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LAW REVIEWS AND LEGAL SCHOLARSHIP:
SOME COMMENTS

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Law reviews are the primary outlet for legal scholars, and the law review *system* is unique to legal education. People in other fields are astonished when they learn about it; they can hardly believe their ears. What, *students* decide which articles are worthy to be published? No peer review? And the students chop the work of their professors to bits? Amazing. And then they check every single footnote against the original source? Completely loco. Can this really be the way it is?

Secretly, I share their astonishment; and I think the system is every bit as crazy, in some ways, as they think it is. There is, in fact, quite a literature of invective—professors and others railing against the law reviews.¹ But it would be rude to make much of a point of all this. After all, the reason I am writing these lines is because the University of Denver asked me to contribute a few pages in honor of their law review and its anniversary. A guest is not supposed to question the very existence of his host. Besides, Denver is one of the few—the very few—schools that takes law-and-society seriously, and its ethos and point of view no doubt have an impact on its law review as well.

So, instead of carping and whining, I want to explore a few features of the law review system, and speculate about their consequences. After all, an institution so entrenched is bound to affect the very nature of legal scholarship—both in formal senses (for example, the *length* of articles); and in the substantive sense (*what* people write about). The medium may

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1. See, e.g., Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990); James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527 (1994); James Lindgren, *Reforming the American Law Review*, 47 STAN. L. REV. 1123 (1995); Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131 (1995). The literature goes back quite far—at least as far as the well-known article by Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1937).

not be the message, but it bends and refracts the kind of messages that people are likely to send.

If you wanted to defend the system, you might begin by pointing out that law reviews were not designed, originally, to serve as the primary vehicle for legal scholarship. They were supposed to be training for students. Students learn how to be careful and precise, how to edit, how to handle (legal) language, and how to construct and critique (legal) arguments. At the same time, the law review students form a kind of elite. In the old days, their elite status was even more pronounced than it is now. The best employers, hoping to skim off the cream, would hire only law review editors. Law review was therefore an adjunct to the grading system. For students, it could be an important rung on the ladder of success. The students, of course, were producing work that was (or was supposed to be) scholarly. Nonetheless, the *prime* goal of the review, originally, was not scholarship as such, but getting training and practice for students.

The law review, however, also became a prestige item for the school, and in the course of time every school decided they *had* to have one. The *Harvard Law Review* dates from the late 19th century. In 1900 only a handful of law schools had law reviews. Now they all do—well, almost all. Many schools have two. A few have as many as five or six. Harvard apparently has nine (or is it ten?). Berkeley has given birth to eight; Tulane has six reviews, Notre Dame five, Temple four.² In almost all schools, though, there is *the* law review; and the second or third journals are, well, second- or third-class citizens.

The net result, of course, is that there is a staggering number of law reviews and subsidiary law reviews. According to one study, there were 326 of them in 1985.³ There are now apparently over 400. This is another unique aspect of the system: no other field has so many journals. There are a lot more academic psychologists and economists than there are law professors; but many fewer journals. Economists talk about the “big five;” there are of course many journals for economists, not just five; but most of the others fall far short by way of prestige. In law, there are dozens and dozens of respectable, even prestigious law reviews. Not only are there many, but the law reviews are getting fatter and fatter all the time. Some of them publish eight issues or more a year. The *Denver University Law Review* runs over 1,000 pages a year. That is nothing special. Some journals, to be sure, publish fewer pages, but lots of them publish more. The *Harvard Law Review* (Vol. 1 had a mere 408 pages)

2. Bernard J. Hibbits, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 638-39.

3. Michael J. Saks et al., *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 SUFFOLK U. L. REV. 353, 363 (1996).

runs to more than 2,000 pages. It is not alone. Vol. 95 of the *Michigan Law Review*, for 1997, ran to 2,658 pages; and Vol. 70 of the *Tulane Law Review* attained 2,749 pages. Can anybody *read* that much?

With all those pages at their disposal—one estimate is that there are over 150,000 printed pages available annually, 150,000 hungry mouths to feed⁴—the reviews can afford to print really long articles. No economist or psychologist could hope to place an article of 100 pages, or even 70 pages, in any leading journal. But very long articles are common in law reviews—they are even completely normal. In 1985, the mean length of law review articles, in a sample of reviews, was 41.83 pages.⁵ Fifty pages is therefore nothing special. Seventy makes hardly a ripple. Ninety and 100 page articles are easy to find. In Vol. 82 of the *Virginia Law Review*, I came across an article that was 229 pages long, with 769 footnotes. Is this some sort of record? Not at all. One notable article, published in 1987, was 491 pages long, swallowed up two whole issues of a review, and contained 4,824 footnotes.⁶

Law review editors are supposed to enforce tight, concise writing. But in fact, legal scholarship suffers enormously from bloat. Very few articles are tightly written. They might have tight *sentences*, but the piece itself goes on and on. And on. Many articles have a kind of hopeless obesity. They display absolutely everything the author has read on the subject, or related subjects, or subjects related to related subjects. The footnotes often almost crowd out the text. If there were only a handful of journals, the typical article would have to be lean and spare. The authors would be forced to get to the point immediately. As it is, if somebody writes (say) an article on some small point of divorce or tax law or the constitution, the author is likely to begin with 30 pages or more of introductory material. She will put the subject in context, discuss it historically, mention (and perhaps critique) everything else written about it; most of this stuff is wholly unnecessary to the modest point that comes up after the reader (if there is one) wades through oceans of print. I say 30 pages; but I have seen articles with way, way more—huge, inflated articles whose “introductions” were as long as the rest of the article; and completely unnecessary.⁷

The law reviews have such a voracious appetite for material, that *anything* can get published; and by that I mean *anything*. Published, that is, *somewhere*. Yet, somewhat paradoxically, the competition to get into the “better” law reviews is fierce and unremitting. A high-prestige law

4. Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 38 (1996).

5. Saks et al., *supra* note 3, at 366.

6. The article, mentioned in Lasson, *supra* note 1, at 937, is Arnold S. Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y.L. SCH. L. REV. 207 (1987).

7. For a defense of this practice, see Wendy J. Gordon, *Counter-Manifesto: Student-Edited Reviews and the Intellectual Properties of Scholarship*, 61 U. CHI. L. REV. 541, 547-48 (1994).

review will receive hundreds of manuscripts a year; and accept maybe 1% of these. According to one estimate, the top journals get as many as 1,200 annual submissions.⁸ This tremendous load is exaggerated by the custom of multiple submissions. Our author will print out fifty copies of her masterpiece, and send it off to fifty law reviews. If they all reject (or, more likely, ignore) her, she will crank up the Xerox machine and send it out to fifty more. You can't do that in journals that operate on the peer review system. But on law reviews, manuscripts are read not by faculty but by students, and nobody cares about wasting *their* time.

Thus the system of law reviews affects what appears in them in some important structural ways. It encourages long, wordy articles crammed with footnotes. (This custom is reinforced by, or reinforces, the notion that young professors must write at least one long, complex, densely annotated "tenure piece," and place it in a leading review.) The footnotes, of course, get meticulously checked by the student editors and editors-to-be. This relieves the author of some of the responsibility for accuracy. Why bother, when the law review is going to check the footnotes, anyway? The law reviews also enforced a certain style of writing; and they forced footnotes and sources into a rigid "blue book" straitjacket. The official law review style was dull and flat. All the blood was drained out of it. Law review editors hated short, simple sentences. They loved to string clauses together with words like "whereas" or "albeit." They loved to say things like "assuming, arguendo, that . . ." They committed many crimes against our mother tongue. To be fair, the straitjacket has gotten a shade looser lately; first of all, the law reviews have opened their doors to "narrative," and, whatever the failings of this style, it is not usually boring. I also have the impression that at least *some* authors of standard articles have learned to write decent English. But on the whole, law review style-blight is still definitely there.

What about content? The influence of the law review system on the *nature* of legal scholarship is much harder to show than the influence on matters of structure, style, and form. But so pervasive a system is bound to have some sort of impact, if we could only figure out what it is. One thing is clear: the law reviews definitely have *power*—at least within the academy.⁹ If the editors of the *Harvard Law Review* accept an article by young Smithers, a brand-new assistant professor at the University of North Dakota Law School, they have definitely given his career a jump-start. Poor Smithers—if he only knew what sorts of thing those editors really dug!

8. Hibbitts, *supra* note 2, at 643.

9. Do they influence the law itself? The work of judges? What legislators think? This is a different and very difficult question. There may be some slight impact, but it is certainly hard to show.

The editors would no doubt say, if asked, that what they like is *quality*; but that is only partly true. They like quality, but they also like articles that are relevant, trendy, with-it (whether they realize this fact or not). Who sets the trends? It is, probably, a kind of reciprocal affair: the law reviews print what appeals to the student editors, but what appeals to the student editors is, in part at least, the result of what their professors tell them is "in," or what excites the professors and gets radiated through the classroom experience.

In any event, no matter how much some professors carp at them, the reviews are here to stay. They cannot be replaced by peer-review journals: out of the question. Where would we find so many peers? There are, in fact, a fair number of law-related journals that *are* peer-review journals—the *Law & Society Review*, for example, or the *Journal of Law & Economics*. There are likely to be more in the future. But I do not expect these journals to drive the law reviews out of business. Peer review, anyway, is far from perfect. Professors are not angels, and they are not unbiased. Most of them are former law review editors, after all. They can be just as trendy as their students.¹⁰

Ultimately, then, the problem is not really the law reviews: the problem is legal scholarship itself—the subject matter that fills the law reviews.¹¹ I now turn briefly to this subject.

At the beginning of the century, legal scholarship fell for the most part into three categories. There was doctrinal analysis—attempts to line up cases, to put them into some kind of order, to explain how they related to each other. There were critiques: the raw material was the same sort of doctrinal analysis, but the writer criticized some cases, and praised certain other cases. On what basis did he do this? Legal logic, of the Langdell sort; or some sort of vague appeal to social norms—statements that such and such was the "better" rule, or the "more just" rule. The third category consisted of casebooks and other teaching materials. These do not particularly relate to the law review, so I will pass this category by.

The aims of legal scholarship have changed over the years. Langdell thought law was a "science." The job of the law teacher was to teach students the principles of that science.¹² Langdell himself put together a casebook, but wrote almost nothing else. His followers were also casebook editors; and they critiqued cases from the standpoint of what they considered logic and legal principle. There was also a generation of great treatise-writers—men like Williston, Corbin, and Wigmore. They

10. Hibbitts, *supra* note 2, at 653.

11. Much of the following is impressionistic. I am not aware of any actual *study* of the content of law reviews in the 1990s. For an earlier study, see Lowell J. Noteboom & Timothy B. Walker, Survey, *The Law Review—Is It Meeting the Needs of the Legal Community?*, 44 DENV. L.J. 426 (1967).

12. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

amassed enormous textbooks—works in many volumes, which were supposed to be definitive and exhaustive statements of the law on some subject. There were great differences between, say, Williston (very Langdellian), and Corbin (more of a realist); but they were writing in the same genre nonetheless. These men became leading “authorities” in their fields, and were at the pinnacle of the teaching profession. They were concerned exclusively with appellate case law, with putting it into some kind of order, and separating wheat from chaff.

Legal scholarship today is different, much more complex, and in many ways totally anarchic. The older forms of scholarship no longer command the same respect (the casebook might be a partial exception). Doctrinal analysis is still “the staple commodity, even in the reviews edited at fancy schools,”¹³ but it definitely has rivals which vie for attention at these “fancy schools” and at others as well. Faculty members have gone off in a dozen directions at once—law and economics, law and society, critical approaches, feminist approaches, approaches out of history, philosophy, psychology, even literary studies. It would be rash to say that there is no hierarchy any longer. Constitutional theory still seems to be king of the jungle. But the lines are most definitely blurred.

Much legal writing, however, is still quite normative.¹⁴ It still asks the question, what is the right rule, the good rule, or the right or good institution? And the most popular currents in legal scholarship all try to answer this question, in one way or another. The different strands of scholarship simply use different techniques and criteria. Many legal economists, for example, have done nothing more than to take the old questions, only giving them new answers. What is the more *efficient* rule or institution? They apply their techniques to doctrine in torts, property law, contracts, bankruptcy, and so on. That the critical literature is, well, critical, goes without saying. It too is concerned with what is right and what is wrong. The critical writers do not always know what the right arrangement is, but they are certainly keen on spotting and unmasking the wrong ones. The leading specialists in constitutional law—the theorists—also write in a heavily normative way. They try to construct a

13. Robert W. Gordon, *Lawyers, Scholars, and the 'Middle Ground,'* 91 MICH. L. REV. 2075, 2100 (1993). Gordon's article is part of a symposium of comments on Harry T. Edward, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992), an article which, among other things, attacked the law schools (and law reviews) for turning away from scholarship that was useful to the profession. Among the many interesting comments, see Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993).

14. Edward L. Rubin, indeed, claims that the entire point of standard legal scholarship is to explore and contrast the pragmatic implications of conflicting normative positions The most promising discourse for standard legal scholarship . . . is not the vaguely articulated neo-formalism of the courts, but prescriptive arguments based on consciously acknowledged normative positions.

Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1893 (1988).

system of postulates or guidelines which would let us know which cases the Supreme Court decided correctly; and which it did not.

I do not want to exaggerate. Nor do I want to say that these currents of scholarship have no value. They most certainly do—some more than others, of course. And the recent “schools” of thought cannot and should not be treated as if they were monoliths. Terms like “feminist jurisprudence” are pretty big tents; they cover a wide area, and all sorts of different tendencies and points of view huddle under them.

Still, those of us (like myself) who consider ourselves members of the law and society movement are apt to deplore the strong and almost exclusively normative flavor of legal scholarship. Perhaps it would be better to say we are disappointed with how little influence we have in the legal academy; how sad we are that the parade seems to be passing us by.¹⁵

Normativity in legal scholarship means that most of the social sciences get short-changed. The exception is economics; but even here, the “economics” of law and economics tends *not* to be, with honorable exceptions, data-driven, empirical economics; it is pretty theoretical, and pretty normative, as I have already mentioned. Legal history is in somewhat better shape. It has a growing literature; and it is genuinely popular with students, at many law schools. And many, many of these schools in fact offer course-work in legal history. Very few schools, on the other hand, offer courses in law and society.

My impression is that, nonetheless, far too many law professors really have no idea what legal history is all about; and the same goes for work in the law and society tradition. This kind of scholarship is quite foreign to them. My evidence is mostly anecdotal, I have to admit. But it is based on my own experience; and the experience of colleagues. I hear, over and over again, colleagues dismissing work in history and empirical social science as “merely descriptive.” They say that the work lacks “theory.” I have heard this, for example, in conversations with professors who ask me my opinion of some young law teacher, struggling to get tenure. Yes, they say, this is an extensive piece of work; but isn’t it “merely descriptive?” I never hear “descriptive” without the word “merely” attached. And “descriptive” is obviously something bad in itself. Other young scholars have told me that they are expected to forget the “law and” stuff; if they want tenure, they have to write a major “legal” piece, and get placed in one of the better law reviews. I know of one case where a promising junior scholar put aside his massive, significant historical study for years, while he ground out “law review articles” to qualify for tenure. Maybe he was overreacting to a chance comment here and there. Maybe he misread the situation. But even this is significant. I

15. Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986).

am sure these young scholars cannot be *totally* wrong, and *totally* paranoid.

In legal scholarship, "theory" is king. But people who talk about legal "theory" have a strange idea of what "theory" means. In most fields, a theory has to be testable; it is a hypothesis, a prediction, and therefore subject to proof. When legal scholars use the word "theory," they seem to mean (most of the time) something they consider deep, original, and completely untestable. History almost by definition lacks theory. Empirical studies, too, are not theoretical—they are, of course, "merely descriptive."

So the caravan moves on without us. I don't want to be too pessimistic, however. Somehow, and in the face of obstacles, the law and society movement does lurch forward. It does better outside the law schools than inside. Legal history has done well *inside* law schools. Both of these fields do not have to rely on law reviews; they have their own journals—peer review journals at that. The law reviews, however, are dominated by the powerful, normative schools of thought that struggle with each other, debate each other, and fill up thousands of pages every year. For most legal scholars, the law reviews *are* legal scholarship; and nothing else (except case-books) is worth considering as such.¹⁶

Will the situation change? The law review system is here to stay, as far as I can tell. What the reviews print is another story. They will continue to mirror what happens in the law schools. It is very unlikely that the law school world will kick its habit of normativity; almost impossible for what I consider *real* scholarship to become the dominant form in law schools. Perhaps there is no real alternative. Still, a few more recruits would be welcome in the club.

In general, law schools all sing the same song, and pursue the same goals. There are some honorable exceptions. Wisconsin, Denver, and Berkeley are schools that take seriously the job of relating law to the society in which it is imbedded. Scholarship that looks with a keen, rigorous eye at legal process; scholarship that is not afraid of exploring reality; scholarship that straddles disciplines, and draws inspiration from the social sciences—this kind of scholarship is nurtured at these few schools, and sporadically at others. The work that scholars do at these schools spills over into the law reviews, of course. This work is like rain in the desert. Like rain in the desert, however, it is all too rare.

16. Hence when the *Chicago-Kent Law Review* did a survey of "faculty scholarship," they limited the survey to articles published in the top twenty journals. They did not count the peer review journals; and they did not count books, book chapters, and so on. Janet M. Gumm, *Chicago-Kent Law Review Faculty Scholarship Survey*, 66 CHI.-KENT L. REV. 509 (1990). The survey covered the period 1983-1988. Almost everything I wrote in that period (for example), would not have been counted.