forget that it is a relatively recent historical phenomenon. Its roots may go back to the eighteenth century, but it was only embraced by most disciplines in the twentieth.\textsuperscript{113} It is definitely not a necessary precondition of good science (\textit{à la} Copernicus, Newton or Darwin\textsuperscript{114}) or good scholarship (\textit{à la} Gibbon, Smith, or Russell).\textsuperscript{115} In fact, the historical rationale for peer review ultimately has less to with guarding academic standards than with making scholarly journals profitable,\textsuperscript{116} keeping the support

\textsuperscript{108} Re-engineering Peer Review, THE ECONOMIST, June 22, 1996, at 78, 79.

\textsuperscript{109} Singer, supra note 104, at 127. According to Nobel prizewinner Rosalind Yallow, "There are many problems with the peer review system. Perhaps the most significant is that the truly imaginative are not being judged by their peers." \textit{Id.} at 132.

\textsuperscript{110} Richard Smith, the editor of the British Medical Journal, "[says] that only 5% of what peer-reviewed journals publish is credible, the rest being 'rubbish'." Lawrence K. Altman, \textit{The Inglefinger Rule, Embargoes and Journal Peer Review — Part I}, 347 LANCET 1382, 1385 (1996).


\textsuperscript{112} See, e.g., Freeman, supra note 107, at 29; Re-engineering, supra note 108, at 78.

\textsuperscript{113} For example, "peer review became the standard in biomedical journals in the English-speaking countries and at least some places in continental Europe, such as the Netherlands and Switzerland, not long after World War II . . . ." John C. Burnham, \textit{The Evolution of Editorial Peer Review}, 263 J. AM. MED. ASS'N 1323, 1327 (1990).

\textsuperscript{114} In a more recent context, it's been noted that "the fundamentals of quantum mechanics, organic synthesis and DNA structure managed to be discovered without the blessing of peer review." Rustum Roy, \textit{Alternative to Peer Review?}, 212 SCI. 1338, 1338-39 (1981).

\textsuperscript{115} James M. Banner Jr., \textit{Preserving the Integrity of Peer Review}, 19 SCHOLARLY PUBLISHING 109, 110-11 (1988).

\textsuperscript{116} Most modern scholarly journals are commercial enterprises; peer review supports them economically insofar as it reassures their publishers that they are printing a "quality" product that will be bought by readers. Without peer review, publishers are afraid that they might print "bad" articles which would lead them to lose their reputations and their paid subscribers. \textit{See generally} James M. Banner, \textit{Preserving the Integrity of Peer Review}, 19 SCHOLARLY PUBLISHING 109, 110 (1988). In this connection it is interesting to note that what is often credited as the first instance of modern peer review was undertaken in 1752 when the Royal Society of London assumed fiscal responsibility for its \textit{Philosophical Transactions}. David A. Kronick, \textit{Peer Review in 18th-Century Scientific Journalism}, 263 J. AM. MED. ASS'N 1321 (1990).

On the basis of these points and observations one might frame the following "economic
of wealthy patrons — be they aristocrats or government agencies,\textsuperscript{117} and ensuring that academic editors maintain politically-tenable positions in their own fields.\textsuperscript{118} Circumventing this form of quality control by electronic self-publishing would not be as risky as one might think. Indeed, it might be desirable.

Electronic self-publishing, however, would not require the circumvention of quality control itself. Over and above the presumed continuation of such “informal” checks as work-in-progress colloquia and draft reviews by colleagues,\textsuperscript{119} that control (like other “added values”) would simply be exercised — and its benefits secured — by new and improved means. For instance, quality in an electronic self-publishing system could be maintained via a system of post hoc reader comments, submitted by e-mail and then (for the information of both authors and future readers) attached\textsuperscript{120} to self-published

theory” of peer review: the incentive for pre-publication peer review rises with the cost of (i.e. financial risk assumed in) publishing scholarship. Conversely, as cost (and risk) decreases — say, with Internet self-publishing — the incentive for pre-publication peer review does likewise.

\textsuperscript{117} “[A] [further] historical reason for disciplining scientific communication was to ensure that the scientists’ aristocratic patrons were not necessarily confused or offended. The aristocrats supported scientific societies in order to be amused, edified, and, in some cases, technically empowered. Peer review instituted the decorum needed to persuade patrons that their money was well spent.” Steve Fuller, Cyberplatonism: An Inadequate Constitution for the Republic of Science, 11 INFO. SOCIETY 293, 299 (1995).

\textsuperscript{118} In other words, peer review essentially allows academic editors to “pass the buck” of responsibility for not publishing a given paper to a set of anonymous colleagues. As a result, editors can avoid becoming the objects of personal resentment and recrimination when the volume of submitted scholarship in their (sub)field grows to the point where they cannot accept all submissions. See Fuller, supra note 101, at 331 (“[I]f enough of the right mix of referees are chosen, the editor can hide his or her hand in the process entirely.”).

\textsuperscript{119} Contrary to what David Rier seems to think, there is no reason to presume that these pre-circulation controls would be abandoned in a self-publishing system. See Rier, supra note 27, at 208-10. Indeed, there is reason to believe that they would become more important than ever (along, perhaps, with such high-tech variations as “trial-balooning” on electronic discussion lists). For a testimonial to the effectiveness of pre-circulation quality control by colleagues in particular, see Ross, supra note 75, at 264. (“I found, for example, that my colleague and fellow legal historian David J. Langum offered a far more detailed and useful critique of my legal history books than did any [peer] reviewer of the books. One’s faculty colleagues, of course, could just as easily critique a law review article or a self-published work.”).

\textsuperscript{120} “Attachment” might take place in several ways. As a start, electronically self-publishing legal scholars might manually attach e-mail responses to their own work (see, for instance, the “Reader’s Forum” section of Last Writings?, (Version 1.1, June 4, 1996) <http://www.law.pitt.edu/hlibbits/readlw.htm>). Eventually, the organization or institution providing the central databank for self-published legal scholarship could maintain a separate database for comments, linked from any given paper, but removed far enough from it technically to ensure that authors could not manipulate or illegitimately “filter” comments posted. It has recently been suggested that to facilitate dialogue, a comments database should actually become a general feature of the Web, in effect allowing any user to add a comment to any web document; those comments could then be viewed (or ignored) by other users at their discretion.
articles as appropriate.\textsuperscript{121} Good articles would presumably receive good comments; bad articles would receive bad comments, or no comments.\textsuperscript{122} The prospect of receiving no comments, or bad comments which would then be publicly posted with the original work (a sort of academic "scarlet letter") would be a powerful disincentive not to post poor quality work in the first place. Such a "\textit{post hoc} peer review" system is not at all revolutionary. A variant already operates in several print-based scholarly journals, and in somewhat attenuated form it is, of course, the foundation of current book review practice. Ultimately, it would probably function better than traditional pre-publication peer review: it would not suppress or create obstructions for innovative or experimental papers, it would expose scholarship to the comments of all legal scholars (as opposed to just a few chosen peer reviewers), and it would make readers' comments available for all to see (providing useful information to later readers while reducing the chances of arbitrary review in the first place). Insofar as it could operate indefinitely, this quality control system would also be able to adapt to continuing changes in an electronically-published article's text. Of course, the system's success would ultimately depend upon the willingness of other scholars to participate. Some scholars might choose not to — David Rier, for instance, would recuse himself on the assumption that inviting such commentary is asking others to do one's own work.\textsuperscript{123} But this is no different (and, given the more advanced stage at which it would take place, probably better) than the tradition of asking colleagues to read drafts, or, for that matter, the practice of sending drafts to student boards for routine editing and cite checking. Many people would probably take advantage of the opportunity to comment on papers that they thought were worth the effort. Not only would that enable them to have a direct, immediate and public impact on others' work, but it would demonstrate their unselfish com-


\textsuperscript{121} As Tom Bruce points out elsewhere in this Special Issue, readers might also rule on the merits of an electronically self-published piece by including it on lists of "recommended papers" posted on their own web pages. Bruce, \textit{supra} note 88, at 746. This has already begun to happen (indeed, I included a number of such lists on my own homepage when I posted that in January 1996, see <http://www.law.pitt.edu/hibbitis/commun.htm>) but, it is not likely to be as rigorous or as informative to other readers as a system of directly appended reader comments.

\textsuperscript{122} Electronic publication "promises to make it evident when a paper is of utter inconsequence to the community by spawning no reactions, or hostile and nonconfirming ones." Robert Silverman, \textit{The Impact of Electronic Publishing on the Academic Community}, \textit{in SCHOLARLY PUBLISHING} \textit{supra} note 38, at 55, 63. \textit{See also} Gary Taubes, \textit{Peer Review in Cyberspace}, 266 SCI. 967 (1994) ("[If no comments at all are attached to a paper] there can be only two reasons. Either nobody cared to read it, or nobody cared to comment positively. In either case, it's either wrong or not even wrong, which for our purposes is equivalent." (quoting Paul Ginsparg)).

\textsuperscript{123} \textit{See} Rier, \textit{supra} note 27, at 208.
mitment to the ideal of scholarship as dialogue.

In a self-publishing system, quality control would also be enforced by self-policing. Electronic dissemination of legal scholarship on the Web would expose law professors' work to the world: in this context, even leaving aside the threat of public sanction through negative reader responses, self-interest would suggest that law professors post quality material lest they publicly embarrass themselves and do serious damage to their own academic reputations. Quality control through self-policing of this sort is not a pipe-dream. The scientific community already relies on self-policing to prevent most instances of fraud.\textsuperscript{124} Self-policing has also succeeded in more specific settings. In the early 1960s, several hundred biomedical scientists from around the world organized themselves into so-called "Information Exchange Groups" focused on specific subject issues. Group members submitted their papers and communications to a central office in Washington D.C. which immediately passed them on to all other participating group members. No editors intervened in the process, although slanderous statements of a personal nature were eligible for return to authors at the discretion of the project Chairman. In the wake of the project's premature termination in 1966,\textsuperscript{125} one participant recalled: "In the early days, many believed that the IEGs would be outlets for a flood of rubbish. This flood never materialized. When a communication is to be scrutinized by 700 or more experts, only a fool would risk presenting an inferior article . . . . The quality of the communications was certainly no worse than the quality of the published literature, and this despite the absence of


\textsuperscript{125} The project was terminated after the editors of five prominent biomedical journals agreed not to publish papers previously circulated within the IEGs. The journal editors cited their concerns about: dual publication, copyright infringement and misunderstanding of non-traditionally published results. None of these arguments was justified, however; in practice, they hid "the fact that the editors were apprehensive that the status and prestige of the journals would be downgraded if another agency (IEG) were distributing to its members, from six months to a year earlier than the journals, the very papers which would eventually appear in the journals . . . ." Green, \textit{supra} note 52, at 86.

Law review editors contemplating a similarly-prohibitive strategy in the face of electronic self-publishing of legal scholarship might usefully reflect on their institutional \textit{raison d'être}: is it to serve the legal and academic communities, or is to serve themselves? Fortunately, the editors who have considered this question thusfar have chosen the former interpretation: see, for instance, the editors' note to Bernard J. Hibbitts, \textit{Last Writes? Re-assessing the Law Review in the Age of Cyberspace}, 71 N.Y.U. L. REV. 615, 616 n.** (1996) ("The New York University Law Review has always been mindful of its role in shaping legal discourse and its continuing obligation to be responsive to the changing legal environment . . . . While our traditional publication policy has been to accept original works that have never been published, an exception was made for Professor Hibbitts' [electronically self-published] article . . . . Our print publication of the Article reflects . . . the continuing commitment of the Law Review to extend the range of legal discourse." ).
reviewing or editorial selection.”

A similarly-successful self-policing system exists today in the physics community: the electronic archive of physics preprints that I described earlier effectively looks after itself — there is no quality control problem at present, and according to the archive’s founder, “no likelihood” that one will develop. In this context, it’s clear once again that protecting and preserving the quality of “published” scholarship does not depend on the survival of established academic periodicals, law reviews included.

Even in the unlikely event that those skeptical of my electronic self-publishing proposal were right in their contention that eliminating law reviews would result in a significant loss of quality control, it’s doubtful that such a loss would have the devastating impact they fear. Good articles would still be written by responsible law professors and lawyers; the “problem,” supposedly, would be how to find those good articles amidst the bad ones that would hypothetically “flood” the academy. In a print-based self-publication system finding better work would admittedly be difficult — it would be possible only after wasting a good deal of time and effort leafing through and trying to evaluate second-rate material. The electronic self-publishing system I outlined in Last Writes?, however, could easily cope with bad articles, effectively shunting them aside and saving scholars the inconvenience of having to read them or even see them. It could do this by taking advantage of its capacity to elicit and carry reader comments. A ranking system could easily be developed wherein self-selected reader-evaluators would rank an article on a 1-10 scale. Alternatively, the organization running the projected databank of self-published legal scholarship could come up with a comprehensive ranking based on the comments received. Scholars could profitably use this information in constructing electronic searches: thus, instead of asking the databank to list everything on a particular topic, a scholar could instruct it only to list articles above a certain ranking. The databank might be

126. Green, supra note 52, at 83.

127. E-mail from Paul Ginsparg to Bernard Hibbitts (Sept. 30, 1996). See also Ginsparg, First Steps, supra note 49 (“Some members of the community have voiced their concern that electronic [self-]distribution will . . . encourage dissemination of preliminary or incorrect material . . . [But] the electronic form once posted to an archive is instantly publicized to thousands of people so the embarrassment over incorrect results . . . is, if anything, increased.”). Skeptics have suggested that the high quality of the physics preprints may be due to the fact that those papers are ultimately destined for the formal physics journals, and that their authors have simply “internalized” the control standards of those publications. If a professional community has truly internalized control standards, however, nothing should happen if the agent of control (i.e. the journal structure) is actually removed.

128. This scheme of numerical ranking (and searching by rank) was originally suggested for electronically-published articles in the sciences, and has recently been proposed for adoption (on an experimental, voluntary basis) in the physics preprint archive. See Richard C. Roistacher, The Virtual Journal, 2 COMPUTER NETWORKS AND ISDN SYS. 18, 120 (1978); Taubes, supra note 122. Applied to law, such a system could theoretically become very
actually contain more (low-quality) articles than it would list pursuant to such
an instruction, but those would be rendered irrelevant and invisible to the
point where, far from being concerned about “flooding,” scholars might not
even be aware of their existence. Ultimately, such a system would probably
be used as a time-saver as much as a junk-filter: busy scholars faced with an
array of reader-classified “quality” articles in a particular area might plausi-
bly rely on rankings to identify the one or two “best” pieces, just as some
currently tend (somewhat more arbitrarily) to choose “elite”-published ar-
ticles on a subject over articles on the same subject appearing in non-elite law
reviews.129

3. Prestige

The third concern voiced by adherents of the Jeopardy Thesis — most
forcefully, by David Rier — is that elimination of law reviews in favor of elec-
tronic self-publication would deprive law professors in particular of the
academic and even professional prestige derived from publishing in highly-
respected journals.130 In other words, they would no longer benefit from the
“boost” of a good placement.

There are several problems with this contention. Not least of these is its
somewhat unseemly nature. If law reviews are to be retained, they should be
retained because they serve scholarship or further a pedagogical purpose, not
because they can make particular law professors “look good” and “get ahead”
in the strictly-careerist sense of that term. Somewhat less idealistically (given
the importance of prestige in fact), it should be noted that placement-based
prestige is in limited supply — a relatively few members of the legal academy
get the opportunity to publish in prestige-generating journals. To this extent,
most legal academics publishing elsewhere have no prestige to lose by opt-
ing for another, in many respects better, system of scholarly communication.
Those skeptical of electronic self-publishing must finally admit that even
under the existing system, prestige isn’t everything. In particular, prestige
will not necessarily win someone tenure and promotion — at many American
law schools, scholarship is judged not according to where an article is placed,
but rather according to how good evaluators (especially external evaluators)

129. In a variant on this system, readers might even rank the comments of other readers;
this would allow later, interested viewers of an article to make intelligent selections from the
mass of responses that might accumulate over time. See generally Glouberman, supra note 120.

130. Rier, supra note 27, at 204 (“[P]rofessors, especially those not yet tenured, can ill
afford to ‘opt out’ of a game that determines their professional fate.”).
deem it to be.\textsuperscript{131} This not infrequently results in non-elite-published and even, on occasion, as-yet-unpublished (and unplaced) articles getting good reviews, and well-published "prestigious" articles getting trashed. The authors of the former tend to be elevated; the authors of the latter tend not to be.

Have no fear, however — in the age of cyberspace, prestige is not going to evaporate into thin air. Electronic self-publishers may by definition be unable to gain prestige through placements, but they will nonetheless obtain it from the electronically-recorded reactions and comments of their colleagues. A "prestigious" self-published piece will be one that many scholars consult and/or revisit (judging from its "counter"), one that numerous scholars or institutions include as a link on their own sites (a form of Web citation, if you like\textsuperscript{132}), one that stimulates widespread commentary and debate as evidenced by attached e-mail messages, and/or one which succeeds in eliciting positive comments from many scholarly readers (or from a few high-profile ones). All four sources of prestige would in fact be more impressive and academically more legitimate than the process that purports to confer prestige at the moment. Take just one example: from a prestige perspective, would you rather have your article on legal history published by students in the Columbia Law Review, or electronically self-published on the Web with positive comments from Morton Horwitz, Bob Gordon and Barbara Black? ... Me too.\textsuperscript{133}

4. Education

The fourth objection that exponents of the Jeopardy Thesis make to electronic self-publishing focuses on the alleged pedagogical cost to law students of supplanting the law review. Tom Bruce, Howard Denemark and Gregory Maggs all hold that law review service educates law students in legal research and writing, appraises them of significant issues in the legal community, and/or hones their analytic judgment. They suggest that without retaining the law review in at least some form, students would suffer.

This concern for the pedagogical welfare of law students is highly commendable (indeed, I share it), but do law reviews really accomplish all that their partisans claim? A growing number of disgruntled law students say not.\textsuperscript{134} Moreover, if law review experience is pedagogically fundamental, why

\begin{flushright}
\textsuperscript{131} This does not make student editing and selection of articles any less problematic under the present system, however. Even if students do not necessarily control how professors are formally evaluated, they do largely control how many people see a particular article (e.g. a Harvard selection guarantees a wide audience) which for scholarly and overall career purposes is just as bad if not worse.

\textsuperscript{132} See \textit{supra} note 121.

\textsuperscript{133} Cf. Rier, \textit{supra} note 27, at 206.

\textsuperscript{134} Witness the scathing comments from former law review staffers from Georgetown, quoted in \textit{Last Wries?}, \textit{supra} note 29, at para. 2.23. In a recent discussion of the value of law reviews on the law student newsgroup \texttt{bit.listserv.lawsch-L}, a law review student from an
is it not offered to more — even all — law students? Would those skeptical of electronic self-publishing suggest that non law-review students are receiving a substandard legal education? If not, they cannot claim that eliminating the institution would do significant pedagogical damage. The skeptics should also remember that other common law educational systems — in particular, England, Australia and to some extent Canada — function very well without student-edited law reviews. Would anyone seriously suggest that graduates of these systems are legally less capable than their American counterparts?

Shifting to a system of electronic self-publication of legal scholarship does not demand, however, that law students lose the pedagogical benefits which the law review was to some extent designed to serve. If the law review itself were felt to be a unique incubator of legal research and writing skills, law schools could always choose to retain it in modified and limited form as a vehicle of student scholarship. It could be reduced to a collection of student Notes, or perhaps a compendium of seminar papers. Alternatively, legal analysis, legal research and writing, and even “currents in contemporary legal thought” could be explicitly taught in a wider range of classes, seminars or independent studies. Not only would such undertakings allow students to approach those subjects directly and comprehensively rather than indirectly and haphazardly, but it would save money as compared to the present system (in other words, it would be more “cost-effective”). Law students wishing

“elite” eastern law school analogously suggested that “the duties of a journal member could be performed by a chimpanzee of average intelligence.” Re: Law Review, how is it run at your school (visited Sept. 18, 1996), <bit.listserv.lawsch-l>. Not surprisingly, many law students doing this sort of work don’t like it very much: in the words of a disgruntled law review student from Stanford, “[v]ery few people seem to enjoy law review as an activity. Most see it as purely instrumental . . . .” Confidential e-mail to Bernard Hibblett, Oct. 24, 1996. In these circumstances, a significant number of good law students are actually foregoing the opportunity to serve on law reviews. See Re: Law Review, How Is It Run At Your School, bit.listserv.lawsch-l (Sept. 18, 1996) (law student stating from personal experience that “many students with high grades do not even try out for law review because they think the chores of law review are not worth their time.”).

135. As early as 1945, Harvard law professor Warren Abner Seavey complained that “from the standpoint of the school it would be better if every other man on the [Harvard Law] Review was a low C man — if more poor men could do the kind of work that is done by the Review. The Review men need the training least of all. The Review might go to hell, but from the standpoint of education it would be better if half your men were selected from those who got seventy or below, or by lot.” ELEANOR KERLOW, POISONED IVY: HOW EGOS, IDEOLOGY AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL 21 (1994) (quoting Seavey). Expansion of staffs and the proliferation of “spin-off” law reviews have recently extended the base of student participation at many American law schools but, at most, “law review” remains a limited opportunity.

136. A prototype for this sort of publication is Cornell’s “iibulletin-ny” [Legal Information Institute Bulletin - New York] service, started in the Fall of 1995: second and third year law students write case comments on significant decisions of the New York Court of Appeals and make them available to interested readers over the Web and by e-mail. See <http://
more intensive, hands-on training in any specified skill or area could apply for research assistantships with productive legal scholars in their schools. In that capacity they would get an intellectual and academic work-out certainly as good as, and — given close faculty supervision — arguably better than any available in contemporary law review offices.  

5. Employment

Finally, we come to the pièce de résistance of the Jeopardy Thesis: the argument (here offered by Tom Bruce and Howard Denemark) that without the credentials provided by the existing law review structure, law graduates may have difficulty finding jobs. It is clear that many contemporary employers favor students with law review experience. It is less clear why they do that. They may believe that a year or two of reading academic articles, editing drafts and checking citations makes one a better lawyer. They may believe that service on a law review board helps acclimate law students to the teamwork and effort expected in corporate legal practice. They may even be biased towards law review students as a result of what Bruce terms “nostalgia” — hiring partners in law firms may (justifiably or not) look back with fondness on their own law review experiences of five, fifteen or twenty-five years ago, and may be tempted to hire students who in retrospect remind them of themselves.

Will electronic self-publishing of legal scholarship wreck this symbiotic relationship between law review staffers and law firm recruiters? Not at all. In the first place, as I indicated earlier, law reviews may in some sense survive a faculty move towards self-publication by limiting themselves to the publication of student-written material. In this context, students would still be able to acquire the editorial and organizational skills that recruiters allegedly value; they will also remain the objects of nostalgic envy and displaced identification. But even if the law review collapsed completely as an institution, students would still get hired. They would get hired on the basis of their grades. They would get hired on the basis of their writing skills. They would


137. This would be especially true under my internalized “value added” system, in which student RAs would do editorial work under direct professorial supervision. See supra Section II.C.1. Even under the current system, see Value of Law Reviews, bit.listserv.lawsch-L (Nov. 11, 1995) (law student “not convinced that [law reviews] do much to improve research and writing skills, at least in comparison to other activities, e.g., . . . working as a research assistant for a professor.”).

138. There is, however, evidence to suggest that some employers do not value law review membership as much as they used to, in part because of how law review staffers are now selected at some schools. For instance, a law review student at Stanford recently told me that despite what he and many other law review members thought going in, “not many interviewers seem to be impressed by law review. This is probably explained by the fact that [at Stanford] grades play no role in law review membership; a writing competition determines membership.” Confidential e-mail to Bernard Hibbitts, Oct. 24, 1996.
get hired on the basis of their interests, their backgrounds, their work ethics, their recommendations, their interviewing skills, and their personalities. Law firms hired law students for these reasons before there were law reviews, and they will hire them for these reasons after there are law reviews. One might even suggest that they actually hire them for these reasons now: especially given how students get onto and advance up law review boards, law review service is in many ways a cipher for many other credentials. Taking away the cipher would ultimately encourage more direct examination — and perhaps more accurate assessment — of qualities that really "count."

A working electronic self-publication system would moreover generate new ways of resume-building for job-seeking law students. Given that many law review editors would likely become RAs in a revamped scholarly production structure, they would have an opportunity to perform — under supervision — many of the same editorial and research tasks they do now. As RAs, they would also secure the benefit of (hopefully, good) recommendation letters from law faculty intimately familiar with their editorial and research work — letters that should be worth more to employers than letters from satisfied authors who might have dealt with a given law review editor only a handful of times while he/she (and perhaps others) were working on the author's article. Being practical people, law firm recruiters would not take long to adjust to these new realities; indeed, they would probably come to appreciate them.

D. The Futility Thesis

In general terms, Hirschman's "Futility Thesis" asserts that regardless of its inherent merits, a given reform will be deemed inadvisable by some of its detractors because it supposedly cannot be accomplished given the forces and obstacles arrayed against it. Rhetorically, the Thesis affords individuals the chance to conjure with an idea while allowing them to avoid endorsing it by pointing out bureaucratic, political or social impediments beyond their control. In the present collection of commentaries on Last Writes?, the

139. "If you are on the law review, employers may assume you are either one of the brightest in your class, or an outstanding writer—or both [emphasis added]." LAW SCHOOL ADMISSIONS COUNCIL, THE OFFICIAL GUIDE TO US LAW SCHOOL, quoted in Denemark, supra note 34, at 223.

140. See Maggs, supra note 23, at 239-40. The letters that Maggs refers to are the "dirty little secrets" of the law review business; the potential of securing one subtly encourages student editors (especially at elite law schools) to publish established names whose endorsements would carry the greatest weight with prospective professional and academic employers. See, e.g., Kerlow, supra note 135, at 24 ("The greatest advantage Review members had . . . was the built-in opportunity to develop personal relationships with faculty members. This could come through . . . editing an article submitted by professors. To secure a clerkship to an appellate judge, nothing was more valuable than having a Harvard Law professor write an editor a letter of recommendation.").

141. See generally Hirschman, supra note 24, at 42.
Futility Thesis is most obviously incarnated in Tom Bruce’s suggestion that even if the electronic, Web-based self-publishing of legal scholarship were a goal worth pursuing, it might be difficult if not impossible to achieve given the likely indifference, intransigence or outright hostility of contemporary law school faculties and administrations (what Bruce calls the “tenacity of the existing culture”\textsuperscript{142}). Expressed somewhat more positively, the Thesis asserts that the time for change has not yet come.

In theory, electronic self-publishing might be stymied both materially and normatively. Material obstacles might manifest themselves in oblivious or overly-cautious law schools failing to provide their faculties with the technological and financial support necessary for faculty members to either self-publish independently, or, more ambitiously, orchestrate a self-publishing system through the creation of a central scholarly databank. The infrastructure for the first of these initiatives, however, is already bought, paid for, in operation or at least imminent in many (if not most) American law schools. All law professors have to do is use it.\textsuperscript{143} As to the second ostensibly more ambitious initiative, that is not nearly so difficult to undertake (or easy to stop) as some might presume. The Internet which supports the World Wide Web was originally designed to be decentralized. Military scientists constructed it so that independent computers operating at any of its nodes would have the capacity to access, organize and deliver information all over the network. Today, this same capacity theoretically gives individual scholars at law schools all over the United States the technological ability to organize electronic databanks potentially holding or linking to thousands of self-published electronic articles. Given existing Web connections and existing law school servers, the cost of doing this (initially on a volunteer, part-time basis) would be close to zero — much less than that generally associated with undertaking a print-based project such as a new law review. In this context, legal scholars interested in launching an experimental electronic databank might easily end-run administrators or colleagues who might not wish to undertake such an experiment themselves.

“End-running” may not be necessary, however. As of August 1996, a global consortium of law firms called Lex Mundi has developed (as part of its Hieros Gamos Web indexing initiative) a limited archiving\textsuperscript{144} and notifica-

\textsuperscript{142} Bruce, supra note 88, at 243.

\textsuperscript{143} For what it’s worth, discussions with my own Dean about the present article (then still a work-in-progress) prompted him to convert our “Word Processing Center” into a “Document Technology Center”, and to request the director of that Center to commence training her staff in the preparation of Internet-ready (HTML) documents for the purpose of helping interested faculty publish their own work on Web servers at the Law School or elsewhere. Letter from Peter Shane to Bernard Hibbitts (Sept. 16, 1996) (on file with author).

\textsuperscript{144} Make an Entry: HG Legal Publications Database, <http://www.cgsg.com/hg/p_enter.html> (visited Aug. 30, 1996). Similar services exist in other fields: note, for instance,
tion service enabling legal scholars to directly link their self-publications to an evolving databank searchable by other legal scholars or by members of the public. Readers reporting their subject-preferences are advised every time the database registers a new article in their areas of interest. The *Lex Mundi* system could arguably be improved in various ways, in particular by incorporating reader commentaries and evaluations which could be used to refine the search process, but the basic point remains: as I write these words, a framework for a generalized system of legal self-publishing is already in place, whether certain law school Deans and faculty members would welcome it or not.

Although by definition literally “immaterial,” the normative obstacles allegedly in the way of electronic self-publishing of legal scholarship are potentially more serious than their material counterparts. Tom Bruce puts the problem bluntly: “unless merit, tenure and promotion committees begin to recognize and actively encourage electronic publication, electronic publication will not take place on a useful scale.” Is this recognition and encouragement likely to be forthcoming? Bruce suspects not, but I’m more optimistic. In the first place, administrators and senior scholars on these committees — not to mention the university officials that oversee them — may turn out not to be as conservative or hostile as Bruce and others presume. A few of them (especially Provosts and central administrators from hard sciences like physics) may be engaged in self-publishing themselves. A larger number may at least come to appreciate its many scholarly benefits and/or acknowledge the comparative rigor of a process that not merely distributes scholarship but intentionally and immediately exposes it to critical public comment. Some senior officials may recognize the political and potentially financial advantages of being seen to endorse a powerful scholarly option presented by the latest technology. Others may insist — heaven forbid! — on continuing to evaluate colleagues’ scholarship on its merits, as opposed to how or where it is published. The composition of “tenure and promotion committees” is also

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146. Bruce, supra note 88, 243.

147. See supra, Section II.A.

148. In a slightly different context see Joseph M. Moxley & Lagretta T. Lenker, *Introduction, to THE POLITICS AND PROCESSES OF SCHOLARSHIP* 1, 3 (Joseph M. Moxley & Lagretta T. Lenker eds., 1996) (“If academic institutions hope to be honored and supported . . . then faculty will be encouraged to participate in computer-related research . . . . Academics just cannot stick their heads in the sand on this issue — that is, if they hope to come up for air.”)
bound to change over time:149 as that change occurs and as those bodies be- come inevitably more Net-literate ("Neterate") themselves, they will be more accepting of a Neteracy-based self-publishing strategy.150

The second reason why I’m relatively optimistic about the chances of overcoming normative obstacles in the way of electronic self-publishing is related to the likelihood that early self-publishing legal scholars will probably take a two-track approach to publication. In the short term, along with putting their work online, most will continue the practice of sending it to printed law reviews in order to reach their entrenched, largely non-Neterate audiences.151 Last Writes?, for instance, was posted on the Web and also submitted to (and accepted by) the New York University Law Review.152 Not incidentally, such a strategy will allow self-publishing scholars to "cover" themselves in the eyes of their colleagues, who will therefore be less likely to reject self-publication itself out of hand. In the meantime, it will gain strength and credibility as a scholarly option. Eventually, the majority of legal scholars will

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150. A recent dictum of futurist Alvin Toffler is à propos here despite having been offered in a slightly different context: "Oh, these ideas are now regarded as zany, kooky, but I believe that in 10, 15 years, as the entire Internet phenomenon spreads, as more and more young people come into the system, these proposals are going to become mainstream proposals. They're not just going to be regarded as these flaky, digerati ideas." Kevin Kelly, Anticipatory Democracy, WIRED, July 1996, at 45, 187 (interviewing Alvin Toffler). Several decades ago, the German physicist Max Planck expressed his own faith in future reform rather more fatalistically: "a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it." Quoted in KUHN, supra note 26, at 151.

151. This does not presume, however, that these self-publishing legal scholars will voluntarily withdraw or freeze their online texts at the moment of print publication. On the contrary, many will doubtless wish to continue taking advantage of their original electronic medium by maintaining and revising the self-published versions of their work post-print. See infra note 152. Not incidentally, the latter activity will allow those versions to supersede the printed versions, and will encourage other legal scholars to look to them rather than to printed copies as the primary objects of academic reading and research. Editors of printed law reviews tempted to save their institutions by pre-emptively prohibiting maintenance and revision of electronically self-published papers after print publication (or even, in a more desperate move, refusing to print any papers previously self-published) are referred to supra note 125.

152. See Hibbits, supra note 125, at 615. In order to preserve my ability to maintain and make post-print changes to the self-published version of Last Writes?, I purposefully retained all electronic rights in the article, except those which would permit NYU to post an electronic version of the printed article in the event of inaugurating an Internet edition of their journal (Agreement Between New York University Law Review and Bernard J. Hibbits, July 30, 1996; the Editors’ Note purporting to describe the Agreement is ironically in error insofar as it indicates that NYU retained unspecified "online rights."). In the interest of extending the range of legal discourse, and having no electronic edition to protect from what would have amounted to electronic competition, the NYU Law Review did not object to this arrangement.
gain enough online experience to realize that far from being a last resort, electronic self-publishing is a first resort that allows them to produce scholarship more easily, more efficiently, more quickly, more cheaply, more accurately, more creatively and more effectively than any legal journal. At this stage they will abandon formal law reviews as being more trouble than they're worth. 

Because large-scale electronic self-publishing of legal scholarship is already a technologically-viable option, because it may prove to be less than anathema to established interests, and especially because it will not lead to the immediate abandonment of the law review, there is no good reason to postpone it to a better, somehow “riper” time. Waiting until everyone is technologically up-to-speed, or until every aspect of the present law review system is replaced, or until “all parties are convinced they will lose nothing in the process [of transition]” is simply not necessary. Nor is it advisable. Progress towards a working system of electronic self-publication will almost inevitably involve some measure of trial and error. Certainly thought should be given to what lies ahead, but solutions to the challenges inevitably presented by the new system should also be allowed to develop incrementally. Because what ultimately works may be very different from what we might expect to work, we should get started as soon as possible. More fundamentally, delaying the shift to electronic self-publishing to some hypothetical “right moment” may paradoxically ensure that it never happens. There will always be someone who (by choice or by force) will stay outside the computerized publication structure. There will always be someone who will insist (perhaps rightly) that the law review is not and cannot be entirely “replaced.” There will always be someone who will feel that change will not be in their interest. These people deserve our respect and our sympathy, but waiting for them would be as counterproductive for us as waiting for recalcitrant scribes would have been for the pioneering printers of five centuries ago.

E. The Alternatives Thesis

The fifth and final type of argument advanced by those skeptical of the prescription I offered in Last Writs may conveniently be termed the “Alternatives Thesis.” The proponents of this Thesis present a variety of proposals which they assert might improve the present legal publishing system without
running the risks allegedly inherent in dismantling the law review structure as we know it. Unlike the exponents of Futility, they believe that some changes can be made, even if there are not the root-and-branch changes I have urged.

The alleged "alternatives" run the gamut from the traditional to the imaginative. The most traditional alternative to electronic self-publishing is proposed by David Rier, who at one point advocates reforming the existing law review system by indirectly and directly strengthening formal pre-publication review procedures. If multiple submissions were limited and manuscripts were shortened, he claims that law students would do a more thorough job of evaluating papers; if more faculty members became involved in editing legal journals or at least supervising the work of student boards, he claims that the overall quality of review would go up. But these proposals are old hat, and are themselves unsatisfactory. Radically limiting multiple submissions to, say, three or five at a time would considerably slow the pace of legal scholarship; the process of placing an article (which now takes only a couple of months, and often less time than that) might ultimately take years. Imposing a formalized publishing preference for short articles would potentially discriminate against scholars taking non-conformist approaches which require further elaboration and documentation than conformist writing, the framework for which is already known and endorsed in the legal community. In any event, reducing the workload of student editors does nothing to make them more educated or more experienced. As to Rier's second suggestion of more faculty editing (or for that matter, more faculty supervising of student-editing), that is unlikely to take hold as a standard practice so long as it threatens to impose additional administrative or pedagogical burdens on

156. For similar proposals, see, e.g., Eric Jensen, The Law Review Manuscript Glut: The Need for Guidelines, 39 J. LEGAL EDUCATION 383, 386 (1989) ("No one should have more than five copies of any manuscript circulating for consideration for publication at one time."); James Lindgren, Student Editing: Using Education to Move Beyond Struggle, 70 CHI.-KENT L. REV. 95, 98 (1994) ("We should also be willing to take on the very substantial work of starting faculty journals.").

157. What's more, "the proposal is obviously naive . . . . Very few non-tenured faculty members, living on the edge of faculty review and possible extinction and always desperate for an acceptance would have the confidence and discipline to limit distribution to five journals." Arthur Austin, Footnote* Skulduggery** and Other Bad Habits*** 44 U. MIAMI L. REV. 1009, 1013 (1990).

158. "Everyone who writes or speaks . . . knows how much you can get away with as long as you keep close to received doctrine . . . . When I refer to Nazi crimes or Soviet atrocities, for example, I know that I will not be called upon to back up what I say, but a detailed scholarly apparatus is necessary if I say anything critical about . . . the United States . . . . This freedom from the requirements of evidence or even rationality is quite a convenience, as any informed reader of the media and journals of opinion, or even much of the scholarly literature, will quickly discover . . . . Evidence is unnecessary, argument beside the point." Noam Chomsky, Interview, in THE NOAM CHOMSKY READER I, 36-37 (James Peck ed., 1987).
faculty which would distract them from their own writing. If faculty members
have time to spare, learning how to self-publish electronically would be a
much better professional investment. Finally, to the extent that faculty edit-
ing presumes peer review, Rier is asking legal scholars to climb onto a band-
wagon precisely when a critical mass of his colleagues in the sciences are
clamoring to get off.\textsuperscript{159} Prudent legal scholars should beware.

A slightly more novel alternative to electronic self-publishing is put
forward by William Ross, who suggests that legal scholars looking for new
avenues of intellectual expression should consider publishing books. Books,
of course, enjoy revered status in the academic pantheon. They represent the
culmination of years of thought and work, and as such are (hopefully) major
contributions to scholarship. They offer professional editing, editorial con-
tinuity, peer review (for good or ill) and even the possibility of revising one’s
work in later editions. By definition, however, they are not an alternative to
articles, which are the focus of my electronic self-publication proposal. Many
good ideas that are perfectly suited to abbreviated discussion in an article
would lose much of their punch in book format. Books take longer to con-
ceive and produce, which is one reason why articles and journals came into
existence in the first place. In several respects, books are also weaker than
articles as a practical medium of legal scholarship: as Ross himself admits,
“many law professors read law review articles far more avidly than books.”\textsuperscript{160}
In law, books don’t even carry a guaranteed prestige advantage: Ross
correctly notes that “most law professors would receive more prestige and atten-
tion from their peers by publishing with a top-ten law review than with a
second-string publisher.”\textsuperscript{161}

Even if books did not suffer from these disadvantages, using them as a
professorial “escape hatch” from law reviews would be complicated by the
fact that the current market for academic monographs is very, very tight, and
getting worse all the time. University presses under severe financial con-
straints are no longer accepting the number of manuscripts that they did even
five years ago.\textsuperscript{162} The manuscripts that many are accepting fit a particular,

\textsuperscript{159} See supra notes 101-17 and accompanying text.

\textsuperscript{160} Ross, supra note 75, at 260.

\textsuperscript{161} Id.

\textsuperscript{162} “Increasingly, presses are saying that they simply cannot afford to publish monographs.
Over the last five years, for instance, the list for one of the top five academic presses in the
country moved from 70 percent monographs to only 30 percent and falling.” The Endangered
Monograph, PERS., Oct. 1995, at 3 (American Historical Association Newsletter). See also
Peter Applebone, Publishers’ Squeeze Making Tenure Elusive, NY TIMES, Nov. 18, 1996 at
A1 (reporting that “university presses are cutting back, sometimes drastically, on publishing
specialized monographs.”); James Shapiro, Saving “Tenure Books” from a Painful Demise,
CHRON. OF HIGH. EDUC., Nov. 1, 1996 at B6 (noting that “[i]t is hard to imagine a grimmer
time in which to get a ‘tenure book’ accepted.”).
somewhat problematic profile: popular, topical, lightly documented works — generally by established, publicly-recognizable academic authors — that are more likely to pay for themselves in the marketplace. Most law professors are not well-known outside their specific areas of expertise; many do not produce, do not want to produce or do not wish to be confined to producing books of this sort. Opting for book publication under these circumstances would force most legal academics to derail their own scholarly agendas. This is clearly not acceptable.

Somewhat more visionary is a third alternative explicitly advanced by both Henry Perritt and (as a futuristic setting for the implementation of his more traditional proposal) David Rier: shift the locus of legal scholarship from printed law reviews to electronic journals (“e-journals”). Taking the basic idea one step further, Perritt even suggests making electronic self-publication a preliminary step in a new electronically-based law review production structure. Of course, electronic journals are Internet entities capable

163. On the relationship between “commercial” academic releases and the decline of footnotes, see William H. Honan, Footnotes Offering Fewer Insights, N.Y. TIMES, Aug. 14, 1996 at B9 (“noting that ‘to compete more effectively [in the retail book market], university press editors began packaging their books more attractively, and that meant . . . fewer footnotes . . .’”). In the age of hypertext, however, the rumors of the footnote’s demise may turn out to have been greatly exaggerated. Internet publishing actually privileges “footnoting” insofar as it values hyperlinked material over non-hyperlinked material. Hyperlinks, of course, are little more than footnotes (usually without numbers or formal citations) that directly take one to another part of a single text, or outside that text altogether. Not only are hyperlinks more powerful “connectors” than footnotes ever were, but readers might be able to “mask” hyperlinks in ways that will allow scholars to include as many hypertextual “footnotes” as they wish for the benefit of highbrows without necessarily frightening or alienating lowbrows. In other words, members of different reading audiences will be able to tailor the appearance and content of Internet texts to suit themselves.

164. “Most [presses] would like to publish the broader second and third books by well-known authors of monographs . . . .” The Endangered Monograph, supra note 162, at 3. See also MacLelland, supra note 33, at 8-9 (“University presses, faced with meshing production costs with audience demand, tend to publish well-known names . . . . Because they can no longer afford the financial risks involved in publishing unknown authors, many university presses are excluding from the dialogical context the very voices which may have produced, or may be producing, the best and most significant scholarship.”). 165. This is no: to suggest that such publications have no proper place in the legal literature. They clearly do. Whether they should become the core or basis of that literature, however, is another matter entirely.


167. See, e.g., Perritt, supra note 57, at 57 (“[I]t probably is appropriate for student edited reviews to migrate to the Web.”).

168. Rier, supra note 27, at 212.

169. Perritt, supra note 57, at 257.
of multimedia and other technological innovations. They also have the social and political "advantages" of being relatively recognizable to users, being compatible with existing scholarly practices, and being (for the most part) protective of existing academic and publishing hierarchies. Building self-publication into electronic legal journals' submission and editorial processes would save mailing and transmission time and would ostensibly allow legal scholars to have their cake and eat it too, i.e. take advantage of self-publishing while preserving the basic law review system.

Having said all this, electronic legal journals and this notion of "preliminary" self-publishing are both problematic. Let's take preliminary self-publishing first. A legal scholar posting her articles online for the sole purpose of having them considered, selected, edited by and eventually "published" in some electronic law journal would in practice be sacrificing most of the benefits of the technological skill she would have bothered to acquire. Assuming with Perritt that the editors of most electronic law journals would not tolerate an electronic self-publisher maintaining or revising the electronically self-published — and by definition directly competing — version of an article after formal e-journal publication, that preliminarily self-publishing legal scholar would be handing over to others the final say over editing, design and dissemination when she could have had that herself. She would also be abdicating direct control of post-publication changes and (most likely) giving up republication and duplication rights. In sum, she would be allowing a fully-representative, up-to-date, dynamic and mobile statement of her ideas to be replaced with something less. This would come close to constituting academic negligence; the self-publisher would be better advised to leave well-enough alone. Any legal e-journals that might permit co-publication by electronic self-publishers in the interest of securing particular articles or in the hope of setting an altruistic example for other journals would be courting disaster: they might retain their readerships for a little while, but regularly peddling soon-superseded (or, at best, redundant) products would ensure their collapse in the long run. In either case, the practical benefits for preliminary self-publishers passing their work products along to e-journals would be limited. Judging by current realities, legal e-journals would have no technological edge over self-publishers, would have access to no larger a potential audience, and might in some instances reduce the actual circulation of papers by

170. See supra notes 33-39 and accompanying text (on advantages of the Web as a publishing platform).

171. On electronic self-publication as possibly both a prelude and a follow-up to publication in a printed law review. See supra notes 151-54 and accompanying text.

172. See Perritt, supra note 57, at 257 (discussing how preliminarily self-published papers would be "locked" and officially "published" by transferring them onto the Web sites of electronic legal journals).
demanding that would-be readers "register" or pay subscription fees. At bottom, the very concept of self-publication as a prelude to e-journal publication is a bit odd. One wonders whether its proponent, transported to the fifteenth century, would have advised legal scholars to have their works commercially-printed as a step towards having them copied by scribes, or (just as nonsensically) re-distributed by printers based in monasteries.

Altogether apart from preliminary self-publication, electronic legal journals themselves may offer scholars less than conventional wisdom currently suggests. At the moment, there are relatively few of them. Most of these are simply Web-based extensions of existing print publications which replicate all the faults and delays of the print-based editorial structure. Legal e-journals which have no independent print existence are more promising, but they too have critical limitations. Insofar as they can currently be counted on the fingers of one hand, relying on them for publication would require many legal scholars — especially those working in areas outside the "law and technology" field — to wait years before enjoying the benefits of the Internet. Moreover, most of the current "electronic only" law reviews have an Achilles heel: they are still student-edited. The one faculty-edited American electronic law journal (the *Journal of Online Law*, edited by Trotter Hardy) is not likely to have many counterparts until American law faculty start volunteering for editorial assignments in significant numbers, which is not likely to happen anytime soon. Even were it to happen someday, faculty editing would delay publication and inevitably would not be foolproof.

The greatest weakness of the electronic law journal, however, is that it is still a journal — as such, even in its "pure" variety, it is but a late twentieth century electronic imitation of a seventeenth century print publishing format which I suspect is fundamentally incompatible with its own electronic environment. As demonstrated by the Web in particular, that environment allows and already rewards ongoing revision of work product: Web authors

173. There is some evidence that the Abbot Trithemius actually took this view. See supra note 7 and accompanying text. At one point in his book *In Praise of Scribes*, he wrote that "the devoted scribe should . . . guarantee permanence to useful printed books by copying them . . . His labor will render mediocre books better, worthless ones more valuable, and perishable ones more lasting." TRITHEMIUS, supra note 6, at 65. Printing was thus contemplated as the first rather than the last step in the publication process.

174. Recall the discussion of "peer review" supra in Section II.C.2.

who periodically revise, update and improve their Web sites tend to get more traffic and more return for their efforts than Web authors who do not. In the age of cyberspace, many scholars will want the same flexibility\(^{176}\) — not merely to attract attention and extend the intellectual "shelflife" of their work,\(^{177}\) but also to ensure that their words continue to be accurate representations of themselves and their ideas.\(^{178}\) Yet any legal e-journal which permitted legal scholars to revise their work at will would be committing institutional suicide: by surrendering editorial control, it would become a platform for self-publication in fact if not in name. Those legal e-journals which attempt to preserve their editorial integrity by requiring proposed changes to be approved in advance\(^{179}\) may eventually find themselves no better off. If their policies do not end up alienating (and driving away) Neterate legal scholars trying to attract or hold on to readers by keeping their work current, they will impose huge burdens on editors trying — with fixed amounts of manpower — to review an ever-increasing number of change requests coming from an ever-increasing number of scholars. In this context, e-journals attempting to save

mode for scholarly writing. Of course scholarship . . . is a long journey, but the hypothetical structure of knowledge — knowledge as a continual pursuit rather than an archived condition — gets increased emphasis through these new forms of study and expression.”).

176. Admittedly, some might not — they might (like Trotter Hardy) prefer to publish a piece and be finished with it. Hardy, supra note 23, at 251. Legal scholars would certainly be free to adopt this attitude, but they would risk losing comparative advantage to others taking a more active, dialogically-responsive approach to their work.

177. In the current publication system, many if not most articles become little more than "museum pieces" within 10 years of initial publication. If scholars had the option of periodically updating and revising their articles, those could remain relevant for a far longer period of time, to the benefit of both writer and readers. The sheer quantity of scholarship produced might decline somewhat (perhaps not such a bad thing), but its quality and long-term utility would arguably increase dramatically. In such an environment, academic achievement might even come to be judged "not [by] past publications . . . but [by] the number of existing publications that are still being developed and maintained with new material." Antony Barry, *Publishing on the Internet with World Wide Web*, <http://snazzy.anu.edu.au/CNASI/pubs/CAUSE94.html> (visited Sept. 2, 1996).

178. "There is scarcely a page I have published in a decade and a half of scholarly writing that I would not now change if I could, but I cannot. Words that I know to be inadequate and in some instances untrue continue to speak for me, who am no longer the person I was when I wrote them, but I am still somewhat their author; I must be, because I once was." O'Donnell, supra note 175, at 24.

179. This recent statement by a commercial editor reflects something of what publishers (and journals of all sorts) have at stake here: "Editors like me spend most of our day reconceiving, rechecking, and rewriting what someone else has already conceived, checked and written. And it's not that I don't trust my authors — if publishers didn't have great respect for their authors' insight, intelligence, and dedication, why would they publish their books? It's simply that . . . authors and publishers have different areas of expertise . . . I work for a publisher that has a reputation for quality — and I find it hard to imagine us publishing anything . . . that we felt reflected poorly on us." Denise Wydra [Senior Editor, Bedford Books] to WEBRIGHTS-L, June 6, 1996.
themselves by providing electronic conveniences (in this instance, revisability) comparable or superior to those already enjoyed by self-publishers may only succeed in putting themselves out of business.

Ultimately, I believe that legal e-journals (and electronic journals in general) are an evolutionary dead-end.\textsuperscript{180} They are publishing's "horseless carriages" — archaic forms which attempt in their very name to reconcile the past and the future, but which serve neither well.\textsuperscript{181} Their comparative recognizability discourages complacent or unwitting legal scholars from seizing or even appreciating many of the exciting new publishing opportunities afforded by Internet technology. In this age of the Information Superhighway, however, each of us has a choice: we can update traditional modes of transportation, keep the carriage-makers going and eventually get run over, or we can get out of our conceptual rut, take control of our scholarship, and start building Ferraris.\textsuperscript{182}

A fourth alternative, mooted if not discussed in detail by both Richard Delgado and William Ross (the latter offering his second option), would theoretically accept self-publication as a final rather than simply preliminary format for legal scholarship, but would only recommend it for certain types of scholarly material. Delgado's comments unfortunately offer little guidance as to what kind of articles he would consider fit for "occasional" self-distribution over the Internet. Ross is somewhat more specific, suggesting that

\textsuperscript{180} See Michael Giles, \textit{Presidential Address — From Gutenberg to Gigabytes: Scholarly Communication in the Age of Cyberspace}, 58 J. POLITICS 613, 614 (1996) (noting that "the conversion of scholarly journals from a paper to an electronic format . . . has tended to obscure the more far-reaching implications of the internet. It is my thesis that the emerging technology of the internet will fundamentally alter the structure of scholarly communication."); Paul LeBlanc, \textit{Pulling Out the Rug: Technology, Scholarship and the Humanities}, in THE POLITICS AND PROCESSES OF SCHOLARSHIP 115, 119 (Joseph M. Moxley \\& Lagretta T. Lenker eds., 1996) (speculating that electronic journals may represent "a short-lived analog from print culture.").

\textsuperscript{181} As Marshall McLuhan so astutely reminded us in the 1960s, the content of a new medium of communication is always imagined (initially) to be an older medium. MARSHALL McLuhan, \textit{Understanding Media} ix (1964). Not only were automobiles initially seen as horseless carriages, but television was initially regarded as a vehicle for broadcasting movies, and printing was initially seen as a faster means of reproducing manuscripts. Today, consistent with this tradition, the Internet is primarily (mis)conceived in academia as a medium for delivering scholarly periodicals.

\textsuperscript{182} Derek Law, \textit{The Electronic Message to Scholarly Publishers: Adapt or Obsolesce}, 6 LOGOS 67, 72 (1995). The shift from institutions to individuals as the primary locus of publishing activity may only be facilitated by the speed at which Internet publishing technology evolves. Already journalists are talking about "Internet time", the accelerated rate at which new Web browsers and other applications are developed and enter the marketplace. Change is occurring so fast that it is almost impossible for actual or would-be publishing organizations to keep up: by the time they collectively decide to take one step, the technology has advanced by another. In this situation, autonomous individuals may be the only agents able to make consistent use of the latest publishing innovations.
papers with limited readerships, of only "current interest" (e.g. articles on pending or just-decided cases, or on legislative revisions) or otherwise having only a short shelflife might be well-suited to personal online dissemination.

There is something to this notion of limited self-publication. For one thing, it implicitly recognizes that certain legal academics dealing with certain subjects in certain ways will likely be drawn to electronic self-publishing ahead of their colleagues. It also recognizes that Internet-based self-publishing is especially attractive for articles on "ephemeral" subjects that might lose much of their topical value while moving through the editing and printing stages of traditional journals. To limit self-publishing in the manner proposed, however, would be to miss most of its potential. As demonstrated earlier in this article (as well as in Last Writes?), all legal scholars can profit from the proposition, and the discussion of all subjects can be advantaged. The apparent "ephemerality" of a process moreover does not predetermine the "ephemerality" of its product. After all, paper-based printing was quite properly considered ephemeral in the scribal, parchment-oriented culture of the fifteenth century, but that hardly compromised print's future as the universal format of scholarly record.

The fifth, final and most forward-looking alternative outlined in this collection of essays is that set out by Gregory Maggs. With a gracious nod to Last Writes?, he foresees that law professors will turn to self-publication for all sorts of legal scholarship; he nonetheless recommends that law reviews be retained in certain residual roles. In Maggs's view, law review staffers might carry on as Note writers, article reviewers, symposium organizers, and/or article editors. I agree with the first two of these proposals; indeed, I made them myself in Last Writes?, and I have already restated

183. "What types of individuals are potential agents of Internet use in the scholarly communication system? Generally, it would be those who have ties that overlap generational, occupational or knowledge groups." Charles A. Schwartz, The Strength of Weak Ties in Electronic Development of the Scholarly Communication System, 55 COLLEGE & RES. LIBR. 529, 535 (1994). See also Peter Martin, How New Information Technologies Will Change the Way Law Professors Do and Distribute Scholarship 83 L. LIBR. J. 633-41 (1991) (discussing how four categories of legal scholars — "Professor Lawyer", "Professor Humanist", "Professor Social Scientist" and "Professor Internationalist" — are likely to approach electronic media in different ways, at least initially).

184. "The printed book is made of paper and, like paper, will quickly disappear. But the scribe working with parchment ensures lasting remembrance for himself and for his text." TRITHEMIUS, supra note 6, at 35.


186. Id. at 238.

187. "[D]irect professorial publishing on the Web would not in itself prevent law students from continuing to publish a law review, if they or others deemed the educational experience sufficiently useful and important. Law students might, for instance, turn to publishing print
one of them here.\textsuperscript{188} Law reviews could certainly survive as collections of student writings. They might even survive as true student “reviews” of self-published faculty articles, performing that evaluative mission along with individual faculty readers (although one wonders what weight they would ultimately carry in that context). In both these scenarios, however, scholarly self-publishing would still have led to the end of the law review “as we know it.”\textsuperscript{189}

I am less certain of the desirability or even feasibility of having law review staffers carry on either as organizers of symposia or as editors of (“to-be-self-published”) articles. Bringing scholars together to discuss a related set of issues is certainly an important function in the contemporary legal academy (one which the editors of the Akron Law Review have in fact undertaken here), but the quality of the resultant scholarly conversation is often only as good as the judgment and the erudition of those who orchestrated it in the first place. Students may not be in the best position to select participants or even topics, just as they may not be in the best position to select ordinary articles. Eliminating the law review as a sponsor of symposia would furthermore not result in the demise of the symposium genre as a whole. In all likelihood, enterprising law faculty would continue to organize such “meetings of minds” much as they do now, soliciting specific colleagues to write on particularly-topical or significant issues (and sometimes publishing their contributions in edited books). Finally, I imagine that in a self-publishing universe, scholars would be brought together in other more efficient and satisfying ways. The possibility of attaching reader comments to electronically self-published papers\textsuperscript{190} could to a certain extent turn every article into a symposium in itself, making student-sponsored dialogue superfluous. On a larger scale, scholars searching a central legal databank could instantly assemble collections of subject-specific self-published articles for themselves\textsuperscript{191} which would be just as — if not more — substantively co-ordinated as many current symposia. It is also highly likely that future developments in Internet- and video-

\textsuperscript{188} See supra note 136.
\textsuperscript{189} See Hibbits, supra note 29, at para. 1.
\textsuperscript{190} See supra note 120 and accompanying text.
\textsuperscript{191} See supra note 90 and accompanying text.
conferencing technology (building from today's listservs, MOOs and CU-SeeMe applications) will make it easy for scholars to organize a greater number of "live" academic gatherings on their own without third party assistance. The same technology, complete with electronic whiteboards and other worksharing devices, might even prompt legal scholars to step beyond the symposium format and write more papers in active collaboration with one another.\footnote{192}

Having law review staffers stay on as editors of faculty prose is similarly problematic. In the first place, that proposal presumes that law review staffers would voluntarily continue to do the "dirty work" of legal publishing without having control over article selection or final presentation. Under these circumstances, most would probably abandon the law review office\footnote{193} and simply work as RAs, where they could have the advantages of both pay and direct supervision of their work (not to mention public acknowledgments and reference letters, the two incentives Maggs associates with law review service\footnote{194}). In the second place, Maggs's argument in favor of continued law review editing assumes that an unsupervised law review staffer would do the same quality of editorial work as an RA hand-picked by and directly responsible to a completely independent self-publisher. To the extent that assumption is debatable, law professors would be unlikely to avail themselves of the service. In the third place, Maggs's scenario does not take into account the likelihood that if it did prove attractive, relying on law review staffs as glorified secretarial pools would likely create backlogs of unpublished, unedited articles; student editors would then have to select some articles over others, which would informally give them much the same degree of control over publication as they enjoy at the moment. For many law professors, an "alternative" which would lead to such a result would be no alternative at all.

* * *

As in the three historical instances Hirschman considered in his own work, the "rhetoric of reaction" generated by my proposal to reform the existing law review system through the electronic self-publication of legal scholarship turns out, for the most part, to be a rhetoric of overstatement, misapprehension and mistake. None of the five theses so vigorously advanced

\footnote{192. See Duncan Sanderson, *Cooperative and Collaborative Mediated Research, in Computer Networking*, supra note 55, at 95.}

\footnote{193. See generally G.P. Thomson & John R. Baker, *Proposed Central Publication of Scientific Papers*, 161 Nature 771, 772 (1948) (noting, in the context of a somewhat similar 1948 proposal for the central deposit and distribution of scientific papers, that "[i]t is extremely unlikely that editors would continue to undertake all the functions they now discharge, largely without payment and from love of their subject, if their power and prestige were diminished to the extent proposed"). See also Ralph Phelps & John Herlin, *Alternatives to the Scientific Periodical*, 14 UNESCO BULL. FOR LIBR. 69 (1960).}

\footnote{194. Maggs, *supra* note 23, at 239.}
by the skeptics — Denial, Perversity, Jeopardy, Futility, or Alternatives — ultimately withstands scrutiny. Instead of having no discernible benefits, as the Denial Thesis claims, electronic self-publishing turns out to have many. Instead of threatening to make things worse for legal scholars, as the Perversity Thesis claims, electronic self-publishing promises to make things better. Instead of imposing numerous costs on law professors, lawyers and law students, as the Jeopardy Thesis claims, electronic self-publishing imposes very few (and in some respects, none at all). Instead of being impossible to realize, as the Futility Thesis claims, electronic self-publishing appears to be quite feasible. Instead of being too radical a change, as the Alternatives Thesis claims, electronic self-publishing seems to be the only one radical enough to address and solve fundamental problems. For all these reasons, legal scholars should embrace electronic self-publishing with enthusiasm.

III. A WHOLE NEW WORLD

Looking back on the commentaries in this Special Issue of the Akron Law Review, I am struck by a remarkable omission: several of the commentators fail to consider or even explicitly register the fact that Last Writes? itself was and is a self-published online document with (even in Version 1.0) hypertext, multimedia, and other structural features far surpassing the capabilities of the then-existing legal literature. It is as if a number of scholars in the fifteenth century had picked up a codex and failed to comment on the fact that it was not a scribbally-produced manuscript, but a commercially-printed book. The explanation for this lack of reaction may have something to do with how some of the skeptics probably experienced and ultimately analyzed the document — not an online product, but as a printout. Given that in this instance, the medium was intended to be much of the message, this tactic may have pre-emptively (and from the skeptics’ perspective, perhaps conveniently) neutralized a good part of the article’s argument. Somewhat more broadly, it a so seems to have encouraged an implicit misperception: that electronic self-publishing is nothing more than a proposal.

It is true that Last Writes? offers a broad proposal for an elaborate system of self-published legal scholarship, but electronic self-publishing itself — complete with instant dissemination, multinational and multidisciplinary access, hypertext links to other sites, multimedia, electronic reader comments, and even searchable indices — is already a fact. Last Writes? demonstrates that legal scholars can self-publish on the Web today — now — and create scholarly products not merely as good as, but in many technical and editorial respects better than any appearing in printed law reviews, or even in.

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195. This behavior may say as much about some skeptics’ level of Neteracy as about the current (but continually shrinking) limitations of on-screen reading.
electronic legal journals.\textsuperscript{196} The very existence of \textit{Last Writs}\textsuperscript{e} combined with its obvious success in generating heated debate in legal circles long before it was printed in a traditional format together suggest that many of the skeptics' protests are already too late. The genie of change is out of the bottle.

In their tardiness, those scholars skeptical of electronic self-publishing are once again following in the footsteps of the critics of commercial printing. Abbot Trithemius wrote \textit{In Praise of Scribes} decades after Gutenberg's invention, and years after his death. Even more telling is the fact that he finished his work in October 1492, the same month that Christopher Columbus symbolically and definitively put an end to the Middle Ages and its scribal culture by his discovery of the New World.

In the late 1990s, legal scholars have discovered a whole New World of their own in the form of the Internet. The discovery of this New World demands radically new arrangements, new customs and new ideas. While the skeptics lobby for the preservation of the law review, they seem not to appreciate that even more fundamental structures are at stake. In fifty years, in the midst of an Internet environment, the "article" which has long been the dominant form of expedited academic discourse will likely have given way to something more akin to what we might today call a "multimedia seminar."\textsuperscript{197} In a hundred years, the "university" (or, for that matter, the "law school") which has for so long sponsored, organized and structured both teaching and advanced (legal) research may not exist in its present physical form.\textsuperscript{198} To the extent that \textit{Last Writs}\textsuperscript{e} presumes the survival of these entities, its recommendation for the development of an elaborate electronic self-publishing system is in one sense quite conservative. Far from threatening law's most cherished scholarly and pedagogical traditions, it provides those traditions with a true technological way-station: a forward base affording both opportunity and continuity while legal scholars, themselves just disembarked on the shifting sands of their New World, scan the jungle looking for a clear path inland.

\textsuperscript{196} "Two centuries ago there was a huge gap between what a scholar could do and what publishers provided. A printed paper was far superior in legibility to hand written copies of the preprint, and it was cheaper to produce than hiring scribes to make hundreds of copies. Today the cost advantage of publishers is gone, as it is far cheaper to send out electronic versions of a paper than to have it printed in a journal. The quality advantage of journals [is also] rapidly eroding . . . ." Odlyzko, supra note 47, at 82.

\textsuperscript{197} See generally Jean-Claude Guedon, \textit{The Seminar, the Encyclopedia, and the Eco-Museum as Possible Future Forms of Electronic Publishing}, in \textit{SCHOLARLY PUBLISHING}, supra note 38, at 71.

\textsuperscript{198} "Four assumptions lie behind our historical conception of a university: the library, a community of scholars (formed around library), drawing on each others knowledge in different disciplines; teachers working with small groups of students and a period of schooling that helps one to transform from adolescent to adult and grants a credential for entering work . . . . Information technology is undermining these assumptions. . . . I suspect we are underestimating the speed at which the traditional university is approaching disintegration." Peter J. Denning, \textit{The University's Next Challenges}, COMM. ACM, May 1996, at 27, 29.