

HABERMAS, THE PUBLIC SPHERE, AND THE CREATION OF A RACIAL COUNTERPUBLIC

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INTRODUCTION

In *The Structural Transformation of the Public Sphere*,¹ Jürgen Habermas documented the historical emergence and fall of what he called the bourgeois public sphere, which he defined as “[a] sphere of private people come together as a public . . . to engage [public authorities] in a debate over the general rules governing relations in the basically privatized but publicly relevant sphere of commodity exchange and social labor.”² This was a space where individuals gathered to discuss with each other, and sometimes with public officials, matters of shared concern. The aim of these gatherings was not simply discourse; these gatherings allowed the bourgeoisie to use their reason to determine the boundaries of public and private and to self-consciously develop the public sphere. As Habermas writes, “[t]he medium of this political confrontation was . . . people’s public use of their reason.”³ The bourgeois public didn’t simply participate, but it did so both directly and critically.

The development of the bourgeois public as a critical, intellectual public took place in coffeehouses, in salons, and table societies.⁴ In Great

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1. JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., The MIT Press 1991) (1962).

2. *Id.* at 27.

3. *Id.*

4. *See id.* at 30.

Britain, Germany, and France, particularly, the coffeehouses and the salons “were centers of criticism—literary at first, then also political—in which began to emerge, between aristocratic society and bourgeois intellectuals, a certain parity of the educated.”⁵ Intellectual equals came together and deliberated, an equality that was key in ensuring the requisite openness and deliberation. No one person dominated the discussion due to his status within the deliberative community. Instead, and above all else, the “power of the better argument” won out.⁶

Two conditions were critical to these deliberations. First, equality was key to the public sphere.⁷ Membership in the public sphere meant that no one person was above the other and all arguments were similarly treated and scrutinized. Second, the principle of universal access was crucial.⁸ The doors of the deliberative space were open to all comers and no group or person was purposefully shut out. Seen together, these two conditions provide a blueprint for deliberative practices in a democratic society.

In the public sphere, reason through speech served as the principal medium of communication. As Nancy Fraser explains:

[The public sphere] designates a theater in modern societies in which political participation is enacted through the medium of talk. It is the space in which citizens deliberate about their common affairs, hence, an institutionalized arena of discursive interaction. This arena is conceptually distinct from the state; it [is] a site for the production and circulation of discourses that can in principle be critical of the state.⁹

Further, according to Michael Warner, “[p]ublic issues were depersonalized so that any person would, in theory, have the ability to offer an opinion about them, submitting that opinion to the impersonal test of public debate without personal hazard.”¹⁰ As such, the bourgeois public sphere served as a forum where a critically debating public arose. More specifically, this sphere operated as a forum for counter-opinion; its members, as part of a rational, engaged public, stood in contraposition to the power of the state. Importantly, it also served as “an institutional mechanism for ‘rationalizing’ political domination by rendering states accountable to (some of) the citizenry.”¹¹

5. *Id.* at 32.

6. *Id.* at 54.

7. *Id.*

8. *See id.* at 85.

9. Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in *THE PHANTOM PUBLIC SPHERE 2* (Bruce Robbins ed., 1993).

10. Michael Warner, *The Mass Public and the Mass Subject*, in *HABERMAS AND THE PUBLIC SPHERE 382* (Craig Calhoun ed., 1992).

11. Fraser, *supra* note 9, at 4.

As we note above, central to Habermas's account of the rise of the bourgeois public sphere are the principles of universal inclusion and strict equality among members. However, the public sphere was much less open and much less equal than Habermas's historiography suggests. In this Article, we use the Habermasian account of the public sphere and the pushback he received from his critics to tell a story of the creation of one counterpublic, the *Michigan Journal of Race and Law*.¹² Our aim is to reflect and affirm the central components of the Habermasian project, which we understand to be the development of a critical, discursive, and public space that is neither private nor controlled by the state. Thus, like Nancy Fraser, we will "take as a basic premise . . . that something like Habermas's idea of the public sphere is indispensable to critical social theory and to democratic political practice."¹³ As importantly, we will also affirm the critiques of the Habermasian project. In particular, we will question the normativity and hegemony of the Habermasian bourgeois public sphere and join with the critics of the Habermasian account by presenting a justification for the necessity and creation of counterpublics. We will also argue that something like the idea of a counterpublic sphere is indispensable to social theory and democratic political practice.

Part I of this Article provides a short overview of Habermas's account and a summary of the criticism of his account. Part II tells the story of law reviews as hegemonic public spheres. Part III reflects on the creation of the *Michigan Journal of Race and Law (MJRL)* using the frame of the public sphere and the counterpublic sphere. The central aim of this Part is to present *MJRL* as intentionally created and conceived as a counterpublic in opposition to the normalized and hegemonic public sphere, which in the context of this Article is the general interest law review.

I. THE PUBLIC SPHERE AND THE COUNTERPUBLIC

According to Habermas, during the late eighteenth and early nineteenth centuries, relatively well-off individuals gathered together, as private individuals, to discuss matters of mutual and public concern.¹⁴ The "emergence of this new public space, which effectively formed a zone of mediation between the state and the private individual, shaped and was shaped by the emergence of a philosophical concept and consciousness of 'publics' and their importance."¹⁵ Public in this sense is a "loose . . . forum in

12. We do not purport here to tell the story of the creation of the *Michigan Journal of Race and Law*. We only purport to tell a subjective story, from our vantage point and from our recollection. Others will certainly have differing accounts, which may differ in critical or trivial respects. We welcome those as well as corrections of our account where objective facts demonstrate otherwise.

13. Fraser, *supra* note 9, at 3.

14. HABERMAS, *supra* note 1, at 23, 127, 172-73.

15. John Michael Roberts & Nick Crossley, *Introduction*, in *AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE 2* (Nick Crossley & John Michael Roberts eds., 2004).

which the private people, come together to form a public, readied themselves to compel public authority to legitimate itself before public opinion.”¹⁶ More specifically, Europeans in the eighteenth and nineteenth centuries came together to deliberate and address issues of general interest.¹⁷ The bourgeois publics studied by Habermas were deliberating “over the general rules governing relations in the basically privatized but publicly relevant sphere of commodity exchange and social labor.”¹⁸ The deliberation of the bourgeois public was the formation of “public opinion” that Habermas defines as “the tasks of criticism and control which a public body of citizens informally—and in periodic elections, formally as well—practices vis-à-vis the ruling structure organized in the form of a state.”¹⁹

Habermas notes two preconditions for the bourgeois public sphere. First, the public sphere must be open and accessible to all.²⁰ Habermas explains that the “public sphere of civil society stood . . . with the principle of universal access. A public sphere from which specific groups would be *eo ipso* excluded was less than merely incomplete; it was not a public sphere at all.”²¹ Second, in the public sphere everyone has an equal voice with influence determined by the force of reason.²² Participants in the public sphere were not to be distinguished on the basis of their station in life but on the strength of their ideas. Habermas writes that the “bourgeois public’s critical public debate took place in principle without regard to all preexisting social and political rank and in accord with universal rules.”²³ Included in these universal rules was the requirement that public deliberation proceeded “in accord with reason.”²⁴ Public opinion was tied to the idea that the “better argument” would win out.²⁵

16. HABERMAS, *supra* note 1, at 25-26.

17. *See id.* at 25-27.

18. *Id.* at 27.

19. Jürgen Habermas, *The Public Sphere: An Encyclopedia Article* (1964), 3 *NEW GERMAN CRITIQUE* 49, 49 (1974).

20. HABERMAS, *supra* note 1, at 85.

21. *Id.*

22. *Id.* at 54.

23. *Id.*

24. *Id.*

25. It is worth quoting Habermas in full: “These rules, because they remained strictly external to the individuals as such, secured space for the development of these individuals’ interiority by literary means. These rules, because universally valid, secured a space for the individualized person; because they were objective, they secured a space for what was most subjective; because they were abstract, for what was most concrete. At the same time, the results that under these conditions issued from the public process of critical debate lay claim to being in accord with reason; intrinsic to the idea of a public opinion born of the power of the better argument was the claim to that morally pretentious rationality that strove to discover what was at once just and right.” *Id.*

However, the public sphere was much less open and much less equal than Habermas's historiography suggests.²⁶ For example, Fraser remarks that "the official public sphere rested on, indeed was importantly constituted by, a number of significant exclusions."²⁷ Under a single public sphere, subordinated groups had no space they could call their own, a forum where they could deliberate amongst themselves about their particular needs.²⁸ Membership in these publics is reflective of social pressures and political hierarchies, thus relegating the principle of universality to mere aspiration, not actual practice. In direct response, Fraser argues that "members of subordinated groups – women, workers, people of color, and gays and lesbians – have repeatedly found it advantageous to constitute alternate publics."²⁹ She labels these new publics "*subaltern counterpublics*."³⁰ These settings play a crucial role vis-à-vis the bourgeois public sphere. They were, as Fraser explains, "parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses, so as to formulate oppositional interpretations of their identities, interests, and needs."³¹

Scholars have produced a great deal of evidence for support of this larger critique. Perhaps the most striking example is the late-twentieth century U.S. feminist subaltern counterpublic, with its varied array of journals, bookstores, publishing companies, film and video distribution networks, lecture series, research centers, academic programs, conferences, conventions, festivals, and local meeting places.³² The examples extend much earlier than this, of course. From the time that the leading publics began to engage in their critical projects, counterpublics arose alongside them as spaces where those excluded could engage in similar practices. The example of women is particularly appropriate, in light of the view that "the bourgeois public sphere is essentially, not just contingently, masculinist."³³ Women were explicitly shut out of the public sphere, but this fact did not prove to be the end of their public engagements. Instead of ac-

26. See, e.g., Fraser, *supra* note 9, at 5.

27. *Id.*

28. *Id.* at 14 ("[M]embers of subordinated groups have no arenas for deliberation among themselves about their needs, objectives, and strategies.").

29. *Id.*; see also MARY P. RYAN, *WOMEN IN PUBLIC: BETWEEN BANNERS AND BALLOTS, 1825-1880* (1990); Mary P. Ryan, *Gender and Public Access: Women's Politics in Nineteenth Century America*, in HABERMAS AND THE PUBLIC SPHERE, *supra* note 10, at 283-84 (explaining that democratic public spaces proliferated and their occupants ranged from working men and immigrants to Blacks and women, all of whom "fought their way into the public from a distinctive position in civil society, usually a place of political marginality and social injustice.").

30. Fraser, *supra* note 9, at 14.

31. *Id.*

32. Roberts & Crossley, *supra* note 15.

33. JOAN B. LANDES, *WOMEN AND THE PUBLIC SPHERE IN THE AGE OF THE FRENCH REVOLUTION* 7 (1988).

cepting defeat, they “found circuitous routes to public influence.”³⁴ In the late 1800s, they held public meetings, petitioned state legislatures directly, and appeared at city council meetings, and also lobbied legislatures and public officials, and “even opened an office in Washington to monitor developments in the nation’s capital.”³⁵ These routes were explicitly political, concerned with affecting public policy through established institutions. But this was not all. Their engagements were also channeled through more unstructured fora, such as “outdoor assemblages, in open, urban spaces, along the avenues, on street corners, and in public squares.”³⁶ Even the home felt the influence of these subaltern movements, thus blurring the traditional line between public and private.³⁷

Race offers a second major example.³⁸ In general, Michael Dawson explains that a Black Public Sphere is “a set of institutions, communication networks, and practices which facilitate debate of causes and remedies to the current combination of political setbacks and economic devastation facing major segments of the Black community and the creation of oppositional formations and sites.”³⁹ Dawson locates these publics as far back as antebellum America and “as recently as the early 1970’s.”⁴⁰ These counterpublics arose in a number of diverse settings. For example:

an active counterpublic was continued through organizations such as the Negro Women’s Club Movement, the journals, meetings and activities of the fledgling civil rights organizations, the small but active literary cycles among Black women and men, the activities and debates of Black academics and through the Black church. The blossoming of Black organizational forms in political, economic and social arenas combined with the Harlem renaissance both strengthened the Black counterpublic and increased pressure for African American inclusion in official discourses and oppositional publics.⁴¹

34. Ryan, *Gender and Public Access*, *supra* note 29, at 284.

35. *Id.* at 281.

36. *Id.* at 264.

37. *Id.* at 272 (“American women, especially of the urban middle classes, worked just as frantically to infuse the home with social functions, giving new definition to the border between public and private life.”).

38. A third major example, that of class, is also deserving of note. See Geoff Eley, *Nations, Publics, and Political Cultures: Placing Habermas in the Nineteenth Century*, in HABERMAS AND THE PUBLIC SPHERE, *supra* note 10, at 319–25.

39. Michael C. Dawson, *A Black Counterpublic?: Economic Earthquakes, Racial Agenda(s), and Black Politics*, in THE BLACK PUBLIC SPHERE: A PUBLIC CULTURE BOOK 201 (Black Public Sphere Collective eds., 1995).

40. *Id.* at 201, 210.

41. *Id.* at 204.

In this way, the Black public sphere may be closely linked to its feminist counterparts. Its genesis is also similarly explained, and rather obvious: “[T]he formal expulsion of African Americans at the end of the nineteenth century from official spheres of public discourse and decision-making and the informal exclusion of African Americans from the mainstream of most oppositional movements, led to a dual strategy that was followed by African Americans until the 1960’s.”⁴² Interestingly, gender differences also proved too strong and influential in the Black Public Sphere, enough so as to generate the creation of a distinctly Black feminist sphere with its own organizations, literatures, and the like.⁴³

These counterpublics share at least two major unifying characteristics. First, they follow the same general formula: exclusion leads to the creation of alternative deliberative spaces for critical engagement. To reiterate, during antebellum America, the fact that women were “excluded, silenced, or shouted down in the public, democratic, and male-dominated space” led them to “carve[] out another space in which to invest psychic, social, and political energies.”⁴⁴ The reality of exclusion led to the necessity of a public deliberative space. Second, these subaltern counterpublics were stigmatized by the dominant publics, deemed inferior and unnecessary. The women-friendly salon culture, for example, was stigmatized by the republicans as “effeminate,” “artificial,” and “aristocratic.”⁴⁵ Despite their hegemonic status, the leading publics were threatened by the mere existence of counterpublics.

Habermas’ second precondition, the principle of equal voice, also falls short. The general argument is simple: individuals gained admission to these publics on the basis of private reason, a resource readily available to all. In other words, one is accorded membership to these publics on the strength of one’s ability to reason, to exercise one’s critical capabilities with others. On this reading, membership in these publics is thus grounded on the equality principle, on the fact that all members are possessors of the ability to reason. This idea of reasoned exchange leads to further benefits. When discoursing with others, for example, “[w]hat you say will carry force not because of who you are but despite of who you are.”⁴⁶ As Michael Warner explains, “Implicit in this principle is a utopian universal-

42. *Id.*

43. *See id.* at 215; Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 404-25 (David Kairys ed., 3d ed. 1998).

44. Ryan, *Gender and Public Access*, *supra* note 29, at 273.

45. Fraser, *supra* note 9, at 5 (quoting JOAN LANDES, *WOMEN AND THE PUBLIC SPHERE IN THE AGE OF THE FRENCH REVOLUTION* (1988)). Fraser went on to remark that “masculinist gender constructs were built into the very conception of the republican public sphere, as was a logic that led, at the height of Jacobin rule, to the formal exclusion from political life of women.” *Id.*

46. Warner, *supra* note 10, at 382.

ity that would allow people to transcend the given realities of their bodies and their status.”⁴⁷ We are equal *qua* members of the public. As such, it is our voices, our ideas, not our selves, which press on and carry the argument. It is most important not who we are, but what we say. Epistemic authority is a function of ideas and not status.

A leading objection argues that “the ability to abstract oneself in public discussion has always been an unequally available resource.”⁴⁸ In order for the larger claim to work, Warner argues that “[i]ndividuals have to have specific rhetorics of disincorporation; they are not simply rendered bodiless by exercising reason.” Yet, he continues, “it is only possible to operate a discourse based on the claim to self-abstracting disinterestedness in a culture where such unmarked self-abstraction is a different resource.”⁴⁹ Warner’s conclusion follows earlier claims about unequal access. Despite the public sphere’s claim to universality, that is, “[t]he subject who could master this rhetoric in the bourgeois public sphere was implicitly – even explicitly – white, male, literate, and propertied.”⁵⁰ In other words, and notwithstanding its claim to equality and universality, “the bourgeois public sphere continued to rely on features of certain bodies. Access to the public came in the whiteness and maleness that were then denied as forms of positivity.”⁵¹ This reliance was no mere coincidence, he argues; in fact, “[t]he bourgeois public sphere has been structured from the outset by a logic of abstraction that provides a privilege for unmarked identities: the male, the white, the middle class, the normal.”⁵² To put this point differently, the fact that the larger argument turns to and depends on ready-made concepts such as reason, law, and nature serves not to universalize the public sphere but to narrow it. This is because reason, law, and nature are not concepts that are available to all. Rather, they are reserved for those deemed ideologically and politically superior. Not all men, on this reading, are considered equal.⁵³

Once we understand the public sphere as a forum of privilege, two further arguments come into fuller view. First, as Nancy Fraser explains:

[Habermas’] narrative . . . like the bourgeois conception itself, is informed by an underlying evaluative assumption, namely, that the institutional confinement of a public life to a single,

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 383.

53. See LANDES, *supra* note 33, at 11 (“[T]he central categories of bourgeois thought – universal reason, law, and nature – are embedded in an ideologically sanctioned order of gender differences and public-private spheres which grounds the institutional and cultural geography of the new public sphere.”).

overarching public sphere is a positive and desirable state of affairs, whereas the proliferation of a multiplicity of publics represents a departure from, rather than an advance toward, democracy.⁵⁴

The single, leading public sphere stands alone as the legitimate public sphere, as the sign of reasoned exchange of ideas. In contrast, counterpublics are signs of the other, the deviant, the outsider. This point is particularly relevant in the context of law reviews and the recent explosion of new journals.

Second, and from the perspective of what we call the counter-participants, these new counterpublics played a crucial role in expanding the “discursive space” for those unable to penetrate the leading public sphere.⁵⁵ Moreover, in stratified societies—societies “whose basic institutional framework generates unequal social groups in structural relations of domination and subordination”⁵⁶—participatory parity is but an ideal, unworkable in practice. As we take into account the reality of counterpublics, however, the level of abstraction is immediately generalized, from the individual to the group. In so doing, the question is no longer whether individuals participate, for they do, in more than one public. More importantly, and from the perspective of the individual, this is a desirable circumstance, for the society will be one “with many different publics, including at least one public in which participants can deliberate as peers across lines of difference about policy that concerns them all.”⁵⁷

This second point is crucial to our larger story. The general response to Habermas’s leading story is one of skepticism about his single public hypothesis. More importantly, the crucial point is not the mere existence of various counterpublics but the fact that a diversity of publics directly increases one’s participatory chances, especially in a society as diverse as our own. Fraser writes: “In general, we can conclude that the idea of an egalitarian, multicultural society makes sense only if we suppose a plurality of public arenas in which groups with diverse values and rhetorics participate. By definition, such a society must contain a multiplicity of publics.”⁵⁸ On this reading, counterpublics are necessary institutions if the claim of participatory equality is to be taken seriously.

54. Fraser, *supra* note 9, at 13.

55. *Id.* at 15 (“[I]nsofar as these counterpublics emerge in response to exclusions within dominant publics, they help expand discursive space. In principle, assumptions that were previously exempt from contestation will now have to be publicly argued out. In general, the proliferation of subaltern counterpublics means a widening of discursive contestation . . .”).

56. *Id.* at 13.

57. *Id.* at 18.

58. *Id.* at 17.

II. LAW REVIEWS AS HABERMASIAN PUBLICS

The previous discussion bears an uncanny resemblance to a long-standing debate within the legal academy that has recently spilled onto larger media outlets. This is the debate over the role of law reviews, institutions with much history and tradition on their side. Most law schools have one “flagship” law review, the place where drafts of prospective articles flow and scholarly reputations are subsequently made. This is an odd institution.⁵⁹ It is odd because it places law students in charge of editorial decisions and in so doing puts the careers of young law professors in the hands of what may charitably be described as amateurs.⁶⁰ This Part examines the history and evolution of these law reviews. Part II.A discusses their genesis and *raison d'être*. Part II.B examines the shift in the purpose of these institutions, away from a strictly pedagogical focus and towards a focus on legal scholarship. As the law reviews shift in focus and become exclusive clubs, the analogy to the Habermasian public sphere comes into sharp relief. In response, Part II.C documents the rise of the legal counterpublics. We situate this history within the creation of the *Michigan Journal of Race and Law*.

A. History

The institution of the law review dates back to the 19th Century, a time when treatises and law reports were the leading forms of legal scholarship.⁶¹ The earliest record of these institutions is the *American Law Journal*

59. See Gerhard Casper, *Foreword*, 50 U. CHI. L. REV. 405, 405 (1983) (“[O]ne of the most startling characteristics of American legal scholarship is the fact that so much of it is published in student-edited periodicals.”).

60. See Michael Bacchus, *Strung Out: Legal Citation, the Bluebook, and the Anxiety of Authority*, 151 U. PA. L. REV. 245, 273 (2002) (“Decisions made by law students, then, have a considerable effect on the careers of law professors. In some ways, amateurs function as the gatekeepers to professional advancement”); Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES (Oct. 21, 2013), <http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html> (“Law reviews are not really meant to be read. They mostly exist as a way for law schools to evaluate law professors for promotion and tenure, based partly on what they have to say and partly on their success in placing articles in prestigious law reviews.”).

61. Legal treatises, or systematic analyses of single substantive branches of law, date as far back as Sir Thomas Littleton’s *Treatise on Tenures*, published in 1481. See A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 634 (1981). Leading treatises include Coke’s various *Institutes*, Hale’s *Analysis of the Law*, and Blackstone’s *Commentaries*. See Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 743-44 (1985). They were the leading, if not the only, form of legal scholarship up until the early 1800s. See *id.* at 742-45. Between 1826 and 1830, James Kent’s influential *Commentaries on American Law* were published. *Id.* at 745. In 1834, Joseph Story’s *Commentaries on the Conflict of Laws* was available to the public. *Id.* at 746.

In contrast with the treatise, the law report contained court decisions, case summaries, and legal commentaries. The earliest account of these reports – the *Year Books* – dates back to the reign of Edward I. See W. Holdsworth, *Sources and Literature of English Law* (1925). The first case

and *Miscellaneous Repertory*, a magazine of sorts that operated from 1808 to 1817.⁶² Similar magazines sought to establish a niche for their own brand of legal doctrine and were aimed at the legal practitioner. For example, *The Carolina Law Repository* was founded in 1813,⁶³ the *New York Judicial Repository* in 1818,⁶⁴ *The Journal of Jurisprudence* in 1821,⁶⁵ the *United States Law Journal and Civilian's Magazine* in 1822.⁶⁶ These magazines had brief life spans, from as short as six months to as long as five years. In 1829, the first magazine to closely resemble our modern journals—*The United States Law Intelligencer and Review*—was founded.⁶⁷ It resembled law reviews by including “lead articles” among its various features.⁶⁸ It lasted two years.⁶⁹

By 1850, one could count ten surviving magazines from among the ranks.⁷⁰ The numbers began to rise, if only slightly at first. In 1852 and 1866, the *American Law Register* and the *American Law Review* were established, respectively.⁷¹ In 1870, professional journals, such as the *Albany Law Journal*, entered the scene, and the *Central Law Journal* was established in 1874.⁷² Subsequent years witnessed a flurry of activity. During the period between 1870 and 1886, the number of legal periodicals rose from seventeen to forty-two.

This period also saw early attempts to establish *student-edited* journals. A precursor of the student-led reviews—the *American Law Register*—began publication in 1852.⁷³ While this journal is now called the *University of Pennsylvania Law Review*, the Department of Law at the University of

reports – the *Kirby Reports* – appeared in the United States in 1789. Swygert & Bruce, *supra*, at 749. A second report appeared in 1790. *Id.* at 749–50. In the following years, these published case reports multiplied dramatically so that 473 volumes could be counted by 1836. *Id.* at 750. Their popularity did not diminish for decades. *See id.* As a result, by the 1870s and 1880s the West Publishing Company established the system we enjoy today. *See* Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 62 (1981).

62. Richard A. Danner, *More than Decisions: Reviews of American Law Reports in the Pre-West Era*, DUKE LAW SCHOOL REPOSITORY 3 (2015), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6172&context=faculty_scholarship.

63. *Id.* at 24.

64. *Id.*

65. *Id.*

66. *Id.* at 24 n.171.

67. *Id.* at 26.

68. *Id.*

69. *Id.*

70. Swygert and Bruce, *supra* note 61, at 754.

71. Danner, *supra* note 62, at 31.

72. *Id.* at 39.

73. *See* A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 430 n.97 (Julius Goebel Jr. ed., 1955).

Pennsylvania did not assume its reigns until 1896.⁷⁴ In 1875–76, the *Albany Law School Journal* was published but did not move past its first volume.⁷⁵

It would be a decade until another student group would attempt to establish a law journal. The event took place on February 3, 1885, when the Columbia College Law School witnessed the birth of Volume I, Number 1, of the *Columbia Jurist*, “an octavo of four pages that was to be ‘published weekly by the students of the Columbia College Law School.’”⁷⁶ The *Jurist* originated within the student ranks, its publication modeled on those of various other departments within Columbia College.⁷⁷ Early on, the *Jurist* published each week’s moot court cases, class notes, as well as “notes of important cases recently adjudicated and leading articles by ‘persons’ of acknowledged merit, in and out of the College.”⁷⁸ The publication of these articles distinguishes the *Jurist* as the forerunner to our modern law reviews. Interestingly, the *Jurist* is also the forerunner in selecting its students by way of competitive essays submitted to a committee.⁷⁹ After passing hands a number of times, the *Columbia Jurist* folded on January 1887.

The demand for a student publication did not wane within the campus of Columbia College, however, and so the following fall a monthly publication—the *Columbia Law Times*—entered the scene.⁸⁰ This publication, unlike the *Jurist*, published book reviews and was edited with much greater care.⁸¹ In most other respects, the *Times* closely resembled its predecessor. For example, it published leading articles as well as dictated lectures notes. Further, students contributed original work, and the succeeding editorial board was chosen on the basis of this written work.⁸²

Around this same time—1887, to be specific—the *Harvard Law Review* was founded.⁸³ Its mission was simple. In its own words: “The REVIEW is not intended to enter into competition with established law journals, which are managed by lawyers of experience, and have already a firm footing with the profession.”⁸⁴ Instead:

Our object, primarily, is to set forth the work done in the school with which we are connected, to furnish news of inter-

74. *Id.*

75. *Id.*

76. *Id.* at 102.

77. *Id.*

78. *Id.*

79. *Id.* at 102–03.

80. *Id.* at 103.

81. *Id.*

82. *Id.*

83. CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 440 (1908).

84. 1 HARV. L. REV. 35, 35 (1887).

est to those who have studied law in Cambridge, and to give, if possible, to all who are interested in the subject of legal education, some idea of what is done under the Harvard system of instruction. Yet we are not without hopes that the REVIEW may be serviceable to the profession at large.⁸⁵

The *Harvard Law Review* was thus spurred by two primary goals: to keep alumni abreast of developments at the law school and to spread the virtues of the Langdellian system of legal education to the world.⁸⁶ Above all, the *Review* wished to be of help to the legal profession.

The *Yale Law Journal* followed four years later.⁸⁷ After its first year, its chairman declared: “Enough has been done to justify the belief that [the *Yale Law Journal*] will widen the scope of the school; a strong and growing band of contributors have come to support it; many articles of permanent interest and value have been published.”⁸⁸ In his view, the Journal had been “well started[,] on its way toward the future . . . with reasonable success, and with the warm encouragement of the graduates of the school.”⁸⁹ The “practical value of the magazine” was self-evident; through this magazine, graduates could keep their “connection and interests in these institutions of learning as we go out from them.”⁹⁰

The emergence of Harvard and Yale’s reviews brought the number of student-led journals to three. But the *Columbia Law Times* would not exist much longer. After ceasing to print class notes in 1891—and thus no longer being a required purchase for students—it stopped publication in 1893.⁹¹ Columbia students would again rise to the editorial challenges posed by a legal publication. On February 27, 1899, “the more ambitious students . . . met to organize a society to engage in and promote scientific legal study and research.”⁹² Keeping in mind the now successful Harvard model, these students hoped to stir interest in a legal publication like the *Harvard Law Review*.⁹³ At first, they simply sought to create an “informal voluntary seminar” in order for students to have a setting where they could “discuss current judicial decisions.”⁹⁴ During the next few months, the students selected student officers, honorary members, and a name for their group (“The Moot”).⁹⁵ Soon, however, the society faltered, as students

85. *Id.*

86. *Id.* at 35–36.

87. See 1 YALE L.J. 1 (1891).

88. *Id.* at 269 (quoting William P. Aiken).

89. *Id.*

90. *Id.*

91. A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY, *supra* note 73, at 182.

92. *Id.*

93. See *id.*

94. *Id.*

95. See *id.* at 182–83.

gained little satisfaction in preparing articles for one another. What they desired instead was to publish their intellectual travails to the public at large. With this aim in mind, members of the then-defunct “Moot” set out to establish a legal publication. From this effort, in 1901, the *Columbia Law Review* was born.⁹⁶

The number of law reviews grew in fits and starts. By 1912, thirty law journals had begun publication yet only fifteen survived.⁹⁷ Between 1912 and 1941, sixty-five new law journals were established yet only forty-five survived.⁹⁸

During the 1950s, the pendulum began to swing ever so carefully away from legal pedagogy as a primary academic role and towards a professorial model where scholarship took center stage. As the number of law reviews grew in dramatic fashion, the professoriat’s emphasis on legal writing grew alongside it.⁹⁹ Since books about the law were “virtually nonexistent,” professors had a difficult time publishing their work.¹⁰⁰ The law reviews served to fill this vacuum, and the relationship proved to be an ideal one. Professors needed to publish their work, while “legal articles in a discipline that did not know the constraints of the refereed journal were in great demand because of the law reviews’ need to fill up the front part of their issues with faculty articles.”¹⁰¹ To this day, the relationship seems a happy one. Not surprisingly, the number of law reviews today has grown in accordance with the demand.¹⁰²

B. *The Rise of Counterpublics: Against Equality and Universal Access*

From their inception more than a century ago, law reviews have acquired much prestige from within the academic community. They are no longer little and unappreciated communes within the law schools but the leading medium through which legal scholarship enters the academic world. In this vein, its members are considered the up and coming talent within the law school world. For this reason, it is important to focus attention on how students gain membership to these institutions. It is important to focus attention, that is, on the concept of merit.

96. See *id.* at 183-84.

97. Lyman P. Wilson, *The Law Schools, the Law Reviews and the Courts*, 30 CORNELL L.Q. 488, 492 (1945).

98. *Id.* at 492.

99. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 271 (1983).

100. *Id.*

101. *Id.*

102. In 1990, Kenneth Lasson could account for 800 law journals in existence. See Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 926 (1990).

The concept of merit and law reviews arises in two separate instances, when speaking about the institutions themselves and when focusing on the students who staff these institutions. Yet, both instances handle the question similarly. In general, the reviews have become prestigious institutions, bringing glory and prosperity to their home schools.¹⁰³ When looking to *the* law review within a given school, it is easy to see that the institution is elite, the cream of the given school's crop. One reason for this status is simply the passage of time. Tradition and age both lead to enhanced status. In other words, as one commentator explains, "[b]ecause they are generally older than the school's specialty reviews, they have had more time to accumulate the patina of prestige."¹⁰⁴ This prestige then plays a self-reinforcing role. As law reviews become more prestigious, their selectivity increases. The more drafts a review receives for consideration, the more selective it can be, which in turn brings prestige and an enhanced reputation.¹⁰⁵

Perceptions regarding the abilities of review members are similar. The general perception is one of merit and achievement. Students within these institutions are considered to be the best and the brightest, the top students the school has to offer.¹⁰⁶ As Frank Kubler writes, "[a]lthough law review is, in truth, little more than a freshman honor society providing experience staffing a periodical, it has achieved a status unequaled by any other honors recognition and unparalleled in any other educational program."¹⁰⁷ This perception follows from structural and substantive understandings of law reviews. Grades and writing ability hold the keys to admission, which is based on one's ability to reason and out-perform

103. See, e.g., CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 440 (Cornell University Library 2009) (1908) ("Another potent factor in increasing the prosperity of the School arose in th[e] [1887] academic year, in the founding of the *Harvard Law Review*, the first legal journal issued in a law school.").

104. Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. EDUC. 387, 387 (1989).

105. See *id.* at 387-88.

106. See Roger C. Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. LEGAL EDUC. 1, 5-7 (1986) ("Some years ago, the automatic selection of law-review editors according to their first-year grades was based on the assumption that the best and brightest could be identified on the basis of academic credentials."); James Lindgren, *Return to Sender*, 78 CAL. L. REV. 1719, 1722 (1990) (quoting a professor who, while speaking with the editors of the *Texas Law Review*, remarked: "You're supposed to be the cream of the Texas Law School"). For critiques of this practice, see Frank Kubler, *Confusion, Obfuscation, Humiliation, and Hardship: Is This the Only Way to Learn the Law?*, 14 STUDENT LAWYER 10, 11 (Nov. 1985) ("Thus, the one universally recognized honor in law school is often bestowed, not on the recommendation of the faculty, but on the questionable judgment of students just finishing their second year."); Phil Nichols, Note, *A Student Defense of Student Edited Journals: In Response to Professor Roger Crampton*, 1987 DUKE L.J. 1122.

107. KUBLER, *supra* note 106, at 11; see also Harold C. Havighurst, *Legal Reviews and Legal Education*, 51 NW. U. L. REV. 22, 23 (1956) ("Indeed, the term 'law review student,' in that it has come to designate one who is superior, has achieved a general honorific significance . . .").

others in intellectual events, or else one's ability to write well. Either way, the selectivity of the admissions process, like the selectivity of article selection, reinforces the larger perceptions about the review members and ensures that those selected will be accorded academic honor and prestige.

III. CREATING A RACIAL COUNTERPUBLIC: THE MICHIGAN JOURNAL OF RACE AND LAW

As Douglas Kellner has written, an important aim of *Structural Transformation* was to “delineat[e] a concept of the public sphere which facilitates maximum public participating and debate over the key issues of the current conjecture and which consequently promotes the cause of participatory democracy.”¹⁰⁸ Kellner notes that “Habermas’s focus on democratization was linked with emphasis on political participation as the core of a democratic society and as an essential element in individual self-development.”¹⁰⁹ The bourgeois public sphere facilitated collective action by providing a space where individuals could come together to discuss issues of mutual concern. It facilitated democratic participation and self-government by enabling individuals “to organize against arbitrary and oppressive forms of social and political power.”¹¹⁰ More importantly, he explains,

[f]or the first time in history, individuals and groups could shape public opinion, giving direct expression to their needs and interests while influencing political practice. The bourgeois public sphere made it possible to form a realm of public opinion that opposed state power and the economic interests that were coming together to shape bourgeois society.¹¹¹

The bourgeois public sphere facilitated the values of democratic participation, self-government, and autonomy in the face of hegemonic rule. The public sphere gives voice to the individuals and creates public opinion to hold the state accountable. It is then in this sense that we believe, with Nancy Fraser, that something like the bourgeois public sphere, even in its idealized form, is normatively desirable.

When a group of students came together in the fall of 1994 at the University of Michigan Law School to start the *Michigan Journal of Race and Law*, though they did not articulate their project explicitly in Habermasian terms, they were coming together to self-consciously form a racial counterpublic, their own version of a bourgeois public sphere.

108. Douglas Kellner, *Habermas, the Public Sphere, and Democracy: A Critical Intervention*, in *PERSPECTIVES ON HABERMAS* 259-60 (Lewis Edwin Hahn ed., 2000).

109. *Id.* at 262.

110. *Id.* at 264.

111. *Id.* at 263.

Like the bourgeois in Habermas's *Structural Transformation*, who were worried about the arbitrary rules imposed upon them by the state and who sought a voice that would hold the state accountable, these students were disturbed by their perceived lack of voice at the law school. They were concerned by the fact that the law school administration was less responsive to the needs of students of color than they were to White students. They came together to create a journal and in the process to discuss issues of concern to them at the law school and in the larger society. Not too dissimilar from the bourgeois in Habermas's historiography, the students of color—by students of color we mean to include white students as well as non-White students—who collectively came together to create the *Journal* were seeking a “zone of mediation” between themselves and the law school administration.

Further, like Habermas's bourgeois public sphere, the *Journal* served as a public sphere—more precisely a counterpublic sphere—that mediated between the students and the law school administration. The founding members of *MJRL* thought that they could get the law school administration to be more responsive to their needs by starting the *Journal*. The justification for this hope was twofold. First, starting the *Journal* involved collective action by the students and also involved convincing the administration to provide some modicum of support for the enterprise. Establishing the *Journal* was proof that a group of otherwise marginalized students could collectively organize and make demands upon the law school's leadership structure.

Second, our observation was that the faculty and the administration paid a great deal of attention to the needs and views of students who were on journals, particularly the flagship *Law Review*. These students were often offered the best resources that the Law School had to dispense: research assistantships, clerkships, awards, and the like. Of course, the implicit reason for dispensing these resources was merit. These students were viewed as deserving because they distinguished themselves academically. Moreover, because this public sphere was ostensibly open and accessible to all, its outputs were also *ei ipso* legitimate.

But our suspicion was that not all students were afforded the same opportunity to distinguish themselves academically. Counterpublics often arise because public spheres are not open and accessible to all. Besides, even if some students of color were let in, they could not expect participatory parity within the public sphere. One reason for starting an academic journal was to provide a space for students of color to distinguish themselves academically, to engage in an academic enterprise that was valued by the institution. Our hope was that we could leverage that value into influence and improve the lot and standing of students of color at the Law School.

As we note above, *MJRL* was a counterpublic. There are at least three insights that follow from viewing law reviews as public spheres and

journals such as *MJRL* as counterpublics. First, we can better appreciate how public spheres are not open and accessible to all and why counterpublics are necessary to assure participatory equality. The *Journal* was created against the backdrop of another institutional hegemon and what passed as the public sphere in that context, the flagship law review, which many students of color viewed as exclusive and unwelcoming.

More pointedly, the racial exclusivity that we perceived in the flagship law review was essential to the status of the law journal. That is, racial exclusivity was tied to the merit of the flagship law review; the fact that there were few people of color on the flagship law review was a testament to its merit. Racial exclusivity was a mark of “distinction.”¹¹² Importantly, racial exclusivity does not simply mean the corporal exclusion of people of color but also the racial exclusion or minimization of racial issues and racial viewpoints that mattered to communities of color. The result was, to paraphrase Fraser, a racialized conception of merit and deservedness that “functioned to legitimate an emergent form of racial rule.”¹¹³ Within this context it is easy to conclude that merit is the rule of the best.¹¹⁴ And those who are part of the public sphere are the best. Missing is an account of the “ways in which social inequalities can infect deliberation [and participation], even in the absence of any formal exclusions.”¹¹⁵

Second, the public sphere offers the opportunity for self-rule and is transformative. The availability of counterpublics makes available the possibility of self-rule and transformation through discursive interaction. The flagship law review as a public sphere is important not simply for what it signifies internally, but also because it helps its participants to develop their individual (as well as collective) capacities and their roles in the larger society. The public sphere is constitutive and transformative; its participants learn to understand themselves by participating in it. To use a grammatically awkward phrase, participants in the public sphere become who they will become by participating in the public sphere. Fraser describes the bourgeois public sphere as “the arena, the training ground, and eventually the power base of a status of bourgeois men, who were coming to see themselves as a ‘universal class’ and preparing to assert their fitness to govern.”¹¹⁶ The public sphere enables its participants to learn how to use their reason, make persuasive arguments, and engage the power structure. It is where participants practice self-rule and become the leaders that they ex-

112. Fraser, *supra* note 9, at 60.

113. *Id.* at 62.

114. Fraser writes: “The important point is that this new mode of political domination, like the older one, secures the ability of one stratum of society to rule the rest. The official public sphere, then, was—indeed, is—the prime institutional site for the construction of the consent that defines the new, hegemonic mode of domination.” *Id.*

115. *Id.* at 11.

116. *Id.* at 60.

pect to be in society at large. This is what we mean by the observation that the public sphere is constitutive.

Law reviews as public spheres are training grounds for future leaders of the profession. They are important sites for the practice of self-government. Their importance as training grounds for leadership and self-government are so well recognized that membership in a law review is often required for entry into the profession's most prestigious jobs such as clerkships, private law firms, government jobs, and academia. Members of a law review develop a sense of themselves as leaders and mediators of power, and they use the law review as preparation "to assert their fitness to govern."¹¹⁷ Law review members develop a self-identity as editors-in-chief, article editors, managing editors, and as students whose positions on the law review minimize the power imbalance that ordinarily exists between students and faculty. Students then take that self-identity to the next rung on the legal employment ladder, clerkships, high-status law firms, prestigious government positions, legal academia, and the like. Fraser puts the point best, noting that flagship law reviews as public spheres "are arenas for the formation and enactment of social identities."¹¹⁸

Finally, like the public sphere, the flagship law review lays claim to truth, objectivity, normativity, and neutrality. It only publishes the best articles. It only selects the best editors. The substantive topics that it publishes are the most important and significant ones. Its selection processes—articles and editors—are based purely upon merit.

The flagship law reviews are often referred to as the general interest law reviews. General interest is framed in contradistinction to specialty interest law reviews. Recall here the claim by Habermas that the public sphere is to deliberate about "public matters." In this context, general interest means of concern to all. Again, this must be seen as in contradistinction to the special interest law reviews, which are of concern to a narrow set of people, such that one might even call these private interests. On that basis, one can then privilege the journals that foster deliberation on matters of general interest and marginalize the specialty or private interest journals.

Notice how marginalization of issues is related to the marginalization of persons. How does the public sphere determine which issues are matters of public concern? The public sphere makes this determination through the public reasoning of its participants and through discursive engagement. Participants in the public sphere get to privilege their views of what matters to all and what ought to be viewed as private or specialized interest. Because the public sphere claims to be open to all and because it is based upon reason without regard to status, the public opinion generated by the

117. Fraser, *supra* note 9, at 60.

118. *Id.* at 16. Fraser goes on to note: "This means that participation is not simply a matter of being able to state propositional contents that are neutral with respect to form of expression. Rather, . . . participation means being able to speak 'in one's own voice,' thereby simultaneously constructing and expressing one's cultural identity through idiom and style." *Id.*

public sphere could be regarded as objective and the product of reason. However, because the public sphere is truly not open and available to all, the public square simply privileges some persons (and their views) over other persons (and their views).

CONCLUSION

Inasmuch as we agree that something like the Habermasian public sphere is normatively desirable—largely because of the necessity of deliberative space that facilitates the collective deliberation about matters of mutual concern, including a collective assessment of the performance of the state or power structure—it also follows that counterpublics are equally normatively desirable. In societies with groups that have multiple identities, no single discursive space can function as the public sphere. Moreover, “in stratified societies, arrangements that accommodate contestation among a plurality of competing publics better promote the ideal of participatory parity than does a single, comprehensive, overarching public.”¹¹⁹

One must be universally skeptical about claims to openness and equal accessibility. Given differentials among individuals and groups, a claim that an overarching public is equally accessible and open to all notwithstanding existing social categories carries an extremely high epistemic burden. Further, given existing social inequalities and how social inequalities interact with opportunity to the benefit of those with higher status as against those with lower status, the epistemic burden of the claim to open access is effectively insurmountable.

When a group of students came together to create the *Michigan Journal of Race and Law*, it was clear that the claim that the flagship law review was open to all who merited entry was demonstrably false. Access reflected existing social inequality and status. In particular, students of color were less likely to gain access, though in our view, they carried no less merit. One reason for *MJRL* was to lay claim to the point that talent was not truly open to merit. The flagship law review was not flagship but simply one among many public spheres, though it happened to be the earliest public sphere.

As importantly, *MJRL* was an exercise in self-government and self-transformation. *MJRL*, like other counterpublics, enabled its participants to form a “parallel discursive area[] where members of subordinated social groups invent and circulate counterdiscourses, which in turn permit them to formulate oppositional interpretations of their identities, interests, and needs.”¹²⁰ Counterpublics can offer different ideas about self-government and self-transformation. They can offer different meanings of leader-

119. Fraser, *supra* note 9, at 122.

120. *Id.* at 123.

ship and train a different group of people for governance in the larger society.¹²¹

Finally, counterpublics redefine what is public and what is private, who counts and who does not. For those of us who founded the *Journal*, issues of race were issues of public concern and not specialized or private interests. We thought that scholars who wrote about race were engaged in important scholarship and deserved to be hired by the best institutions, provided that they were not being disqualified simply because they wrote about race. The *Journal* was and perhaps still is a claim about who matters and what matters. The *Journal* made legible the ways in which claims to openness, universal access, reason, and merit replicate existing inequalities.

121. *Id.* at 124 (“The point is that, in stratified societies, subaltern counterpublics have a dual character. On the one hand, they function as spaces of withdrawal and regroupment; on the other hand, they also function as bases and training grounds for agitational activities directed toward wider publics.”).