Yale Journal of Law & the Humanities

Volume 30 | Issue 1 Article 1

September 2018

Legal Scholarship as Spectacular Failure

Omri Ben-Zvi
The Hebrew University of Jerusalem, Faculty of Law

Eden Sarid
University of Toronto, Faculty of Law

Legal Scholarship as Spectacular Failure

Omri Ben-Zvi & Eden Sarid*

Most authors of legal scholarship would probably hesitate to describe their writings as heroic tales of (intellectual) conquest and adventure. They would also most likely deny that they are unreliable storytellers. Equally, conventional accounts of legal scholarship tend to view it as lacking a common structure. This article challenges these assumptions by offering a novel aesthetic perspective on legal writing. We argue that most legal essays are modeled on a narrative device known as "the hero's journey," in which a protagonist (the scholar) overcomes a particularly frightening menace (the legal problem), and returns home with the bounty (the legal solution). However, there's a twist: legal theorists are institutionally conditioned to treat this story suspiciously, looking for false and misleading features, thus (perhaps unconsciously) treating the narrator as unreliable. By exposing these common literary patterns, this essay also reveals a unique and as-of-yet unexplored trade-off between two different qualities of legal scholarship: the more unreliable the reader finds the legal article, the greater the aesthetic pleasure she derives therefrom. Consequently, many legal articles are, in a way, beautiful failures. That is, unsuccessful attempts to convince their readers of the truth of their theses that nevertheless resonate with their readers aesthetically. This essay explores these ideas and explains their implications, from both a law & literature and philosophical perspective.

* Omri Ben-Zvi, The Hebrew University of Jerusalem, Faculty of Law; Eden Sarid, University of Toronto, Faculty of Law. The authors wish to thank Haim Abraham, Shulamit Almog, John Enman-Beech, Olga Frishman, Denise Réaume, Pierre Schlag, and Simon Stern for helpful and insightful comments, and the editors of the *Yale Journal of Law & the Humanities* for their constructive suggestions.

INTRODUCTION

What is the value of legal scholarship? Why do legal academics continue to devote themselves to the project of producing scholarly prose, primarily dedicated to the exploration and resolution of legal puzzles?

A cynic might reply that the institution of legal scholarship serves the powerful by reaffirming the status quo and ensuring that power stays where it has historically resided.[1] However, several other, more positive accounts have been suggested in scholarly debates on this issue. For example, some believe that legal scholarship creates a meaningful conversation about legal puzzles, which results in a thriving liberal polity.[2] Others propose that engaging with legal scholarship may help in understanding how legal issues are thought about and discussed, thus helping the readers develop certain analytic skills.[3] According to other accounts, legal scholarship provides courts, legislators, practitioners, and others with arguments that they can use in policy making or adjudication.[4] And some contend that legal scholarship is preoccupied with the discovery of the truth and the promotion of knowledge.[5]

In this essay, we explore and defend a novel take on the value of legal scholarship. We argue that legal scholarship is valuable for *aesthetic* reasons. It holds significant aesthetic value (at least most of the time). Moreover, we claim that this type of aesthetic value may be higher the less legal scholarship achieves its more ordinary goals, with the prime example being knowledge production. We will not define "aesthetic value" precisely, except to note that aesthetic value is the value that

1. *See, e.g.*, Richard Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 GEO. L. J. 845, 849 (2008) ("fields that provide a significant service function in a university will retain their place even if they are intellectually weak").

2. *See* Bruce A. Ackerman, *The Marketplace of Ideas*, 90 YALE L. J. 1131 (1981); Richard A. Epstein, *Let "The Fundamental Things Apply": Necessary and Contingent Truths in Legal Scholarship*, 115 HARV. L. REV. 1288, 1312-1313 (2002).

3. *See, e.g.*, Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1330 (2002) ("My own view is that, for scholars in a professional school, at least part of the mission is to advance understanding and promote improvement of their profession and its institutions. For legal academics, this includes all of the contexts in which law is developed, enforced, interpreted, and practiced.").

4. *Id.* at 1338-39 ("[O]ne of the most important functions of legal scholarship is to expose the historical, structural, and ideological underpinnings of current legal norms and to assess their social value. . . . [S]uch work can nonetheless contribute to informed policymaking and help shape the views of students who could someday guide reform efforts."). *See also*, Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 903-04 (1992).

5. *See, e.g.*, Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L. J. 955, 967-68 (1981) ("The defining characteristic of scholarship is its preoccupation with the discovery of truth. The end of scholarship is the discovery of truth and the promotion of knowledge. . . . To understand the world as it truly is—this, and nothing else, is the goal of scholarship."). The question of what knowledge is, and what its value is, is raised in Plato's *Meno* and is a subject of current philosophical debate. *See generally* JOHN HAWTHORNE, KNOWLEDGE AND LOTTERIES (2004); JONATHAN L. KVANVIG, THE VALUE OF KNOWLEDGE AND THE PURSUIT OF UNDERSTANDING (2003); TIMOTHY WILLIAMSON, KNOWLEDGE AND ITS LIMITS (2002).

inheres in good pieces of art.[6] Picasso's *Guernica* has significant aesthetic value, as does Shakespeare's *King Lear*. For our purposes, to say that an object has aesthetic value is to say that the object is enjoyable or important *qua* a piece of art. We rely on an intuitive understanding of the term "aesthetic value." Though enjoyment is relevant to aesthetic value, we do not discuss whether enjoyment constitutes aesthetic value, or whether it simply indicates some other attribute of the work that generates aesthetic value on independent grounds that do not rely on the subjective feeling of enjoyment.

The suggestion that legal scholarship as a whole possesses aesthetic value might seem peculiar at first. After all, most pieces of legal thinking are not readily enjoyable as works of art. Perhaps some articles are more artistic than others, but the field as a whole seems ill-suited to possessing aesthetic value. And indeed, most approaches to law & literature do not conceptualize legal scholarship as an object of inquiry. They focus, instead, on other aspects of law (like court proceedings and legal opinions).[7] We argue against this intuitive understanding by discussing the manner in which two literary devices—a popular narrative structure and a powerful literary technique—supply much aesthetic value to the typical piece of legal scholarship (or TPLS). To the extent that the literary devices we identify have aesthetic appeal (and we believe they do), legal scholarship (as such) is valuable on aesthetic grounds.[8]

We argue, then, that phenomenologically speaking, TPLS (a) utilizes a specific narrative structure; and (b) employs an important literary technique.[9]

We term this structure *the hero's journey*, echoing Joseph Campbell's famous narrative category.[10] This is a very old and established narrative structure, in which a protagonist (like a knight) overcomes a major obstacle (like a dragon) and achieves something coveted and important (like saving a village in distress, or finding a lost treasure). Many stories

6. Here too several philosophical approaches are possible. *See, e.g.*, MONROE C. BEARDSLEY, THE AESTHETIC POINT OF VIEW (1982); MALCOLM BUDD, VALUES OF ART: PAINTING, POETRY, AND MUSIC (1995); ALAN H. GOLDMAN, AESTHETIC VALUE (1995); MATTHEW KIERAN, REVEALING ART (2005); FRANK SIBLEY, APPROACH TO AESTHETICS (B. Redfern Benson, & J. Cox eds., 2001); R.A. Sharpe, *The Empiricist Theory of Artistic Value*, 58 J. AESTHETIC & ART CRITICISM 321 (2000).

7. *See, e.g.*, Rhode, *supra* note 3, at 1327 ("We reflect endlessly on the deficiencies of other participants in the legal culture—judges, legislators, lawyers, and government officials—but rarely devote similar attention to our own inadequacies.").

8. It is important to note, however, that aesthetic value may be achieved in legal scholarship via other narrative instruments. We do not deny this, though we focus on what we perceive as a common narrative structure that contributes to most legal articles' aesthetic appeal.

9. *See* Pierre Schlag, *The Law Review Article*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746650, at 1047 ("The basic idea is that *the very form* of the law review article is stylized and thus ineluctably enacts, narrows, and channels what can be said and thought.").

10. *See* JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES (2d ed., 1968).

are based on this literary mold, from the tales of Moses and Buddha to *Aladdin*, *The Lion King*, *The Hobbit*, and *Star Wars*. We suggest that, appearances notwithstanding, TPLS implicitly relies on this kind of narrative structure, though with an intellectual twist: in legal scholarship, the protagonist is the author, the danger to be overcome is the legal puzzle or problem that the article seeks to resolve, and the treasure is the solution offered. TPLS is thus a tale of how a danger was averted, and it is told after the journey has ended—the article is written after the problem has been solved. In Part I.A, we offer this reading of TPLS as a kind of hero's journey. We demonstrate our claim by analyzing two recent examples of TPLS and by applying our thesis to this essay as well.

But there is another twist to the story, for TPLS is not an ordinary hero's journey. An additional literary device—*the unreliable narrator*—applies as well, complicating things. In stories that utilize this technique, the information supplied by the narrator (eventually) comes into question and the reader is left to piece together the truth of the matter based on clues and other points of view supplied in the text. Stories with unreliable narrators are quite common in modern literature (like Agatha Christie novels, *Lolita*, and *The Life of Pi*), and they hold considerable aesthetic value, for they engage the reader in a unique way: once she understands or suspects that the narrator is unreliable, she (the reader) is turned into a quasi-detective herself, and consequently must do more than passively consume the text.[11] Part I.B is devoted to explaining this literary technique.

The upshot, which we explore in Part II, is this: TPLS is phenomenologically conceptualized as *a hero's journey told by an unreliable narrator*. TPLS presents readers with a story of success—an important puzzle is resolved, a novel theory is established, a normative solution is now at hand. In short, the knight has returned home with the bounty. But because of the way the legal academy is structured, competent legal academics are conditioned to read the piece with suspicion, and to seek out clues that the narrator is conveying false information. Thus, the reader hypothesizes that the dragon was not actually slain, or that there was no dragon to begin with, or that the treasure-chest is in fact empty. In reading TPLS (this essay included), one is constantly trying to figure out what is wrong with the hero's journey that is narrated. Discovering the flaw and unmasking the knight as a

11. We acknowledge that there is, of course, a difference between the author (the person who actually wrote the piece; for example, Yann Martel in YANN MARTEL, LIFE OF PI (Alfred A. Knopf Canada ed., 2001)) and the narrator (the person telling the story; Pi Patel). However, in TPLS, seemingly, both are almost always the same person. The author of the piece is also the narrator (note that many TPLS are written in first person). In line with common terminology, throughout this essay we use "narrator" or "unreliable narrator" rather than "author;" in TPLS they are very rarely different people.

failure brings with it great aesthetic value.

Why should it matter that TPLS has this type of aesthetic value? We believe that our thesis has two important implications—both for the field of law & literature and for understanding the unique dynamic of aesthetics and knowledge in law. First, the literature on law and narrative rarely addresses legal scholarship, and in the rare instances in which it does, it assumes that legal academic texts do not share a unifying structure and that they do not include any reference to their author.[12] As Part II makes clear, we challenge both these assumptions and argue that TPLS has a common structure and narrative in which the author-narrator is very much present.

Second, our theory sheds light on a unique dynamic within legal research and writing—an *exchange of value* between aesthetic quality and knowledge production in TPLS. In essence, the less successful a reader finds a piece of legal scholarship in reaching its explicit or implicit goal of knowledge production, the greater the aesthetic enjoyment she derives therefrom. This novel counter-intuitive principle implies that legal spheres experiencing stagnation when it comes to knowledge production might in fact be seen as generating considerable aesthetic value. We show that several prominent legal spheres suffer from this problem. Consequently, our theory suggests that there is a need for a reevaluation of these spheres, in a manner that also takes into account the currently hidden value that stems from failed attempts to generate knowledge. This argument is discussed in the latter section of Part II.[13]

I. TPLS AS LITERATURE

We now turn to examine our claim that TPLS is modeled in a specific manner that usually generates aesthetic enjoyment. This part discusses two literary instruments that allow for the generation of this type of value.

A. The Hero's Journey

Joseph Campbell has provided a description of a narrative structure that is common to many literary works. From Biblical stories to *The Matrix*, we seem to be fascinated by the same basic tale, though the details of the

12. Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 151 (1997) (claiming that the story that TPLS tells about the author is "a story of invisibility").

13. We have deliberately waited until this point to address a possibly concerning aspect of our argument: our use of the term "legal scholarship." Generalizing about legal scholarship, as Meir Dan-Cohen observed, "is bound to ignore important distinctions." Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. COLO. L. REV. 569, 569 (1992). We agree. However, we have clarified that our investigation involves a certain predicament—that of knowledge creation—and that our thesis does not apply to all legal scholarship or understandings of what legal scholarship does (see further discussions above and in Part II). We proceed with the use of the term "legal scholarship" with this limited context in mind.

narrative change: "It will always be the one, shape-shifting yet marvelously constant story that we find."[14] The meta-structure, the "monomyth," is described in the following manner:

> A hero ventures forth from the world of common day into a region of supernatural wonder: fabulous forces are there encountered and a decisive victory is won: the hero comes back from this mysterious adventure with the power to bestow boons on his fellow man.[15]

"The hero's journey" is thus composed of three stages—separation, initiation (or conflict), and return.[16] In the first phase, the hero senses or is told that something is wrong with the peaceful world she knows: a monster, a tyrant, a natural disaster, or a disease is posing a threat (however, note that the threat may be a new one or an old one, but in any case, unaccounted for).[17] The hero then embarks on a mission to rectify the problem. To complete the journey, the hero will have to venture into the threatening and the unknown, and face dangers of various kinds—and the fact that the protagonist is willing to sacrifice herself in the pursuit of justice and peace is the reason for treating her as heroic. Finally, after the monster is slain, the hero returns and shares the bounty with the rest of society.[18]

Campbell's thesis is mostly descriptive and structural, that is, he aimed to capture the manner in which many classical and modern stories and myths are presented.[19] However, "the hero's journey" has become a prescriptive thesis as well. Hollywood writers, for instance, follow

---

14. CAMPBELL, *supra* note 10, at 3.

15. *Id.* at 30.

16. See ROBERT JEWETT & JOHN SHELTON LAWRENCE, THE AMERICAN MONOMYTH, at xix-xx (1977). For a similar (though more abstract) account, see TZVETAN TODOROV, THE POETICS OF PROSE 11 (Richard Howard trans., 1977) (explaining the "minimal complete plot"). *See also* Baron & Epstein, *supra* note 12 (on the definition of a "story").

17. The important point about the first stage of the hero's journey is thus limited to becoming aware of a danger, whether new or old—thus generating a need to react, through a heroic journey. Consequently, situations in which an old threat suddenly surfaces evince the idea of "blissful ignorance": the protagonist lived happily because she wasn't aware of the gravity of the danger that was threatening her. For example, think of the movie ARMAGEDDON (Touchstone Pictures 1998). A meteor has been progressing towards Earth for some time, though the protagonists were blissfully unaware of it. Another example is the movie THE MATRIX (Warner Bros. 1999). The protagonist first becomes aware that he has lived his entire life unaware of grave dangers, at the beginning of the narrative.

18. JOSEPH CAMPBELL, THE HERO'S JOURNEY: JOSEPH CAMPBELL ON HIS LIFE AND WORK 123 (1990) ("The usual hero adventure begins with someone from whom something has been taken, or who feels there's something lacking in the normal experience available or permitted to the members of his society. This person then takes off on a series of adventures beyond the ordinary, either to recover what has been lost or to discover some life-giving elixir.").

19. On this type of structural analysis in literature, see RONALD A. CHAMPAGNE, THE STRUCTURALISTS ON MYTH: AN INTRODUCTION (1992). *See also* HANS BERTENS, LITERARY THEORY: THE BASICS, ch. 2-3 (2014); PAUL H. FRY, THEORY OF LITERATURE (2012); GLOBAL LITERARY THEORY (Richard J. Lane ed., 2013); CLAUDE LÉVI-STRAUSS, MYTH AND MEANING (2008).

Campbell's idea,[20] and today it is common knowledge that "Campbell's theory indirectly shapes and delimits the expectations of audiences, critics, and storytellers."[21] Consequently, many current movies and television shows are modeled on the myth of a hero who sets out to obliterate a danger that plagues the rest of mankind.[22] This is why it is plausible to assume that "the hero's journey" is a narrative structure with clear aesthetic value—we enjoy hearing stories that feature a protagonist that overcomes adversity in this manner. Again, as this is not an essay on aesthetics, we do not wish to explain exactly *why* "the hero's journey" resonates so deeply with our collective subconscious and brings us joy—we only note that it does, and that as a consequence, stories that are modeled on "the hero's journey" have significant aesthetic appeal.

Many law review articles draw on the narrative structure that is expounded in "the hero's journey." Our comments on this matter are focused less on the "objective" structure of TPLS (assuming, that is, that such a thing as an objective narrative structure exists, and that it can be attributed to texts, including legal texts). Instead, we want to claim that the legal community as a whole *perceives* TPLS as modeled on the myth of "the hero's journey." The difference is that this essay's argument is centered on the manner in which our collective legal consciousness *structures* TPLS, as opposed to arguing that there is something objective in TPLS itself that we simply come in contact with. In other words, this is a claim about *us*, the readers of TPLS, and our shared consciousness. "The hero's journey" functions as a presupposition that guides our readings when we engage with TPLS.

In legal scholarship, the tripartite structure of separation, initiation, and return is translated into the realm of the theoretical. Accordingly, each of the three parts of the story has a TPLS-corollary that takes on the part's typical characteristics, but in a way that is suited for matters of the mind. Thus, we get: (i) an original state of peace, threatened by the theoretical, normative, or empirical problem; (ii) an intellectual journey; (iii) disentanglement of the problem and return to peace.

TPLS is usually framed as a *solution to a problem*. The main driving force, which explains why the article was written, and why it deserves to be read, is that some difficulty—whether theoretical, empirical, moral, or otherwise—will stay unresolved if we disregard the solution that the

20. *See* CHRISTOPHER VOGLER, THE WRITER'S JOURNEY: MYTHIC STRUCTURE FOR WRITERS (1992).

21. Brett M. Rogers, *Heroes Limited*, *in* CLASSICS AND COMICS 73, 74 (C.W. Marshall & George Kovacs eds., 2011). *See also* ROBERT JEWETT & JOHN SHELTON LAWRENCE, THE MYTH OF THE AMERICAN SUPERHERO, at xix-xx (2002).

22. *See* MICHAEL E. SALLA, THE HERO'S JOURNEY: TOWARD A SECOND AMERICAN CENTURY (2002); STUART VOYTILLA, MYTH AND THE MOVIES: DISCOVERING THE MYTHIC STRUCTURE OF 50 UNFORGETTABLE FILMS 20 (1999).

article offers.[23] The legal community is implicitly depicted as living peacefully until the legal problem disrupts the status quo. The rest of the article is then devoted to the journey itself—showing how the difficulty is overcome. In the article's conclusion, the author usually explains that the community can return to its prior condition of peaceful existence. In sum, TPLS enlists the author as the protagonist, while the menace is represented by the legal problem, and the legal solution symbolizes the bounty.[24]

Note, again, that our claim here is not about the actual state of mind of a specific author of TPLS. Instead, the argument is about the *phenomenology of reading TPLS*. That is, the common structure of thought that readers share when they engage with TPLS as academics.[25] More specifically, we claim that something like "the hero's journey" is an implicit structural assumption that we share as legal academics, and that this assumption acts as an important "frame-setting"[26] that guides our interaction with pieces of legal scholarship. Moreover, readers also approach TPLS with a skeptical perspective. That is, readers subliminally assume (*ex-ante*) that the author is wrong in her propositions. We further discuss this claim in Part I.B.

When we read a new TPLS, as Schlag notes, we already assume that "the hero's journey" is the type of story that is narrated to us, and, because we are institutionally conditioned to think this way, it takes strong evidence to convince us otherwise.[27] Here, too, we are not interested in examining why this is the case, since this is not a paper on the sociology of the legal academy.[28]

Let us now demonstrate our thesis by giving three examples of "the hero's journey" in legal writing. The first example was chosen randomly—this was the latest article published in the *Harvard Law*

23. *See* Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Schlag, *supra* note 9.

24. This notion is perhaps also reflected in the bias against publishing negative results. Imagine a piece of legal scholarship that claims the problem it identified was actually not a problem in the first place or that it does not suggest a solution, or one that claims others have already solved the problem properly. The reader might find this piece boring (despite the fact that the piece might be extremely important in other ways).

25. For a discussion of phenomenology in law, see Omri Ben-Zvi, *Zombie Jurisprudence*, *in* IN SEARCH OF CONTEMPORARY LEGAL THOUGHT (Justin Desautels-Stein & Christopher Tomlins eds., forthcoming 2017). *See also* Justin Desautels-Stein & Duncan Kennedy, Foreword, *Theorizing Contemporary Legal Thought*, 78 L. & CONTEMP. PROBS. 1, at i (2015).

26. *See* Schlag, *supra* note 9.

27. Though this does happen. *See, e.g.*, Schlag, *Normative and Nowhere to Go*, *supra* note 23; Pierre Schlag, *My Dinner at Langdell's*, 52 BUFF. L. REV. 851 (2004).

28. This point hopefully clarifies a possible confusion regarding where the "unreliability" rests. Indeed, the narrator in the TPLS is an "unreliable narrator," but her unreliability stems neither from her state of mind while writing the article nor from the limits of creating knowledge inherent to legal scholarship in general, but rather from the reader's (conceivably subconscious) state of mind when reading the piece. *See also* Part I.B.

Review at the time this article was written. The second example was chosen because it represents a leading methodology (analytic philosophical analysis). It addresses an important subject in evidence law—statistical evidence—and was published recently in a leading law review. These examples show that "typical" in TPLS by no means implies average *quality*. The third example—this article—was chosen because we are part of the phenomenon we are trying to describe.

The first example is *Systemic Facts: Toward a New Institutional Awareness in Criminal Courts* by Andrew Manuel Crespo.[29] It deals with the manner in which criminal courts regulate institutional actors, such as prosecutors and police officers. The article's central claim is that courts are unjustly viewed as unfit for regulating law enforcement behavior, and that a closer look at the way criminal courts collect and utilize "systemic facts"—that is, facts about the criminal justice system itself—may help the reader better understand the role of courts in the regulation of criminal law. For obvious reasons, we will not address the merits of the argument. Instead, we wish to focus attention on the way the investigation is framed, and more specifically on the journey that the reader is invited to follow.

It does not take long for the framing to begin—in the very first words of the article, we learn of the trouble that haunts the once-peaceful land of criminal adjudication: "A troubling tension has come to define constitutional criminal law, that large and ever-growing body of jurisprudence that serves as the principal mechanism for regulating American law enforcement."[30] Note how this sentence situates the reader in a specific narrative, by hinting at the old state of peace that supposedly existed before the "troubling tension" came to define constitutional criminal law. The story that unfolds is thus about finding a way to reach the desired state of tranquility that the hero once knew and that now eludes her. This is the first part of the tripartite heroic narrative—"separation"—in which we are introduced to the monster, and given the motivation for the journey.

How can we solve the problem that lies at the root of current constitutional criminal law? The author challenges existing solutions that rely on non-judicial regulative bodies and offers a different way to solve the problem. His solution is to explore the manner in which "systemic facts"—facts about the criminal justice system itself—are chronicled and utilized by criminal courts. Systemic facts are currently under-explored in the literature, but this is not a problem for the article. On the contrary, herein lies the source of the article's power. We need to *embark on a*

29. Andrew Manuel Crespo, *Systemic Facts: Toward a New Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016).

30. *Id.* at 2050.

journey in order to conceptualize, understand, and then correctly employ these systemic facts—a journey through unexplored territory is needed to solve the problem. And note that the journey is depicted in terms very similar to those of Joseph Campbell ("a region of supernatural wonder"), and for good reason—the journey must be depicted in a manner that will elicit the right aesthetic response. Crespo claims that "systemic facts occupy a space beyond the familiar and canonical concepts of adjudicative facts and legislative facts first introduced by Professor Kenneth Culp Davis over half a century ago."[31] The idea of a place beyond the familiar, an unexplored land,[32] provides the perfect setting for the "initiation" or "conflict" part of the journey, namely, the part of the narrative in which strange and new entities are met and overcome. In the article's words, "[i]dentifying such a pathway toward criminal courts' enhanced institutional capacity is this Article's primary aim."[33] Indeed, finding a "pathway" through the "place beyond the familiar" is the exact narrative structure Campbell identified.

Finally, we get a description of the treasure that awaits at the end of the journey. The author has already found the treasure, for he has completed the journey, and now our task is only to recognize this accomplishment:

> If criminal courts continue to allow this specialized institutional knowledge to lie dormant, they will merit the critique that they have failed to live up to their institutional responsibility as proponents of systemic criminal justice. If, however, criminal courts are able to acquire, collect, and organize their systemic facts; to report them to litigants, other vested institutional actors, and the public; to enlist expert assistance where necessary to access and understand them; and to proactively encourage the integration of such understanding into the judicial process, then criminal courts could well gain the capacity to participate, at a systemic level, in budding efforts to reform the failed criminal justice state over which they now preside.[34]

The monster, the conflict, the treasure—it is relatively easy to discern these three stages of the heroic journey in the article. This narrative structure helps situate us as readers. We know roughly what to expect as the narrative continues. And we are hooked. Regardless of what one thinks of the criminal justice system and of systemic facts more specifically, this *type* of story is exciting, as it echoes traces of stories we have heard or read since birth. This is the monomyth, retold in an

31. *Id.* at 2052.

32. *Id.* ("Scholars to date have failed to appreciate just how much of this information exists—or how valuable it can be.").

33. *Id.* at 2053.

34. *Id.*

academic tone.

The second example, *Sense and 'Sensitivity': Epistemic and Instrumental Approaches to Statistical Evidence*, attempts to give a new account of why courts and legal scholars view statistical evidence with suspicion.[35] The authors argue that this suspicion stems from the fact that statistical evidence fails to meet the "sensitivity" condition, according to which a belief must be counterfactually sensitive to the truth in order for us to justifiably call the belief "true." However, the article also claims that "sensitivity" is not a required condition in legal matters, and offers another, incentive-based reason for treating statistical evidence with suspicion. The article claims that this suggestion has considerable descriptive power vis-à-vis current evidence law, and may also be used normatively, as a criterion for legal reform.

Here too we shall be concerned only with the narrative structure of the argument, and not its merits. The heroic journey starts, yet again, with a troubled landscape—a legal field plagued by a problem:

> "For nearly twenty years, law journals have been the forum for a bitter debate about the use at trial of overtly probabilistic evidence and methods," wrote Jonathan J. Koehler and Daniel N. Shaviro in 1990. More than two decades have passed since then, but these words still hold true. Despite the voluminous body of literature dedicated to the issue of statistical evidence, it continues to generate great controversy in evidence law scholarship. Questions regarding the admissibility and sufficiency of statistical evidence arise in court with ever-growing frequency, with seemingly inconsistent treatment in the case law. The aim of this Article is to dispel some of the confusion surrounding the use of statistical evidence in the legal arena . . .[36]

Note that here, too, the framing begins *in the very first words of the article*, signifying how important it is for authors to situate the reader in a very specific type of space—one plagued by a problem that threatens our well-being. The problem is depicted as having "depth" and "gravity,"[37] and the authors spend considerable time explaining why past attempts to solve the problem have failed (while noting that their survey could be much longer, as it "is not intended to be either conclusive or comprehensive in scope"[38]). The point, of course, is to indicate that the obstacles are great, and that a truly heroic act has to be undertaken, in order to succeed where others have failed: "The inconsistent treatment of

35. David Enoch & Talia Fisher, *Sense and "Sensitivity": Epistemic and Instrumental Approaches to Statistical Evidence*, 67 STAN. L. REV. 557 (2015).

36. *Id.* at 559.

37. *Id.* at 565.

38. *Id.* at 571; *see also id.* at 565-571.

statistical evidence in both legal doctrine and the evidence law literature has created a need for an overarching theory."[39] Someone must step up and defeat the monster.

As we stated earlier, in TPLS the heroic journey is entirely intellectual. This example illustrates this point well, because here the problem to be solved is less in the tangible world, and more in our theoretical understanding of it. Most people are unwilling to give statistical evidence much weight in court, but that in itself is not the problem. Rather, the challenge is to *explain* whether and why this practice is justified. Framed this way, the narrative's hero is the legal theorist. In this case, the journey will take the reader to the realm of epistemology, the philosophical field that deals with questions of knowledge. After exploration and conflict in this space, at the end of the journey, we return to the land of evidence law with the treasure—a newfound understanding which allows us to dispel the difficulty that has plagued this land. Now we can neatly explain why evidence law takes its current doctrinal form,[40] and provide suggestions for legal reform.[41]

Finally, our third example is this very essay.[42] We engage in this exercise in order to demonstrate that the narrative structure of an argument can be analyzed without analyzing the argument's merits.[43]

We will now mention the essential markers of our own hero's journey. Our introduction begins with an attempt to problematize the current situation—to convince the reader that there are hidden insights regarding legal scholarship that no one, including the reader, has noticed. The important point to note is that this problem is the main driving force of the entire piece: without a sense of danger there is no need to embark upon a journey to a new understanding. And in this case, the journey takes the reader to the lands of phenomenology and literature analysis—which are foreign, and beyond the usual scope of most legal scholarship (which is why we spend some time explaining the terms we use throughout the paper). The upshot of the paper is presented both as a direct consequence of the journey, and as a coveted bounty: a new understanding regarding legal academia, which the reader did not have before the journey.

We now turn to discuss the second literary device which is used by legal scholars, and which gives TPLS its distinctive character: the unreliable narrator.

---

39. *Id.* at 564.

40. *See id.* at Part III.

41. See *id.* at Part IV.

42. *Cf.* Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 921-927 (1988) (another self-applying argument).

43. We are aware that since this essay is itself a TPLS, our readers are likely to treat this claim as unreliable. We discuss this later.

B. The Unreliable Narrator

Life of Pi tells the story of how the narrator, Pi Patel, survived for hundreds of days at sea after a shipwreck.[44] The story is quite fantastic—Pi explains how he managed to stay alive on one lifeboat with a zebra, a hyena, and a Bengal tiger (among other animals). At the end of the book, the readers learn that there is another, equally (or perhaps more) believable version of the story, in which people, not animals, survived on the lifeboat with Pi. In this version, the animals mentioned throughout the story represent the character traits of the survivors. Pi refuses to say which version is correct.[45] *Life of Pi* is fundamentally about belief and the power of faith, and because of this, the narration is designed to mask the actual events, in an effort to make the reader question whether it is important to know exactly what happened. Many other stories include narrators who are confused, mentally ill, deceived, or deceiving.[46] In narratology, this phenomenon is known as "the unreliable narrator."[47] Anyone who reads an engaging story that features an unreliable narrator should recognize the immediate aesthetic appeal of this literary instrument: the suspicion of unreliability generates a new type of relationship between the reader and the text, and forces the reader to become much more active in sifting through the details of the story in an effort to figure out what is true and what is false.

One could argue that the idea of an unreliable narrator does not apply to TPLS, because the narrator's unreliability is usually the author's explicit choice, and most authors of legal scholarship wouldn't choose to be read as unreliable.[48] However, in literary theory, narrative unreliability may also be the *audience's* interpretative technique employed in an effort to make sense of the text.[49] Thus, "[i]n assessing the narrator's

44. *See* MARTEL, *supra* note 11.

45. *Id.* at 350.

46. *See* Dorrit Cohn, *Discordant Narration*, 34 STYLE 307 (2000), for a discussion of the distinction between factual and normative unreliability.

47. One of the first studies of unreliability in narration is WAYNE BOOTH, THE RHETORIC OF FICTION (1961). After Booth, many literature critics have taken up this idea and studied it from a variety of angles. *See, e.g.*, AMIT MARCUS, SELF-DECEPTION IN LITERATURE AND PHILOSOPHY (2007); WILLIAM RIGGAN, PICAROS, MADMEN, NAIFS, AND CLOWNS: THE UNRELIABLE FIRST-PERSON NARRATOR (1981); Manfred Jahn, *Frames, Preferences, and the Reading of Third-Person Narratives: Towards a Cognitive Narratology*, 18 POETICS TODAY 441 (1997); Tamar Yacobi, *Package Deals in Fictional Narrative: The Case of the Narrator's (Un)Reliability*, 9 NARRATIVE 223 (2001).

48. For an exception, see Schlag, *Normative and Nowhere to Go*, *supra* note 23.

49. Note that our position is based on the idea that one cannot differentiate neatly between what the author "originally" puts into the text and what the reader does with it after it is "completed." Of course, there are many nuances to this view, which we wish to avoid adjudicating. For example, some believe that the author and the reader mutually constitute the "completed" text together. *See, e.g.*, Wolfgang Iser, *The Reading Process: A Phenomenological Approach*, 3 NEW LITERARY HIST. 279 (1972). Others think that the reader is much more instrumental in creating the text's meaning. *See, e.g.*, STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETATIVE

(un)reliability, the reader projects his own comprehension of human psychology and history, as well as the literary conventions with which he is familiar, on the narrator's evaluations and descriptions."[50] Indeed, unreliability can be ascribed to an *entire sub-genre*[51] of works that generate the textual and contextual hints that make unreliability their most rewarding reading.[52]

In this subsection, we argue that this is exactly what has happened with the manner in which legal academics read TPLS. As anyone trained as a legal academic will know, the idea of deep skepticism of others sits at the core of our phenomenological experience of the legal world, and conditions us, as legal academics, to approach new pieces of alleged knowledge as only *prima facie* solutions. Legal academics are so used to the idea of different competing theories, that the idea of each new intervention being only partly true and prone to many difficulties and objections serves as a *pre-interpretive supposition* that animates the way we approach TPLS: every facet of our engagement with legal scholarship assumes this epistemic deficiency, to the point that reading TPLS becomes an attempt to vindicate our preconception. As Schlag notes:

> There is nothing quite like the exhilarating experience that comes from reading a provocative new piece of legal thought. Of course, at some point this exhilaration will give way to ennui as the new piece of legal thought unravels—ultimately to be classified as yet another possibly clever, perhaps thoughtful, but nonetheless utterly failed contribution. One characteristic feature of our own postmodern condition is the breakneck speed with which the second experience succeeds the first. From exhilaration to failure, the distance has been reduced to a couple of sentences.[53]

Indeed, even brief introspection will reveal that this is in fact the way many legal scholars often experience legal discourse.[54] What tends to

---

COMMUNITIES (1980). The important point for the purpose of this essay is that the reader's response to the text is an important part of what generates the text's meaning in the first place. *See generally* ELIZABETH FREUND, THE RETURN OF THE READER: READER-RESPONSE CRITICISM (1987). Theoreticians who disagree with us on this point may regard our claims about narrator unreliability as interpretative, rather than narrative.

50. MARCUS, *supra* note 47, at 81.

51. See Per Krogh Hansen, *Reconsidering the Unreliable Narrator*, 165 SEMIOTICA 227, 242 (2007) (arguing that "the genre, to a very high degree, establishes a horizon of expectations for the reader that, in large part, predetermines the meaning of the text"). *See generally* JAMES PHELAN, LIVING TO TELL ABOUT IT: A RHETORIC AND ETHICS OF CHARACTER NARRATION (2005).

52. MARCUS, *supra* note 47, at 89 ("unreliable narration may gradually become an automated device").

53. Schlag, *Normative and Nowhere to Go*, *supra* note 23, at 167.

54. Approaching scholarship with pre-interpretive suppositions is not unique to legal scholarship. Researchers have demonstrated that similar phenomena exist in other fields as well—these may be similar to those in legal scholarship (supposing that each new intervention is probably partially true), or may involve other pre-interpretive suppositions. *See, e.g.*, Charles Bazerman, *Physicists Reading Physics: Schema-Laden Purposes and Purpose-Laden Schema*, 2 WRITTEN COMM. 3, 14 (1985)

happens when we first lay eyes on a new article regarding contract law, intellectual property, or constitutional adjudication? We usually engage with these sorts of texts within a framework of problem-*seeking*, not problem-*solving*: we assume that the argument presented is riddled with problems, and the act of reading is infused with an urgency to identify and catalogue them.[55] Thus, the identification of passages containing the author's questionable claims is central to engaging with TPLS.[56]

It is hard to give a concrete example of narrator unreliability in TPLS, because our claim is one about the reader's state of mind when approaching the nuances of a given text, and we wish to avoid the task of specifying the details of yet another random article.[57] But, happily, we have a convenient example at hand—this essay. Surely, reading this text has prompted the type of response we have described: reading critically. Dear Reader, have you not been going back and forth between our argument, and your ideologies, methodological inclinations, moral suppositions, and analytic frameworks—and checking whether any of these can defeat the details of our thesis? And is this exercise not

(arguing that physicists approach a text either to educate themselves about an unknown topic, in which case they are "likely to read trustingly and uncritically," or, as is the more common case, to consider the piece against theirs, in which case they approach the piece critically and judgmentally); Ken Hyland, *Persuasion and Context: The Pragmatics of Academic Metadiscourse*, 30 J. OF PRAGMATICS 437, 447-48 (1998) (discussing, inter alia, how different academic communities approach texts, and noting differences between microbiology and astrophysics, and applied linguistics and marketing). *See also* Nat Bartels, *How Teachers and Researchers Read Academic Articles*, 19 TEACHING AND TCHR. EDUC. 737 (2003) (arguing that researchers approach academic texts critically whereas teachers approach them in the pursuit of using the findings in their practice).

55. *See, e.g.*, Rubin, *supra* note 4, at 892 (noting "[h]ow rarely a legal scholar reads another scholar's work simply to learn something" and how authors "generally evaluate whether such works are good or bad, right or wrong, even as we read them for the information they contain").

56. This is not to suggest that this is the only way in which readers engage with legal scholarship. We agree with James Boyd White that "reading, like writing, is not the same for all of us, and the differences deserve attention and respect." James Boyd White, *Why I Write*, 53 WASH. & LEE L. REV. 1021, 1022 (1996). We are well aware that there are other ways or methods by which readers approach legal scholarship. For example, there are approaches that emphasize finding where the author is right or helpful, some readers simply enjoy reading well-crafted arguments, and so on. However, this problem-seeking approach seems to be common when legal academics read legal scholarship. *See* Schlag, *Normative and Nowhere to Go*, *supra* note 23; Schlag, *supra* note 9. Indeed, the idea of legal scholarship as a conversational process has long been acknowledged. *See* James Boyd White, *The Desire for Meaning in Law and Literature*, 53 CURR. LEGAL PROBS. 131, 134 (2000) ("[T]he most significant intention of the legal author is not that a particular result obtain, but that the text be read in a certain way. In fact, both as readers and as writers the primary desire we have is . . . that something be done with the text, that it become the occasion of a certain kind of attention and thought and conversation, in a certain community of understanding and value.").

57. This perhaps reflects, albeit in a different fashion, the literary form of "the tragic hero": a protagonist embarks on a mission but eventually fails in achieving her goal. However, unlike the tragic hero in classic literature (*e.g.*, SOPHOCLES, OEDIPUS REX (Elizabeth Osborne, ed., J.E. Thomas, trans., Prestiwick House, Inc. 2005); SOPHOCLES, ANTIGONE (Paul Woodruff, trans., Hackett Publishing Company, Inc. 2001); WILLIAM SHAKESPEARE, HAMLET (Barbara Mowat & Paul Westein, eds., Simon & Schuster 1992)), in TPLS failure is not the consequence of the actions or misfortune of the protagonist, but rather the consequence of the way in which her reader reads her text. *See* PATRICE PAVIS, DICTIONARY OF THE THEATRE: TERMS, CONCEPTS, AND ANALYSIS 414-18 (Christine Shantz Trans., 1998).

aesthetically pleasing—or, in other words, intellectually fun?[58]

II. THE UPSHOT

We are now in a position to spell out more explicitly the main thesis of this essay. As a phenomenological matter, the act of reading and engaging with a piece of legal scholarship presupposes a certain structure of consciousness. This structure facilitates our experience of working with the legal text, by giving us a certain directionality and situating us in a certain space.[59] Also, this structure is a feature of the Anglo-American legal academy (and we do not venture to explain why this is the case).

The structure of the experience of reading a law review article is this: the legal text we read is modeled on the dynamic of a heroic journey involving a struggle, in our case the struggle between a protagonist—the author—and a monster—the legal problem. Most pieces of legal academic discourse are thus tales of how order and peace return (or ought to return) to our realm, now that the monster has been vanquished, and the treasure retrieved. However, the story is almost never accepted as reliable, and the presupposition of unreliability provides us with a certain motivation and directionality vis-à-vis the article. Belief in the unreliability of the tale generates the desire to seek evidence for this belief. Thus, the reader will often read the legal academic article (perhaps subliminally) in search of something very specific—the places where the narrative breaks down and stops supporting the author's thesis.

This complicated phenomenological structure has immense aesthetic potential. TPLS is a story about heroism, which is exciting, but it is also an act of deceit, and as such it motivates the reader to go on her own, separate journey in search of truth. The literary stakes are high, as TPLS asks us to believe that the author has performed an extremely rare deed—and the higher the stakes, the more exciting the reading becomes. Consequently, in TPLS the myth of the hero and the literary form of the tragic hero (the hero's fall) are infused into one structure, and the reader vacillates between admiration and disbelief. The result is a unique literary structure that draws on both the hero's journey and the narrator's unreliability but cannot be reduced to either: the former suggests that the author is an unsuccessful *hero*, the latter suggests that the author is an

58. As an aside, we note that using a self-referential example does not make our account unfalsifiable. Our thesis may be falsified in many ways, including by demonstrating that the legal academic mind does not aim to find flaws in TPLS.

59. *See, e.g.*, Charles Bazerman, *Systems of Genres and the Enactment of Social Intentions*, *in* GENRE IN THE NEW RHETORIC 67 (Aviva Freedman & Peter Medway eds., 1994) (maintaining that a shared sense of genre allows readers to understand what it is that the writer wishes to convey); Carolyn R. *Miller*, *Genre as Social Action*, 70 Q. J. SPEECH, 151 (1984) (arguing that genre is in fact a social act that creates meaning).

unsuccessful hero. No wonder we like to read and write TPLS.

Our thesis has two main ramifications. First, this way of looking at TPLS sheds light on an important but underexplored aspect of the field of law & narrative: the narrative structure of legal scholarship. As we mention in the introduction, studies that focus on the narrative structure of law have discussed many aspects of the legal world, but have largely ignored legal scholarship. Scholars have analyzed, in depth, the narrative structure of court proceedings (e.g. testimony), court rulings, law codes, specific statutes, and even law itself.[60] Baron and Epstein's article, which does deal with legal scholarship, assumes that each article tells a *fundamentally different* story, one focused on the law under discussion.[61] Another approach has been to explore how legal scholarship is successful in introducing "outsider" voices into the legal world.[62] In our account, however, there is much more in common among pieces of legal scholarship than is often recognized. TPLSs usually share underlying phenomenological presuppositions that animate a very specific type of reading and engagement. TPLS is a distinct literary category—a hero's journey told by an unreliable narrator—that is worthy of attention.[63]

Second, and perhaps more importantly, our account provides a new understanding of an as-of-yet unexplored tradeoff between different valuable aspects of TPLS.[64] In the next subsection, we argue that the less

60. *See, e.g.*, PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS (1987); Peter Brooks, *The Future of Confession*, 1 L. CULTURE & HUMAN. 53 (2005); Monika Fludernik, *A Narratology of the Law? Narratives in Legal Discourse*, 1 CRITICAL ANALYSIS L. 87 (2014); Lisa Kern Griffin, *Narrative, Truth and Trial*, 101 GEO. L.J. 281 (2013); Greta Olson, *Narration and Narrative in Legal Discourse*, *in* HANDBOOK OF NARRATOLOGY vol. 1, 371 (2d ed., Peter Hühn, Jan Christoph Meister, John Pier & Wolf Schmid, eds., 2014); Simon Stern, *Narrative in the Legal Text: Judicial Opinions and Their Narratives*, *in* NARRATIVE AND METAPHOR IN LAW (Michael Hanne & Robert Weisberg, eds., forthcoming 2017); Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 61 (Peter Brooks & Paul Gewirtz eds., 1996).

61. *See supra* note 12 and accompanying text.

62. *See, e.g.*, Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1 (2006); Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Normative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995); Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845 (1994).

63. Though we are unaware of any study that suggests that the particular common narrative structure of the hero's journey (and moreover, the unreliable hero's journey) is found in other academic fields, the notion of a common narrative structure is probably not unique to legal scholarship. *See, e.g.*, Bazerman, *supra* note 59; Hyland, *supra* note 54 (discussing common narrative structures in several academic fields).

64. We do not suggest that all law review articles that fare poorly in generating epistemic value will necessarily succeed in generating aesthetic value. Some succeed in both, some fail in both. Many things can explain that, but exploring this question is not the purpose of this paper. Instead, we wish to note that TPLS's aesthetic value is enjoyable like a piece of art's (see our introduction). And just like with art, people often come across a piece that does not generate any (or generates very little) aesthetic (and epistemic) value, or that generates high epistemic and aesthetic values. Also, faring poorly in epistemic and aesthetic terms does not at all mean that the piece of legal scholarship, or piece of art, does not exhibit other types of value.

successful TPLS is as a knowledge-producing instrument, the better it fares as an aesthetic artifact—that is, as an unreliable hero's journey. This is an important insight because it is relevant to how we ought to perceive several legal fields which are today (arguably) facing an epistemic crisis, in the sense that the fields ostensibly experience difficulties in producing legal knowledge. The next subsection explains this situation and demonstrates how our analysis might change the way we view such legal fields.

***

In order to understand what it means for a field to suffer from an epistemic deficiency, we return to one type of value of legal scholarship that we briefly mentioned in the introduction: the generation of legal knowledge. Knowledge is important for many reasons which we will not explore at length here. We assume that, just as it is valuable to understand the laws of physics that allow planes to fly and the biological and chemical theories that ground modern medicine, so it is important to understand the nature of contractual obligation, or the effects law has on the impoverished, and so on (and indeed, knowledge may be important also on intrinsic grounds). It is fairly common to assume, then, that legal scholarship produces important knowledge that we utilize in various ways.[65] We call the type of value that stems from generating legal knowledge *epistemic value*.[66]

Framed this way, the difference between epistemic and aesthetic values becomes apparent. A object, such as a work of fiction, has epistemic value to the degree that it provides new knowledge—for instance, about life or the social world. And it has aesthetic value to the extent that we find it enjoyable or important as art. The two values are usually independent: a scientific paper written in a telegraphic manner may have considerable epistemic value and little aesthetic value, while a painting may be highly enjoyable or important without generating information about the world.

This understanding of epistemic and aesthetic values is helpful in analyzing a phenomenon attributed to several legal spheres in which researchers are experiencing an epistemic deficit—from their point of view, legal scholarship is generating little significant legal knowledge. These spheres suffer from what we call *the standoff*—such a sphere is riddled with different plausible theories that have all been shown to be

65. Kronman, *supra* note 5, at 955; Rubin, *supra* note 4, at 894. Other accounts, of course, exist. See, for example, James Boyd White, *Legal Knowledge*, 115 HARV. L. REV. 1396, 1397 (2002) (explaining that law is not a body of knowledge that can be reduced to propositions or rules; its primary object is not truth, as if it were a kind of science, but justice). Also see our introduction.

66. This is not to suggest that knowledge is the only thing that has epistemic value. Insight, appreciation, understanding, and so on might also have epistemic value. In fact, even aesthetics generate some epistemic value. However, this is irrelevant to this paper's argument: we are investigating knowledge creation in legal scholarship, not the meaning of epistemic value.

inadequate. Each theory can competently critique rivals, but is unable to defend its own internal coherence, moral relevancy, or adequate fit with its subject matter. The result is theoretical stagnation. In spheres that experience the standoff, legal scholarship produces intellectual products which are options that seem inadequate in important ways (and this inadequacy is often clear even to those who endorse the inadequate theory). Moreover, the introduction of new theories usually does little to help. More often than not, whenever a new purported legal solution, technique, or theory is presented, it is quickly subjected to overwhelming criticism from major players in the field, with the result being that the new solution is unmasked as just as problematic and question-begging as the old positions. And so the standoff continues.

As we illustrate below, several central spheres of legal research are best described as existing in this state of standoff. Needless to say, this is not a good situation if one cares about epistemic value. Despite the investment of talent and hard work, knowledge production in law is still deemed by some as a "fraught endeavor that is in some fundamental ways misguided."[67] It is important to stress that the standoff does not entail that the theories are *false*. Rather, the standoff entails the claim that the theories are *insufficient to guarantee* knowledge: we do not know which of the theories are true, or which parts of which theories are true. The predicament is one of knowledge production, not of radical doubt. Of course, many legal problems have been settled by courts and legislatures, but that is beside the point—we are asking if legal scholarship has demonstrated to us whether the solutions adopted are right or justified, and to *this* question it is hard to give a positive answer in a state of standoff.[68]

We wish to stress that we do not offer a definition of "knowledge" according to which the standoff is anathema to knowledge-creation. What knowledge amounts to is a difficult conceptual question, and one can plausibly argue that in this sphere too there is an intellectual standoff (a second-order standoff) between rivaling positions. For example, in his overview on the concept of knowledge, Jonathan Jenkins Ichikawa notes that, "the attempt to analyze knowledge has received a considerable amount of attention from epistemologists, particularly in the late 20th Century, but no analysis has been widely accepted. Some contemporary epistemologists reject the assumption that knowledge is susceptible to

67. Pierre Schlag, *The Knowledge Bubble—Something Amiss in Expertopia*, *in* IN SEARCH OF CONTEMPORARY LEGAL THOUGHT, *supra* note 25 (manuscript at 4) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741144).

68. *Cf.* Rhode, *supra* note 3, at 1339-40 (arguing that when done well, legal scholarship can be very helpful to practitioners in understanding judicial decisions, and to policymakers in assessing the implications of courts' decisions; yet "too much" of it is "not done well").

analysis."[69]

In lieu of a formal definition that will conclusively prove our point, we rely on a set of intuitions that are widely shared, both by us and by practitioners in the fields discussed. According to this common implicit understanding, although we can say many things about a field's objects of inquiry from a variety of viewpoints, these assertions are subject to harsh critique, contradict one another, and do not add up to any one coherent understanding. The result is that we cannot say that we *know* a whole lot about the field's object of inquiry, only that we *suspect* certain things; and there is no adequate basis for deciding which of our suspicions is correct.[70] We demonstrate that this is the case in several fields; we hope that the shared intuitive self-understanding of those who actually partake in the relevant scholarship is a sufficient indication that a state of standoff creates problems from a knowledge-creation perspective.

Many (though certainly not all) fields of legal studies are today experiencing this kind of standoff.[71] In this part, we supply two examples to demonstrate our thesis: jurisprudence and contract theory. However, the same point is true of other branches of law as well, such as torts,[72] constitutional theory,[73] intellectual property,[74] and so on.

First, jurisprudence. For five decades, jurisprudence has been

---

69. *See* Jonathan Jenkins Ichikawa, *The Analysis of Knowledge*, STAN. ENCYCLOPEDIA PHIL. (Feb. 6, 2011), https://plato.stanford.edu/entries/knowledge-analysis/.

70. *See* Epstein, *supra* note 2, at 1294-99.

71. *See* Rubin, *supra* note 4, at 896 ("The failure to agree upon a substantive position does not represent an unfortunate or temporary disarray within the field, but a central feature of [legal scholarship] as a whole.").

72. *See, e.g.*, J.C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L. J. 513, 581 (2002) (surveying existing tort theories and concluding that "[w]hat is needed then, and what we do not find in twentieth-century tort theory, is a theory that really is grounded in the law of tort"). *See also* Epstein, *supra* note 4, at 1298-99 ("In tort law, it is exceptionally difficult to come up with one dominant solution, which perhaps explains why so many different versions of comparative negligence have been tried and found wanting."); James Goudkamp & John Murphy, *The Failure of Universal Theories of Tort Law*, 22 LEGAL THEORY 1 (2016); Arthur Ripstein, *Tort Law in a Liberal State*, 1 J. TORT L., 1 (2007) (noting, inter alia, the lack of agreement as to the purposes of tort law); Arthur Scott, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942 (2017).

73. *See, e.g.*, RICHARD POSNER, HOW JUDGES THINK 324-46 (2008); Frank L. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297 (1995) (surveying the landscape of constitutional theory found *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995)); Posner, *supra* note 1, at 853.

74. *See* William W. Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL & POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001) (providing an overview of the "struggles among and within" the four major IP theories, arguing that "the proponents of all four of the leading theories of intellectual property purport to provide lawmakers with answers," but that, "[u]nfortunately, all four theories prove in practice to be less helpful in this regard than their proponents claim. Ambiguities, internal inconsistencies, and the lack of crucial empirical information severely limit their prescriptive power"). *See also* Neil Wilkof, *Theories of Intellectual Property: Is It Worth the Effort?* 9 J. INTELLECTUAL PROP. L. & PRAC. 257 (2014) (noting that none of the IP theories "can really provide a one-stop shop for conceiving intellectual property," and proposing that "[t]he reader can decide whether achieving . . . 'conversation' merits the effort of seeking to develop 'theories' of intellectual property").

dominated by the disagreement between positivism and non-positivism, often referred to as the Hart-Dworkin Debate.[75] The debate has become extremely nuanced and complex; both Hart and Dworkin have responded to criticisms,[76] and others have tried to offer more sophisticated versions of positivism and non-positivism to meet the challenges specified in the literature.[77] Today, it is hard to even understand where we are in the dialectic without a "guide to the perplexed" that surveys almost 50 years' worth of highly sophisticated philosophical debate.[78]

Where has the debate led? Not so far from where it began, apparently. Theorists today believe that "neither side can be right,"[79] and that "for far too long, the field has been preoccupied by a question that is poorly formed."[80] Now, we want to resist the temptation of saying exactly *why* both sides can't be right: to do so would be to buy-in to the idea that there has to be some knowledge production, and that our analysis can make sense of it in just a few lines. Instead, our purpose in this part is descriptive and not interpretative: we want to show that jurisprudence *is* in a position of standoff. Thus, it suffices to show that analytic legal philosophers *themselves* believe that their field is stagnating and does not by and large generate new knowledge. And for this there is ample evidence. Currently, jurisprudence is considered by many philosophers to be stale and uninteresting,[81] and the reason for the malaise is precisely that little intellectual progress has been made.[82]

In contract law, the standoff is also considered a fact of life.[83] Several theories of contract are considered "prominent," and these supply answers to the major questions regarding contractual liability: its moral grounds, its scope, and its connection to other branches of law. It is common to classify "major" theories into four groups: promise, reliance, economic

75. *See* RONALD DWORKIN, LAW'S EMPIRE (1986); H.L.A. HART, THE CONCEPT OF LAW (3d ed., Paul Craig Ed., 2012).

76. *See* HART, *supra* note 75, at 238-76; Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1, 2 (2004).

77. *See, e.g.*, JULES COLEMAN, THE PRACTICE OF PRINCIPLE (2001); EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN (Scott Hershovitz ed., 2006); JOSPEH RAZ, THE AUTHORITY OF LAW (2nd ed., 2009).

78. *See* Scott J. Shapiro, *The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed*, *in* RONALD DWORKIN 22 (Arthur Ripstein ed., 2007).

79. SCOTT SHAPIRO, LEGALITY 49 (2011).

80. Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1163 (2015).

81. *See* Shapiro, *supra* note 79, at 3-4; Jeffrey A. Pojanowski, *Redrawing the Dividing Lines Between Natural Law and Positivism(s)*, 101 VA. L. REV. 1023, 1023 (2015); Gerald J. Postema, *Jurisprudence, the Sociable Science*, 101 VA. L. REV. 869 (2015); David Enoch, *Is General Jurisprudence Interesting?*, available at https://ssrn.com/abstract=2601537.

82. *See, e.g.*, Roger Cotterrell, *Why Jurisprudence is Not Legal Philosophy*, 5 JURIS. 41 (2014); Andrew Halpin, *The Methodology of Jurisprudence: Thirty Years Off the Point*, 19 CAN. J.L. & JURIS. 67 19 (2006). This issue is discussed at length in Ben-Zvi, *supra* note 25.

83. For more on this subject see Omri Ben-Zvi & Efi Zemach, *Contract Theory and the Limits of Reason*, TULSA L. REV. (forthcoming 2017).

efficiency, and pluralism,[84] though other alternatives exist as well,[85] and new contenders appear regularly.[86] However, things are not looking bright here either, at least if one is interested in epistemic value. Virtually all theories of contract have been met with intense criticism, and there is no agreement across the spectrum of the field that any one theory meets the criticisms in a manner that would render it an adequate theory of contract. For example, "contract as promise" is conceptually incoherent for a variety of reasons,[87] economic theories of contract do not explain contract doctrine,[88] reliance theories fail to live up to their own internal distinctions,[89] and pluralism is considered "anti-theoretical."[90]

Taking all this into account, we may ask—after many decades of thinking about contract, have we progressed from speculation and suspicion to knowledge? We believe it is hard to answer this question affirmatively. The different theories can formulate many answers to the fundamental questions of contract law, but all rely on perspectives deemed problematic and partial in important ways by contract theorists themselves, to the extent that all of the answers are conditional: *if* one accepts presupposition A (e.g. economic efficiency can explain contract law), then X, Y, or Z follows. And scholars who do not subscribe to A have no strong incentive to accept the conditional.[91] Thus, another standoff.[92]

---

84. *See, e.g.*, PATRICK ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); CHARLES FRIED, CONTRACT AS PROMISE (2ND. ED., 2015); GRANT GILMORE, THE DEATH OF CONTRACT (1974); ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW (1997); RICHARD POSNER, THE ECONOMIC ANALYSIS OF LAW (6th ed. 2003); Richard Craswell, *In That Case, What Is the Question? Economics and the Demands of Contract Theory*, 112 YALE. L. J. 903 (2003); L.L. Fuller & W.R. Perdue, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE. L. J. 52 (1936), 46 YALE L. J. 373 (1937); Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915 (2012).

85. *See, e.g.*, Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 271 (1986); Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673 (2007).

86. *See, e.g.*, Robin Bradley Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759 (2016).

87. *See* PATRICK ATIYAH, PROMISES, MORALS AND LAW 128-29 (1981); ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 25 (3d ed. 2003); Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1115 (1989); Curtis Bridgeman, *Liberalism and Freedom from the Promise Theory of Contract*, 67 MOD. L. REV. 684, 687 (2004).

88. Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829 (2007); Eric Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE. L. J. 829, 834 (2003).

89. *See* BRIAN H. BIX, CONTRACT LAW—RULES, THEORY AND CONTEXT 134 (2012); Barnett, *supra* note 85, at 276; Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99 (2000).

90. Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1283-84 (1990); Kreitner, *supra* note 84; Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 133 YALE L.J. 541, 543 n.2 (2003).

91. See Schlag, *supra* note 67.

92. It would take this paper too far afield to examine why exactly legal scholarship does not often excel in creating epistemic value. Instead, we list several possible explanations that have been suggested elsewhere. It should not be surprising that these explanations are, themselves, all partial and

To conclude: in these fields, and in others, we find a phenomenon scholars regularly view as worrisome—very little knowledge-production is occurring. We wish to avoid the debate over how central a place knowledge-production *ought* to take as a goal for legal academics. Instead, our point is that knowledge production is surely *not* the only type of value that counts. Furthermore, because of the unique narrative structure of TPLS (the unreliable hero's journey), the epistemic failure, by stoking the narrative's unreliability, contributes to the production of aesthetic value. It would therefore be misguided to conclude that the situation is dire simply because knowledge production does not occur. To the extent that the standoff is a fact of life in field X (and even assuming that one thinks that knowledge production is an important goal), one should not conceive of field X simply as a failure, as some current practitioners do.[93] Instead, the more complete view is that field X is a *spectacular* failure—an epistemic failure which produces aesthetic value. The overall judgment of a field's success should take into account how it fares across the intellectual spectrum. If one sees value in a tale of heroic failure, the benefits of a standoff may even outweigh its disadvantages (especially if one believes that knowledge production is not necessarily an important goal for legal academia).[94]

We wish to emphasize that our proposition is a contingency, not a concept. The hero's journey may very well end in success n the eys of the reader (though for the reasons we outline in this article, we believe that this scenario is probably rare), and a reliable, successful hero's journey may also bring aesthetic value to the reader.[95]

---

inconclusive. For example, Schlag suggests that several macro-level problems interfere with the legal academic's attempts to produce knowledge (like the problem of sharply distinguishing a small and well-defined object of inquiry and insulating it from the effects of the larger field within which it usually resides; problems of entailment between law and the social; and problems with the temporal nature of legal research). See Schlag, *supra* note 67 (manuscript at 23). A different explanation is that at least certain theories become compromised because of the way they mirror existing ideological debates, which are themselves undecidable. The theories are destined to internalize criticism until they "reflect the conflict-ridden political and theoretical field [they have] promised to transcend." Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life-Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1838 (2016). A third explanation—though we are unsure whether this truly is an explanation or just a restatement of the problem—is that law, or some of its domains, are "essentially contested concepts," or even "second order essentially contested concepts." *See* Richard Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COL. L. REV. 1 (1997); W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1956); Wibren van der Burg, *Law as a Second-Order Essentially Contested Concept*, 8 JURIS. 230 (2017); Jeremy Waldron, *Is The Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137 (2002).

93. See, as an example, our discussion of jurisprudence.

94. For such a view, see Ben-Zvi & Zemach, *supra* note 83.

95. All the more so, given that, as mentioned, we do not define aesthetic value and recognize that there are several possible philosophical approaches to its definition. *See supra* note 6. It is certainly possible that one derives substantial aesthetic value from reading a successful TPLS.

CONCLUSION

The typical piece of legal scholarship follows a certain narrative pattern—the hero's journey. A story about a heroic struggle in which a menace in the form of a legal puzzle is solved by the author. However, most readers read this story with deep skepticism, looking for errors, thus treating the narrator as unreliable. This narrative structure—the unreliable hero's journey—reveals a unique nexus between two kinds of value that inhere in legal scholarship: epistemic and aesthetic. The lower the epistemic value of a piece, the greater its aesthetic value: the discovery of flaws increases the narrative's unreliability and thus generates aesthetic value. Thus, legal scholarship is a multifaceted phenomenon, and a piece of legal scholarship has the potential to produce many different types of value. In this essay, we do not mean (nor do we think it is possible) to capture all or even most of the values of TPLS. We simply wish to demonstrate that an epistemic standoff in legal academia can and should be evaluated through multiple prisms.

It is important to resist the temptation to draw normative conclusions from our theory. If our argument has been persuasive, enough has been accomplished—some light has been shed on the manner in which TPLS is structured. In addition, in keeping with the fact that this essay is an example of TPLS, we hope that it brought aesthetic joy to our readers.