LAW PORN AND ITS DISCONTENTS

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Introduction

"Law porn" is an epithet that refers to professional-looking, glossy publications commissioned by law schools to tout their own achievements and to create the impression of a vibrant, intellectual culture. These materials are widely-distributed to law professors throughout the country on an unsolicited basis, regardless of whether the recipient has any connection to the law school in question.

The emergence of law porn is often attributed to attempts by law school administrators to influence the U.S. News & World Report annual ranking of law schools. The most heavily-weighed factor in the rankings is a peer assessment score, which is determined by questionnaires sent to law school administrators, newly tenured law faculty, and members of law school hiring committees. Law porn can influence the rankings—so the theory goes—by creating a favorable impression among these people.

Anecdotal evidence suggests that law porn is on the rise. As one professor lamented, "I guess it is now typical in the law porn business to distribute glossy brochures to every law professor in the country that extol the unparalleled virtues of the sender's school and each hiccup and burp it emits." Most faculty members treat law porn as a nuisance, and it often goes straight from the faculty mailbox into the recycling bin. A few astute critics have stridently—and in my view, correctly—denounced law porn for containing false, bombastic, and narcissistic claims.

But my concern is not with the *truth* or *falsity* of law porn, but rather with its *meaning* for the legal academy. What troubles me—and this is the major point of this essay—is that most of the claims in law porn are neither true nor false, but rather a kind of magical speech in which saying something is an attempt to make it come true. In the technical terminology of the linguist, law porn conflates the *indicative* grammatical mood (statements about what is or isn't the case) with the *optative* mood (statements about what is hoped to be the case). Rather than reporting on some antecedent truth, law porn is an attempt to create a truth *a posteriori*. Law porn is not news; it is mythology.

Furthermore, law porn makes a mockery of deeply-held values and traditions. It is a daily reminder that we are not some medieval cloisters of scholars, but that we are subject to the same brutal market forces as for-profit businesses, and that we are thrown into a world of visible and public narcissism, one-upmanship, and pretense. It pierces our deepest aspirations to think that we are—in the end—salesmen, and that we compete in a beauty pageant where professors and schools become commodities.

I. WHAT IS LAW PORN?

The expression "law porn" was most likely coined in the late 1990s by Professor

¹ U.S. NEWS & WORLD REPORT, BEST GRADUATE SCHOOLS 75 (2013); *See also* Robert Morse & Sam Flanigan, *Methodology: Law School Rankings*, U.S. NEWS & WORLD REP.

⁽Mar. 12, 2012), http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/03/12/methodology-law-school-rankings.

² Dan Markel, *A Constitutional Floor for Indigence*?, PRAWFSBLAWG (Aug. 15, 2005, 4:39 PM), http://prawfsblawg.blogs.com/prawfsblawg/2005/08/a constitutiona.html.

³ Brian Leiter, *The Law School Observer*, 3 GREEN BAG 2D 327 (2000); Brian Leiter, *The Law School Observer*, 4 GREEN BAG 2D 311 (2001).

Pam Karlan of Stanford University Law School.⁴ She later clarified that the "porn" which she had in mind was not sexual pornography but so-called "food porn," that is, the artful display of food in glossy pictures accompanied by breathless descriptions meant to convey luxurious and sensuous consumption. She said, "My guess is that the word 'porn' was being used there to refer to the titillating way the articles appealed to the senses. I was struck by the resemblances between the law school magazines and the foodie publications." 5 By way of singling out a particular offender, Karlan mentioned the New York University Law School Alumni Magazine, which was one of the first widely-disseminated publications containing full color pictures and bold headlines. She knew the term was not literally accurate (after all, such materials are not literally "porn," nor are they, strictly speaking, "law"), but she was using the term ironically. Obviously, the term struck a chord.

The first scholarly mention of law porn was in a short article by University of Chicago law professor Brian Leiter, who (like Karlan) singled out the self-promotional materials commissioned by New York University Dean John Sexton:

Although NYU's widely circulated and hyperbolic alumni magazine is an object of derision among law professors (one Stanford professor has dubbed the shamelessly self-promoting publication 'law porn'), there is no disputing what NYU Dean John Sexton has accomplished over the past decade: he has made the school a genuine rival of Columbia, something that would have been unthinkable a generation ago. . . . Now "Sexton wannabees" are popping up in law school deanships around the country. They usually announce themselves with the arrival of effusive alumni magazines in faculty mailboxes – most of which, of course, land right in the trash. (Why deans think that law professors would want to read someone else's alumni magazine is hard to fathom.)⁶

Leiter then started a "Sextonism Watch" on his blog, where he surgically took apart claims made in law porn. He referred to law porn from Washington University in St. Louis as "demonstrably false," and he also put together a compendium of law porn in which, inter alia. Wake Forest University claimed to have the best law faculty in America, the University of Chicago claimed to possess (by a wide margin, no less) the most influential faculty in the country and perhaps the world, New York University claimed to have the leading legal scholars in the nation and the world, Harvard claimed to have the most interesting and diverse law faculty in the world, and the University of Pennsylvania said that its law faculty was unparalleled. Obviously, these statements cannot all be true.

There is also the practical question of whether law porn actually works. Here, reasonable people disagree. Some professors have claimed that it can affect the rankings because those who vote on the rankings don't have the time to investigate each school: "Constrained by the lack of useful information, respondents often rank schools impressionistically, and law porn

⁴ Paul L. Caron, Law Porn, Law School Puffspam, Haiku, and Woodpeckers, TAXPROF BLOG (Oct. 27, 2005), http://taxprof.typepad.com/taxprof_blog/2005/10/ law_porn_law_sc.html.

⁵ Id. (setting forth Pam Karlan's e-mail of October 26, 2005, to Paul Caron explaining the term "law porn").

⁶ Leiter, *supra* note 3, at 327.

⁷ Brian Leiter, UCLA Law School Infected with Sextonism, LEITER REPORTS: A PHILOSOPHY BLOG (Oct. 1, 2004, 5:11 PM), http://leiterreports.typepad.com/blog/2004/10/ucla law school.html.

⁸ Leiter, *supra* note 3, at 327–28.

⁹ Brian Leiter, *Hyperbole Watch*, BRIAN LIETER'S LAW SCHOOL REPORTS (Feb. 16, 2007), http://leiterlawschool.typepad.com/leiter/sextonism_watch/index.html.

supplies an impression."¹⁰ Others disagree, and some professors report that law porn can create an unfavorable impression. Professor David Bernstein admitted being turned off by an unsolicited piece of law porn because it contained the LSAT numbers for the entering class, which were very low, and the rest of the publication consisted of typical law porn filler, which he hilariously describes as, "Professor X spoke at an important conference on the future of legal reform in outer Slovobia" and "Women alumni form networking group."¹¹ Bernstein creatively suggested that a law school would be better-served to send a simple postcard listing a few impressive facts about the school that are not generally known.

However, law porn might succeed by invoking a diabolical feedback loop at the heart of the rankings process. In a fascinating study of the ranking of liberal arts colleges, researchers at the University of Michigan discovered that the most important factor in how professors and administrators ranked other liberal arts colleges was by assessing a school's reputation *as based on its ranking*. That is not a typo. Reputations are built on rankings, which provide a proxy for reputations:

The most important factor in the change of a college's reputation among peers wasn't changes in its financial performance, the academic markers of its incoming class, or the quality of its instruction. It was the ranking itself.

... [We tend to assume that] a college's reputation should help shape the trajectory of its ranking. But the exact opposite is true. The ranking shapes the trajectory of a college's reputation, to the point where rankings and reputation are no longer independent concepts. To put it simply, the ranking of a college has become its reputation among other college leaders—the same leaders who bemoan the influence of college rankings. 12

If true, this means that law porn might function as a kind of magic show in which a law school presents itself as something more than it is in order to get others to see it as more than it is, in which case it will have an improved reputation and a higher ranking, which will then attract better students and faculty, transmogrifying it (in reality) into the school that it claimed that it was. This may sound strange. But as a lawyer for an investment fund, I see it all the time: a trader provocatively claims to have a strategy that will earn a consistent fifteen percent return on investment, and even though he has no track record, he manages to convince investors to fund the strategy, and by luck it happens to return fifteen percent. A posteriori the original lie has been consecrated as truth, and no one has the patience to return to the beginning of the dialogue to point out that the original statement (about obtaining fifteen percent returns) was false at the time it was spoken.

This kind of reckless disregard for the truth-value of a statement when it is uttered is a new thing in legal education. It heralds a new epoch where boundaries dissolve, where truth

¹⁰ Gordon Smith, *U.S. News & "Law Porn,"* THE CONGLOMERATE (Oct. 5, 2004, 12:03 AM), http://www.theconglomerate.org/weblogs/archives/000719.html; Victor Fleischer, *Law Porn and the Branding of Legal Education*, THE CONGLOMERATE (Aug. 12, 2005),

http://www.theconglomerate.org/2005/08/branding_legal_.html (claiming that law porn is useful for communicating brand image to students, employers, and alumni).

¹¹ David Bernstein, *Ineffective "Law Porn"*, THE VOLOKH CONSPIRACY (Sept. 27, 2010, 8:04 PM), http://volokh.com/2010/09/27/ineffective-law-porn/.

¹² Michael Bastedo, *Perspective: Should We Care About Rankings?*, 106 OBERLIN ALUMNI MAG. (Summer 2011), http://www.oberlin.edu/alummag/summer2011/features/rank.html. (summarizing Michael Bastedo & Nicholas Bowman, *U.S. News & World Report College Rankings: Modeling Institutional Effects on Organizational Reputation*, 116 Am. J. OF EDUC. 163 (Feb. 2010)).

and falsity are no longer meaningful categories, where the academic merges with the commercial, where reputations are conflated with rankings, where expertise and accolades are self-anointed, where every new professor with a blog is suddenly an expert. say that legal educators once lived in a golden age of purely rational discourse, and that its wonderful Eden has now been polluted by the desperate stink of salesmanship. There has always been irrationality and pointless ritual and superstition in legal education and in the ranking process. My point is that law porn propels law professors and administrators onto a playing field that is several standard deviations away from our traditional roots in texts and arguments, and pushes the profession into a strange new world of mirrors and surfaces.

For the same reason, it makes no sense to decry law porn as a waste of paper or a squandering of resources because it is sent out scattershot to all law professors. 13 It is more accurate to say that waste is precisely the point of law porn, and the success of law porn is probably related to the amount of waste in it. Law porn is beyond the economic categories of efficiency, rational choice, and Protestant frugality. Law porn is a *potlatch* in which the winner is the law school that gives away the most and who is best able to squander its wealth and thereby humiliate and humble those who cannot afford to waste the same amount of money. Law porn invokes the perverse logic of the super-rich and the celebrities who are famous for being famous, where the mark of distinction is precisely the ability to waste one's assets and to speak about oneself interminably.

II. LAW PORN AS NEITHER-TRUE-NOR-FALSE

In searching for a theoretical framework to understand law porn, we might begin by asking whether law porn is a species of "bullshit" as philosopher Harry Frankfurt defines that term. ¹⁴ According to Frankfurt, a "bullshitter" is unconcerned - or rather, indifferent - to the truth-value of what he says. Whereas a "truth-teller" and a "liar" both have their eyes on the truth as a point of reference, the bullshitter merely borrows a discourse of facts in order to create a smokescreen of believability, where feigned sincerity passes for truth. As applied to law porn, Frankfurt might say that the purveyor of law porn is not really concerned to report the truth of what is happening at the school, but seeks to present such a spirited picture of the school that the reader will confuse fervor with veracity. So yes, law porn seems to be a type of bullshit, but we still need to understand exactly what kind of bullshit.

In my opinion, law porn is best understood as statements of the type that Daniel Boorstin once called "neither-true-nor-false," which (according to Boorstin) are the *lingua* franca of advertising. Think here of Gillette's claim that its razors are "the best a man can get." We know on some level that either it isn't true or that it is at least challengeable (surely there must be a better razor somewhere); we also suspect that Gillette has not done the research to support their claim, and we vaguely sense that the claim is an admixture of truth and fiction that is not worth untangling. Boorstin says that neither-true-nor-false statements can become true by virtue of what he calls a 'pseudo event.' Boorstin gives the example of an aging hotel that needs to refurbish its worsening reputation. One path is to hire a new cook and re-design the rooms; this would be a path of reality. But another path is to stage a pseudo event such as a gala ceremony meant to celebrate the thirtieth anniversary of the hotel where celebrities are

¹³ See e.g., Bernstein, supra note 11; Dropping the U.S. News Fig Leaf, 9 GREEN BAG 2D 8 (2005).

¹⁵ Daniel J. Boorstin, The Image 214 (25th ed., 1992).

paid to give glowing testimonials about the storied history of the hotel and its importance to the community. When this event is photographed and reported in the press, it confirms the stellar quality of the hotel as if it was a pre-existing fact, thereby making it true: "Once the celebration has been held, the celebration itself becomes evidence the hotel is really a distinguished institution. The occasion actually gives the hotel the prestige to which it is pretending."16

The same logic applies to law porn. You may ask yourself, "Why am I receiving this alumni magazine from a law school that is a complete stranger to me?" The answer is that you are being asked to participate in the creation of a mythology about that school. Your participation in the celebration (even as an anonymous witness) is necessary in order for there to be something worth celebrating (much in the same way as a buyer and seller must both believe in the 'reality' of a dollar bill for it to be something more than a piece of colored paper). Put crudely, they are constructing themselves at your expense. You really have no option other than passive acquiescence, because to insist on evidence in this context – to call up the law school's dean and demand proof - is not a permissible move in this game.

Building on Boorstin's notion of the neither-true-nor-false. French sociologist Jean Baudrillard spoke of our current situation as a 'hyperreality' where maps and models replace reality, and where no one bothers to look beneath the models, which eventually become 'more real than the real.' Baudrillard says that the rise of models is linked with the development of a new way of speaking where truth is relative only to models and not to any kind of underlying reality – and this is precisely the 'truth' found in advertising:

Advertising is a spoken prophecy to the extent that it isn't meant to be comprehended or apprehended, but to be foretold. What it says doesn't presuppose a prior truth, but a posterior confirmation through the reality of the prophetic sign it emits. . . "Persil [detergent] washes whiter" is not a sentence, but Persil-speak. Like other advertising syntagms, it does not explain or offer meaning – they are neither true nor false, but are meant to eliminate meaning and proof. . . . As with all magical speech, this tautology in discourse attempts to induce tautological repetition by an event. Through his purchase, the consumer can do no more than consecrate the event of mvth. 17

What this means for law porn is that when an unranked, newly formed law school claims that it has a 'leading group of world class experts,' they are speaking their own truth based on their own models, and they are asking you to 'buy' their models - or at least, that you refrain from voicing objection. To untangle their claims publicly might be considered a hostile act in which the untangler (so to speak) comes off worse than the purveyor of the tangled web. Sadly, law porn re-enacts an endless dinner party where another professor touts his own accomplishments but never inquires about yours; to speak up is to appear self-promoting and to enter a narcissistic competition that you don't seek, but to remain silent is to be degraded into an audience member instead of an interlocutor.

Taking myself as an example, when I look at law porn from my alma mater (which shall remain nameless), I feel a complex range of emotions. My first reaction is pride. I identify with the accomplishments of the faculty and with the school's new initiatives. But this soon gives way to creeping vertigo. When I look closer, I see that the photos have a stagemanaged feel. They are a reflection of somebody's image of what a law school should look

¹⁶ *Id*. at 10.

¹⁷ Jean Baudrillard, The Revenge of the Crystal 94 (1999).

like, but they have the sense of a Civil War reenactment. The smiles are forced and the poses are wooden and clichéd. Between the lines, I sense that, so to speak, the school doth protest too much. The eye-popping headlines provide a portentous litany of noteworthy events, but the sheer weight of so many groundbreaking events induces a mixture of incredulity and weariness. I like the school. I am proud to have gone there. But I feel like I am reading an annual report from a public company that is trying to assure me about an investment.

In the last alumni magazine from my alma mater, virtually every article was about the hiring of a new Dean. This was news indeed, and I wanted to know if he had the scholarly background and the vision of the previous Dean, of whom I thought highly. But I soon hit a formidable wall of platitudes. The new Dean intends to "hit the ground running" because "standing still is not an option," so he will "build on what has already been done," and his "plans will be big and ambitious, befitting a great law school in challenging times." In other words, we know nothing. That's at a so-called top twenty school. But what is happening down the highway at a regional, forth tier school (which shall also remain nameless)? Here, the Dean announces, "Recent articles in the media asserted that law schools have not taught law students the skills they need to be practicing lawyers. Those articles could not have been referring to [our school] which has always been proud of producing lawyers ready to practice and serve their community." Hmm. I pause and ask myself whether I have just been insulted by the Dean's implication that their graduates shouldn't be lumped in with the untrained masses let loose upon the world by the University of Chicago, Northwestern, and Notre Dame.

Regardless of the tier, one wonders if the gesture of law porn undoes itself. The need to make a glossy brochure, to list every accomplishment, to herald every guest speaker, to magnify every program, and then to distribute this indiscriminately to law professors throughout the country-isn't this an indication that the sender secretly lacks the very qualities that he is so eager to proclaim? The anthropologist, Clifford Geertz, made this point about coronations and elaborate rituals by which ordinary persons are elevated to kings and queens. The ostensible point of the ritual is to show that the chosen person is somehow different and more deserving than ordinary people, but if their uniqueness was so obvious, there wouldn't be any need for the ritual to consecrate it. 18 In fact, says Geertz, a coronation is an indication that the person is not special and that it is only the process itself that makes them special. Much of the same thing happens in law porn, as law schools celebrate themselves in order to prove that they are worthy of celebration.

It's a game. But it's one that law schools are pretty much forced to play, because there is a kind of prisoner's dilemma at work in law porn. Once the first school produces law porn, there arises a disadvantage to be the only school not doing it. True, there might be a certain cachet to a law school that flatly refused to produce law porn on principle, but so far that has not been the case. It is almost as if law schools believe that law porn creates a zero sum game where the ascent of one school entails the descent of another. If this is true-and it may very well be-then law schools' reputations and rankings are tenuous and easily manipulated, which makes the whole endeavor a massive charade, but one that everyone is playing.

III. THE HARM OF LAW PORN

The literary equivalent of law porn is the so-called 'business card scene' from American Psycho. The novel is a stream of consciousness by Patrick Bateman, an image-

 $^{^{18}}$ Clifford Geertz, Local Knowledge 124–25 (1983).

obsessed investment banker who lives in a consumerist world of labels, fashion, exclusive clubs, trendy restaurants, and meaningless relationships with 'hardbodies.' His yuppie façade belies a psychotic fantasy world where he mutilates and tortures his competitors and other people who don't live up to his elite standards. At dinner with colleagues, he brandishes a new business card:

I pull it out of my gazelle skin wallet (Barney's, \$850) and slap it on the table, waiting for reactions.

"New card." I try to act casual about it but I'm smiling proudly. "What do you think?"

"Whoa," McDermott says, lifting it up, fingering the card, genuinely impressed. "Very nice, take a look." He hands it to Van Patten.

"That's bone," I point out. "And the lettering is something called Silian Rail."

"Silian Rail?" McDermott asks.

"Yeah. Not bad, huh?"

"It is very cool, Bateman," Van Patten says guardedly, the jealous bastard, "but that's nothing . . ." He pulls out his wallet and slaps a card down next to an ashtray. "Look at this."

We all lean over and inspect David's card and Price quietly says, "That's really nice." A brief spasm of jealousy courses through me as I notice the elegance of the color and the classy type. I clench my fist as Van Patten says, smugly, "Eggshell with Romalian type. . . . He turns to me, "What do you think?"

"Nice," I croak, but manage to nod, as the busboy brings four fresh Bellinis. "Jesus," Price says, holding up the card to the light, ignoring the drinks . . .

"But wait," Price says. "You ain't seen nothing yet..." He pulls his card out of an inside coat pocket and slowly, dramatically turns it over for our inspection and says, "Mine."

Even I have to admit it's magnificent.

Suddenly the restaurant seems far away, hushed, the noise distant, a meaningless hum, compared to this card, and we

all hear Price's voice, "Raised lettering, pale nimbus white . . . "

"Holy shit," Van Patten exclaims. "I've never seen . . . "

"Nice, very nice," I have to admit. "But wait, let's see Montgomery's."

Price pulls it out, and though he's acting nonchalant, I don't see how he can ignore its subtle off-white coloring, its tasteful thickness. I am unexpectedly depressed that I started this...

I pick up Montgomery's card and actually finger it, for the sensation the card gives off to the pads of my fingers.

"Nice, huh." Price's tone suggests he realizes I'm jealous.

"Yeah," I say offhandedly, giving Price the card like I don't give a shit, but I'm finding it hard to swallow . . .

I am tranced out by Montgomery's card. The classy coloring, the thickness, the lettering, the print ¹⁹

Notice how the players have no reaction to the actual *content* of their business cards. Style has replaced substance, the content drops out. There is no conversation, only an attempt to dominate, and there is confusion between the symbol and the actual thing represented. If you think that this cannot happen in legal education, consider that one prominent law professor frankly admitted, "I 'read' most of these publications like I read travel magazines: I look at the pictures and read their captions, but skip most of the text."²⁰

Law—in practice and in scholarship—has always been a written and spoken profession. It involves words. One of the attractions of law is that it is *not* a visual medium. Apart from a few impressive buildings and some solemn courtrooms and judicial robes, law has always been a very textual profession. In courtrooms and in law reviews, there is an insistence on arguments, support, demonstrations, citations, logic, process, and adversarial counterargument. Law has never been anchored to photographs, advertisements, displays, or promotions. For those of us who grew up before the advent of law porn, we knew about famous judges and professors by reading their work and we typically had no idea what they looked like, nor did we particularly care. Because people can be easier swayed with pictures than with words, the textual feature of law has always been a factor that worked in favor of independence and autonomy, and that is why courts have struggled so mightily with the question of whether cameras should be allowed in courtrooms, since the act of being seen can change the outcome of what is observed.

With this in mind, the transfer to a visual culture based on glossy brochures, web

¹⁹ Bret Easton Ellis, American Psycho 44–46 (1991).

²⁰ Smith, *supra* note 10.

pages, YouTube lectures, podcasts, and the like have a deeply transformative effect on the profession. All of a sudden there is greater visibility of law faculty, which is good, but also greater emphasis on icons, symbols, and displays. Conversely, there is a subtle denigration of anyone or anything that cannot be neatly promoted, and this can affect how both administrators and professors think about which activities are worthwhile.

In a glossy brochure, five mediocre articles outshine a single well-placed seminal article. A professor on a five or ten-year project that will revolutionize legal thinking might have nothing to report for years on end, and he will compare unfavorably with a gadfly who organizes endless conferences that function as little more than social clubs. True, law porn can sometimes indicate—by a kind of reverse deduction—those faculty members who are 'dead wood' and have nothing to report, but even this exposure-by-negative-implication is a kind of cruel display that is better handled in private. On an even deeper level, when a professor considers whether to start a particular project, she must now be cognizant about how it will look to third parties in the school's marketing materials.

CONCLUSION

Whatever our opinions of 'real porn,' at least it is sought by a consumer, for his own gratification, to be viewed in private. The reverse is true for law porn—it is intended to benefit the sender, and it is public. Law porn belongs less to the seductive tradition of *Playboy* than to the narcissism of social media like MySpace, Facebook, and Twitter. This is because a sender's communication through social media is often indifferent to the response because the message is really intended for the sender. This is also why law porn cannot be understood as junk mail, which, however bothersome, at least seeks to invoke some desire in the recipient which can be satisfied at least temporarily by the sender. Real pornography degrades the woman depicted (because she is reduced to an object) but it also degrades the end-user, who is made out to be incapable of a real relationship with a woman. Similarly, law porn degrades both the sender and the recipient (who switch places, incidentally, depending on who happens to be the sender), because each is using the other merely as an audience member instead of an interlocutor.

Law porn is not some apocalyptic event in the history of legal education. It is a small thing. So small that it has been overlooked as a topic worthy of extended thought. But it deserves consideration because it signals a new way that law schools think about their faculty and mission. Since the advent of law porn, it is now possible to view law school rankings as a kind of stock market where schools behave like stocks that move up or down based on their latest earnings statements and quarterly reports, and with law porn functioning as a prospectus for each school. This image is sufficiently disturbing to give us pause.