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Gresham's Law of Legal Scholarship

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GRESHAM'S LAW OF LEGAL SCHOLARSHIP

Gresham's law, in case you've forgotten, says that "bad money drives out good." As Sir Thomas Gresham explained to Queen Elizabeth in 1558, the idea is that people will hold on to the good stuff, so that only bad coins will circulate.

This is an early example of a more general concept economists call "adverse selection."[1] Adverse selection is the converse of Darwinian evolution. Darwin's theory of natural selection is based on the survival of the fittest. Economists have discovered, however, that in some situations selection weeds out the fittest, leaving only the inferior members of the group. For example, insurance is the best buy for those with the highest risks, so unless insurance companies take precautions, only the worst risks will buy their policies. This can be a fast track to insolvency for the insurer. Under some circumstances, adverse selection can lead to the total collapse of a market.[2]

The concept of adverse selection helps explain some otherwise puzzling aspects of legal scholarship. Even a casual reader of major law reviews will rapidly discover two things. First, most generally accepted legal rules should be immediately discarded, according to our leading law reviews.[3] Second, the courts—particularly the Supreme Court—virtually never reach the obviously correct decision even in the simplest cases. It seems puzzling, however, that the legal system has managed to survive if its ineptitude is as great as the law reviews indicate.[4]

Also puzzling is why judicial opinions are so stupid. The Harvard law review student who lambasts the manifest idiocy of the courts will, a year or so later, be a law clerk helping to draft opinions, which in turn will be revealed as idiotic by a new generation of

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1. Following the advice of Nobel laureate George Stigler, this essay will employ "the most powerful techniques of modern mathematical economics, including ridicule." G. STIGLER, THE INTELLECTUAL AND THE MARKETPLACE 32 (1984).

2. *See* Rothschild & Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q.J. ECON. 629 (1976); Wilson, *The Nature of Equilibrium in Markets with Adverse Selection*, 11 BELL J. ECON. 108 (1980). *See generally* Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

3. When a conventional rule should be retained, of course, it is never for the conventional reasons.

4. For a useful critique of current scholarly writing about constitutional law, see Tushnet, *Truth, Justice and the American Way*, 57 TEX. L. REV. 1307 (1979).

law review students. Unless Harvard graduates suffer a frightening decline in I.Q. immediately after graduation, the judicial opinions they draft cannot be that much dumber than their case notes.

Adverse selection explains both puzzles. An example will make it easier to understand the process. Instead of a real example, which would leave some eminent law professor infuriated, a hypothetical seems more prudent.[5] The seventh amendment requires trial by jury "in Suits at common law." For the past two hundred years, everyone has understood that trial by jury is not required in other civil suits, for example, actions "in equity" seeking injunctions rather than damages. Obviously, a law review article defending this trite proposition would not be published by a major law review—in fact, it might not be published even by the most obscure law review in the country. On the other hand, a really clever argument that juries should be required in injunction actions would have much greater appeal to editors.

This example may seem so extreme as to be fanciful.[6] In fact, framing such an argument would not be all that difficult. The distinction between equity and law actions with regard to jury trial is largely historical, and would be relatively easy to attack on policy grounds.[7] The language of the seventh amendment could be squared with this result by construing "suits at common law" to mean any suit not based on a statute. Two strategies are open for dealing with the historical record—either deny that the framers' intent is dispositive (the "living Constitution" idea),[8] or dredge up some historical fragments to support the theory (any good lawyer ought to be able to find some shreds of supporting evidence for *anything*). Of course, with equal ingenuity one could make the opposite argument that the seventh amendment no longer applies to any case—"suit at common law" meant a suit under one of the common

5. At least, I hope that no one has espoused this theory. If I am incorrect, I apologize to the authors involved.

6. One way to rebut this would be to cite some equally fanciful recent articles. Although my colleague Roger Park has graciously given me several examples in his own field of expertise, discretion seems far the better part of valor here. Readers are invited to supply their own examples.

7. If the role of the jury is to represent the voice of the community, such a role seems even more justified in many cases involving injunctions, where the court's order may affect the operations of major social institutions such as schools and prisons. As a practical matter, being a committee, the jury might have problems drafting a detailed court order and might also find it difficult to monitor compliance. These practical problems are surely not insurmountable. For example, a special master might be employed to handle these details under the jury's general supervision, just as a corporate president functions under the aegis of the board of directors.

8. After all, the framers had no idea of the role that federal judges would come to play in public law litigation, and hence could not anticipate the need for jury participation.

law writs, and no such writs are in use today. Given a couple of bright law students to assemble the evidence and fill in the details, a seminal article could result.[9]

Of course, such silly ideas are not the only things found in law reviews. For example, if the "new learning" on the seventh amendment started to catch on, the status quo would become controversial, and hence its defense would no longer be wholly trite. Possibly some member of the old guard would write an article defending the existing law. Even so, the law review literature would reflect a pretty even division of opinion on the subject. (Nobody is going to publish ten rejoinders to a novel argument.) In all likelihood, half of the articles in the literature will favor a position, even if ninety-nine percent of the professors in the country think it's crazy.

The point is that articles defending the legal status quo are much less likely to be published than articles attacking the status quo. The more sensible a legal rule, the less will be published supporting it, while articles cleverly attacking it often will be taken as brilliant insights. Thus, the law review literature will be dominated by articles taking silly positions, while the sensible positions held by most law professors usually will be underrepresented.

Adverse selection is even more obvious with case notes. Imagine the following as a synposis of a case note:

> In *Bryden v. Farber*, the Supreme Court held *X*. Part I of the opinion correctly explained that this result is required by precedent. Part II showed that the framers of the Constitution would have agreed with the result. Part III showed that the opinion is sound social policy, and consistent with political theory and moral philosophy. In short, the Court wrote a great opinion, leaving nothing much further to be said.

No one with good enough test scores to get into law school would be stupid enough to imagine that any law review in the country would publish such a thing. Case notes lauding the Court's performance will rarely be published; case notes damning the Court will find ready access to print. Hence, regardless of the merits of a judicial opinion, most published comments will be hostile.[10]

It would be easy to blame the law review editors for this situa-

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9. Any reader who is taken with these ideas (or is desperate for a topic for a tenure piece) should feel free to turn them into major law review articles. Under the circumstances, I will understand if you choose not to attribute the idea to this column. (Similarly, if some economist in urgent need of a dissertation topic wishes to use "Adverse Selection in the Market for Scholarship," he or she has my permission. Certainly, it should not be difficult to dress up the theory with a few equations and graphs along the lines of the sources cited *supra* note 2.)

10. If the opinion is so good that no one can think of any significant criticisms, it will usually be ignored, unless it is so important that commentators feel obliged to discuss its future impact. Statistically, such opinions can be expected to be rare.

tion. Student editors are particularly ill-suited to discerning the difference between a valid insight and a clever sophism. They have intellectual ability, but not experience or breadth of knowledge. But other factors are also at work, and presumably operate even in disciplines where professors edit the journals. Scholarship is expected to be original, and defense of the conventional wisdom provides few opportunities for brilliance. The professor seeking scholarly recognition is well-advised to steer away from the true but trite, in favor of the false but novel.

The pressures on young scholars are especially acute. The great names of the profession are so well established that even their sensible thoughts are publishable. The untenured beginner must work hard to attract attention, and taking a shocking position is a manifestly reasonable strategy.

The argument so far suggests that the legal literature will generally be less sensible, taken as a whole, and more prone to eccentricity, than the unpublished weight of scholarly opinion. For similar reasons, the scholarly literature will also show much greater fluctuations over time. For example, after a few years of heavy exposure in the law reviews, the "law and economics" school became established and conventional, leading daring young scholars to turn to literary criticism and philosophy as arenas of professional struggle. Soon, these too will have had their day, and the bright young path-breakers will turn elsewhere (sociobiology? cognitive psychology? artificial intelligence?) in their search for the new and exciting.

Can adverse selection be combated? Some countermeasures are possible. The current trend toward faculty-edited law reviews should help.[11] A shift in professional attitudes, emphasizing thoughtfulness over "brilliance" would also be useful.[12] Perhaps someday there will be a Conference of Sensible Legal Scholars, though such a group would surely never attract the attention that its less sensible competitors have gotten from the mass media.

A reduction in professional courtesy would also be helpful. In law, unlike some other fields, it is rare for a professor to attack a colleague's work in print.[13] Such attacks, when they occur at all, are likely to be restrained and extremely polite. With a few refresh-

11. Attacks on student law reviews are now so common that it seems unnecessary to elaborate on this point.

12. *See* Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).

13. Note that even while making this suggestion, I prudently use a hypothetical article as my example, rather than cite any of the examples that come readily to mind. *See supra* note 5 and accompanying text.

ing exceptions,[14] one law professor never calls another a fool. Consequently, silly ideas are not weeded out of the literature quickly. Sharper professional criticism would not prevent the publication of clever sophisms, but it would help limit the length of time such inanities were taken seriously. At least over time, we might hope that only the truly valid insights would survive.[15] Currently, however, a certifiably nutty idea can be repeated in major journals for years on end, before some brave soul ventures to suggest that "although there is some validity to the insights of Professor Wacko's theory, some serious qualifications should be stressed to a greater extent than has been previously recognized."[16]

In its implications for the scholarly literature, adverse selection implies a certain pessimism. Although it may be possible to combat adverse selection, the forces behind it are too strong to be wholly defeated. Thus, the scholarly literature will always have some bias in favor of the trendy as opposed to the sensible.

In another sense, however, the implication is optimistic. It would be profoundly disheartening to believe that the mass of our professional colleagues are as silly as the law review literature would indicate. The theory of adverse selection tells us, however, that the sensible and thoughtful professor is not nearly as rare as the thoughtful and sensible article. For that we may be grateful.

D.A.F.

14. *See* Shapiro, *The Death of the Up-Down Distinction*, 36 STAN. L. REV. 465 (1984); Leff, Book Review, 29 STAN. L. REV. 879 (1977).

15. This is pretty much the classic "marketplace of ideas" rationale for the first amendment, which is somewhat out of favor with scholars today. Still, even if it is naive to view society as a whole in this way, perhaps some room for hope exists that in the academy good ideas may have an edge in the struggle for survival (else what are we all doing?).

16. A related problem is the tendency of many academics to see some virtue in every new idea. As Paul Meehl, a distinguished psychologist, once said, if some people thought the sun rose in the east and others thought it rose in the west, some well-meaning folks would say there was something to be said for both points of view and the truth is probably somewhere in between.