

# THE LAW REVIEWS: DO THEIR PATHS OF GLORY LEAD BUT TO THE GRAVE?\*

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## I. INTRODUCTION

Critics of the law review product are legion. The classic statement is from 1936 by Fred Rodell: "There are two things wrong with almost all legal writing. One is its style. The other is its content."<sup>1</sup> The standard law review criticisms have been of excessive article length, an overabundance of footnotes, a lack of publication speed, an overly theoretical emphasis, over-editing by students, and a lack of student knowledge sufficient to select and edit articles. In some of these perceived faults authors are complicit, being empowered in their search for prestige by an abundance of law journals<sup>2</sup> competitively hungry for something to publish. But while law reviews have frequently

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\* Cf. Thomas Gray, *Elegy Written in a Country Churchyard*, in *Norton Anthology of Poetry* 508 (Alexander W. Allison et al. eds., rev. ed., W.W. Norton & Co., Inc. 1975). The relevant stanza of Gray's poem is

The boast of heraldry, the pomp of power,  
And all that beauty, all that wealth e'er gave,  
Awaits alike the inevitable hour.  
The paths of glory lead but to the grave.

*Id.*

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1. Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38, 38 (1936).

2. As used here "law journals" are academic law journals (including law reviews) and "law reviews" are the sub-set of law journals that are student edited.

been berated,<sup>3</sup> little has changed, which leads one to wonder if the issues matter all that much, if vested interests are overwhelmingly strong, and if some other system is capable of replacing the one we know as we move further into an online information world.

At the time of Rodell's criticism, there were fifty-two general law school reviews in the United States and about forty specialized law journals.<sup>4</sup> The numbers of law journals have robustly grown to the present day. There are now about 200 general print law reviews (together with a dozen online adjunct publications to some of the higher-ranked law reviews) along with over 700 specialized law journals, which is an average net increase of about ten new law journals a year. Additionally there are over 500 English language law journals published outside the United States, many with international coverage. And the growth of journals is not slowing. During the years 2005 to 2007 an average of about twenty U.S. and twenty non-U.S. law journals started publication each year.<sup>5</sup> Today there is a very wide avenue for article publication, with plenty of space for the classics, the trendsetters, and the workhorses to exist side by side. There is also plenty of space for the less desirable vehicles that really needed an overhaul before getting onto the publication highway.

Instead of this multiplicity of publications, imagine one database where all legal articles are housed, and where prestige arises from just the author, the writing, and its subsequent treatment, and not from any journal packaging. To date, the pre-print database SSRN<sup>6</sup> comes closest to this model. If there were excellent searching, sorting, and ranking tools, with the ability

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3. See e.g. Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. Leg. Educ. 387, 418-24 (1989) (listing seventeen perceived weaknesses).

4. This count, which excludes bar journals, is taken from the "Periodicals Indexed" list in *Index to Legal Periodicals, Oct. 1934-July 1937* (H.W. Wilson Co. 1994). ILP has never been a totally comprehensive index, so the true number is likely a little higher. (The reader should be aware that, except as otherwise indicated in the text and the notes, this article addresses only law reviews and journals published in the United States.)

5. See *W&L Ranking*, supra n. \*\* (listing academic law journals and, for those that began publishing in the past eight years, showing the years in which they began publishing).

6. See *Social Science Research Network*, <http://www.ssrn.com> (accessed May 6, 2009; copy of main page on file with Journal of Appellate Practice and Process).

for users to attach comments and evaluation, this type of massive collection has the potential to supersede existing law journals. But the Boolean and proximity searching that exists in LEXIS and Westlaw would not itself be sufficient to enable easy use of such a collection; multiple sorting and ranking options would be needed to substitute for the quality-proxy of journal prestige. With the advantages of a new paradigm for disseminating legal scholarship in mind, this essay examines deficiencies and distinctive features of today's law reviews, suggesting some improvements while also proposing the practicality of a database model to replace law journals entirely.

## II. PRESTIGE AND RANKING

Everyone will agree that the general law reviews at Harvard, Yale, and Columbia are the elite law reviews.<sup>7</sup> Established reputation becomes reinforced by the motivation of authors to publish in prestigious locations, and by readers who suppose the articles best read and cited to be found in those journals. A ranking that allows us to judge an article's quality by the prestige of its packaging is useful in making quick judgments about an author's work. But plainly not everything in Harvard Law Review is great, and much in lesser-ranked journals will be excellent and more appropriate to one's purpose. Assumptions about an article's quality based on its journal placement are superficial yet very practical. If you want to cite a work for background analysis and there are alternative sources available, why cite Houston when you can have Yale, particularly when you haven't very carefully read either? Yale may reflect more stature on an argument than does a source of substantially lesser status.<sup>8</sup> It seems reasonable to assume that

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7. While agreement might splinter on those deserving the next few dozen slots, it will be likely to fail on ranking the many that follow the top twenty-five or thirty. Still, there is probably broad agreement that there are more prestigious and less prestigious law reviews at every level in whatever scale is used for any ranking.

8. Recent research in neuroscience bears this out. See e.g. Frank Greve, *The More Wine Costs, the Better We're Likely to Think of Its Taste*, 33 Newark (N.J.) Star-Ledger (Feb. 24, 2008) (reporting on results of a Cal Tech study showing that "[i]n the \$5 to \$45 comparison, which used a \$5 wine, the tasters liked the wine nearly twice as much when they thought it cost \$45. In the \$10 to \$90 comparison, which used a \$90 wine, they liked the wine half as much when they thought it cost \$10"). It is not, then, irrational for law

much citation to academic legal literature is of this self-reinforcing form: prestige begetting citations, which beget more prestige.

Numerous rankings of law journals have been published over the years, most based on citation counts, though other bases exist, such as author prominence (1000 points for authors who are Presidents, 850 points for Senators, and the like),<sup>9</sup> and expert peer opinion.<sup>10</sup> All have deficiencies in methodology. For author prominence, it is the arbitrary nature of the point scheme; for peer evaluation, it is the inability of experts differentiating more than a small number of journals; and for citation count, it is that authors may use articles without citing to them.

No empirical evidence shows which ranking system authors use when deciding where to publish legal articles. The chief prestige indicator for law schools is the *U.S. News & World Report* annual ranking of law schools,<sup>11</sup> and many academics can be presumed to have internalized some part of that ranking. Thus, many authors are likely to use the halo effect of a law school's ranking to similarly rank its law review. This is unfair to law reviews, as it treats their energetic struggle to

review authors and editors to be responsive to non-intrinsic attributes, but we as readers must remember that editors have probably been socialized to prefer the work of prestigious authors, even in the cases in which their articles are not extraordinary. On the other hand, some law review editors apparently recognize this phenomenon and attempt to correct for it. See e.g. Harvard Law Review, *Guidelines for Submitting Manuscripts*, <http://www.harvardlawreview.org/manuscript> [hereinafter *Harvard Guidelines*] (instructing the submitting author, in order to “facilitate our anonymous review process,” to “confine [her] name, affiliation, biographical information, and acknowledgments to a separate cover page”); Prawfsblog, *Update: YLJ Submission Policy Revealed* (12:22 p.m., May 20, 2008), <http://prawfsblawg.blogspot.com/2008/05/developments-in.html> [hereinafter *Update: Yale Submissions*] (noting that Yale Law Journal editorial board has “a very strong commitment to the anonymous review process”) (accessed May 14, 2009 copy on file with Journal of Appellate Practice and Process).

9. Robert M. Jarvis & Phyllis Coleman, *Ranking Law Reviews by Author Prominence—Ten Years Later*, 99 *Law Libr. J.* 573 (2007) (also available at [http://www.aallnet.org/products/pub\\_llj\\_v99n03/2007-33.pdf](http://www.aallnet.org/products/pub_llj_v99n03/2007-33.pdf)).

10. See e.g. Gregory Scott Crespi, *Ranking International and Comparative Law Journals: A Survey of Expert Opinion*, 31 *Intl. Law.* 869 (1997); Gregory Scott Crespi, *Ranking the Environmental Law, Natural Resources Law, and Land Use Planning Journals: A Survey of Expert Opinion*, 23 *Wm. & Mary Envtl. L. & Policy Rev.* 273 (1998).

11. U.S. News & World Report, *Best Law Schools*, <http://grad-schools.usnews.rankingsandreviews.com/grad/law> [hereinafter *U.S. News Ranking*] (main page; click “The Rankings” to reach list) (accessed May 12, 2009; copy on file with Journal of Appellate Practice and Process).

compete as an effort only to avoid messing up too badly. If authors fail to look at journal performance, then nothing that editors do affects anyone's perception of their journal.

The other major ranking scheme available to authors is the site at Washington and Lee,<sup>12</sup> which is, for law-journal-ranking purposes, more objective than the *U.S. News* list, being more closely tied to actual performance by the law journals.<sup>13</sup> W&L ranks around 800 U.S. law journals, so it has something to say about the numerous journals inhabiting the slopes well below the fashionable Nob Hill slots inhabited by the likes of Harvard, Yale, and Columbia. But even down there, where the gravitational force of the *U.S. News* rankings ought to be faintly felt, authors will struggle between the *Lewis & Clark Law Review*<sup>14</sup> and the *Hofstra Law Review*,<sup>15</sup> or between the *Boston University International Law Journal*<sup>16</sup> and the *Georgetown Journal of International Law*.<sup>17</sup> In comparing the two specialized journals many authors would surely be attracted to Georgetown's higher *U.S. News* prestige, and would ignore *Boston University International Law Journal's* out-performance of Georgetown based on citation counts. Still, for prestige to function strongly, it does not have to be tied to anything sensible; in large part prestige is self-reinforcing.

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12. See *W&L Ranking*, *supra* n. \*\*. The basic rankings are (a) total journal cites to each journal, (b) an impact-factor ranking (broadly meaning journal cites divided by the number of articles published in the cited journal), (c) a combined melding of total cites and impact-factor to create a default ranking for each journal, and (d) total cites from federal and state cases to each journal. Citation counts come from journal articles in Westlaw's Journals and Law Reviews (JLR) database and cases in Westlaw's Federal and State Cases (ALLCASES) database. More information is available on the *W&L Ranking* methodology page. Washington & Lee University School of Law, *Law Journals: Submissions & Ranking—Explanation*, <http://lawlib.wlu.edu/LJ/method.asp> (accessed May 12, 2009; copy on file with Journal of Appellate Practice and Process). The author of course acknowledges that even this method can be objected to by those who dislike citation rankings.

13. The *U.S. News Ranking* is based, to a significant degree, on a dubious, and dubiously small, survey of lawyers, judges, and academics.

14. 96 at W&L, 73 at USN. See *W&L Ranking*, *supra* n. \*\*; *U.S. News Ranking*, *supra* n. 9.

15. 59 at W&L, 99 at USN. See *W&L Ranking*, *supra* n. \*\*; *U.S. News Ranking*, *supra* n. 9.

16. 108 at W&L, 21 at USN. See *W&L Ranking*, *supra* n. \*\*; *U.S. News Ranking*, *supra* n. 9.

17. 194 at W&L, 14 at USN. See *W&L Ranking*, *supra* n. \*\*; *U.S. News Ranking*, *supra* n. 9.

Using a law journal's prestige as a short cut to judging its content is being officially systematized in Australia. The Australian Research Council (which is the primary source of advice to the Australian government on academic research grants) is in the process of ranking research journals. Part of the exercise is to assess the research quality of institutions, such as law schools, by weighting the publications of their faculty by the journal rank category in which their articles are published. The law journal portion of the ranking<sup>18</sup> was, at the draft stage, substantially based on the W&L rankings,<sup>19</sup> which prompted David Hamer, a professor at the University of Queensland School of Law, to complain about the U.S.-centric bias of the ranking:

ARC's scheme places journals into four rankings: A\* (top 5 per cent), A (next 15 per cent), B (next 30 per cent) and C (bottom 50 per cent). I have only managed to find two Australian law journals ranked above C—Sydney Law Journal and Melbourne University Law Review, both ranked B.<sup>20</sup>

Professor Hamer's complaint—that under such a ranking scheme Australian authors could be motivated to publish in U.S. law reviews and so to shift the focus of their research to topics of more interest to U.S. readers—is justified.<sup>21</sup> No doubt the final rankings from the Australian Research Council will elevate many Australian journals to at least A and B status for “[i]t

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18. Deakin University, *Journals on Draft List in a Field of Research, 1801: Law*, <http://lamp.infosys.deakin.edu.au/era/?page=fordet&selfor=1801> (accessed May 12, 2009; copy on file with Journal of Appellate Practice and Process).

19. See Margaret Thornton, *Ire of the Beholder*, *Australian* (Sept. 24, 2008) (noting that “[t]he discipline of law initially declined to co-operate with the proposed system because of its glaring inadequacies,” and that “[t]he Australian Research Council then imposed a journal rankings schema developed by the law school at Washington and Lee University in the US”).

20. David Hamer, *ARC Rankings Poor on Law*, *Australian* (June 26, 2008) (available at <http://www.theaustralian.news.com.au/story/0,25197,23921819-25192,00.html>) (accessed May 14, 2009; copy on file with Journal of Appellate Practice and Process).

21. *Id.* (noting that “Australian legal scholars, not having any recognised Australian outlets, will aim to publish in US law journals, and in order to do so, will write about matters of interest to a US audience”).

would be wrong to describe the law as parochial, but it is jurisdictionally specific.”<sup>22</sup>

It is easy to denigrate as superficial a mass-ranking system like Australia’s attempt to quantify research excellence, but it is not feasible to obtain enough experts to read and score articles published in every publication. Similarly, any reader can only digest a minute fraction of law journal output and must rely on some external source for perceptions of comparative journal quality and prestige. Nevertheless, rankings will inevitably either suffer from infirmities in methodology or be simplistic, and the very existence of a ranking scheme has its negative side.

Academic authors reasonably suspect that the journal placement of their work influences hiring and promotion decisions, and thus they submit their articles to the highest ranked journals that might possibly publish their work. Rankings entrench journal status, making it difficult for new or lower-ranked journals to attract outstanding work, and they encourage contributions to elite journals years after any slide in their quality might have occurred. It can be argued on the other hand that competition by journals for the best articles, along with the value placed by authors on publishing in the most prestigious journals, encourages improvement in the quality of articles. Put a little more work into the article, add a bit more research, a few more footnotes and you can move your article up some placement notches. But if the articles published by elite journals are too [whatever you want to say here: theoretical? lengthy? footnoted?] then this influence moves down the food chain as authors form their writing for prestigious journals, receive offers from the less prestigious, and hope that those offers make them more attractive to the gatekeepers at the elites. Thus blandness and uniformity spread from top to bottom.

### III. PEER REVIEW

Articles submitted to law reviews are very rarely peer

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22. Thornton, *supra* n. 19. Professor Thornton has a point, of course, for the W&L rankings primarily look at citations from U.S. articles and cases and thus find few articles citing to Australian journals. In fact, because case law is particularly jurisdictional, cites to articles in law journals published outside the U.S. are even more rare in the opinions of judges in this country.

reviewed, in the sense of being routinely sent out for evaluation by external experts who are ignorant as to the identity of the articles' authors. As an extreme condemnation of a system lacking peer review, Michael Madison says that

outside the law schools, pretty much everyone in the academy knows that what law professors do can't really be called "scholarship" because there are no quality standards, and (aside from a few quirky journals) there is no peer review, and that means that most everything that shows up in legal journals is badly-researched, badly-written, and badly-argued.<sup>23</sup>

He admits that he is setting up a facetious argument here,<sup>24</sup> though it is one with more than a touch of truth. There is certainly a modicum of law faculty interest in establishing peer-edited and peer-reviewed law journals, though the interest is more in the category of "it would be lovely if someone would do that." It is hardly a trend, but there are occasional launches of faculty-edited peer-reviewed law journals such as the *Journal of Legal Analysis*, which Harvard University Press and the John M. Olin Center for Law, Politics & Business at Harvard Law School launched earlier this year as a generalist journal with a social science and interdisciplinary emphasis.<sup>25</sup>

The South Carolina Law Review conducted a peer review experiment in 2008-09 with one issue of its volume 60.<sup>26</sup> The experiment was apparently successful, because the SCLR has now launched the "Peer Reviewed Scholarship Marketplace," which is designed to provide law reviews with continued access

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23. Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige and Open Access*, 10 Lewis & Clark L. Rev. 901, 909 (2006) (emphasis omitted).

24. *Id.* (following the previously quoted material with the statement that "those objections are mistaken").

25. See JLA—The Journal of Legal Analysis, <http://www.hup.harvard.edu/journals/jla/index.html> (outlining editorial policies and practices, and listing initial articles) (accessed May 13, 2009; copy on file with Journal of Appellate Practice and Process). See also *Harvard Guidelines*, *supra* n. 8 (informing potential contributors that "at least two editors review every submission, and many pieces go through substantially more stages of review, including an Articles Committee vote, a preemption check, faculty peer review, and a vote by the Body of the Review") (emphasis in original).

26. See South Carolina Law Review, *Peer Reviewed Scholarship Marketplace*, <http://www.sclawreview.org/peerreview/index.php> (accessed May 13, 2009; copy on file with Journal of Appellate Practice and Process).

to peer review.<sup>27</sup> As formal peer review reduces the intellectual role of student editors, this is a surprising development, but very welcome, as any efforts to try new ideas and create new niches can potentially diversify the mainline law reviews.

Peer review can certainly work for a limited number of specialized law reviews, but it is hard to see widespread adoption as likely, especially among the general law reviews. There are strongly entrenched customs that militate against it. One is that only a handful of the law reviews require exclusive submission.<sup>28</sup> For peer reviewed journals, it is unworkable to send articles that are simultaneously being considered by other law reviews out for review. The extra work in refereeing would allow competing non-peer-reviewed law reviews to commit earlier to the best works, and peer-reviewed journals rightly expect an author's publishing commitment during the peer-review period. Even without a general move to peer review, however, it would be feasible for law reviews to allow authors who request peer review, and submit exclusively, to have their submissions peer reviewed and the published articles marked accordingly. In that limited way peer review might be workable, as it would stay marginal enough to overcome the major problem with peer review in law reviews, which is finding enough willing reviewers. Law school faculty, unless they publish with journals from other academic fields, are not accustomed to being reviewers. When reviewing isn't expected, it's hard to see the motivation for law faculty to participate beyond a minimal level.

While law reviews should not consider formal peer reviewing as more than a niche activity, a less formal advisory board is an attractive scheme that should be widely adopted. The *Wake Forest Intellectual Property Law Journal* is an example of a student-edited law review with an active advisory board.<sup>29</sup> The

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27. *Id.* (explaining that “[m]ember journals will enjoy peer reviewed articles to choose from as well as reviews to guide them in their article selection at no cost or obligation to publish them”).

28. See e.g. *Harvard Guidelines*, *supra* n. 8 (indicating a preference for exclusivity by stating that “[w]e strongly recommend that you submit your manuscript to us exclusively,” but not requiring it).

29. See *Wake Forest University, Intellectual Property Law Journal, Board of Advisors*, <http://ipjournal.law.wfu.edu/advisors> (listing names and employers of advisors and providing links to expanded professional biographies).

journal has about fifteen advisors, most of whom are practicing attorneys. Submissions are first read by the Manuscripts Editor, and usually also by the Executive Articles Editor, and when those editors tentatively decide that an article should be published, they send it to an advisor for review before extending an offer to the author.<sup>30</sup> Such an informal review process usefully militates against the argument that student editors lack enough substantive knowledge to assess an article's quality. The availability of expertise is also, of course, a strong argument in favor of the specialized law reviews. They attract students with an interest in the journal's subject matter and would have little trouble attracting pools of specialist practitioners and academics happy to promote the subject and to list that advisory role on their own web biography pages. The general law reviews, precisely because they are general, have difficulty in accumulating wide student expertise, and their advisory boards have to be sizeable to keep individual workloads down and to have knowledgeable advisors for each submission.<sup>31</sup>

For generations law faculty have complained about student law reviews and have not founded peer-reviewed journals in substitution. This suggests that, on the whole, faculty like the present situation better than the alternative. So would law reviews be better for being peer reviewed? There is no proof, just supposition that articles coming out of a peer-review process will be better than if they had been student edited, and of course there are disadvantages to peer review, such as delay,

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30. E-mail from Kristen Becker, Editor-in-Chief, Wake Forest Intell. Prop. L.J., to John Doyle, Libr., Wash. & Lee Sch. of L., *Wake Forest Intellectual Property Law Journal* (Sept. 20, 2008, 3:27:22 p.m. EST) (on file with author).

31. Alexander McCall Smith's charming passage about a scholarly journal paints a scene that encapsulates the advantage of the specialized journal in its capacity to be as eagerly anticipated as a good friend:

Von Igelfeld had a personal subscription and enjoyed nothing more than taking his copy home on the day of its arrival and settling down to read it in his study over a glass of Madeira wine. It was, in many respects, the highlight of his existence: to savour the unadulterated pleasure of at least four articles on Romance philology, together with at least ten pages of book reviews, and several pages of *Notes and Queries*. Usually he finished his first reading of the journal that evening, and would return to it over the following days, after he had mulled over the contents.

Alexander McCall Smith, *The Finer Points of Sausage Dogs* 34 (Anchor Books 2004). By comparison, the general law review is a conglomerate breeding little passion.

cost, and possible suppression of non-centrist views. And it may be that formal peer review will come to seem antique in an Internet age.

This is a little forward looking, but let's assume the existence of a systematic online environment that contains a large organized collection of citable articles. Authors contribute pre-prints, modifications occur until version 1.0, and authors continue with numbered and dated revisions until they wish to stop. Reader commentary, which can cycle into the authorial changes, is attached to the online copy. Other authors cite to whatever version they read, knowing that the cited version might well be superseded by a later version—but then everyone involved knows that it is a fluid environment. The online commentary, plus the potential for author modification, obviates the need for any formal peer review process.

If there is any role for law reviews in such a scenario, it would only be in an archival role with possibly a peripheral prestige-enhancing function. Even the archival function of law journals will become a retrograde influence because journals are motivated to fix the final version of a work at version 1.0, whereas authors may wish to continue making changes based on later reflection or criticism. In the current system law journals should ideally maintain versioned copies online permitting author modification, but it's easy to see that journal editors would be unhappy to have their printed version 1.0 competing with a version 1.4 online.

#### IV. ARTICLE LENGTH AND FOOTNOTING

Footnoting in U.S. law journals is more verbose than the equivalent in non-U.S. law journals. It is not that articles published here are grossly disproportionate in footnoting, but that because they do have more textual words, they will have more footnotes. As a general order of magnitude, lead articles (distinguished from essays, comments, and the like) in elite U.S. law reviews weigh in around 30,000 words with over 300 footnotes, and lead articles in U.K. equivalent journals<sup>32</sup> are

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32. Among these would be the Cambridge Law Journal, Law Quarterly Review, and Modern Law Review. See Hamer, *supra* n. 20.

around 14,000 words with fewer than 150 footnotes.<sup>33</sup> Authors writing articles for publication in U.S. reviews seem to have a moderate tendency to add useless footnotes because authors think editors will demand them,<sup>34</sup> to create too many “my research assistant should have her name added to this” footnotes, or to over-burden footnotes saving the main text from criticism on controversial points. This is all part of the more generic issue of authors emulating the traditional feel of an elite law review article throughout the law review hierarchy. To be perceived as scholarly is to pile on the well-researched minutiae, and to lavish on readers a discursion of prior scholarship despite ample coverage in other articles. Still, footnotes are useful in pulling together pre-packaged research, and succinct footnotes should not be discouraged. Far more significant is the overall wordiness of articles. In a related context, Francis Lieber derided those who believed that “explanation and specification, piled upon explanation, would produce greater and greater clearness, while in fact they produced greater and greater obscurity.”<sup>35</sup> Less is more<sup>36</sup> if shorter articles are more pointed and encourage readership by their absence of verbosity.

In April 2005 twelve prominent law reviews issued a statement asserting that the “vast majority of law review articles can effectively convey their arguments within the range of forty to seventy law review pages, and any impression that law reviews only publish or strongly prefer lengthier articles should be dispelled.”<sup>37</sup> Research in LEXIS confirms a reduction in size

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33. *Id.* (comparing articles published by the Connecticut Law Review, the Cambridge Law Journal, and the Sydney Law review).

34. While true that one person’s obvious is not another’s, it is doubtful that footnoting background material, for example, is useful because authors may just have given instructions to their research assistants to “find something citable here.”

35. Francis Lieber, *Legal and Political Hermeneutics* 28 (3d ed., F.H. Thomas & Co. 1880).

36. This an example of a mostly useless footnote, noting that Browning’s work is the origin of “less is more.” See Robert Browning, *Andrea del Sarto*, in *Norton Anthology of Poetry*, *supra* n. \*, at 794, 796.

37. See Georgetown University, Georgetown Law, *Joint Law Review Statement on Article Length*, <http://www.law.georgetown.edu/journals/glj/JointStatement.html> (accessed May 14, 2009; copy on file with Journal of Appellate Practice and Process). The law reviews endorsing the statement were Berkeley, Columbia, Cornell, Duke, Georgetown, Harvard, Michigan, Stanford, Texas, U. Penn., Virginia and Yale.

of their lengthiest articles in the subsequent couple of years.<sup>38</sup> In 2004 those dozen law reviews published thirty-eight items with 40,000 words (which is roughly eighty pages) or more, which dropped to thirty-five such articles in 2005, fourteen in 2006, and fifteen in 2007. If we arbitrarily define as lengthy those articles having 20,000 words (which is roughly forty pages) or more, and examine just that set of lengthy articles, in 2004 forty-five percent of the lengthy items were 30,000 words (which is roughly sixty pages) or longer. This dropped to forty percent in 2005, and thirty percent in 2006, rising slightly to thirty-two percent in 2007. So, a sizeable reduction in length at the high end did occur. Looking at all items in all U.S. law journals and using the same definition of lengthy, the percentage of lengthy items that had at least 30,000 words was thirty-three percent in 2004, thirty-one percent in 2005, twenty-eight percent in 2006, and twenty-seven percent in 2007.<sup>39</sup> Again we see a reduction in the high-end length of articles during these years.

This is a compelling example of the influence of the elite law reviews over authors, and it is no doubt also a relief to many authors who would otherwise have been drudging through more words. The current Harvard policy is to give preference to articles with fewer than 25,000 words (which is roughly fifty pages), and to decline to publish articles that exceed 35,000 words (which is roughly seventy pages) except in extraordinary circumstances.<sup>40</sup> Since 2005, Harvard has dramatically reduced the number of published items with greater than 20,000 words and has only published two or three articles each year with more than 35,000 words.<sup>41</sup> The upshot is that we can expect law faculty authors to rapidly adjust to the 25,000 word article being

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38. The date and length fields would vary, but otherwise the LEXIS search in the "US Law Reviews and Journals, Combined" file is: date(=2007) and length(>29999) and cite (cal. l. rev or colum. l. rev or cornell l. rev or duke l.j or geo. l.j or harv. l. rev or mich. l. rev or stan. l. rev or tex. l. rev or u.pa. l. rev or va. l. rev or yale l.j) and not cite (s. cal. l. rev or district or impressions or s. tex. l. rev or w. va. l. rev or pocket).

39. This is calculated in LEXIS by searches like: date(=2007) and length(>29999).

40. See *Harvard Guidelines*, *supra* n. 8 (linking to *Joint Law Review Statement* and noting that "[i]n December 2004, the Harvard Law Review surveyed nearly 800 law professors on the state of student-edited law journals," and "found that nearly ninety percent of respondents believe that law review articles are too long") (accessed May 14, 2009; copy on file with Journal of Appellate Practice and Process).

41. This is calculated in LEXIS by searches like date(=2007) and length(>20,000).

as prestigious as the 35,000 word article used to be. The loss of those 10,000 words will not be mourned.

Authors may spend too many words detailing how a particular work fits in with previous literature just for the purpose of bringing the student articles editor up to speed, and might better place some of that introductory material in a cover letter to the law review. Another method for paring articles down to essentials is to move extraneous, or at least more in-depth, material off to the publisher's website. This is easily done with less critical appendices such as statistical, tabular, and graphic material, but could also be done with arguments that aren't necessary for the core logic, but which the author just won't abandon. If the journal limits articles to 20,000 words, it can tell authors of larger articles to either tighten their belts or to have some less important arguments in an online supplementary form.

This proposal may raise visions of the ultimate progression, which would lead to law reviews' moving entire articles online. Or in a world where authors can upload finished copy to a central database, Harvard Law Review could simply be a list of all the articles that Harvard would have published had it actually published a review. After all, the major distinction of an elite journal is that it adds prestige to articles, and it need not actually publish any articles to do that.

## V. SELECTION AND SUBMISSIONS

Selection at the top-ranked journals is not too important, as it is not overly significant that a work was published at Cornell when it deserved to be published at Yale.<sup>42</sup> Occasional bad article-selection decisions at the top law reviews won't prevent good articles from being respectably published, so there is little cause for agitation at this level. In fact, the editors at one of the elite law reviews might try the experiment of selecting articles at random for a while (assuming a minimal level of quality) to see if it makes any difference to the reception of each published

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42. Selection at lower-ranked journals is more significant, as those journals are more likely to receive poor-quality submissions, and so they have more responsibility for rejecting lumps of coal.

issue.<sup>43</sup> Or they could choose only submissions from female authors<sup>44</sup> or reject submissions from academics at the top-ten law schools.

The ideal method of selection—at any level of the hierarchy—is one blind to the author’s identity. But because highly ranked law reviews can receive two thousand submissions a year,<sup>45</sup> it is in general more efficient, particularly in the initial culling, for the law reviews to flag successful authors.

Back in 1997 Stephen Heifetz had suggested a central clearinghouse for article submissions.<sup>46</sup> Subsequently the Express-*O*<sup>47</sup> service from the Berkeley Electronic Press developed as a commercial method for rapidly transmitting an

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43. David Picker, a movie studio executive, is noted as saying, “If I had said yes to all the projects I turned down, and no to all the ones I took, it would have worked out about the same.” William Goldman, *Adventures in the Screen Trade* 41 (Warner Books 1983). Somewhat less aphoristically, an earlier published account is given by Axel Madsen in *The New Hollywood: American Movies in the '70s* at 17 (Crowell Publ. 1975). Madsen says of Picker that “[h]e once suggested that if in any one year UA did every project it had turned down and said no to every project it eventually did bring to the screen, the result might be the same number of hits and flops.”

44. Over-selecting female authors might for a time actually improve the academic quality of a journal, as female authors may be under-represented in elite journals. See Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the “Top Ten” Law Reviews*, <http://ssrn.com/abstract=1140644> (providing link (at “Download”) that enables reader to receive full text) (accessed May 14, 2009; copy on file with Journal of Appellate Practice and Process).

45. See e.g. *Update: Yale Submissions*, *supra* n. 8 (indicating that Yale receives about 2,500 submissions per year); The University of Alabama School of Law, Alabama Law Review, *Submissions, Review Process*, <http://www.law.ua.edu/lawreview/index.php?page=submissions> (indicating that Alabama receives over 2,000) (accessed May 14, 2009; copy on file with Journal of Appellate Practice and Process); William & Mary, Marshall-Wythe School of Law, William & Mary Law Review, *Submissions*, <http://web.wm.edu/law/publications/lawreview/submissions.shtml> (indicating that William & Mary receives around 1,800) (accessed May 14, 2009; copy on file with Journal of Appellate Practice and Process).

46. Stephen R. Heifetz, *Efficient Matching: Reforming the Market for Law Review Articles*, 5 Geo. Mason L. Rev. 629, 631 (1997) (outlining a proposal for a system that would include “(1) centralization of the matching mechanism, which would improve stability; (2) a degree of forced self-selection by the authors of law review articles, which would reduce the transaction costs associated with achieving any particular level of stability; and (3) a matching process that generates matches three times per year, which would cap the costs of waiting for more information about the market”).

47. See ExpressO, *Express Online Deliveries to Law Reviews*, <http://law.bepress.com/expresso> (including links to various functions) (accessed May 15, 2009; copy on file with Journal of Appellate Practice and Process).

author's submission to journals selected by that author. And the *W&L Ranking* site also has an author submissions process. *W&L Ranking* has since 2002 simply displayed for authors a list of chosen journal e-mail addresses suitable for copying and pasting into an e-mail program and for those journals not accepting e-mail it displays upload links or postal addresses—a less efficient alternative for authors, but cost-free. These submission systems are based on author preferences as to which journals to submit to, on authors selecting the time at which their manuscript development is ripe for submission, and usually on multiple simultaneous submissions to law reviews. Simultaneous submissions place costs on the selection process, causing many articles editors to read the same submission at the same time. This is not particularly efficient. Consequently, the following is proposed as an improved alternative:<sup>48</sup>

#### Stage 1 Option 1—General Submission

- An author uploads an article (either preliminary or completed) to an online database. Articles are tagged as available for journal offers if the author wishes to do that.
- Articles are viewable by anyone connecting to the website unless the author makes the article viewable only by journal editors. Readers can tag viewable articles with comments and quality assessments.
- Journal editors can log in and view articles sorted by various methods, such as upload date, subject, and author affiliation, and can establish profiles to be notified of future additions. Journals make publication offers directly to authors.

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48. In the spring of 2009, in an effort to implement part of this proposal, W&L's LexOpus service began. See W&L Law, *LexOpus—From Law Working Papers to Published Works*, <https://lawlib.wlu.edu/lexopus/index.aspx> (accessed May 15, 2009; copy on file with Journal of Appellate Practice and Process). Whether it works over time as now envisioned will be a topic for later research.

### Stage 1 Option 2—Channeled Submission

- The author commits to accepting an offer from within the submissions system if the author has not removed the article.
- The author prioritizes a list of journals, and agrees to the terms of the system, which are that each journal in sequence will be notified of the article submission and have a guaranteed seven days in which to accept the offer.
- Journal rejection will move it along to the next journal or inaction will move it along after the seven days concludes.
- Journals ranked higher by the author may still accept after their guaranteed period, but will be placed in priority below the current journal, so that only after the current journal rejects the article, or its seven days expires, will acceptance be effective for the higher-ranked journal.
- Authors can remove their article from the submissions process but removal is only effective upon the current journal's rejecting the article or its seven-day period expiring.

### Stage 2—After Offer and Acceptance

- The article is marked as being in publication, closing it to offers. (This is done by the system as part of the submissions process, or by the journal if acceptance is from a general system offering, or by the author if offer and acceptance is entirely outside the system.)
- Optionally the journal copies the article to its website, notifies the system of the website address for the article there, and the system adds a link from its copy of the article over to the official site. The journal periodically overwrites the official online copy with more current versions as copy-editing goes forward. Periodically, the system automatically copies back the current version from the journal's official site.

A system like this allows enterprising journals to identify unclaimed works in progress and make offers to willing authors. For the finished works that authors have channeled to prioritized law journals, each journal on the author's list would have a small, but guaranteed, offer window. Most journals would potentially have more than seven days in which to make an offer, but the author's acceptance of that offer would not be guaranteed beyond the seven-day exclusive period. Such a system seems more efficient than the present scattergun approach to submissions.

## VI. READERS AND AUTHORS

Citation to law articles peaks roughly three to four years after publication.<sup>49</sup> Sadly, many articles attain their readership peak years earlier in the law review's office. Thomas A. Smith found that forty-three percent of law review articles, notes, and the like are never cited by any law review article or case.<sup>50</sup> Not being cited is only indirect evidence of a lack of use, but such a high percentage of non-citation strongly indicates that much law review writing is never used.

In 1991 a survey of academics, judges, and practitioners found that attorneys and judges used law reviews less frequently than do professors, and their use is predictably less academic and more practical: They value law review articles for summarizing a topic and listing relevant authority.<sup>51</sup> Many have deplored what they see as a move by law reviews toward the theoretical pole.<sup>52</sup> Such a reality seems true for at least the elite journals, and the elite are often emulated. A substantial sample

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49. John Doyle, *Ranking Legal Periodicals and Some Other Numeric Uses of the Westlaw and Lexis Periodical Databases*, 23 Leg. Ref. Servs. Q. 1, 17 (2004).

50. Thomas A. Smith, *The Web of Law*, 44 San Diego L. Rev. 309, 336 (2007).

51. Max Stier, et al., *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 Stan. L. Rev. 1467, 1485 (1992).

52. See e.g. Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. Leg. Educ. 313, 319 (1989) (noting that "[p]rominent law reviews are increasingly dedicated to abstract, theoretical subjects, to federal constitutional law, and to federal law generally, and less and less to practice and professional issues, and to the grist of state court dockets").

of federal cases over the years<sup>53</sup> shows that less than one percent of federal cases during the 1940s cited to any of the top five law reviews. This rose to around two percent of cases by the early 1960s. During the period 1964 to 1982, around three percent of cases cited any of these elite journals. Use then fell from that plateau and descended again below one percent by the 1990s.

These statistics suggest that instead of asking why judicial use of law reviews is so low, a better question is why their use rose to a plateau during and around the 1970s. Minimal judicial use of law reviews is the norm. Litigants expect decisions to be based on primary law, cases, statutes, rules, and regulations, not on the views of academics. In fact, Judge Lebovits and his co-authors suggest that, except in novel cases, “noncontrolling precedent should be deleted from the opinion,”<sup>54</sup> and while articles are not in that category, they are no more controlling than precedents from other jurisdictions. However, judges do cite articles in support of their reasoning or as “see generally” references, and will quote passages that elegantly express a thought. Appellate judges in particular write as much for their peers as for the litigants, and they, or their law clerks, can be expected to leave more of a research trail. Wherever appropriate, it is beneficial for judges to reward authors and journals with citations, as both like to be cited by judges, and citation offers feedback as to what judges are finding useful.<sup>55</sup>

Judicial citations to top-ranked journals have declined in the current decade, resulting in about thirty percent fewer citations to the top fifteen general law reviews, and about fifteen percent fewer citations to the top fifteen specialized law

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53. The search in Westlaw’s ALLFEDS database is (varying the years from 1946 to 2001): `date(december 2001) & harv.l.rev harvard.l.rev colum.l.rev columbia.l.rev fordham.l.rev ford.l.rev n.y.u.l.rev n.y.u.l.q.rev yale.lj yale.lj (harv harvard colum columbia fordham ford ((new +2 york +2 u university) n.y.u) +3 l.rev l.r. l.q.rev l.q.r. (l law +3 rev review)) (n.y (new +2 york) +2 (u.l +2 rev review) u.l.rev u.l.q.rev) (yale +2 lj "l.j." (l +1 j journal) (law +2 j journal))`.

54. Gerald Lebovits, Alifya V. Curtin, & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 *Geo. J. Legal Ethics* 237, 256 (2008).

55. *See Judicial Writing Manual* 18 (Sylan A. Sobel ed., Fed. Jud. Ctr. 1991) (taking position that “[b]ecause law review articles, treatises, texts, and non-legal sources are not primary authority, they should be cited sparingly and only to serve a purpose,” but indicating that an acceptable purpose “may be to refer to a sound analysis supporting the reasoning of the opinion,” and also acknowledging that “[s]ome authors are so well respected in their fields that, in the absence of a case on point, their word is persuasive”).

journals.<sup>56</sup> A decline is also evident in judicial citations to all law reviews.<sup>57</sup> As there are good reasons for judges not to cite journal articles, a lot of this decline may simply be attributable to a current trend in opinion-writing, as might have been true with the high plateau of use around the 1970s. Beginning in 1992 Judge Edwards's well-known criticisms of law reviews and the scholarly output of law schools may have been influential in further diminishing judicial citation of articles,<sup>58</sup> and his views were certainly reinforced by those Judge Posner expressed in roughly the same period.<sup>59</sup> Other potential reasons might be that judges interpreting increasingly statute-based law

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56. This is comparing 1996-2003 with 2000-07. *See W&L Ranking, supra* n. \*\*. At the same time citations to top-fifteen journals found in journal articles have increased by about eight percent. *Id.*

57. This can be determined (inelegantly) by a search in Westlaw's ALLCASES database (i.e. all federal and state cases) looking for "l. rev." Such a search is plainly unable to retrieve all citations to law reviews, but it is useful for comparing years. So, selecting a set of larger cases (arbitrarily those with at least 90 occurrences of the word "court"), 9.87 percent of them cited to "l. rev." in 2000, but that had fallen to 7.15 percent of cases in 2007.

The search (with varying years) is: date(2008) & atleast90(court) & text("l. rev" l.rev). It yielded the following results:

2007 (7.15%)  
 2006 (7.52%)  
 2005 (8.37%)  
 2004 (10.07%)  
 2003 (8.9%)  
 2002 (9.27%)  
 2001(9.8%)  
 2000 (9.87%).

(As the overall number of cases decided generally increases year by year, it is best to compare years close to each other.)

58. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 Mich. L. Rev. 2191 (1993); Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession"*, 69 Wash. L. Rev. 561 (1994).

59. *See* Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 Yale L.J. 1113, 1129-30 (1981) (advocating law school enhancement of interdisciplinary research and the development of faculty-edited refereed law journals); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 Mich. L. Rev. 1921 (1993) [hereinafter *Deprofessionalization*] (commenting on Judge Edwards's 1992 article); Richard A. Posner, *Legal Scholarship Today*, 45 Stan. L. Rev. 1647 (1993) [hereinafter *Scholarship Today*]; Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 Stan. L. Rev. 1131 (1995).

have less need of idea-shaping articles;<sup>60</sup> that since the mid-1980s LEXIS and Westlaw have made the law review article's aggregation of prior research less significant; and that expanding dockets have left judges no time to read what they do not need to read.

If judges do not cite academic work in their opinions, it is possible for them to do so in writing articles themselves and so to create works useful to judges and practitioners. Understandably, judges are reluctant to write on topics that may come before them, but that has less application to the retired judge. Indeed, Judge Aldisert has a recommendation for "every retired judge—trial or appellate, state or federal: Make yourselves heard on scholarly issues."<sup>61</sup>

But will judicial articles be published? In a recent study on the article-selection process, the researchers show that a judge as author "is a positive factor overall, but it becomes very significant at the lower ranked journals."<sup>62</sup> This study also shows that high-tier law review articles editors are negatively disposed to selecting articles from practitioner authors, but that it "becomes a relatively important positive factor at the lower-ranked journals."<sup>63</sup> So judges, and even more so practitioners, should avoid submitting articles to the elite general journals, and should perhaps use a specialized journal if there is one for the topic, but then that is preferable for everyone who does not need a prestige boost for tenure or promotion. A little damping down of the prestige game would be good, particularly as it relates to the specialized journals, which need some positive discrimination to redress decades of prestige marginalization.

In an empirical study of whether scholarly activity helps or hurts teaching, another researcher found no correlation between

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60. See e.g. Thomas Adcock, *Federal Judges Discuss Usefulness of Law Reviews*, N.Y.L.J. 20 (Mar. 16, 2007) (quoting Judge Pooler of the Second Circuit when noting that "the appellate bench has 'little need for cutting-edge theory' because so much of the work is statute-based and simply 'doesn't need re-thinking'").

61. Ruggero J. Aldisert, *All Right, Retired Judges, Write!* 8 J. App. Prac. & Process 227, 228 (2006) (footnote omitted).

62. Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 Alb. L. Rev. 565, 606 (2008). The authors, whose study focused on articles editors at student-edited law reviews, were articles editors on the University of Pennsylvania Law Review during the 2005-06 academic year.

63. *Id.*

law faculty teaching effectiveness (as measured by student evaluations) and academic productivity (as measured by numbers of citations).<sup>64</sup> It is reassuring to learn that law faculty, in spending up to a third of their professional hours on research and writing,<sup>65</sup> do not hinder their teaching responsibilities. But if scholarly writing does not appreciably improve their teaching, law schools must justify scholarship on other bases. Many articles are never cited in academic literature, and use by academics would be expected to find its way into citations. Article use by practitioners, judges, and non-lawyers is poorly reflected in citation counts,<sup>66</sup> so it is of course possible that these never-cited articles are being used outside of academia. But the more that articles tend to the theoretical the less likely it becomes that these other possible readers are using the works either.

From a lofty viewpoint Judge Posner reminds us that “[e]very academic field is populated mainly by drones.”<sup>67</sup> Judge Edwards takes an even more severe view in saying that his “most serious concern . . . with legal scholarship is that too much of it is useless.”<sup>68</sup> Not that these positions are really far apart. Posner discusses the waste in publishing trivial articles by considering the spawning of wild salmon: From 6000 fertilized eggs, he says, two will reach adulthood.<sup>69</sup> In his view, that does not amount to waste unless there is a less costly means of reaching the goal. As there are so many publishing outlets, the spawning issue is not going to be handled at the law review end.

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64. See generally Benjamin Barton, *Is There a Correlation Between Law Professor Publication Counts, Law Review Citation Counts, and Teaching Evaluations? An Empirical Study*, 5 J. Empirical Legal Stud. 619 (2008).

65. A 2000-01 survey of full-time law faculty in Ontario found that “the average percentage of time they spent on teaching, research and service was 42/33/25.” Theresa Shanahan, *Legal Scholarship in Ontario’s English-Speaking Common Law Schools*, 21 Canadian J.L. & Socy. 25, 36 n. 39 (2006). A 1991 U.S. survey found that, of those professors who answered the survey question, the mean percentage of time spent on scholarly writing was thirty-two percent. Max Stier, Kelly M. Klaus, Dan L. Bagatell & Jeffrey J. Rachlinski, *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 Stan. L. Rev. 1467, 1481 n. 64 (1992).

66. See e.g. Kaye, *supra* n. 52, at 313 n. 2 (stating “I read a great many more law review articles than I cite in my opinions”).

67. Posner, *Scholarship Today*, *supra* n. 59, at 1655.

68. Harry T. Edwards, *Reflections (On Law Review, Legal Education, Law Practice, and My Alma Mater)*, 100 Mich. L. Rev. 1999, 2001 (2002)

69. Posner, *Deprofessionalization*, *supra* n. 59, at 1928.

It should be addressed either in changes to the law school tenure and promotion processes,<sup>70</sup> or through the development of better post-publication technologies that help with filtering quality.

## VII. STUDENT EDITING

From the student viewpoint law review membership is beneficial in applying for law, clerkship, and academic employment, but why should a law school take on the responsibility of a law review? The prestige factor of a law school's having one or more law reviews has to rank high in the competitive law-school market, but the espoused reason is going to be the educational benefits for the students on law review. But what really are those benefits? One can argue that there is educational value in most everything a student does at law school, but is law review the best practical training compared with clinical work? How would it compare with working on a team that assists the widow of a black-lung victim? Hour upon hour of law review bluebooking, while beneficial for the expiation of past sins, is mostly grunt work. And tracking down obscure publications is too haphazard to be professionally useful. The rallying cry would be that law review work teaches the value of meticulous attention to detail. One could not deny that, but Lon Fuller reminds us of the "need to recall that the slogan, 'We teach men to think,' has been the last refuge of every dying discipline from Latin and Greek to . . . Common-Law Pleading."<sup>71</sup> And while the value of the editing and source-checking work on law review is generally touted by legal academics as one of the chief justifications for student involvement in law reviews, this may be more damning of law school curricula than it is praise of law reviews.

In the past, law review has been one of the better practical training programs offered by law schools. However, the law schools are now undergoing a curriculum re-thinking process influenced by the recent Carnegie Foundation report, which

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70. This might be accomplished by, for example, reducing the tendency to count the number of faculty publications instead of assessing their quality when evaluating candidates for hiring, promotion, and tenure.

71. Lon L. Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. Leg. Educ. 189, 190 (1948).

pressed for better integration of legal theory and doctrine with the practical skills of lawyering.<sup>72</sup> This is particularly significant for the third year of law school, which is too often seen by students as a boring wait for the next stage of life to begin. Law schools are beginning to respond. For example, Washington and Lee has announced a shift to a new third-year curriculum that is entirely experiential.<sup>73</sup> The new third-year experience is designed to be a mix of legal clinics, simulated law practice, and internships. The intent is to have no third year courses relying on faculty-led casebook discussions, but to develop knowledge and skills in realistic settings that call for negotiation, counseling, problem solving, and teamwork. In such an environment the practical benefits of law review membership such as improved research skills, an increased ability to attend to detail, and an opportunity to work as part of a team, can be integrated into the curriculum for everyone. It is not necessary for a student to be associated with a particular law review to write a note or an article. The educational advantages of writing, editing, and cite-checking can be gained by creating publishable work in many contexts. And it is perhaps far better done under the sole guidance of an experienced legal-writing instructor or other faculty member than under the guidance of another law review student who only learned what to do in the previous couple of semesters. Of course, it would help if there were more real publishing opportunities for students. Few law reviews accept work from students at law schools other than their own,<sup>74</sup> which is a policy that law reviews might ideally loosen in order to accept competitive student work.

Law schools support journals at every point. They support faculty time and research assistance in writing articles, they

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72. William M. Sullivan, Anne Colby, Judith Welch Wagner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

73. Rodney A. Smolla, *We're Preparing 3Ls for Professional Life: New Curriculum at Washington and Lee Aims to Give Students Practical Experiences*, Leg. Times 17 (Sept. 1, 2008); see also Washington & Lee University School of Law, *The New Third Year, A Message from the Dean*, <http://law.wlu.edu/thirdyear> (describing goals of program and providing links to more information) (accessed May 19, 2009; copy on file with Journal of Appellate Practice and Process).

74. The Indiana Law Journal is one of the exceptions; it "has no policy against publishing student-written articles." Douglass A. Hass, *The New Journal: A Supplement Not Undertaken Hitherto*, 83 Ind. L.J. 393, 397 n. 35 (2008).

support students in their capacities as law review editors, they provide budgets so that law reviews can publish, and they fund libraries to buy the journals. The chief advantage that law school funding provides is student work: Editing and production by students produces an inexpensive journal,<sup>75</sup> and inexpensive journals are historically significant to legal scholarship because of their role in more widely disseminating authors' works. However, gradually during the 1990s both LEXIS and Westlaw became close to comprehensive on full-text availability of current articles, and so judges and academics with flat-rate contracts had less need of printed law reviews.

If legal authors and law journals want readers beyond their core legal communities, they must make electronic access the norm. Law school journals are slowly moving to such an open access model, making their recent articles freely available on the Internet. This satisfies the needs of authors and readers for free and rapid dissemination, but reduces the print subscription base.<sup>76</sup> Without the student-edited law reviews, there would be many fewer, and many more expensive, law journals, so there is no doubt that we all benefit from the student labor. Wholesale abandonment of student-run law reviews by their law schools is unlikely any time soon, but a dean whose law school offers clinical programs that substitute for the skills training of law review may well question if law review is the best use of funding and student time.

## VIII. ARTICLE QUALITY

When even Homer nods, the best of works will have their errors, and many works are less than perfect when submitted to law reviews. The problem with student copy editors and cite checkers making works publishable is that their efforts encourage the submission of incomplete work. Even though

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75. The *Yale Law Journal* costs \$55.00 annually for about 2,000 pages, while the commercially published *Labor Law Journal* is \$309.00 annually for about 280 pages, and many commercial journals are pricier yet.

76. Consider the case of the Harvard Law Review, which has its issues online from November 2004 onwards. It had a circulation of 3,735 in 2002, which had declined to 2853 by 2007. See *Statement of Ownership, Management, and Circulation*, 116 Harv. L. Rev. iv (2002); *Statement of Ownership, Management, and Circulation*, 121 Harv. L. Rev. iv (2007).

authors may dislike being over-edited, improvements are always possible, and the law reviews provide free editing assistance. Student editors must edit for their sense of worth and authors, like anybody else, can be lazy if allowed to be. The best weapon a law review has against sloppy work is feedback to authors. If the articles editor tosses an article into the reject pile after reading two pages because the footnotes are incomplete and the writing is sloppy, then telling the author honestly that the writing needs tightening up will mean better submissions in the future.

Not all non-student-edited law journals have the staff to do copy editing, and they simply demand that authors supply publishable material for which the authors take personal responsibility,<sup>77</sup> but most student-edited law reviews do not do this. In one survey of law student editors, most of the respondents admitted that they were surprised by the poor quality of submissions.<sup>78</sup> The researchers also quote some top-fifty law review editors, who confessed that they “haven’t read many articles that [they] were enthusiastic about,” that they were surprised by “how bad a significant majority of submissions are,” and that “the citation quality . . . tends too often to be too low.”<sup>79</sup> Higher-ranked law reviews have the luxury of rejecting the rough diamonds if they wish to, but the lower-ranked law reviews have fewer options and are left to hope that an author’s careless editing brings a work to them whose substance deserved higher placement.

The law reviews should move the burden of copy editing and cite checking to where it belongs: with authors. Faculty authors will continue to use their research assistants for tasks of this sort, which at least shifts the cost to where it belongs. The busy-work part of editing, and of law review management, is a minimally productive use of student time, and it is dubious that

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77. The *Yale Journal of Law & the Humanities* is an example of a law review that makes an effort in this direction, saying on its submissions page that “[a]uthors are personally responsible for the accuracy of their citations.” See *Yale Journal of Law & the Humanities*, *Submissions*, <http://www.yale.edu/yjlh/submit.htm> (accessed May 19, 2009; copy on file with *Journal of Appellate Practice and Process*).

78. Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those With All the Power—Student Editors*, 59 *S.C. L. Rev.* 175, 201 (2007).

79. *Id.* at 202-03.

law schools should be requiring it of students when they take positions on law reviews.

The downside of removing a safety net beneath faculty writing is the acceptance of some level of imperfection. But beyond a reasonable level of verification, a journal is not responsible for the statements of authors; the authors are. And a reasonable conformity with core Bluebook, ALWD, or other established citation rules should be enough. If the format makes sense, enables the reader to locate the source, and is unlikely to offend anyone, then let it be. Further, in recognition of a more multi-disciplinary world, law reviews should permit articles to be published that use the APA style common in the social and behavioral sciences.<sup>80</sup>

## IX. IMPORTANCE OF ACCESS

The recent advent of the online companion journal to the likes of the Harvard, Yale, Texas, and Virginia law reviews is an effort to bridge the gap between the slowly developed reflection of the law review and the current awareness of the blog format. The creation of this new hybrid form evidences the unease that law review editors feel in coping with uncertain foundations in the Internet world, and an admirable desire to engage with the challenge. Nevertheless, law reviews are now operating in an environment in which users expect, or at least want, immediate access on the Internet. There are various routes for readers to gain open access to journal articles. One, currently being tried by commercial journal publishers like Cambridge University Press, is for an author's institution or funding agency to pay journals a supplemental fee for the article's speedy appearance on the publisher's Internet site.<sup>81</sup> Another possibility is for authors to self-archive on their own web pages or to use an institutional repository. For example, Harvard Law School announced in May 2008 that its faculty voted unanimously to

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80. See Am. Psychol. Assn., *Publication Manual of the American Psychological Association* (5th ed., APA 2001).

81. See Cambridge Journals, *For Authors, Cambridge Open Option*, <http://journals.cambridge.org/action/forAuthors?page=open> (accessed May 19, 2009; copy on file with Journal of Appellate Practice and Process).

make their scholarly articles available online free of charge.<sup>82</sup> It is now mandatory for Harvard law faculty (unless granted an exemption) to make a final copy of each published article available on Harvard's institutional repository. It is not clear, however, whether the Harvard faculty will be able to prevail upon journals to make the final printed, edited, and paginated version available, or whether the repository will hold just the final text copy that left the author's computer.

Useful as individual collections of articles are, it is vital to have a centralized collection, which is why the pre-print database SSRN is where any current academic ferment will be found. In light of this, it is no longer acceptable for a print law review to take nine months after submission to make articles available. Law reviews must insist that authors present substantially publishable pieces. Once author and review are in agreement on publication, the article should immediately be loaded onto the law review's website as an in-process copy for the coming issue(s). If any agreed-upon changes are made after the initial posting, then they can be saved back to the journal's website. Users can access the current work, and the law review benefits from users citing to the official version on the law review website.

## X. CONCLUSION

Academics, who write most law review articles, gain prestige from being read and cited by their peers. Even when their works are minimally cited, they gain prestige by publishing in prestigious journals. Student editors seek the prestige of law review membership to attain prestigious jobs and clerkships. Law schools seek the prestige of publishing prominent law reviews. But if no law reviews existed, commercial publishers would be happy to expand their journal offerings and publish faculty work, competitive schools would compete on some other basis, and students would find some other means to signal how hardworking and smart they are.

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82. See *Harvard Magazine, Update: Harvard Law School Faculty Approves Open Access*, <http://harvardmagazine.com/web/breaking-news/update-harvard-school> (May 8, 2008) (announcing change and providing links to more information) (accessed May 19, 2009; copy on file with Journal of Appellate Practice and Process).

Nobody would be audacious enough to say that the purpose of law student labor is to produce inexpensive journals, as important as that is, so the primary justification for student-edited law reviews is the educational value of students' work. Undoubtedly there is educational value in reading submissions, though considering the deluge that many law reviews receive, most of them during a couple of yearly bottlenecks, there is no time for contemplative reading when a day's delay may mean losing the article to a competitor.

The law is a life of detail and documentation, and law review work reflects that, but repetitive law review bluebooking and cite-checking are an excessive waste of student time in pursuit of excessive perfectionism. Bluebookitis is a serious malady, not a noble mission. Law reviews should establish a few core rules that cover eighty percent of citations, and for the remainder, as long as the author cites to what was actually used in a way that's sensible and findable, editors should just loosen up.

Substantive and technical edits, though they might improve the work, diminish authorial responsibility and encourage sloppy work. Law reviews might consider a policy statement: "We make no substantive changes to an author's work. Only minor house style changes will be made. The author is entirely responsible for the accuracy of all assertions and footnotes."

If it were conceded that the educational value of law reviews can better be replaced by other clinical work and by student writing programs, then the routine law review work that remains would be moved to paid employees—an editor, a secretary, or some student assistants. This leaves only article selection as a task for law review editors, which itself is best done with an informal advisory board. At this level of student involvement, it would be best to have only specialized journals, perhaps in association with a clinic, and abandon general law reviews.

The Internet is the catalyst in the witch's broth, the cauldron bubbling with its blogs, RSS feeds, online adjunct law reviews, online specialized law journals, pre-print databases, open access journals, and newts (well, not really newts, unless we are eyeing the new technologies of scholarship). Value is where you find it, and with ever-expanding communications, it

may not be found in printed law reviews. When knowledge is free, attention is costly, and law reviews will have difficulty maintaining interest and sustaining relevance if they hold to their traditional past. If the law reviews are to survive, they must make their presence felt on the Internet and compete with databases like SSRN. Ideally, this means some conformity in document availability. In order to meet user expectations for fast access, law reviews must place their publications on line first in pre-print and then in final form. Law reviews should create in a fixed location online a meta-data file with indexing and file-location information so that agents like Google, or any other interested database or individual, can collect that joint information and make it available as they choose.

The indispensable element in transitioning away from the existing law journal system is a technological core. Someone (preferably a non-profit database supplier) must create a reliable and sophisticated database that attracts authors to submit their articles. A monopolistic system of this type could work only under conditions of great confidence, which would require total openness: an understanding that others may copy any part of the database, and that redundant copies of the entire database must be established at partner sites. Aside from confidence in the continued existence of the data, the key element is a service with enough features to motivate authors to submit articles. That attractive force would involve maintaining versioned copies, feedback and tagging features, and ranking mechanisms that can replace the prestige function of elite journals. It is possible that academics, judges, and practitioners could be the foundation of such a prestige system by registering as readers, being fed articles in their subject areas, and ranking whichever of them they read (with guarantees of privacy). For a while, some authors would also continue to submit their version 1.0 copy to the law reviews. Other authors would be content to eliminate the editorial hassle of law reviews and be responsible for their own work product, potentially continuing to update their versions online for as long as they pleased. Eventually, law schools would see that it is pointless to continue their law reviews when the current versions of all articles are freely available online as fully citable text.