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Essay

The Law Reviews vs. the Courts: Two Thoughts From the Ivory Tower

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I. INTRODUCTION

If you're reading this, you must not be a federal judge.

According to a March 2007 article in the *New York Times*, legal scholarship has become too ethereal and abstract to be of any practical use to federal judges in their everyday disposition of cases.[1] In the words of Dennis G. Jacobs, Chief Judge of the U.S. Court of Appeals for the Second Circuit, "I haven't opened up a law review in years. . . . No one speaks of them. No one relies on them."[2] Paraphrasing 19th century Scottish writer Andrew Lang, Second Circuit Judge Robert Sack went even further, suggesting that, even when judges *do* cite law review articles today, they "use them like drunks use lampposts," *i.e.*, "more for support than for illumination."[3]

This accusation is nothing new. For almost as long as legal scholarship has been around, there have been questions as to its relevance to everyday practitioners, including the bench and the bar.[4] Perhaps the most famous

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[1] Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8, *available at* LEXIS, News Library, NYT File.

[2] *Id.*

[3] *Id.*

[4] *See, e.g.*, Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936). As Rodell suggested, "[t]here are two things wrong with almost all legal writing. One is its style. The other is its content." *Id.* at 38. It is also nothing new to suggest that this problem is particularly acute in the courts

and sustained critique, at least for our generation, was mounted by Judge Harry T. Edwards as part of a controversial 1992 article in the *Michigan Law Review* on the "growing disjunction between legal education and the legal profession,"[5] and then later as part of subsequent reflections upon his earlier work.[6] As Judge Edwards argued, "[t]oo many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it."[7] As a result, "[b]ecause too few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners, too many important social issues are resolved without the needed input from academic lawyers."[8]

Make no mistake: The charge that our scholarship is of increasingly marginal utility to judges is more than just "an anti-intellectual know-nothingism that is understandable but regrettable."[9] It is an accusation that all legal academics should take seriously, especially those, like myself, who write in areas at the heart of current litigation. Whether or not we agree with this sentiment,[10] the salient issue to those who find this trend disturbing must be whether our scholarship is both accessible to judges and applicable to the disputes before them. Thus, I find the suggestion that at least some legal scholarship *should* aspire to be useful to judges entirely unobjectionable, and the complaint that it isn't doing so one that merits sustained reflection.

That being said, there are any number of reasons having nothing to do with the scholarship itself that may well be to blame for scholarship's declining utility. In this short Essay, my aim is to suggest one additional factor that may also impact the extent to which legal scholarship factors

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of appeals. *See, e.g.*, Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051 (1991).

[5] Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

[6] *See* Harry T. Edwards, *A New Vision for the Legal Profession*, 72 N.Y.U. L. REV. 567 (1997); Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession,"* 69 WASH. L. REV. 561 (1994); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993).

[7] Edwards, *supra* note 5, at 36.

[8] *Id.*

[9] Liptak, *supra* note 1 (quoting Columbia law professor Michael C. Dorf).

[10] To be clear, I do not mean to accept without qualification the assumption underlying these charges—*i.e.*, that judges are, and always have been, the most important audience of legal scholarship. There are certainly numerous ways in which contemporary scholarship is not (and should not be) targeted toward the bench. Two obvious examples are "law and . . ." scholarship, which focus more at the relationship between law and other disciplines, and scholarship focused at *other* players in the legal process, including legislators and executive branch officials. *See, e.g.*, Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327 (2006); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006). My point is simply that, to whatever extent we *do* believe that judges are an important audience for our work, this charge is a fairly serious one.

into contemporary judicial decisionmaking: the ever-increasing hostility to litigation in the federal courts in recent years, as manifested both by the cabining of judicial discretion (in contexts other than criminal sentencing,[11] anyway), and the constriction of federal remedies both by Congress and the Supreme Court.[12]

Specifically, my thesis is that judges in general—and appellate judges in particular—have been held to increasingly narrow resolution of the substantive legal issues before them. As Congress has enacted ever-more-restrictive standards of review and ever-higher burdens of proof; as the Supreme Court has constrained the scope of previously recognized remedies; and as the Courts of Appeals have increasingly relied upon doctrines such as "procedural default," "clear error," and "harmless error" to affirm lower-court decisions on other grounds, these jurists are encountering fewer opportunities today to consider the novel legal theories or interpretations of doctrine for which legal scholarship has traditionally been valuable.[13] And so, part of the reason why jurists like Chief Judge Jacobs may no longer find law reviews useful is simply because he has less ability to resort thereto, entirely irrespective of the content contained therein (or, in some cases, the lack thereof).

Certainly, I do not mean to suggest that the decline of judicial discretion and the increasing constraints on remedies are entirely or even largely responsible for the current schism between the academy and the courts. Nor do I mean to suggest that judges have *no* discretion today to consider arguments made in scholarship in addition to those presented by the parties; there are dozens of readily identifiable examples to the contrary.[14]

By focusing at least some attention on the significance of the *decline* in that discretion, however, my hope is that we can better appreciate both the

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[11] *See* United States v. Booker, 543 U.S. 220 (2005) (invalidating part of the Sentencing Reform Act and thereby restoring some modicum of judicial discretion in sentencing). *But see* Craig Green, Booker *and* Fanfan*: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395 (2005) (arguing that *Booker* does not restore discretion to the degree commonly accepted).

[12] For three compelling academic surveys of this trend, see Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUPREME COURT REVIEW 343 (2003); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003); and Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006).

[13] As one particularly prominent example, consider the narrowing of the scope of federal habeas corpus for state prisoners by the Antiterrorism and Effective Death Penalty Act of 1996, as summarized by Judges Noonan and Reinhardt in their separate concurrences in *Irons v. Carey*, 479 F.3d 658, 665–70 (9th Cir. 2007). *See also* Joseph M. Brunner, Comment, *Negating Precedent and (Selectively) Suspending Stare Decisis: AEDPA and Problems for the Article III Hierarchy*, 75 U. CIN. L. REV. 307 (2006) (summarizing various of the constitutional issues enmeshed in AEDPA's restrictions on federal habeas review).

[14] Moreover, most limitations on the discretion of federal district or circuit judges are, of course, inapplicable to Supreme Court Justices. Per Liptak's article, however, I take the specific problem to be the utility of legal scholarship to lower-court judges, given both the proliferation of amicus briefs in the Supreme Court and the extent to which the Court may overrule its own precedents.

impact that reduced discretion has on the substantive scope of judicial decisionmaking, and, in more practical terms, the significance of finding ways to reach out to those who are in the best position today to properly place our scholarship before judges: practitioners.[15] Ultimately, as this Essay concludes, the real question we should be asking ourselves is how we can make our scholarship more accessible to those litigating in our respective fields.

Blogs, of course, are one important answer, and much has been written about their potential significance to legal scholarship going forward.[16] But inasmuch as traditional legal scholarship still has a role to play in contemporary judicial decisionmaking, of equal—if not greater—significance may be online media specifically targeted at increasing the accessibility of law review content, including the growing list of online law review companions to which *CONNtemplations* is but the latest addition.[17]

II. FIRST THOUGHT: DISCRETION, REMEDIES, AND SCHOLARSHIP

A. *The Ever-Increasing Limitations on Discretion and Remedies*

I am hardly the first to suggest that, in recent years, federal courts have witnessed a marked decrease in judicial discretion at the same time as they have also encountered an upsurge in legislative and judicial constraints upon remedies. As Andy Siegel has explained:

> it is impossible to understand the [Rehnquist] Court's complicated intellectual matrix without acknowledging and assimilating the Court's hostility towards the institution of litigation and its concomitant skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice.[18]

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[15] A more direct solution, of course, would be the restoration of the discretion that has been lost. On the assumption, though, that scholarship cannot effect such a restoration on its own, my suggestion is that we should reevaluate the extent to which scholarship empowers litigants to invoke what discretion remains.

[16] *See, e.g.*, Editorial, *The Future of Legal Scholarship*, 116 YALE L.J. POCKET PART 1 (Sept. 6, 2006), http://thepocketpart.org/2006/09/06/the_future_of_legal_scholarship.html; Symposium, *Bloggership: How Blogs are Transforming Legal Scholarship*, Berkman Center For Internet & Society at Harvard Law School, http://cyber.law.harvard.edu/home/bloggership (last visited Apr. 28, 2007).

[17] In this regard, I join the sentiments of my co-blogger Matt Bodie, who discusses the virtues of such online companions in far more depth in Matthew T. Bodie, *Thoughts on the New Era of Law Review Companion Sites*, 39 CONN. L. REV. CONNTEMPLATIONS 1 (2007), http://conntemplations.org/comments.php?y=07&m=05&entry=entry070506-120000.

[18] Siegel, *supra* note 12, at 1108.

Focusing on the Rehnquist Court's jurisprudence with respect to remedies,[19] official immunity,[20] fee-shifting,[21] arbitration,[22] punitive damages,[23] and sovereign immunity,[24] Siegel argues that hostility to litigation is, in many ways, a more coherent thematic narrative of the Rehnquist Court than the typical federalism- and neo-conservatism-based accounts.[25]

To similar effect is Judith Resnik's important 2003 article.[26] Resnik goes further, however, and lays much of the responsibility for this trend at the feet of Congress, which has taken a far more active role in defining the scope of judicial review in recent years.[27] And whatever we may believe with respect to the wisdom and appropriateness of the trend identified by Resnik and Siegel, the evidence is fairly overwhelming as to its existence, and, with perhaps one as-yet-underdeveloped exception,[28] its continuation on the Roberts Court.[29]

Separate from the substantive constriction of remedies that has marked the past two decades, however, is the increasing prevalence of doctrines of default and exhaustion, especially in habeas cases,[30] prisoner litigation,[31]

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[19] *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002); Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001); Alexander v. Sandoval, 532 U.S. 275 (2001).

[20] *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574 (1998).

[21] *See, e.g.*, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598 (2001).

[22] *See, e.g.*, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (plurality opinion).

[23] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

[24] *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002); Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[25] Siegel's narrative even overlooks another area, of significant contemporary importance, where the Rehnquist Court manifested a hostility to litigation: the scope of the so-called "state secrets privilege." *See, e.g.*, Tenet v. Doe, 544 U.S. 1 (2005).

[26] *See* Resnik, *supra* note 12.

[27] *Id.*

[28] The exception is the curious decision in *Cent. Va. Comty. College v. Katz*, 546 U.S. 356 (2006), where the Court, in the last opinion joined by Justice O'Connor, appeared to turn its back on its sovereign immunity jurisprudence, holding that Congress *could* abrogate state sovereign immunity in federal court pursuant to its powers under the Bankruptcy Clause of Article I, notwithstanding a handful of earlier cases, *Seminole Tribe* foremost among them, that appeared to suggest Congress possesses no such power.

[29] *See, e.g.*, Phillip Morris USA v. Williams, 127 S. Ct. 1057 (2007) (punitive damages); Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy, 126 S. Ct. 2455 (2006) (attorneys' fees).

[30] In this area, courts of appeals have found their discretion constrained largely by the Supreme Court's decisions in *Coleman v. Thompson*, 501 U.S. 722 (1991), *Reed v. Farley*, 512 U.S. 339 (1994), and their progeny, which have emphasized that

> [i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750.

and immigration appeals.[32] Although the evidence is anecdotal, at best, and more empirical research is needed to bear out the scope of these claims, there is a widely accepted assumption in federal litigation today that, by virtue of AEDPA,[33] the Prison Litigation Reform Act of 1996 (PLRA),[34] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[35] federal courts have experienced a precipitous decline of the number of cases in these three categories that actually reach the merits.[36]

Nor is this trend limited to the scope of judicial decisionmaking at the trial-court level. Equally prevalent today are decisions by reviewing courts affirming lower-court decisions on other grounds because parties waived their arguments or because any error by the lower court was harmless.[37]

I do not mean to overstate things. There are still numerous areas wherein judicial discretion remains substantially unbounded, and there are developing areas of doctrine where courts in recent years have taken a fairly flexible approach to fully defining the relevant parameters, as perhaps best typified by the jurisdictional minefield created by the Class Action Fairness Act of 2005 (CAFA).[38] And in non-habeas, non-prisoner, non-immigration constitutional litigation, there are still plenty of examples of important decisions in which legal scholarship features prominently.[39] My point, simple though it may be, is that inasmuch as there has been a

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[31] *See, e.g.*, Booth v. Churner, 532 U.S. 731 (2001) (holding that a prisoner had failed to exhaust his administrative claims pursuant to 42 U.S.C. § 1997e(a), even where the administrative process did not provide an appropriate remedy). For an interesting take on the scope of *Booth*, see *Brown v. Valoff*, 422 F.3d 926 (9th Cir. 2005).

[32] *See, e.g.*, 8 U.S.C. § 1252(d)(1) (2000) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies as of right . . . ."). *See generally* Zhong v. U.S. Dep't of Justice, 480 F.3d 104, 117–25 (2d Cir. 2007) (Calabresi, J.) (summarizing the scope of exhaustion in immigration cases, and the interplay with federal jurisdiction).

[33] AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 40, 42, 49, and 50 U.S.C.).

[34] PLRA, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to -77 (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; and 42 U.S.C. §§ 1997-1997h).

[35] IIRIRA, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48, and 50 U.S.C.).

[36] This begs the question, of course, of the propriety of the interposition of such procedural hurdles specifically in those cases where the litigants are most likely to be proceeding either without (or with court-appointed) counsel. *See, e.g.*, John M.M. Greabe, *Mirabile Dictum: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 426 n.125 (1999) (summarizing the hurdles faced by litigants in such civil rights lawsuits).

[37] *E.g.*, Wood v. Valley Forge Life Ins. Co., 478 F.3d 941 (8th Cir. 2007).

[38] CAFA, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). For just one of the thornier issues raised by CAFA, see Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1094–1100 (9th Cir. 2006) (Bybee, J., dissenting from denial of rehearing en banc).

[39] As just one prominent recent example, consider the D.C. Circuit's controversial invalidation of a District of Columbia gun control ordinance on Second Amendment grounds in *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), in which both the majority and dissenting opinions substantially relied upon law review articles.

well-documented upsurge in recent years in the cabining of judicial discretion and the constriction of judicial remedies, we have not yet paid any attention to the impact such a trend might have on the utility and accessibility of legal scholarship to federal judges—and we *should*.

B. *The Underexplored Link Between Discretion and Scholarship*

Although little attention has been paid to the relationship between the trend identified above and the utility of legal scholarship to federal judges, it is not hard to see how one could effect the other. Take contemporary habeas litigation, for example. As summarized by Judge Reinhardt in *Irons*, the ultimate effect of AEDPA on federal court review is "that we may not grant relief to citizens who are being held in prison in violation of their constitutional rights unless the constitutional error that led to their unlawful conviction or sentence is one that could not have been made by a reasonable jurist."[40] The wisdom of such legislative restriction on judicial review notwithstanding, the result is to elevate the reasonableness *vel non* of the state-court judge over any substantive analysis of the underlying constitutional issue. Thus, even the most cutting-edge and important scholarship on, say, the scope of the Sixth Amendment's Confrontation Clause[41] after *Crawford v. Washington*[42] would be irrelevant to a federal judge faced with the conclusion that any constitutional error on the part of the state court was "reasonable," or, at least in AEDPA's terms, not "unreasonable."[43]

An analogous example may be found in the current litigation challenging the detention of non-citizen enemy combatants at Guantánamo Bay, Cuba. Although there are (growing) mountains of scholarship on the difficult questions with respect to the existence and scope of substantive rights capable of enforcement by the detainees in U.S. courts, judicial consideration of this largely unprecedented issue has been foreclosed by the jurisdiction-stripping provisions of the Military Commissions Act of 2006 (MCA), which has, at least thus far, withstood constitutional challenge.[44]

The latter example is exceptional, but the former is not. In any number of ways, federal courts today are devoting increasing amounts of time to

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[40] Irons v. Carey, 479 F.3d 658, 670 (9th Cir. 2007) (Reinhardt, J., specially concurring).

[41] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

[42] Crawford v. Washington, 541 U.S. 36 (2004) (holding that the Confrontation Clause precludes admission of any "testimonial" out-of-court statement by a witness unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness).

[43] *See, e.g.*, Grossman v. McDonough, 466 F.3d 1325 (11th Cir. 2006).

[44] *See, e.g.*, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 127 S. Ct. 1478 (2007); Hamdan v. Rumsfeld, 464 F. Supp.2d 9 (D.D.C. 2006), *cert. denied*, No. 06-1169 (U.S. Apr. 30, 2007).

questions having little to do with the underlying merits of legal disputes, deferring to either federal administrative or state court adjudication. That is not to say, of course, that scholarship in *those* areas might not be of equal importance—we need look no further than the vast literature on jurisdiction stripping and its relevance to the debate over the constitutionality of the MCA for proof of that. Indeed, the more that courts and Congress seem bent to focus on the cabining of judicial discretion and the constriction of judicial remedies, the more important scholarship on the potential constitutional and policy infirmities with such actions will be (and has already become). And the more that federal courts defer to federal agency and state-court decisionmaking, the more that scholarship targeted at *those* areas will ultimately matter.

But for those scholars who concentrate their research and writing in areas touching on what Judge Edwards referred to as "practical" scholarship—producing articles that focus on broad doctrinal trends and misconceptions, and emphasizing potential new directions in various classes of constitutional or statutory litigation—the net effect of this trend is to increasingly marginalize their scholarship in judicial decisionmaking, and not because of any substantive flaws in the scholarship itself.

III. SECOND THOUGHT: LAW REVIEW COMPANIONS AND ACCESS TO SCHOLARSHIP

To the extent that this is a problem worth a solution—a point upon which I imagine many will disagree—the next question is obvious: What can be done? I don't pretend to have all the answers, but I do want to make a couple of observations:

First, the solution is *not* to change the content of our scholarship.[45] For any number of reasons, we should continue to have faith that, if we are doing our job correctly, our scholarship is still relevant. More to the point, there is every reason not to shift our own agendas to those topics more likely to matter to judges. The problem I have attempted to identify herein is not with substance; it is with application.

Which brings me to my second observation: If we take the charge seriously, and want to do something about it, our goal should be to find ways to make our scholarship more relevant to those best in a position to utilize it; to state courts and administrative agencies in the types of cases noted above, but more importantly, to litigators and practitioners. The more that our scholarship appeals (and is accessible) to those in the trenches, and the more that our ideas, where relevant, make it into briefs

[45] The one exception would be scholarship focusing on fixing the problem identified above—*i.e.*, the decline of judicial discretion. But wish though some of us might, not all law professors are Federal Courts scholars.

and petitions for review, the more likely that courts will have as good an opportunity as possible, if they are so inclined, to take into account the view from the Ivory Tower.

As such, to whatever extent federal judges read law reviews less frequently these days than in the past, the real question should be whether the same can be said for federal court *practitioners*. If the answer is no, then this is all much ado about nothing. If the answer is yes, then, at least in my view, *that* is a problem worth a solution.

And that is where online law review companions come in.

There are any number of virtues to online forums for legal scholarship such as *CONNtemplations*, of which Matt Bodie does a far more exhaustive job categorizing than I ever could.[46] Suffice it to say that one of the most important features of such online companions is the extent to which they facilitate the dissemination of the offline content—not just by making the full text of law review articles easily accessible to anyone with an internet connection, but as much, if not more so, by providing shorter and more accessible summaries of the scholarship, and, in an increasing number of cases, responses thereto.

In short, the central virtue of online law review companions is the ease with which they provide for the distillation of lengthy—and at times laborious—scholarship to readers who simply don't have the time to read dozens and dozens of seventy-page articles. And these companions are not just providing easy access to the scholarship; they are also facilitating debates over the points of controversy between scholars on all sides of the issue,[47] opening the door to a far-more-comprehensive understanding of the relevant concepts than one would garner from thumbing through the original article itself.[48]

Online companions also have more flexibility with respect to hosting symposia, as typified by the symposium on the Michigan Civil Rights Initiative recently hosted by the *Michigan Law Review*'s *First*

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[46] *See* Bodie, *supra* note 17.

[47] One recent example is Bob Ellickson's *Unpacking the Household: Informal Property Rights Around the Hearth*, which appeared in long form at 116 YALE L.J. 226 (2006), and then as a shorter—and more accessible—essay at 116 YALE L.J. POCKET PART 336 (2007), http://yalelawjournal.org/2007/04/16/ellickson.html. In conjunction with the shorter form of Ellickson's essay, the *Pocket Part* also published two responses: Robert A. Pollak, *Bargaining Around the Hearth*, 116 YALE L.J. POCKET PART 348 (2007), http://thepocketpart.org/2007/04/16/pollak.html; and Shoshana Grossbard, *Repack the Household: A Response to Robert Ellickson's Unpacking the Household*, 116 YALE L.J. POCKET PART 341 (2007), http://yalelawjournal.org/2007/04/16/grossbard.html.

[48] Even my first foray into the world of online law review companions drew a response. *Compare* Stephen I. Vladeck, *That's So Six Months Ago: Challenges to Student Scholarship in the Age of Blogging*, 116 YALE L.J. POCKET PART 31 (2006), http://www.thepocketpart.org/2006/09/06/vladeck.html, *with* Anthony Ciolli, *Much Ado About Nothing: Why Student Scholarship Has Nothing To Fear from Blogs*, 116 YALE L.J. POCKET PART 210 (2006), http://thepocketpart.org/2006/12/18/ciolli.html.

Impressions.[49] Like blogs, these online companions are also far better situated to respond to current and pressing legal developments than their hard-copy parents, even the fastest of which still take upwards of four months from article solicitation to publication. Thus, in the same way that blogs provide a better medium for interaction between scholars and practitioners, online law review companions provide a better medium for interaction between scholar*ship* and practitioners. As a result, the proliferation of such companions in recent months and years is appropriately the cause for celebration and further encouragement. *CONNtemplations* and its brethren cannot, of themselves, solve the problem of the decline of judicial discretion, but they can increase the accessibility of perhaps our own potential solutions, and, in the interim, of that scholarship that might still have the capacity to factor into contemporary judicial decisionmaking.

IV. CONCLUSION

It is somewhat gauche, and certainly a little self-indulgent, to use the debut of a new online law review companion to extol the virtues of such endeavors. And some of my colleagues will no doubt wonder if the move toward ever-speedier and shorter writing is itself a threat to legal scholarship going forward. Although I think the answer is a resounding "no," and that there is still an important role for the "old-fashioned" seventy-page law review article to play, it is nevertheless still too early to fully appreciate the effects of this new medium.

But to the extent that federal judges really are finding law reviews increasingly worthless and inaccessible, the question is whether these companions might be filling the gap. There is, of course, no way to tell—until companion pieces start getting cited in judicial opinions, anyway. My suspicion, however, is that the answer is yes—that judges, or at least their clerks, *are* reading *The Pocket Part* and the *Colloquy*; *See also* and *PENNumbra*; *First Impressions* and *In Brief* (if the editors of these sites are voyeuristic enough to check, I imagine that an increasing number of URLs on the sitemeters end in "uscourts.gov" and even "scus.gov"). More importantly, I suspect that the real measure of success for these companions will ultimately be their accessibility and utility to practitioners, something that will be far more difficult to measure, but, in an age of shrinking judicial discretion and constricting judicial remedies, far more important.

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[49] *See* Symposium, *An Online Symposium on the Michigan Civil Rights Initiative*, 105 MICH. L. REV. FIRST IMPRESSIONS 117 (2007), http://www.michiganlawreview.org/firstimpressions/vol105/MCRI.htm.

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Essay

Mrs. Lincoln's Lawyer's Cat: The Future of Legal Scholarship

ALFRED L. BROPHY*

When Judge John Noonan wrote about law reviews in the *Stanford Law Review* back in 1995, he likened them to cathedrals.[1] Just as every self-respecting medieval town had one, every self-respecting law school must have one. Schools that aspire to high rankings need more than one, actually. I might use a different analogy, more closely related to dissemination of written knowledge: every self-respecting 19th century town needed a newspaper—sometimes a lot of them. And just as we look back to newspapers and other literary output to gauge something about the culture of the 19th century, we can judge a school by its law review. In focusing on this theme (of the connections between law review quality and law school ranking), we can help improve legal scholarship and perhaps legal education as well.

I am honored to be present at the origin of *CONNtemplations*, this new form of publication by the *Connecticut Law Review*, and to be part of such an important conversation on the relationship between law reviews, citations, and rankings with two people whose work I much respect, John

* Professor of Law, University of Alabama. The author would like to thank Mary Sarah Bilder, Joseph A. Colquitt, Daniel Hamilton, Peggy McGuiness, Kenneth Rosen, Sherrie Alice Armstrong, and Vimala Snow for their assistance with this in one way or another. I presented parts of this at a panel on "The Future of the Legal History Book" at the annual meeting of the American Society for Legal History in Baltimore in November 2006 and would like to thank Peter Hoffer and Dirk Hartog for comments there.

[1] John T. Noonan Jr., *Law Reviews*, 47 STAN. L. REV. 1117, 1117 (1995).

Doyle and Ronen Perry.[2] For those topics are all central to a law school's missions. Law schools seek to educate their students, push back the frontiers of legal knowledge, and also promote their reputations. I hope that in the mission of promoting their law reviews, law schools will both contribute to their students' education and promote legal scholarship. When they do the first two well, they deserve to have a good reputation. This may be one of those instances in which doing the right thing also produces a private good.

My work to date, most of which has appeared in the fall 2006 issue of the *Connecticut Law Review*, has been more modest. It looks to the correlation between citations to law reviews and the ranking of their parent institutions. This all relies on two sources of data. The first is John Doyle's significant and time-consuming research on citations. His research, which is reported in detail at his extraordinarily helpful website,[3] employs the Westlaw jlr (journals and law reviews) and allcases databases to examine how frequently each law review is cited over the past eight years by both journals and courts.[4] The second source is the *U.S. News* rankings of law schools. I focus in particular on the peer assessment scores, which *U.S. News* compiles by surveying a number of people at each law school (the dean, academic dean, most recently tenured faculty, and chair of the hiring committee).[5] The correlations are close. For instance, considering the *U.S. News* top 50 schools, there is a .88 correlation between the *U.S. News* peer assessment scores and the citations by journals to those schools' main law reviews.[6] I'm not always sure that the *U.S. News* peer assessments measure what we should care about. And I have skepticism about the efficacy of using citations to a law review as a measure of law school quality. But whatever the problems with either of those measures, they are closely related. They are also closely related to other measures of quality like median LSAT score. Together these measures may not mean much, but they are at least related to one another. If they are specious, they are wrong together.

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[2] The fluid nature of this project is illustrated that between the time I first drafted this and when I turned in my final paper, three other scholars, Matt Bodie, Paul Horwitz and Steve Vladek, joined the discussion. From the drafts I've read, we're going to have a great and wide-ranging discussion. And so now I'm honored to be among five people whose work I respect.

[3] Washinton & Lee Law School, Law Journals: Submissions and Rankings http://lawlib.wlu.edu/LJ/ (last visited Apr. 18, 2007).

[4] For detailed discussion of his methodology, see Washington & Lee Law School, Law Journals: Submissions and Ranking, Introduction, http://lawlib.wlu.edu/LJ/method.asp (last visited Apr. 18, 2007).

[5] *See Law Methodology*, U.S. NEWS & WORLD REPORT, AMERICA'S BEST GRADUATE SCHOOLS 2007, *available at* http://www.usnews.com/usnews/edu/grad/rankings/about/07law_meth_brief.php (last visited June 15, 2006). The 2008 methodology currently available on the internet can be found at http://www.usnews.com/usnews/edu/grad/rankings/about/08law_meth_brief.php (last visited Apr. 28, 2007).

[6] *See* Alfred L. Brophy, *The Relationship Between Law Review Citations and Law School Reputation*, 39 CONN. L. REV. 43, 50 (2006).

Table 1 updates the data in my initial article, using the 2008 *U.S. News* data (released in March 2007) and Doyle's data for 1999–2006. It provides the correlations for 175 schools between a number of student characteristics (LSAT 25th percentile, LSAT midpoint—the mean of the 25th and 75th percentile, and LSAT 75th percentile), peer assessment and lawyer/judge assessment scores, and citations to the schools' main law journals by other journals, by cases, and by impact (citations in other journals divided by the number of pieces published in each cited journal). There is a high correlation between peer assessment and journal citations (.90) and peer assessment and impact (.91). Table 2 presents the data for the top 50 *U.S. News* schools. Peer assessment correlates with journal citations (.89) and impact (.87) at similar levels. If Harvard Law School, which is an outlier (its law review is by far the most-cited), is excluded the correlation between peer and law review citations increases slightly to .91.

Table 1
Correlations of LSAT, *U.S. News* Data, and Law Journal Data
All Schools

	LSAT			Assessment				
	25	75	Mid	Peer	Law/J	Journ.	Cases	Impact
LSAT 25	1.00	.97	.99	.90	.87	.83	.73	.84
LSAT 75	.97	1.00	.99	.93	.89	.85	.74	.85
LSATmid	.99	.99	1.00	.92	.89	.84	.74	.85
Peer	.90	.93	.92	1.00	.96	.90	.77	.91
Law/J	.87	.89	.89	.96	1.00	.85	.76	.86
Journal	.83	.85	.84	.90	.85	1.00	.87	.91
Cases	.73	.74	.74	.77	.76	.87	1.00	.73
Impact	.84	.85	.85	.91	.86	.91	.73	1.00

N = 175; $p < .0001$ for all correlations.

Table 2
Correlations of LSAT, *U.S. News* Data, and Law Journal Data
U.S. News Top 50 Schools

	LSAT			Assessment				
	25	75	Mid	Peer	Law/J	Journ.	Cases	Impact
LSAT 25	1.00	.94	.99	.84	.85	.80	.64	.73
LSAT 75	.94	1.00	.98	.88	.86	.86	.68	.77
LSATmid	.99	.98	1.00	.87	.87	.84	.67	.76
Peer	.84	.88	.87	1.00	.96	.89	.67	.87
Law/J	.85	.86	.87	.96	1.00	.86	.67	.84
Journal	.80	.86	.84	.89	.86	1.00	.85	.81
Cases	.64	.68	.67	.67	.67	.85	1.00	.56
Impact	.73	.77	.76	.87	.84	.81	.56	1.00

N = 50; p<.0001 for all correlations.

There are continuing agreements on journal citations (though we may quite legitimately ask what journal citations mean) and peer judgements. They correlate at remarkable degrees over time. And journal citations correlate more highly with peer assessments than with any other data studied here. Whether that supports the relevance of both peer assessments and journal citations is unclear.

Ronen Perry is skeptical of the inferences we might draw from the high correlations in "Correlation and Causality."[7] One of Perry's key points is the observation that a correlation between citations to law journals and peer assessment scores does not prove causation.[8] Of course this is correct. My primary interest in citations is in the utility of citations to a journal as a gauge of the parent institution's quality.[9] In a concluding

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[7] *See generally* Ronen Perry, *Correlations versus Causality: Further Thoughts on the Law Review/Law School Liason*, 39 CONN. L. REV. 77 (2006).

[8] *Id.* at 87.

[9] *See, e.g.*, Brophy, *supra* note 6, at 48–49 ("Given the close connections between law review citations and school reputations, we can say with confidence that for the top law schools, school reputation is related to law review quality, as measured by citations.").

section I discussed a little of the meaning of those connections, where I again emphasized the modest and limited inferences that should be drawn from the data. I urged schools to pay attention to their law journals. I then speculated that a good journal might help in some way improve a school's reputation:

> The findings suggest that law reviews are schools' ambassadors to the rest of the legal academy. Much of what people at other schools know about a school's academic orientation may come from the articles and notes published in the school's law journals. Thus, those schools seeking to advance in reputation may want to pay attention to their law reviews. Of course, correlations do not prove causation. Obviously, just because a law review receives increased citation will not necessarily result in an increase in its school's rankings. Nor does an increase in a school's ranking necessarily led to increased citations. Each probably influences the other; as reputation increases, law reviews are able to have a greater choice of articles. And as faculty see articles cited more frequently, they may have increasing respect for the schools associated with them. The arrows of influence probably point both ways. So schools on the move may want to pay increasing attention to their reviews.[10]

I suggested that if you want to know where a law school is headed, you should look to its law journal.[11] Perry uses that suggestion to ask: do we see evidence of law reviews serving as leading indicators of schools that are rising or falling. His key point here is that there we have not seen convergence between law review citations and law school reputation over time.[12] Here he turns in part to the longitudinal data on John Doyle's website. In a separate article, I, too, observe that there is little convergence over the limited time represented by Doyle's data (2002–2005).[13] Given the static nature of law school reputation assessments, that window of time is too small to see the kinds of changes in reputation that I would predict might correlate with variations in law review quality. Again, I'm thinking that law reviews are a measure of the quality of their parent institutions.

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[10] *Id.* at 55. Along similar lines, Gordon Smith has speculated whether a law review's rejection (or acceptance) rate is a reliable indicator of a law review's quality. Gordon Smith, *Just Curious About Law Review Rejection Rates*, CONGLOMERATE.ORG, Mar. 21, 2007, http://www.theconglomerate.org/2007/03/just_curious_ab.html.

[11] *See, e.g.*, Brophy, *supra* note 6, at 56.

[12] Perry, *supra* note 7, at 81–82.

[13] Alfred L. Brophy, *The Emerging Importance of Law Review Rankings for Law School Rankings, 2003–2007*, 78 U. COLO. L. REV. 35, 43–44 (2007) (noting limited evidence of changes in citations correlating with changes in reputation over the period 2002–2005).

The data do not point up a wholesale convergence over a short compass of time between citations in other journals and peer assessment scores. There are, however, some suggestive cases here of well-performing law reviews signaling the high quality of their parent institutions. Let me take just several. *Fordham Law Review* is ranked in the stratosphere—it's in the top 10 in citations. Part of their secret is that they publish *a lot*; another part is that it's really good. That seems to suggest a vibrant intellectual community; indeed, even though the *Fordham Law Review* has fallen slightly (from 7 to 9.5), its law school ranking has improved. And if the law review is an indicator (and I think it is) of the quality of the school, Fordham Law School is still underrated. I think of three other schools that have consistently produced terrific law reviews in recent years: Cardozo, Chicago-Kent, and DePaul. In each case the law journals are performing quite well (they are ranked 26, 28, and 41, while their schools are ranked in the 2007 *U.S. News* ranking 53, 60, and 80 respectively). I think the reviews are indicative of the exciting intellectual cultures of those schools. And one might also refer to the *Albany Law Review*, *Hofstra Law Review*, *Houston Law Review, Marquettte Law Review*, *South Texas Law Review*, and *William Mitchell Law Review*, which all have citation ranks substantially ahead of their parent institutions' *U.S. News* peer assessment ranks. Those reviews testify to the exciting intellectual atmosphere at each of those schools. I continue to believe the law reviews may be a good gauge of what's going on at those schools. And the fact that there has not yet been convergence of law review citations and peer assessments may say more about the static nature of reputations than about the weakness of law review citations as a barometer of quality.

Perry has also explored the relevance of student credentials (as measured by the 75th percentile of the LSAT) to law review citations.[14] He points out that law review citations correlate highly with student quality (and he also explores the polynomial relationship between LSAT scores and citations). It is worth observing in this context that law review citations correlate more highly with peer assessment scores. Partial correlations indicate that peer assessment accounts for most of the predicted relationship with journal citations, and LSAT midpoint makes little independent contribution.[15] Another way of approaching this is to run a multiple correlation with journal citations using both peer assessment and

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[14] Perry, *supra* note 7, at 91–93.

[15] Partial correlations (N = 175): Peer assessment v. Journal citations = .59, after removing effect of LSAT midpoint. LSAT midpoint v. Journal citations = .08, after removing effect of Peer assessment.

LSAT midpoint as independent variables. Again, LSAT midpoint contributes little beyond journal citations.[16]

So we see a connection between law review citations and law school rankings. One implication I suggested in the main article is that perhaps we should use citations to a school's main law review as a measure of the quality of schools, particularly those outside of the top 50—the ones for whom we are least likely to have adequate peer assessment measures of quality. I think that looking to the quality (which in this case we measure by citations) of each school's law review might result in a good gauge of the law school's quality. And those numbers may be more responsive to changes in quality at a law school than the notoriously static (and perhaps prejudiced) peer assessments.

I have begun looking a little more recently at the peer assessment scores. We know through William Henderson's work about how notoriously static those numbers are.[17] And in some instances, I think them quite unfair. Ted Seto's recent work reverse-engineering the *U.S. News* data, for instance, looked to the peer assessment scores of institutions. Together the peer assessment and lawyer judge scores, in his words, "given an aggregate weight of 40%, *really* matter."[18] Seto further compares peer assessment scores with each school's LSAT scores. While in most instances there is a close correlation, in some cases there are dramatic differences. All of this points up the (apparently) pre-judged way that raters fill out the survey.[19] And in the search of another measure that is responsive to changes in academic quality, as well as a decent indicator of the intellectual orientation of a law school, I think that citations to a law school's review may be helpful.

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The movement in the historical profession known as the "history of the book" project may give us some guidance here. The "history of the book" project places books at the center of historical analysis. It studies all sorts of phenomena around the production and dissemination of books to make assessments of the surrounding culture. Historians ask questions like who was the audience for books, who read them, what purposes did books

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[16] Multiple correlation for Peer assessment and LSAT midpoint v. Journal citations (N = 175): Rsquare = .81; Rsquare adjusted = .81. r = .90, which is the same (to 2 decimals) as correlation between Peer assessment alone and Journal citations. LSAT midpoint did not contribute significantly (p = .28).

[17] *See* Bill Henderson, *Variation in US News Reputation Over Time*, CONGLOMERATE.ORG, Apr. 4, 2006, http://www.theconglomerate.org/2006/04/variation_in_us.html.

[18] Theodore P. Seto, *Understanding the U.S. News Law School Rankings* 27 (Loyola of L.A. Law Sch. Legal Studies Working Paper No. 2006-33, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=937017.

[19] Seto used LSAT scores to predict peer assessment scores. *See id.* at 27–30. In the case of the University of Alabama, for which I have particular affection and concern, if the peer assessment score were in line with what is predicted by the LSAT score, the University of Alabama's peer assessment would move up .6 points. *See id.* at 30.

serve? Because of the rather precise ways in which we can trace the citation of law books, legal historians have something particularly important to contribute to this project.[20] But the story of this exciting, even thrilling project is best reserved to another time.[21] What I'm interested in right now is the way that we can employ an insight from the history of the book: if you want to gauge the culture of an institution, use data produced by it. As applied in this case, that means that if you want to know about a law school, you should examine its output (its law reviews and the scholarship its faculty produces).

The example that I like to start with, because it relates to my school, is the *Alabama Law Review* in the post-*Brown* years. The *Review* published an article by Alabama professor Jay Murphy that argued against the constitutionality of a plan then in circulation in the legislature to shut down the public schools.[22] The article was, according to local lore, important in blocking the plan. Though outsiders would not know this—and perhaps few others than legal historians would care—the *Alabama Law Review*'s progressive stance reflected the attitudes at the law school. To take another of the many examples, in 1921 the *Yale Law Journal* published an article arguing that the Fugitive Slave Act of 1850 was constitutional.[23] The Act—one of the most vilified ever passed by Congress—was believed unconstitutional by many at the time and it had been repealed for decades by 1921. The article reflects attitudes in the academy in the 1920s towards the Civil War and the issues of Jim Crow. In short, if you want to know something about what people think, read their literary output.[24] Of course,

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[20] Alfred L. Brophy, *The Law Book in Colonial America*, 51 BUFFALO L. REV. 1119 (2003).

[21] For more extensive discussions of this topic, see RICHARD D. BROWN, KNOWLEDGE IS POWER: THE DIFFUSION OF INFORMATION IN EARLY AMERICA, 1700–1865 (1989); ELIZABETH EISENSTEIN, THE PRINTING PRESS AS AGENT OF SOCIAL CHANGE (1980); RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE (1995); Michael H. Hoeflich, *Legal History and the History of the Book: Variations on a Theme*, 46 U. KAN. L. REV. 415 (1998).

[22] *See generally* Jay Murphy, *Can Public Schools Be Private*, 7 ALA. L. REV. 48 (1954).

[23] *See generally* Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE L.J. 161 (1921).

[24] One can learn a lot about a university community by reading the output of its faculty. My current project, "University, Court, and Slave," is about moral philosophy in the antebellum university and its connections to the antebellum judiciary. It relies upon the writings of university faculty (and other intellectuals) to create a broad picture of their moral-philosophical views, which then provides a context for understanding the glimmers of that world that appear in judicial opinions. Through a close read of key works, such as ALBERT TAYLOR BLEDSOE, AN ESSAY ON LIBERTY AND SLAVERY (1856); THOMAS R.R. COBB, AN HISTORICAL SKETCH OF SLAVERY, FROM THE EARLIEST PERIODS (1858); THOMAS RODERICK DEW, A DIGEST OF THE LAWS, CUSTOMS, MANNERS, AND INSTITUTIONS OF THE ANCIENT AND MODERN NATIONS (1852); ALBERT TAYLOR BLEDSOE, LIBERTY AND SLAVERY (1856); R.H. RIVERS, ELEMENTS OF MORAL PHILOSOPHY (1860); WILLIAM A. SMITH, LECTURES ON THE PHILOSOPHY AND PRACTICE OF SLAVERY, AS EXHIBITED IN THE INSTITUTION OF DOMESTIC SLAVERY IN THE UNITED STATES: WITH THE DUTIES OF MASTERS TO SLAVES (1856), along with substantial literary output (such as CAROLINE LEE HENTZ, THE PLANTER'S NORTHERN BRIDE (1854)) and shorter works in the *Southern Literary Messenger* and the *Southern Quarterly Review*, as well as literary addresses and judicial opinions, one can gauge the ideas of those people. When read against their northern counterparts, like HARRIET BEECHER STOWE, DRED: A TALE OF THE GREAT DISMAL SWAMP

drawing inferences about a law school from its law review is somewhat different (and more attenuated) than drawing inferences from its faculty's output. The correlation between a school's intellectual culture and law review output is not as perfect as, say, judges' ideas and the opinions they write,[25] or maybe even the correlation between literary addresses and a school's culture.[26]

Given the ways that reviews can reflect the intellectual culture of a school and can serve as ambassadors to the legal community, I hope that schools will pay increasing attention to their reviews. I suspect that one effect of a renewed focus on the connections between a law review's quality and the quality of its parent institution will be that schools pay increased attention to their reviews.

* * *

I'd like to focus now on two implications of correlations between law review quality and law school quality: the importance of a school's wealth in its ability to produce law reviews and the implications of the close connection between law reviews and law school quality for the future of legal scholarship.

Law Reviews are part of the educational mission and part of the promoting of the school, so law schools are willing to spend money on them. At the University of Alabama, where I have some sense of the numbers, we publish five issues a year at a cost of approximately $7000 per issue or approximately $35,000 per year. Those figures include only the cost of printing and mailing each issue; they exclude the cost of a full-time secretary, as well as the costs of office space, office supplies, mailing (other than that of the issue to subscribers), and other miscellaneous expenses related to the educational process. Of course, in Tom Sawyer fashion, we get labor from students for free.[27] That means that legal scholarship does not have the same constraints as scholarship in many other disciplines. That is, the subsidy—what is called a subvention in academic publishing terms—is provided by the publisher.

The fact that law schools are willing to underwrite the cost of publication distinguishes reviews from much other scholarship these days. Rising publication costs have frustrated library budgets and scholars; they

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(1856), and WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE (1853), we can create a detailed map of the considerations of utility and history that the university faculty and judges employed.

[25] *E.g.*, Alfred L. Brophy, *"Necessity Knows No Law:" Vested Rights and the Styles of Reasoning in the Confederate Conscription Cases*, 69 MISS. L.J. 1123 (2000) (comparing opinions of Confederate courts, issued almost simultaneously, on the same issue of vested rights, to map the variance in judicial philosophies).

[26] *See generally, e.g.*, Alfred L. Brophy, *The Law of Descent of the Mind: Law, History, and Civilization in Antebellum Literary Addresses*, 20 LAW & LITERATURE (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=777724.

[27] *See* MARK TWAIN, TOM SAWYER ch. 2 (1876).

have led to a crisis in many arts and sciences fields, where tenure often depends on publishing a monograph (book), but publication costs have risen (and library budgets have fallen) so much that many scholars with important, new, good work have a hard time getting their monographs published. Law reviews, which are run in part to promote the schools themselves and in part to provide training to law students, help in promulgating scholarship. And because of the educational and promotional roles they serve, law schools are willing to underwrite the cost of law journals. Some subscriptions are still quite expensive; an institutional subscription to the *Harvard Law Review* is $200/year ($95/year for non-profit institutions, as John Doyle points out). But through the generosity (and self-interest) of law schools, we avoid the absurd costs associated with journals in other academic fields. The editors of the mathematics journal *Topology,* for example, resigned over the subscription costs, which are now more than $1600 per year!

Economics remain important for legal publishing, however, particularly for books. Price of books is one critical constraint, because if you want a book to get into the hands of students, it has to be affordable (especially if it is not the primary casebook). At the University of Alabama and I suspect at many other campuses, the administration requests that professors give strong consideration to the costs of books assigned to students. And that is just as it should be. Moreover, in these days of drastically reduced library budgets and of shrinking subsidies from universities for their presses, the economics of publishing are really beginning to hurt opportunities for publishing scholarly monographs, I fear. The days of the major university libraries that try to purchase every serious scholarly book are waning. Some presses, like Oxford University Press and Cambridge University Press, can still expect to sell a few hundred copies of everything they publish, no matter how expensive. But you have to ask yourself, how many people are going to buy even a terrific book if it costs $190? $335? And even how many university libraries are going to buy it? It's a serious problem.

Take the *Oliver Wendell Holmes Devise History of the Supreme Court.* It has that strange name because Holmes left money in his will to the United States government—and Frankfurter funneled it towards a multi-volume history of the Court. William Wiecek's volume just came out this summer. The final volumes are about to come out. I'm eagerly awaiting the volumes by Morton Horwitz on the Warren Court and by Robert Post on the Taft Court. Now you may say: "wow, Holmes died in 1935. What's going on; we're still publishing books using money he left to the government in his will more than seventy years ago?" There's a pretty

interesting story, actually, which Sanford Levinson tells in brief compass in the *Virginia Law Review*.[28]

The *Oliver Wendell Holmes Devise History* volumes are expensive. G. Edward White's volume on the Marshall Court cost about $90 when it came out in 1988. It's out of print now, which is a huge shame. I used to assign it (when it was available for about $30 in paperback) to my legal history students. Then there's the Oxford History of the Laws of England. Richard Helmholz's volume in that series, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* is being praised to heaven.[29] One very distinguished legal historian, whose judgment is rock solid, told me that he thinks it is one of the best volumes *ever* written in any field in legal history. Yet, it costs $335. So make sure to read it in your library, because it's a must read and it will be hard to afford to read it any other way.

There are still some presses where costs are relatively unimportant. Those are presses where the university is underwriting them to help them get market share. The limits of the market do not apply in the same way at those presses. The University of Pennsylvania Press is one of those that, at least a few years ago, was spending more on production and publicity than they expected to get in return. Penn was willing to fund them because the university saw a major press as an important selling point for the university. (Sounds like law journals, doesn't it?) In legal history, the area I know best, the University of Georgia Press, Northern Illinois University Press, and University Press of Kansas all produce books that are affordable. They are, perhaps, more interested in publishing than in the bottom line. But all of these are senses that I have acquired through looking at their lists and seeing good books, rather than speaking with anyone knowledgeable at any of those presses.

My sense is that Cambridge University Press continues to be one in which cost is, if not *no* object, certainly subordinate to the quality of the manuscript. One of the reasons I so respect Cambridge is that I think they will produce a book if it's great, even if there is only a small market for it. It's refreshing to see academic merit as the central (and perhaps only) consideration, however rare that may be these days. Some practical books in law still find significant sales, like *Powell on Real Property* and Sutherland's *Statutes and Statutory Construction*. Some expensive practical volumes still make a profit. Perhaps that's one of the lessons of this focus on economics: legal academics should be writing more on practical topics and less on esoteric ones. When I found out something

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[28] Sanford Levinson, Book Review, 75 VA. L. REV. 1429, 1429–30 n.2 (1989) (reviewing G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835 (1988)).

[29] *See* Charles J. Donahue, Book Review, 25 LAW & HIST. REV. 217–19 (2007) (reviewing RICHARD HELMHOLZ, THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640'S (2004)).

about the economics of practitioner treatises a few years ago, I certainly thought seriously about changing my research agenda.

The long and short of it is that costs are rising; sales are falling; and while there are still some fields where there is enough interest to support excellent scholarship, I fear things are going from bad to worse. The importance of the bottom line continues to grow, as money becomes tighter everywhere. It never ceases to surprise me how small the audience for academic books is—even for academic books that get a huge amount of attention. There is still some room for popular works on history (or law). A couple of examples here. James Loewen's *Lies My Teacher Told Me*, about the way that American history textbooks misrepresent American history.[30] It's a fabulously entertaining read. It sold more than one million copies. Michael Bellesiles's *Arming America* was the center of much attention a few years ago; it won the prestigious Bancroft Prize and then had the prize taken away.[31] Knopf, which published it, subsequently stopped selling it (though you can still get it for as little as $0.45 at Amazon). I'm not here to praise Bellesiles or to criticize him. I understand that it sold something around 18,000 copies. So even a book that gets a huge amount of attention (in its later period, much of it negative, of course), sold less than 20,000.

I think that those who write on U.S. legal history have an easier time than those who write on many other topics, because there still seems to be a sufficient interest among libraries to support books on reasonably broad topics in U.S. legal history. There's a lesson for authors in this, I guess. Write on a topic of great public interest. Lawrence Kohl, whose *The Politics of Individualism* is a one of the finest works of history I have ever read, told me a joke about book topics: people read books about presidents, first ladies, and cats. (And I think we might add lawyers, too.) So if you want to sell some books, write about Mrs. Lincoln's lawyer's cat. Actually, if you want to sell some academic books, write a textbook, or one on the military history of the Civil War.

Dedi Felman, a senior editor at Simon and Schuster, has an important, revealing article in the *Chronicle of Higher Education* on what editors are looking for.[32] One of her key points is that books are different from articles. They have bigger themes, they pull together more ideas, they usually have a larger audience and a longer life. A more extensive discussion of these issues appears in Susan Rabiner's *Thinking Like Your Editor*—a book I highly recommend to those considering writing an academic book.[33]

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[30] JAMES LOEWEN, LIES MY TEACHER TOLD ME (1994).

[31] MICHAEL BELLESILES, ARMING AMERICA (2000).

[32] Dedi Feldman, *What are Book Editors Looking For?*, CHRON. OF HIGHER EDUC., July 21, 2006, *available at* http://chronicle.com/jobs/news/2006/07/2006072101c/careers.html.

[33] SUSAN RABINER & ALFRED FORTUNATO, THINKING LIKE YOUR EDITOR (2002).

So universities are providing less money and book sales are generating less. What's next? How do book reviews fit into this rather grim picture? In ways you would not at first expect. Book reviews are not about selling books, unfortunately. Some years ago one of the syndics at Cambridge University Press told me that their research indicated that reviews of books in academic journals—and even prizes—had virtually no effect on sales. For those who are fortunate enough to have a review in the *New York Times*, that helps—but my sense (and limited experience) is that even a review in a major paper other than the *Times* (and maybe the *Los Angeles Times*) does little. And reviews in academic journals do virtually nothing in terms of sales. This, I suspect, is the reason that it is hard to squeeze review copies out of some presses: they know this secret as well.

Reviews in academic journals are about something else—something substantially more important than sales: the promulgation of ideas. Reviews are about distributing knowledge. After authors have collected every bit of information and squeezed every story they can out of their research, then put it together in a narrative, waded through interminable edits, and waited another year for the manuscript to appear, it's the book review that reduces their life's work to around 800 words.

I've enjoyed—and learned the most from—the critiques that engage with my thesis.[34] I would much rather have someone seriously engage with my work and help improve it than give some polite (but ultimately dismissive) comment. Book reviewers may feel, with Ralph Ellison's *Invisible Man*, that they were never so disliked as when they were honest. There are better (and poorer) ways to deliver a critique. But authors ought to appreciate a respectful and earnest engagement with ideas. Reviews, then, can serve the function of helping to get ideas into circulation, even as books are becoming less affordable. They provide a vehicle for talking to one another, which we do less and less in the academy.

So, where are we left? I think we're going to see fewer books being published. There will be more pressure for universities to provide subventions to presses to help them put out books at a reasonable cost. Because law schools have money, their faculty may be able to weather this crises better than arts and science faculty. And I think that areas like American legal history have the potential for some more library sales than many other areas. Perhaps peer reviewed journals (which are facing the same kinds of problems detailed above of rising costs and fewer sales) and maybe law journals will take up some of the role that university presses have traditionally served. Some of the distribution of scholarship will take

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[34] *See generally, e.g.*, Alberto Lopez, *The Reparations Debate Beyond 1865*, 69 TENN. L. REV. 653 (2002), excerpts available at http://academic.udayton.edu/race/02rights/repara17.htm (reviewing ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921 (2002)); Perry, *supra* note 6 (responding to my suggestions about rankings).

place electronically, through services like the Social Science Research Network (SSRN) and the Berkeley Electronic Press (Bepress).

Some of the specialized law journals help to foster and give voice to the communities from which they spring. A few years ago the *Columbia Journal of Gender and Law* focused a lengthy issue on the question of the place of feminist law journals. Felice Batlan's history of the journals explained some of the roles they fill.[35] Joanna Grossman explored the implications (she might say hazards) of rankings of journals (and where faculty publish) for publishing with feminist law journals.[36] As Henry David Thoreau pointed out in the essay that is now popularly known as *Civil Disobedience*, we can be free of institutions, if we want to be. And the internet helps to liberate us as authors from institutions like law reviews. But it is not so easy for an entire society (in this case the legal profession) to move away from them.

Because of financial constraints, law review scholarship may take on increasing importance. Here I think that there are some key changes in the works that are improving legal scholarship. First, faculty are taking a dramatically increasing role in the running of journals—mostly behind the scenes. Even in the old days (the late 1980s) when I was an editor of the *Columbia Law Review*, we vetted articles with faculty. (Faculty intervention, rather than student foibles, may account for some of the idiosyncracies of what's published in major law journals.) As faculty advisor at the *Alabama Law Review* I work closely with students in the selection of all articles and student notes. We have a modified peer review process, in which we ask faculty members with expertise in the article under consideration to review every article before we make an offer. And while I suspect that weak articles can still make it through that process (and we undoubtedly pass on highly deserving articles, in part because the peer review process slows us down and in part because students still make the first cut on articles), we have improved quality control. Moreover, I think that this peer review process may become a point of pride both for the journal and for our authors who publish in it. In addition, we have been the beneficiary of several excellent symposia held at the school and also by publishing articles by our distinguished lecturers. Moreover, every student note is written in conjunction with a faculty advisor. Some of the most rewarding teaching experiences I have had in the last six years have been working with students on their notes. Among my favorites are Amy

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[35] *See generally* Felice Batlan, *A Journal of One's Own? Beginning the Project of Historicizing the Development of Women's Law Journals*, 12 COLUM. J. GENDER & L. 430 (2003).

[36] *See generally* Joanna L. Grossman, *Feminist Law Journals and the Rankings Conundrum*, 12 COLUM. J. GENDER & L. 522 (2003). I am a little less pessimistic than Grossman about the rankings issue;. she focuses largely on the exclusion of feminist law journals from rankings of the most influential journals—and the disincentive that gives to publishing in them. However, almost all journals are excluded from those rankings.

Wilson's on the jazz influence in property law;[37] Kitty Rogers's on integrating the city of the dead (that is, cemeteries);[38] Leah Green's on the Erie Canal in American legal thought;[39] Elizabeth Bates's on statutes of limitations for reclamation of artwork produced by slaves;[40] Chad Bryan's on the problems with the reparations movement;[41] Chris Williams's on an empirical study of smart growth;[42] Fred Wright's on the effect of New Deal residential finance and foreclosure policies on property law;[43] Grace Long's on constructive trust doctrine and the changes in equity jurisprudence;[44] and Royal Dumas's on Alabama judges' rhetoric of race in the Progressive Era.[45] Look for some really fine pieces in the near future on the integration of libraries in the immediate post-Brown years, an empirical study of wills in antebellum Alabama, and the intellectual origins of cost-benefit analysis in legal scholarship of the 1970s and 1980s.

It is heartening to see faculty who actually care about the work their law reviews publish. And that suggests that law reviews are adapting. When we think of institutions that have survived over the centuries—the Catholic Church, the common law, and universities—we see a couple of traits. First, conservatism in methods, balanced by an ability to adapt. And I think we see both of these traits in law reviews. They have been around for a long time; they are conservative (more or less) in the type of scholarship they publish. However, they are also have the ability to adapt. This blog is one illustration of that ability to adapt. But legal scholarship has been adapting for a long time. During our country's Watergate crisis Charles Black wrote a short book on impeachment and then published it with Yale University in a very short compass of time. It was subsequently the center of attention during Watergate.[46] When speed is absolutely necessary, university presses and law reviews may provide it. To take a more recent example, when my colleague Susan Hamill wrote an important

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[37] Amy Leigh Wilson, Comment, *A Unifying Anthem or a Path to Degradation?: The Jazz Influence in American Property Law*, 55 ALA. L. REV. 425 (2004).

[38] Kitty Rogers, Comment, *Integrating the City of the Dead: The Integration of Cemeteries and the Evolution of Property Law, 1900–1969*, 56 ALA. L. REV. 1153 (2005).

[39] Leah Moren Green, Comment, *The Erie Canal and the American Imagination: The Erie Canal's Effects on American Legal Development, 1817–1869*, 56 ALA. L. REV. 1167 (2005).

[40] Elizabeth Tyler Bates, Comment, *Contemplating Lawsuits for the Recovery of Slave Property: The Case of Slave Art*, 55 ALA. L. REV. 1109 (2004).

[41] Chad W. Bryan, Comment, *Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599 (2003).

[42] Christopher J. Williams, Comment, *Do Smart Growth Policies Invite Regulatory Challenges? A Study of Smart Growth and Regulatory Takings in the Southeastern United States*, 55 ALA. L. REV. 895 (2004).

[43] Fred Wright, Comment, *The Effect of New Deal Residential Finance and Disclosure Polices Made in Response to the Real Estate Conditions of the Great Depression*, 57 ALA. L. REV. 231 (2005).

[44] Grace Murphy Long, Comment, *The Sunset of Equity: Constructive Trusts and the Law-Equity Dichotomy*, 57 ALA. L. REV. 875 (2006).

[45] Royal Dumas, Comment, *The Muddled Mettle of Jurisprudence: Race and Procedure in Alabama's Appellate Courts, 1901–1930*, 58 ALA. L. REV. 417 (2006).

[46] CHARLES L. BLACK, IMPEACHMENT: A HANDBOOK (1974).

empirical study about the Alabama property tax system, it was published in pre-print, pdf form on the internet, so that it could be distributed before the 2002 election.[47] Hamill's article was front-page news on the *Wall Street Journal*[48] and named by the *New York Times* as one of the best ideas of 2003.[49]

Law reviews certainly have problems. Many, many of them. However, here I would like to focus on their virtues and talk about some of the reforms that are making reviews better. Increased faculty involvement is certainly one of them.

Extension of law reviews to the internet is another. Blogs are sometimes cited as a more flexible alternative to law reviews. And while I share others' great skepticism of blogs as scholarship and most assuredly do not believe that those of us who spend our free time blogging deserve credit for it, blogs can help with speedy dissemination of ideas. They can also help build communities. The *Connecticut Law Review's* on-line version illustrates the new directions. There are, of course, already a few other entrants. Even the staid *Harvard Law Review* has an on-line forum.[50] There are *The Yale Pocket Part*,[51] the *University of Pennsylvania Law Review's PENNumbra*,[52] and the *Michigan Law Review's First Impressions*.[53] The *Michigan Law Review* describes the goal of *First Impressions* in this way:

> First Impressions, an online companion to the Review, features op-ed length articles by academics and practitioners in order to fill the gap between the blogosphere and the traditional law review article. This extension of our printed pages aims to provide a forum for quicker dissemination of the legal community's first impressions of recent changes in the law.[54]

The *Northwestern University Law Review's Colloquy*[55] straddles electronic and print. Some of their pieces appear first in the *Colloquy* on the web, then appear in print form in the law review. And at the leading peer-reviewed journals, my sense is that a similar move is occurring. At the

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[47] *See* Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics*, 54 ALA. L. REV. 1 (2002), *available at* http://www.law.ua.edu/pdf/hamill-taxreform.pdf.

[48] Shailagh Murray, *Divine Inspiration: Seminary Article in Alabama Sparks Tax Code Revolt*, WALL ST. J., Feb. 12, 2003, at A1, *available at* Lexis, News Library, WSJNL File.

[49] Jason Zengerle, *The Third Annual Year in Ideas: Biblical Taxation*, N.Y. TIMES, Dec. 14, 2003, §6 (Magazine), at 52, *available at* Lexis, News Library, NYT File.

[50] Harvard Law Review Forum, http://www.harvardlawreview.org/forum/HLRforum.shtml (last visited Apr. 25, 2007).

[51] The Pocket Part, http://www.thepocketpart.org/ (last visited Apr. 25, 2006).

[52] PENNumbra, http://www.pennumbra.com/ (last visited Apr. 26, 2007).

[53] First Impressions, http://www.michiganlawreview.org/index-fi.htm (last visited Apr. 25, 2007).

[54] *Id.*

[55] Colloquy, http://northwestern-colloquy.typepad.com/ (last visited Apr. 25, 2007).

Law and History Review, for instance, we post pre-prints of the articles months before the hard copy appears.

Blogs help create a community. I often learn a lot from blogs; I get ideas for exams and for class discussion and learn about recent scholarship. I don't think I've ever gotten an idea for scholarship from reading blogs, but that may suggest more about the esoteric nature of my own scholarship, which lies so far from the center of the legal academy. Or it may suggest something about the limitations of blogs in promoting scholarship. I think of blogs the same way I think of lunchtime conversations—they're very entertaining; they're fun; and they can be substantive, but I wouldn't dare put one down on my resume and I don't expect credit for them. Perhaps, like lunch, they are increasingly necessary to survival in the academic world, however. Michael Madison talks much about this in his provocative article, *The Idea of the Law Review: Scholarship, Prestige, and Open Access*, which appeared recently on the web and in the *Lewis and Clark Law Review*.[56] Then, again, the end [of academic blogging] may be near.

Part of the advantage of law reviews' entrance into the blogosphere is flexibility. But why post in *CONNtemplations* rather than, say, at *PropertyProf Blog*, where I'm a semi-permanent fixture? In part, to get an audience. (Well, I already have "work shopped" part of this at *PropertyProf*.) In part, though, the purpose of publishing here is to gain the imprimatur of the *Connecticut Law Review*. Part of what law reviews do is lend their good name (and their school's good name) to the scholarship they publish. All of which points up why law schools ought to take a stronger role in the running of reviews.

Where is this all leading in legal scholarship? There's great diversification in legal scholarship. Scholars are writing articles on pretty narrow topics. We are now in need of field theories. There is a splintering of legal scholarship; everyone has a voice. And we're even seeing this in publishing of textbooks. Where once there were a few leading casebooks, now we're seeing many more, specialized texts. In the antebellum period much of what lawyers needed to know about law (or knew about law anyway) was contained in James Kent's four-volume *Commentaries on American Law*.[57] I have been struck in reading antebellum property cases how frequently the same few cases appeared in discussion. They are often cases that are cited in Kent's *Commentaries*.

It was also possible to think of doing without books (or doing with a very small number of them) when there were so few and they were so

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[56] Michael J. Madison, The Idea of the Law Review: Scholarship, Prestige and Open Access, 10 LEWIS & CLARK L. REV. 901 (2006), *available at* http://www.lclark.edu/org/lclr/objects/LCB_10_4_Madison.pdf.

[57] JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826).

expensive. Ralph Waldo Emerson, in speaking to the citizens of Concord on the Fugitive Slave Act of 1850, suggested that we don't always have to cite law books. "No reasonable person," he said, "needs a quotation from Blackstone to convince him that white cannot be legislated to be black." Some of that may be attributed to the general disdain for law engendered by that act. One might recall that Henry David Thoreau said of the rendition of Anthony Burns ordered by Justice Loring under the Act,

> does any one think that justice or God awaits Mr. Loring's decision? For him to sit there deciding still, when this question is already decided from eternity to eternity, and the unlettered slave himself and the multitude around have long since heard and assented to the decision, is simply to make himself ridiculous.[58]

Indeed, the law lost much of its majesty in the antebellum period. Print might often serve to disseminate legal knowledge and to unify and stabilize. It might be the vehicle for expansion and promulgation of empire. Yet, it might also be the vehicle for destabilizing law–through critiques of its unfairness. William Sampson stated during a trial of journeymen for organizing a union in New York in 1810, "Cicero wondered how two soothsayers could look each other in the face. I wonder how the two learned expounders of the common law opposed to us can do so without laughing."[59] And in the next decade he spoke and published widely on exactly that topic.

Or, going back another 130 years from Kent, to the turn of the 18th century, the first legal treatise written in British North America was a form book. In a few hundred manuscript pages, Francis Daniel Pastorius recorded most of what one needed to navigate colonial Pennsylvania's legal system.[60] It was easy to have a well-defined and narrow canon when there were relatively few books. Encyclopedias, like Francis Lieber's *Encyclopedia Americanae* pulled together a mass of data. We were able to put the world into a few volumes, or as one charming volume about an eighteenth century encyclopedia terms it, "The World In A Box."[61] Even in the antebellum era, the intellectual universe was rapidly expanding. My colleague Paul Pruitt and I are editing the University of Alabama's two antebellum library catalogs, which give us another sense of the intellectual world of antebellum Tuscaloosa. The catalogs mark the boundaries of the

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[58] Henry David Thoreau, *Slavery in Massachusetts*, *available at* http://thoreau.eserver.org/slavery.html (last visited Apr. 28, 2007).

[59] People v. Melvin, 1 YATES SEL.CAS. 112, 153 (N.Y. Sup. Ct. 1809).

[60] Alfred L. Brophy, *"Ingenium est Fateri per quos profeceris:" Francis Daniel Pastorius' Young Country Clerk's Collection and Anglo-American Legal Literature, 1680–1720*, 3 U. CHI. L. SCH. ROUNDTABLE 637 (1996).

[61] ANKE TE HEESEN, THE WORLD IN A BOX: THE STORY OF AN EIGHTEENTH-CENTURY PICTURE ENCYCLOPEDIA (2002).

knowledge they had access to; the field is broad, indeed. Though in those days, the University library's 5000 volumes contained much of the knowledge available in the United States.[62] By plotting changes between the two catalogs and by comparison with other library catalogs, like the Brown University's, we hope to plot an impressionist picture of the intellectual landscape. The edited volume is tentatively titled *Burned Books*—a reference to the tragic destruction of the library in the final month of the Civil War.

Today we can not even begin to think of law as contained in a few volumes. Now, instead of having a compact shelf of law books, we're simply overwhelmed with commentary. And perhaps what we need, in addition to the continued production of scholarship, are some additional ways of categorizing and making the data accessible. We need field theories, which pull together the strands of legal scholarship and connect it to practice, as well as to each other. We need to synthesize the disparate pieces of knowledge. Perhaps blogs can help us to see the connections between scholarship. Though there's also a role for traditional law review articles to undertake that serious, difficult task of synthesizing. We know a lot; we have lots of insight from the social sciences and humanities. One direction that I hope we'll go is increased connections between the legal academy's insights and the legal profession. Along those lines, I particularly enjoy articles that link theory with practice, like Mari Matsuda's *Looking to the Bottom*, in which she proposes ways of critiquing and rebuilding the present system.[63] Bill Henderson and Andrew Morris's work on legal education provides a way of reconstructing what we are doing.[64] Lawrence Zelenak provides an assessment of critical tax scholarship—scholarship that looks at the gender and racial implications of the tax system—and then suggests what modest changes might be made.[65] Emily Houh rethinks sex discrimination and contract law and suggests modest changes, which might actually have some effect.[66] The examples go on and on, of scholars providing scholarship that might remake our world. We continue to need to synthesize and to bring those ideas

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[62] WILSON GAINES RICHARDSON, CATALOGUE OF THE LIBRARY OF THE UNIVERSITY OF ALABAMA, WITH AN INDEX OF SUBJECTS (Tuscaloosa, M.D.J. Slade, 1848).

[63] *See generally* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

[64] *See generally* William D. Henderson & Andrew P. Moriss, Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era, 81 Ind. L.J. 163 (2006), *available at* www.law.indiana.edu/ilj/volumes/v81/no1/9_Henderson.pdf.

[65] Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N. C. L. REV. 1521 (1997), *available at* http://eprints.law.duke.edu/archive/00000591/01/76_N._C._L._Rev_1521_(1997-1998).pdf.

[66] *See generally* Emily Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025 (2003); Emily Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455 (2005).

together. Law reviews can help us with that process. We need faculty working with students, supported by the administration, to accomplish this.

There's much work to be done....

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Essay

The Business of Law Reviews

JOHN DOYLE*

Even articles that have criticized the institution of the law review tend to note some of the benefits of law reviews such as signaling quality students to employers, imparting rigor to the thought and writing of students via the editing process, and enhancing a law school's competitiveness. Such functions are the inefficient by-products of law reviews. The core business of law reviews—at least prior to recent years—seems to have been one of filtering article quality toward more or less prestigious journals, distributing subsidized funding throughout the industry, and disseminating for access and archival storage the printed copies of articles. Although filtering via the mechanism of reputation is an interesting one, the focus here is on law review economics and the industry's movement away from print copies.

Plainly, there is a measure of altruism in the publication of law reviews. The self-interest of law schools, authors, and editors is tempered by their perception of a public good. But unavoidably, economics is a powerful force. The economics of legal periodical publishing is heavily influenced by the relentless pressure toward electronic publishing, impacting higher-priced commercial publishers (who aim to sustain profits), subsidized law reviews (which aim not to be a drain on their supporting institutions), and open access publishers (who struggle with the issue of who will pay for free access to journals). Although I take it as given that in a few years we will see most new legal academic articles freely available online in their "post-print" final format, the path to that

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end is not clear. What is clear is that authors and readers drive the market, and publishers must find an economic model between the two, facilitating more open access.

As an example, commercial publishers are experimenting with optional open access where authors—presumably through their institutions—may pay a substantial sum to allow a published article to be made freely available on the publisher's website.[1] If the entire industry shifted to this kind of commercial access, it would not take many faculty articles before the cost to a law school exceeded the budgeted amount for a typical law review.

One vitally important issue for the law review industry is the current opportunity for price escalation. It is in the long-term interests of law reviews to resist this path. In the fall of 2003, *Harvard Law Review* recognized that the price inelasticity of demand for its journal was relatively high, and in a fit of hubris, raised its price for libraries from $55 to $95.[2] Many law reviews have entirely resisted price increases. For example, *Connecticut Law Review* has remained steady each of the past four years at $30,[3] as have *Duke Law Journal* at $44,[4] *Indiana Law Journal* at $30,[5] *Minnesota Law Review* at $40,[6] *Ohio State Law Journal* at $45,[7] and *Southern California Law Review* at $36.[8] But in the 2006–2007 academic year, *Emory Law Journal* increased its price by 14%,[9] and *Cardozo Law Review* increased its price by an audacious 70%.[10] It is not worth suggesting that authors resist publishing with *Harvard Law Review* because its price is higher than its competitors, but it would benefit the academic enterprise if authors valued rewarding journals that approach closest to the free open-access model. Certainly authors can do considerable good by steering their article submissions away from the over-priced journals.[11]

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[1] Cambridge University Press for example, charges $2700 for such availability. Cambridge Journals, Cambridge Open Option—FAQs, http://journals.cambridge.org/action/displaySpecialPage?pageId=48 (last visited Apr. 28, 2007).

[2] *Compare* 117 HARV L. REV. iv (2004) (showing a one year subscription price of $55) *with* 118 HARV. L. REV. iii (2004) (showing a one year subscription price of $95 for "nonprofit institutions" and $200 for other institutions). Harvard initially had raised its price to $200 for institutional subscribers but retreated to a non-profit rate of $95 after objections from law libraries.

[3] *See, e.g.*, 37 CONN. L. REV. (2004); 38 CONN. L. REV. (2006).

[4] *See, e.g.*, 54 DUKE L.J. (2004); 56 DUKE L. J. (2006).

[5] *See, e.g.*, 79 IND. L.J. (2004); 82 IND. L.J. (2007).

[6] *See, e.g.*, 89 MINN. L. REV. (2004); 91 MINN. L. REV. (2007).

[7] *See, e.g.*, 65 OHIO ST. L.J. (2004); 67 OHIO ST. L. J. (2006).

[8] *See, e.g.*, 78 S. CAL. L. REV. (2004); 80 S. CAL. L. REV. (2006).

[9] *Compare* 55 EMORY L.J. (2006) *with* 56 EMORY L.J. (2006) (reflecting a price increase from $35 to $40).

[10] *Compare* 27 CARDOZO L. REV. (2006) *with* 28 CARDOZO L. REV. (2007) (reflecting a price increase from $50 to $85).

[11] For a comprehensive list of legal periodicals ranked by cost-effectiveness, see Washington & Lee Law School, Selecting Legal Periodicals: What Cost Effective Legal Periodicals Should be Purchased with a Given Budget, http://lawlib.wlu.edu/LJ/selecting.aspx (last visited Apr. 28, 2007).

The following is a list of the top 10 legal periodicals in terms of their cost-effectiveness ranked from highest to lowest. The column to the right shows the average number of citations per year that each subscription dollar purchases: [12]

1	*Stanford Law Review*	$42	13.49
2	*Yale Law Journal*	$55	12.22
3	*Columbia Law Review*	$54	11.89
4	*Fordham Law Review*	$40	10.2
5	*California Law Review*	$50	9.76
6	*University of Chicago Law Review*	$45	9.74
7	*University of Pennsylvania Law Review*	$47	9.44
8	*New York University Law Review*	$50	9.32
9	*Harvard Law Review*	$95	9.27
10	*UCLA Law Review*	$40	9.07

This table shows among other things, that *Harvard Law Review* is over-priced by comparison with other leading law reviews. At a price of $65 however, it would be as cost-effective as *Stanford Law Review*.

Paper copy subscriptions are a declining industry. For example, *Harvard Law Review* showed an average of 3735 "paid and/or requested circulation" in 2002, which dropped to 2837 by 2006—a loss of 24%.[13] In the same period, *Houston Law Review* subscriptions declined from 690 to 486—a loss of 30%.[14] Harvard produced a substantial revenue increase with its bottom-line decision, whereas Houston steadily lost revenue during those four years by maintaining its price at $33.26.[15] Houston and other law schools that have restrained their subscription rates may have perceived the undesirability of general price increases, forcing their libraries to pay more and/or subscribe to less, and also may have feared a loss of impact.

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[12] *Id.*

[13] *Compare* 116 HARV. L. REV. iv (2002) *with* 120 HARV. L. REV. iii (2006).

[14] Compare 39 HOUS. L. REV. iii (2002) *with* 43 HOUS. L. REV. iii (2006).

[15] The number of subscribers for each year was: 2002: 690, 39 HOUS. L. REV. iii (2002); 2003: 629, 40 HOUS. L. REV. iii (2003); 2004: 574, 41 HOUS. L. REV. iii (2004); 2005: 564, 42 HOUS. L. REV. iii (2005); 2006: 486, 43 HOUS. L. REV. iii (2006).

A journal that significantly increases its price might expect to suffer a loss of subscribers, a diminution in access, and a reduction in citations. Although a subscriber loss may very well occur, a loss of impact is unlikely if the law review is well positioned with access via the Internet, HeinOnline, Lexis, and Westlaw. Electronic avenues for disseminating articles have rendered paper copy subscriptions of diminished importance. The satisfaction of having an impact—including the associated bundle of reputational and salary effects—is an article author's most substantial reward, and publishing with an over-priced journal—while certainly opposed to the public good—may be sensible for the author if the publisher offers enhanced services that may affect impact. Large commercial publishers such as Oxford, Cambridge, and Blackwell will load articles online prior to issue completion, offer their own databases of searchable articles that most university libraries license as complete units, and allow linking from indexing databases via Digital Object Identifiers and OpenURL servers. These are desirable features that law reviews should work to emulate.

The decline of paper subscriptions appears to be no discouragement to law schools starting new, specialized law reviews. In 2005, U.S. law schools began twelve new specialized journals (one of which was an online journal), and in 2006 another fourteen new specialized journals (two of which were online journals).[16] Certainly there is no shortage of optimism, although many new journals not remarkably dissimilar from previous journals may add to the long tail of journals that are rarely cited—there are around 100 U.S. student-edited law reviews that are each cited less than 100th as often as is the *Harvard Law Review*.[17] Still, an abundance of law reviews is a wonderful feature of U.S. legal publishing, showing the breadth of subsidization that law schools are willing to fund. However, when a dean looks for economies, the law library budget that subscribes to those journals is a natural target due to its large size and the uncertain

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[16] New U.S. law school journals in 2005 were: *B.Y.U. International Law & Management Review; Environmental & Energy Law & Policy Journal; Hastings Business Law Journal; Journal of Animal Law; Journal of Business and Securities Law; Journal of Food Law & Policy; Journal of Law, Economics & Policy; Journal of National Security Law & Policy; N.Y.U. Journal of Law & Liberty; Seton Hall Circuit Review; Stanford Journal of Civil Rights & Civil Liberties; Unbound: Harvard Journal of the Legal Left* (online). New U.S. law school journals in 2006 were: *Brooklyn Journal of Corporate, Financial & Commercial Law; Charleston Law Review; Duke Journal of Constitutional Law & Public Policy; Entrepreneurial Business Law Journal; F.I.U. Law Review; Florida Entertainment Law Review; Intercultural Human Rights Law Review; Journal of Animal Law & Ethics; Journal of Business & Technology Law; Northwestern Journal of Law and Social Policy* (online); *Pittsburgh Journal of Environmental and Public Health Law; Southern New England Roundtable Symposium Law Journal* (online); *Texas Journal of Oil, Gas, & Energy Law; Virginia Law & Business Review*.

[17] There are around 100 U.S. student-edited law reviews that are each cited less than 100th as often as is the *Harvard Law Review*. *See* Washington & Lee Law School, Law Journals: Submissions and Ranking, http://lawlib.wlu.edu/LJ/index.aspx (select "Jnls" option, then select "Student-edited" option, then follow "Submit" hyperlink) (last visited Apr. 27, 2007).

connection between a dollar decrement and any negative impact on the law school's mission or *U.S. News* ranking. The past few years have been ones of budgetary curtailment for U.S. law school libraries, and despite the reasonable prices of most law reviews, there is no reason to suppose that law libraries are willing to substantially increase the amount devoted to law reviews. This, in conjunction with a radical near-term shift in expenditures from print to electronic sources, means that sizeable reductions in print subscriptions will be ongoing.

Publishing paper copies is, in many ways, a negative for law reviews. The primary value of paper is in fixing the copy in a permanent archival format; but with fixity comes rigidity. Law reviews need to vacate the business of printing, instead supplying online graphic image copies of the law review, convenient for viewing, and for efficient printing, at the article, the issue, and the volume level. Law reviews should freely leave to commercial publishers the final production of print-on-demand issues and volumes for those individuals or libraries wishing to purchase and store them.

As an aside, my preference favors law reviews maintaining volume and issue structures even in an electronic era. In my experience with maintaining a law journal tables of contents service on the web,[18] electronic journals that simply add new articles on a rolling basis are difficult to deal with from a control point of view. It is probably a remnant print orientation, but while we remain interested in the journal as a package for articles—and eventually we may not be—it is better to maintain a structural hierarchy through the volume and the issue level. This is a problem for journals when adding articles online prior to an issue being filled. The method used by Oxford University Press is instructive here, where new articles are put into an Advance Access webpage "at regular intervals and are then taken off the Advance Access page once they have been paginated, at which point the issue into which they are incorporated will be posted online."[19]

Authors should be encouraged to improve online articles after they have been posted. If authors are able to modify online copies post-publication, then some balance needs to be agreed upon to keep archived print copies matched with online content. I suggest that journals should establish a period of two years after online availability, during which time, an author may make changes, and after which fixation occurs and print copies for permanent storage may be made. Thus, until the end of the embargo period, the author could remain engaged with the article and responsive to criticism. At present, much of the total contemporary

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[18] *See* Washington & Lee Law School, Current Law Journal Content, http://lawlib.wlu.edu/CLJC/ (last visited Apr. 27, 2007).

[19] British Journal of Criminology, British Journal of Criminology Advanced Access, http://bjc.oxfordjournals.org/misc/papfaq.dtl (last visited Apr. 9, 2007).

audience for an article has already seen the article in a pre-print form—such as on SSRN or Bepress—in the months prior to formal publication. Law reviews need to recapture that audience by shifting away from a print-centric process.

There is no denying that authors, journals, and aggregators like HeinOnline, Lexis, and Westlaw would face versioning difficulties in a system that maintains flexible content for two years. Journals would need a standard for electronic reporting of version numbers that would allow aggregators to re-load updated versions. An opportunity for extended commentary is more beneficial than any formal peer-review process, and well worth the extra effort. This can be a major selling point in any battle for the minds of authors between peer-reviewed journals and the law reviews. To make such commentary reach its potential, law reviews urgently need to explore online comment features along with social tagging, download counting, and any electronic means of facilitating group assessments. A number of law reviews such as Connecticut, Harvard, Pennsylvania, Texas, and Yale have begun online adjuncts to their print law reviews, and any such experimentation in this area is a welcome development.[20]

Unfortunately, taken as a whole, law reviews are backward looking, redolent of a dying cottage industry that faces its post-print industrial revolution. The chief problems for law reviews are conservatism caused by rapid student-leadership turnover, and the lack of infrastructure due to small scale operations. On the positive side, law reviews, most of which are low cost and subsidized, are extremely well placed for the inevitable move to open access publishing. It would be a mistake for law reviews to attempt to maintain their existing revenue in the face of falling paper copy subscriptions by increasing prices. It would be better for their deans recognize the need for a full $40,000 subsidy for printing costs, or better yet, to move entirely out of the business of printing and leave the job to print-on-demand publishers who can do the production more efficiently.

In early 2007, there were around forty free U.S. online-only legal periodicals.[21] There is no doubt that the majority of current authors have a preference toward publishing their work elsewhere—in print-based journals. It would benefit those online-only periodicals if they gained a greater print orientation, not in the sense of printing issues or volumes themselves, but through a more uniform graphic presentation of their articles, issues, and volumes. A journal that packages articles into an online format that can readily be downloaded and printed allows publisher

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[20] *See e.g.*, CONNtemplations, http://www.conntemplations.org; Harvard Law Review Forum, http://www.harvardlawreview.org (last visited Apr. 27, 2007); PENNumbra, http://www.pennumbra.com (last visited Apr. 27, 2007); See Also, http://www.texaslrev.com/seealso (last visited Apr. 27, 2007); Pocket Part, http://yalelawjournal.org (last visited Apr. 27, 2007).

[21] *See* Washington & Lee Law School, Law Journals: Submissions and Ranking, *supra* note 17.

and subscription agents (such as William S. Hein & Co.) to take subscription orders and to produce printed volumes on demand, thus transitioning online-only journals to a print and online format.

Open access publishing implies minimizing royalties, though not necessarily the total elimination of royalties. Libraries will continue to subscribe to aggregator services such as HeinOnline, and no doubt users will continue to search Lexis and Westlaw for their convenience and comprehensive coverage. That said, law reviews are more flexible when not obliged to rely on either subscriber revenue or royalty payments. Editors should talk to their law school's development department to see what can be done toward raising an endowment fund for more self-sufficient financing.

In a quality comparison between student-edited law reviews and commercial, peer-reviewed law journals, it is not obvious that one is inferior to the other. In a comparison of prices however, student-edited law reviews are vastly superior. Peer-reviewed commercial journals such as *Law & Human Behavior* at $950, *Law & Policy* at $446,[22] *Law & Society Review* at $281,[23] compare poorly with the price of: *Law & Contemporary Problems* at $54,[24] *Harvard Journal of Law & Public Policy* at $45,[25] or *Columbia Journal of Law & Social Problems* at $40.[26] Moreover, as a group, these student-edited examples are cited more often in U.S. legal literature than are the peer-reviewed examples.[27] This price advantage positions law reviews well for the future if they are able to leave behind their print publication orientation. Law reviews need to aggressively inject their articles into all avenues of electronic notification and searching, and to cease relying on print subscriptions for impact. As a simple example, law reviews should move to have their most current issues available online at HeinOnline. Sole reliance on insular walled-off legal databases such as HeinOnline, Lexis, and Westlaw however, is not an adequate method of bolstering an article's impact. Authors want to be read in the wider academic arena, and this is where open access publishing comes to the forefront. This also suggests that law reviews would benefit from joint action in making their articles—particularly more recent articles—searchable and retrievable. Jointly funding a server that

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[22] *See* Blackwell Publishing, Law & Policy, Subscription Information, http://www.blackwellpublishing.com/subs.asp?ref=0265-8240 (last visited Apr. 28, 2007).

[23] *See* Blackwell Publishing, Law & Society Review, Subscription Information, http://www.blackwellpublishing.com/subs.asp?ref=0023-9216&site=1 (last visited Apr. 28, 2007).

[24] *See* Law & Contemporary Problems, Order and Cost Information, http://www.law.duke.edu/journals/lcp/order.html (last visited Apr. 28, 2007).

[25] *See* Harvard Journal of Law & Public Policy, Subscriptions, http://www.law.harvard.edu/students/orgs/jlpp/Subscriptions.htm (last visited Apr. 28, 2007).

[26] *See* Columbia Journal of Law and Social Problems, Subscriptions, http://www.columbia.edu/cu/jlsp/subscriptions.shtml (last visited Apr. 28, 2007).

[27] *See* Washington & Lee Law School, Law Journals: Submissions and Ranking, *supra* note 17.

automatically retrieves from individual law school sites, indexing meta-data and article texts for indexing purposes, seems accomplishable with little technical difficulty. Such a service could supply linking capacity, such as an OpenURL server, to compete with the offerings of large, commercial journal suppliers. In any event, and at minimum, individual law reviews need to work with existing indexers and aggregators, and augment their own websites to ensure that their current articles are rapidly and widely available. Services such as e-mail alerts and RSS feeds should also be added. It is astonishing how many law review websites even fail to provide a list of articles from their own current issue.

In sum, the business of law reviews should be minimized. Concentrate the business tasks in a non-student business manager if there must be one, but otherwise distill the tasks to their intellectual core, remove the business chores and devolve them to the commercial sector. Compete with SSRN head-on by offering works-in-progress. Be an active facilitator in the process of integrating feedback into the improvement of articles. Cooperatively index and tag contributions via a centralized online system. Endeavor by any and all electronic means to offer open access articles via web search engines, indexing databases and full-text aggregators. Educate law school deans on the importance of the free flow of legal scholarship, and the vital current and future role of the law reviews.

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Essay

"Evaluate Me!": Conflicted Thoughts on Gatekeeping in Legal Scholarship's New Age

PAUL HORWITZ*

"Look at me! Grade me! Evaluate and rank me! I'm good, good, good and oh so smart!"

– Lisa Simpson[1]

As another entrant into the fast-growing ranks of online law review supplements, the *Connecticut Law Review* has chosen to begin by contemplating—or is that "CONNtemplating?"—an ambiguous phrase: "Law Reviews Matter: Legal Scholarship, Law Reviews, and the Online Age." We might read that open-ended phrase in several ways. Perhaps most interestingly, it might be read as inviting us to think about the "matter"—the pronouncements, extrusions, eruptions, and, alas, ephemera—contained within the law review format, and its increasing emigration to an infinite online space, on SSRN, Bepress, blogs, and elsewhere. We might also read it as a positive pronouncement: no matter how battered by their many critics or by competition from online sources, law reviews *do* matter, damn it. But the very act of making that

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[1] *The Simpsons: The PTA Disbands!* (Fox television broadcast April 16, 1995); *see* Wikiquote, The Simpsons, http://en.wikiquote.org/wiki/The_Simpsons (follow "6.20 The PTA Disbands" hyperlink) (last visited Apr. 24, 2007).

pronouncement, the very need to make the assertion, cannot help but lead readers to supply the question mark the editors have seen fit to omit. In an "online age" in which "legal scholarship," in its many forms, can be propagated with ease and without the assistance of the law review and its editors, *do* "Law Reviews Matter?"

In this contribution, I want to offer some decidedly personal thoughts on the implied question of whether law reviews continue to matter in the online age, as well as the implied assertion that they do. To make a long story short, I think they still do matter, with or without online supplements—and that the existence of online supplements, while surely a positive development, won't much affect the reasons why they matter. But, for the most part, that is not the game I will be hunting here.

This question has been the subject of much recent discussion in a variety of similar online and print publications.[2] If I have anything to contribute to what has already been said, it is a note or two of a kind that is often obscured by the professional and professorial voice that still generally characterizes legal scholarship: some candor, some tentativeness—and more than a dash of complicity. Michael Olivas recently observed that although law professors, like most academics, are deeply fascinated with the "tribal rituals" involved in "who gets what and how they go about getting it," these issues are still "a little embarrassing and uncomfortable to mention in public."[3] What I have to offer here are some embarrassing and uncomfortable thoughts on who gets what and how they go about getting it in the online age.

A useful place to start, I think, is to situate this commentary within and between a set of antinomies posed by other scholars, both of which serve as the leitmotifs of this short contribution. The first is a paired opposition presented by Julius Getman, in his deeply personal and valuable critique of the present state of the American university, and especially the law school, *In the Company of Scholars*.[4] Getman writes of his discovery over time that "the surface calm of academic life obscure[s] a continual struggle between the elitist and egalitarian aspects of higher education."[5] As Peter Alces summarizes the theme, "the members of the academy are preoccupied both with their prestigious titles and trappings and, at the same

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[2] *See, e.g.,* Symposium, *Open Access Publishing and the Future of Legal Scholarship*, 10 LEWIS & CLARK L. REV. 733 (2006); Editorial, *The Future of Legal Scholarship*, 116 YALE L.J. POCKET PART 1 (2006), http://yalelawjournal.org/editorial/the-future-of-legal-scholarship.html; Symposium, *Bloggership: How Blogs Are Transforming Legal Scholarship*, Berkman Center for Internet & Society, Harvard Law School, http://cyber.law.harvard.edu/home/bloggership (last visited Apr.28, 2007).

[3] Michael A. Olivas, *Reflections on Academic Merit Badges and Becoming an Eagle Scout*, 43 HOUS. L. REV. 81, 82, 85 (2006); *see also* David P. Bryden, *Scholarship About Scholarship*, 63 U. COLO. L. REV. 641, 642 (1992) ("Our reticence on the subject of professorial selfishness reflects, I suppose, a taboo against cynicism within the family.").

[4] JULIUS GETMAN, IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION (1992).

[5] *Id.* at 2.

time, with disseminating their message and its benefits to all in earshot, literally or figuratively."[6] Those words were published in 1994, but could not be more applicable to the online age.

Getman does not attempt to resolve the tension, although the book is surely a cry to other academics to recognize and ameliorate it where they can. Indeed, although he spiritedly defends egalitarianism in the academy, he also notes that he came to be "more tolerant of academic elitism and less comfortable with its populist critics."[7] Nevertheless, his conclusion is that the tension between elitism and egalitarianism in the academy is ubiquitous and endless, a product of the conflicting desires and the "widespread insecurity" of the scholar and teacher.[8]

Getman's depiction of the eternal conflict between elitist and egalitarian values in the academy helps frame our understanding of changes in the legal academy that have been occurring since long before the online age, let alone the rise of blogs and online law review supplements, but which surely have been reinforced by those developments. A fairly standard account might run something like this: In the old days, elites ruled. A relatively small number of professors at a relatively small number of highly prestigious law schools stood at the top of a fairly well defined hierarchy—and belonged there (or believed they did). Their status in the hierarchy was confirmed through the recognition of their scholarship in a small and select number of prestigious venues: law reviews at highly ranked schools, university presses, and the like. Publication in a particularly prestigious journal, as Larry Solum notes, performed a "certification" function: "if it's in the Yale Law Journal, it must be good."[9] In some cases, certification of a scholar by one of these intermediaries secured his position as a member of the elite;[10] he "wrote up." In other cases, a professor's membership in an elite school, by dint of other hard-won credentials, increased the likelihood that he would be published in an elite law review, which in turn was taken to confirm his membership in the elite, in an endless circular motion.

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[6] Peter A. Alces, *Toil of the Firestarters*, 92 MICH. L. REV. 1707, 1709–10 (1994) (reviewing GETMAN, *supra* note 4).

[7] GETMAN, *supra* note 4, at x.

[8] *Id.* A recent book review seems to have come up with *le mot juste* here, albeit in a very different context. *See* Lee Siegel, *The Niceness Racket*, NEW REPUBLIC, April 23, 2007, at 49, 50, *available at* LEXIS, News Library, NEWRPB File (reviewing DAVE EGGERS, WHAT IS THE WHAT: THE AUTOBIOGRAPHY OF VALENTINO ACHEK DENG (2006), and referring to "the exclusive egalitarian club" of the *McSweeney's* publishing enterprise).

[9] Lawrence B. Solum, *Download It While It's Hot: Open Access and Legal Scholarship*, 10 LEWIS & CLARK L. REV. 841, 861 (2006).

[10] *Cf.* Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1328 (2002) (judgments about legal scholarship "determine who is appointed, promoted, published, and featured in important academic events").

None of this worked perfectly well, and few would have supposed otherwise.[11] Still, on the whole, the distinction between a few great schools (and their professors, and their students) and the remaining schools was clear, and things sorted themselves out more or less as they should. And this sense of hierarchy was evident throughout the legal profession as a whole: those students certified as members of the elite through admission to a prestigious law school, and who in turn spent their time as law review editors certifying the prestige of their professors, would occupy the empyrean heights of the great law firms in New York, Boston, or a few other cities, which would set the standard of greatness for the profession. Of course there were other options: other schools, other firms, other places. But those alternatives could, for a long time, be treated as falling beneath the notice of those who occupied the elite institutions.

The online age, in the conventional account, takes a sledgehammer to the old days.[12] As Solum says, "[t]he new world of legal scholarship is about disintermediation"[13]—the elimination of all the old barriers and intermediaries that kept the elites in their place and everyone else in theirs. Jack Balkin makes a similar point in somewhat different terms, arguing that the Internet provides a way of "rout[ing] around the traditional gatekeepers of legal scholarship."[14]

The list of online vehicles for routing around the traditional gatekeepers is pretty well recognized by now. Legal blogs, of course, are one way to get noticed through non-traditional channels. Similarly, the Internet greatly facilitates access to legal scholarship by a wide variety of readers, and offers legal scholars a means of distributing and publicizing their work, without the significant mediation supposedly performed by the law journals.[15] Online supplements to mainstream law reviews, like this

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[11] Among other things, as I make clear below with reference to the legal profession as a whole, some or many of those who sat atop the law school hierarchy did so in part because they managed to fend off potential competition from women and members of racial and ethnic minorities, who either were not given a chance to develop the relevant credentials for law teaching or were not given full consideration as candidates even if they had those credentials. *See, e.g.*, Michael A. Olivas, *The Education of Latino Lawyers: An Essay On Crop Cultivation*, 14 CHICANO-LATINO L. REV. 117, 133–34 (1994).

[12] In fact, of course, in many respects things had changed in the legal academy, and the legal profession as a whole, long before the Internet was even a gleam in Al Gore's eye. But the online age certainly has contributed to these changes, and added some new wrinkles of its own.

[13] Solum, *supra* note 9, at 857.

[14] Jack M. Balkin, *Online Legal Scholarship: The Medium and the Message*, 116 YALE L.J. POCKET PART 23, 25 (2006), http://thepocketpart.org/2006/09/06/balkin.html. Balkin is referring specifically here to only one gatekeeper—the traditional law review. I think his point can be generalized, however. Online speech is, in fact, a way of routing around *all* the traditional elite gatekeepers: not just the law reviews, and specifically the elite law reviews, but also the elite law schools that house them, and the elite law professors who train the editors of the top journals and enjoy pride of place in their pages.

[15] *See, e.g.*, Solum, *supra* note 9, at 858. One of the primary vehicles for disseminating legal scholarship on the Internet is, of course, the Social Science Research Network, or "SSRN," http://www.ssrn.com/.

one, occupy a middle ground. By selecting pieces from contributors, they provide a mediating function. But they also provide an additional means of calling attention to a scholar and his or her work, and may even prove more willing to publish the work of young and unproved scholars than are their hard-copy parents.[16] The true innovation of the law review supplements is their form,[17] but they thus also serve a routing-around function. Finally, although they have been around so long that they may seem unremarkable or dated, Westlaw and Lexis/Nexis themselves also route around traditional gatekeepers, since they provide a means for *any* legal scholarship that is collected by those databases to turn up in the same search that also turns up articles from the *Harvard Law Review* and other elite journals.

In short, as Dan Hunter has observed, the Internet has drastically "reshap[ed] the way that users can access content,"[18] in a way that weakens the old gatekeepers' hold on power. Beyond that, the Internet has also provided a variety of new formats in which legal scholars can present and publicize their ideas. What this means, in effect, is that the old gatekeepers can no longer keep the hordes from the gate. A vulgar arriviste who is willing to use these new media can receive attention, readers, and even respect without being certified in the traditional way by the traditional sources.[19] That, at least, is the fairly conventional account offered by the champions of the online age.[20] This account is surely overstated, in part for reasons I will suggest below. But it is certainly the chorus in the triumphalist song sung by a number of law bloggers in recent years.[21] In Getman's terms, it is the triumph of egalitarianism over elitism.

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[16] *See, e.g.,* Editorial, *supra* note 2, at 2.

[17] *See* Solum, *supra* note 9, at 854–56 (listing other examples of ways in which online speech may encourage changes in the format of legal scholarship).

[18] Dan Hunter, *Open Access to Infinite Content (Or "In Praise of Law Reviews")*, 10 LEWIS & CLARK L. REV. 761, 768 (2006).

[19] Some of those online media may perform a light certification function, as Peg Brinig has pointed out to me. For example, SSRN technically "peer reviews" papers that one uploads to the service. Moreover, one must be selected for inclusion in the various subject-matter series of papers posted on SSRN, and selection involves choices made by the editors of these series, who are themselves usually respected figures in the field. But the threshold for inclusion in both cases is low. *See, e.g.,* Solum, *supra* note 9, at 858 ("[T]here is no pretence of selecting only the 'best' pieces [on SSRN]. Everything written by serious academics will be abstracted in the appropriate journal"). Although he is too modest to mention it, Larry Solum also performs a certification function when he selects papers to publicize on his *Legal Theory Blog*.

[20] *See, e.g.,* Franklin G. Snyder, *Late Night Thoughts on Blogging While Reading Duncan Kennedy's* Legal Education and the Reproduction of Hierarchy *in an Arkansas Motel Room*, 11 NEXUS 111, 121 (2006) (arguing that "[t]he ability of the institutions, particularly the elite ones, to control the dialogue of legal education has decreased dramatically" as a result of blogs, SSRN, and other online resources).

[21] *See* Brian Leiter, *Why Blogs Are Bad for Legal Scholarship*, 116 YALE L.J. POCKET PART 53, 57 (2006), http://www.thepocketpart.org/2006/09/20/leiter.html (noting the note of "self-congratulation" struck by many "like-minded academic bloggers," and their resistance "to the suggestion that blogs are not as important as their proprietors think they are").

These developments have triggered an ongoing debate about the meaning and value of the changes in the environment of legal scholarship caused by the online age. What does the online age add to the existing order of legal scholarship? Does it take away from the existing order—and are those changes good or bad? How do we address concerns about quality in legal scholarship and/or blogging by legal scholars in the online age? Are there reasons to be concerned about these developments as well as welcoming them? And how should we measure the impact of these developments on legal scholarship? A variety of increasingly familiar arguments have been staked out on these positions. Underneath them all, though, we can sense the recurring theme that is at least old as Getman's book, and really far older: the contest between egalitarianism and elitism.

A nice example of this can be found in the second set of opposing views on which I want to focus: a pair of observations by Larry Solum and Brian Leiter, both of whom are renowned as legal scholars *and* as legal bloggers. Solum argues that the Internet has disrupted the rule of the traditional intermediaries in legal scholarship, and that this is, by and large, a good thing, given the contributions that might be made to legal scholarship by a wide range of individuals outside the gates of the traditional elite law schools and law reviews:

> I have been astonished by the thoughtful and genuinely informative comments and blog posts that have come from nonacademic sources. I'm proud to be an academic and I believe in the value of academic institutions. But I think it is both wrong and silly to think that credentials matter more than content.[22]

Elsewhere, Solum has similarly argued that the online age has "opened new doors for the intelligent and ambitious," and that "there is extraordinary talent located outside the elite legal academy . . . . The smart and motivated are everywhere."[23]

By contrast, Leiter has written to suggest that the online age eliminates the "mediating boundaries" of "experience, education, and intelligence," and that this "poses problems for serious scholarship."[24] Responding to the passage by Solum quoted above, Leiter acknowledges that there are "many non-academic experts," and says, "one must, of course, agree that 'content' matters more than 'credentials.'"[25] But he worries that the reduced role of elite intermediaries and the immediacy of the Internet will "conspire to

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[22] Blogging, Legal Scholarship, and Academic Careers, Legal Theory Blog, http://lsolum.blogspot.com/archives/2006_01_01_lsolum_archive.html#113683990156732487 (Jan. 9, 2006, 17:35 EST).

[23] Solum, *supra* note 9, at 865.

[24] Leiter, *supra* note 21, at 53.

[25] *Id.* at 56.

create availability cascades that result in inferior work getting the most scholarly attention and, in the process, lowering the general quality of scholarly discourse."[26] Blogs are "hostage to the ignorance and irrationality of their most visible proprietors," and on the whole "have been bad for legal scholarship, leading to increased visibility for mediocre scholars and half-baked ideas and to a dumbing down of standards of judgments."[27]

What is this dialogue, if not Getman's eternal conflict rewritten for a new age? Solum strikes a distinctly egalitarian note, praising the online age both for its ability to open up access to legal writing for a wide audience beyond the conventional elite circles of legal scholarship and for its ability to allow anyone and everyone to "contribute significant new ideas to scholarly debates."[28] Leiter, in turn, strikes a note of elitism, with his concern that the elimination of intermediaries will open the floodgates to "mediocre scholars" and their "half-baked ideas."[29] His solution, too, strikes a note of elitism: he suggests that the online age might be counteracted by the increasing presence of "first-rate scholars" in the blogosphere, and a "shift to peer-refereed publications in the legal academy."[30] In other words, restore the gatekeepers.

Now, as I will suggest below, there is something to both positions. Despite the usual tendency to freight these words with moral judgment, and the easy appeal of standing with the masses and against the old guard, egalitarianism is not always good, and elitism is not always bad—at least, it is not necessarily bad if the selection of those elites is based on something more than crude credentialism. But if I had to choose which position to favor—or, more precisely, which mood to adopt, for both Solum and Leiter evoke, in broad strokes, a general mood of optimism and pessimism, respectively, about the online age—I would adopt Solum's optimistic and egalitarian view.

In important respects, my vote for this position is influenced by my take on changes in the larger legal profession, of which the advent of the online age is, in some ways, an echo. Consider the entry of Jews into the legal profession in the "old days" I discussed earlier. Not so long ago—and, not coincidentally, at the height of "the American legal profession's cartel" status[31]—Jews were still unwelcome at many of the law firms that sat perched at the top of the gatekeeping elite of the legal profession.[32]

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[26] *Id.*

[27] *Id.*

[28] Solum, *supra* note 9, at 865.

[29] Leiter, *supra* note 21, at 57.

[30] *Id.*

[31] RICHARD A. POSNER, OVERCOMING LAW 60 (1995).

[32] As Posner notes, the sentiment was an old one, and tended to express itself in elitist, credentialist terms at one abstract remove from any actual mention of ethnicity. Thus, without attributing any anti-Semitism to him, he quotes Professor Wigmore recommending early in the last

But, in concert with and as a part of a broader suite of changes in the legal profession that rendered it more competitive and less guild-like, Jews, and members of other ethnic minorities, nevertheless stormed the gates of the profession, and altered it forever. In Balkin's terms, they routed around the old gatekeepers, transforming the profession in the process in ways that the gatekeepers at the elite firms—many of which are now long gone—could neither prevent nor fully foresee.

It is easy enough to "pine for the days of the professional guild and professional mystique," before the vulgarization of the profession became "an offense to the fastidious."[33] Not a few lawyers have expressed nostalgia for the old days, at least as they choose to remember them. But there can be little doubt that opening the legal profession to genuine competition was a good thing. It made the profession far more egalitarian, and the very success of the new and "vulgar" entrants to the profession laid bare the extent to which the old gatekeepers were elite by status, not merit, and the degree to which the profession was and always had been a business—albeit a cartel rather than a genuinely competitive one.[34]

One could make many of the same observations about the online age of legal scholarship and its effects on the academic side of the legal profession.[35] As Solum observes, there is a significant crop of extraordinarily talented legal scholars out there, and by no means are all of them to be found in the mythical "top 15" law schools, or the top 50. His own blog documents each year the increasingly impressive backgrounds of entering professors at all strata of legal education. And yet, no matter how accomplished or promising they are, they know that some set of gatekeepers will judge them on little more than the school displayed on their nametag at the next AALS convention.[36] The online age offers these "smart and motivated"[37] scholars a variety of methods for routing around

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century that law students be required to have completed two years of college as "a beneficent measure for reducing hereafter the spawning mass of promiscuous semi-intelligence which now enters the bar." *Id.* at 61 n.38 (quoting John H. Wigmore, *Should the Standard of Admission to the Bar Be Based on Two Years or More of College-Grade Education? It Should*, 4 AM. L. SCH. REV. 30, 31 (1915)).

[33] RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 194, 196 (1999). For examples of such laments, see, e.g., MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

[34] *See* POSNER, *supra* note 33, at 196–97.

[35] To be clear, I am not suggesting that any of the scholars who inhabit the "elitism" side of the elitism-egalitarianism divide I am describing in legal scholarship harbor any improper or exclusionary motives. I am only suggesting that certain aspects of the recurring conflict between elitism and egalitarianism are evident in both the decartelization of the legal profession and the current discussion of the online age of legal scholarship.

[36] Everyone in legal education is familiar with this phenomenon, in which, on meeting someone at the AALS convention, one watches his or her eyes slide toward the school name on one's nametag—and, as often as not, to some entirely different part of the room immediately thereafter. We are all aware of it because, often enough, our own eyes are completing a similar circuit. *See generally* Eric L. Muller, *What's in a Name(Tag)?*, 52 J. LEGAL EDUC. 314 (2002).

[37] Solum, *supra* note 9, at 865.

the more status-obsessed members of the palace guard: distributing their work on SSRN, hawking their ideas on blogs, taking advantage of online law review supplements to enjoy at least a residue of the prestige associated with their parent reviews ("My last piece was published in the *Harvard Law Review . . . Forum*"), and so on. Many of the charges that were leveled against the new entrants to the legal profession in 1960 could be raised against them today. They want to be heard, they want their ideas to circulate, and they do not pretend otherwise. They cannot affect a studied indifference to such matters as self-promotion, as could a junior faculty member at an elite school, who knows that his or her institutional affiliations alone will guarantee an audience and ample writing and speaking invitations. Their model may seem to be Sammy Glick as much as Erwin Griswold.[38]

These up-and-comers of the online age *are* more vulgar than the more elite members of the legal academy, by many measures—although the elites are certainly just as ambitious. But *if* their work is good, and if they succeed in finding an audience for it, I cannot help but think that is a good thing. If their manner of doing so seems vulgar to some, then I cast my vote with the vulgarians. If they are an "offense to the fastidious," then so much the worse for the fastidious.

Now, some caveats must be added to this conclusion. First, as I've said, egalitarianism is not always a good thing, and elitism is not always a bad thing. Were it otherwise, Getman's work would not be nearly so compelling, for he recognizes that both elitism and egalitarianism are important motivating factors in the academy, that both have their role to play, and that it is the good scholar's lot to remain suspended between them, pulled in both directions. One may properly criticize the elite gatekeepers when their position is founded on little more than status and their role consists of little more than evaluating credentials and guarding against challenges to that status. But that is not the same thing as denying that there are authorities who have *earned* their authority, that there is and can be such a thing as standards (hopefully, but not always, performance-based ones), or that there is such a thing as good and bad scholarship. To the extent that some gatekeepers—professors who are expert in a field, refereed journals, or (even) law review editors—*accurately* certify some work as more trustworthy and meritorious than other work, or negatively stamp a particular work as poor, that function can be a valuable one, helping to economize our limited time and attention by steering us toward the best work and away from the worst.

Thus, I think there is something to be said for the "elitist" views expressed by Professor Leiter. And Leiter is clear that "'content' matters

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[38] *See* BUDD SCHULBERG, WHAT MAKES SAMMY RUN? (1941).

more than 'credentials,'"[39] although I am not sure whether he uses quotes here because he is adopting Solum's terms, or because he wants to cast doubt on them. And yet, I am troubled by his pessimistic view of the online age, and of the value of blogs and bloggers in particular.

I do not mean to unduly extol bloggers. Nor do I mean to unearth a subtext to Leiter's words if there is none there. But I find it hard to read his comments without sensing a subterranean mood of credentialism. It emerges, for instance, from the elision between drawing a distinction between good and bad *scholarship* (or, as he puts it, "half-baked tripe"),[40] and his repeated focus on, and faith in, undefined "leading scholars,"[41] or "first-rate scholars" with "pre-Internet *gravitas*,"[42] as opposed to the ranks of "second-rate scholar[s]."[43] I do not mean to deny that there is a difference. But it is all too easy to move from a qualitative assumption about the work of various scholars, which is difficult and time-consuming, to a convenient but simplistic scrutiny of the names and places on their resumes.

My sense that a crude, rather than sensitive and qualitative, elitism might linger somewhere beneath the surface is reinforced by my doubts about the primary concern Leiter raises—that blogging is especially subject to "availability cascades,"[44] in which Internet buzz about scholarship will elevate mediocre work over better and more careful work. My sense is that this concern, although not unfounded, is overstated.

In thinking about this concern, we must consider the relevant audiences for legal scholarship, whether traditional scholarship or its Internet-driven variants. One audience is that of journalists, non-academic lawyers, laypeople, and so on. I doubt their interest will affect legal *scholarship* one way or the other; and while it may well be true that their attention will focus at times on second-rate scholarship that makes its way online, it will also sometimes fasten on first-rate ideas. In any event, how are we better off if these individuals are simply deprived of access to information altogether? Are their only options either to voice prejudices uninformed by *any* information, of greater or lesser quality, or to wait patiently for the elites to inform them what to think? A second audience consists of second-rate scholars; but I should think that Leiter is not interested in what they think in any event.

The third audience consists of "leading" or "first-rate" scholars. All the online age has done is give them increasing access to scholarship from a variety of sources and individuals. If they are capable of sorting between

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[39] Leiter, *supra* note 21, at 56.
[40] *See id.* at 55.
[41] *Id.*
[42] *Id.* at 57.
[43] *Id.* at 53.
[44] *Id.* at 54.

good and bad scholarship, then so much the better—they will have more access to both, easier access to first-rate scholarship from unknown scholars and schools, and a cheaper and louder megaphone with which to call attention to the good work. If they are not capable of distinguishing between the two, then we ought to be suspicious of their own elite status. So, in the end, while I think he does offer a useful reminder of the values of elitism, I am not certain that Leiter's pessimism is strongly warranted. I think Leiter raises some valid concerns, but worry that they may slide easily into a simple concern with maintaining the status of what Solum calls the "right people."[45]

I am thus left with the view that routing around the gatekeepers, a phenomenon that is greatly facilitated by the online age, is on balance more likely to be a good thing than a bad one. If it appears to be a more vulgar pursuit than we are used to, that perception merely reflects the extent to which the existing gatekeepers, like the white-shoe law firms of old, have managed to launder or conceal the same ambitions and impulses while maintaining guild-like privileges against those outside the gates.

But things are more complicated than that. For, as Balkin observes, routing around is not the only observable phenomenon of the online age. It also commonly features "glomming on"—the tendency of online media to "depend on [traditional gatekeepers] rather than displace them. The old gatekeepers don't go away entirely, and new ones arise that partially supplement and partially compete with them."[46] Thus, the online age is likely both to reproduce old methods of signaling quality—one will care more about the online presence of the *Harvard Law Review* than the online *Podunk Law Review*—and to come up with new ones, such as ranking by SSRN downloads (which will, in turn, generally favor papers uploaded by scholars who have already been certified by the old gatekeepers).

Similarly, the old gatekeepers will find ways of glomming onto and co-opting the new media. The *Harvard Law Review* will bring its status-reinforcing type font to the online *Harvard Law Review Forum*, and Harvard Law professors will upload their papers to SSRN, and take their high download rates as further evidence that the elite certification process is working as it should – or take their low downloads as evidence that the new system is arbitrary and bankrupt. So the new methods of evaluating one's work and one's influence in the online age will "gradually be layered on top of existing methods of assessing quality and generating scholarly reputations; and they will, over time, merge with and influence them."[47] Thus, the online age will disturb and in some cases alter the *ancien regime*, but as with most revolutions, a certain quality of "meet the new boss" will

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[45] Solum, *supra* note 9, at 865.
[46] Balkin, *supra* note 14, at 28.
[47] *Id.* at 29.

sneak in.[48] Certainly things will change in terms of the format of legal scholarship[49] and its availability,[50] and some new scholars may succeed in routing around the old gatekeepers, thus achieving something like Getman's dream of egalitarianism. But we will continue to have gatekeepers in one form or another, certainly including the old gatekeepers; after all, whatever their flaws, they do serve at their best to separate the wheat from the chaff, as Leiter observes. So there will be room for elitism in the online age too. The tension continues, as it must, in this age as any other.

And this is where a measure of candor is called for. Like many young scholars who have established a presence on the Internet, I am a champion of the new regime. I welcome the egalitarian impulse of the online age, I use it to advance my own ideas and seek new and wider platforms for my work, and I cheer on those who route around the staid old traditional elites. But I am also eager to receive status in the old regime. And I'm not only talking about myself. Many legal bloggers, while stressing the contributions that the online age makes to the egalitarian side of the eternal scholarly divide, have also used it to "trade up"—to seek the approbation and certification of elite law schools and elite law reviews. Perhaps we deserve that approbation, and maybe we would have gotten it even if we had stayed offline. But it is clear that we are self-consciously working the new system to gain the prerogatives of the old. We are proving that nametags don't matter, or shouldn't—while working the online age for the chance at a better nametag.

There is a link here, I think, although perhaps not an entirely evident one, to a phenomenon that I believe is related to the rise of the ostensibly egalitarian online age: a dramatic increase in the interest we pay to rankings in the legal academy.[51] Our rankings fixation takes the form of critiques of *U.S. News*, defenses of *U.S. News*, alternatives to it, citation studies, law review rankings and critiques of those rankings, SSRN rankings and critiques of those rankings, and so on.

I do not mean to demean these studies.[52] Given the last paragraph, I could hardly get away with doing so if I wanted to. Leaving aside the

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[48] THE WHO, *Won't Get Fooled Again*, on WHO'S NEXT (Polydor 1971).

[49] *See generally* Solum, *supra* note 9.

[50] *See generally* Hunter, *supra* note 18.

[51] For a superb example, see Symposium, *Dead Poets and Academic Progenitors: The Next Generation of Law School Rankings*, 81 IND. L.J. 1 (2006). In a recent paper, Pierre Schlag refers to law schools' "obsessive fixation on rankings—rankings of law schools, rankings of law reviews, rankings of legal scholars, rankings of citation and impact, and soon to come, by way of the web and pomo, rankings of rankings." Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)* 32 (Univ. of Colo. Law Sch. Legal Studies Research Paper Series, Paper No. 07-11, Apr. 4, 2007), *available at* http://ssrn.com/abstract=976078.

[52] Indeed, this very collection of papers contains some valuable thoughts on the subject of law reviews and law school rankings from one of my esteemed colleagues. *See* Alfred L. Brophy, *Mrs.*

question of whether and why we would want to reform the rankings, thinking about impact, citations, and so on is a perfectly valid and important aspect of our study, not so much of law, but of the legal academy as an institution. But it is worth asking *why* we are currently so intent on the study of rankings, at the very moment at which the online age, by providing an infinite content universe[53] and multiple opportunities for routing around, has weakened the hold of the old gatekeepers: why, in Pierre Schlag's formulation, we are suffering from such "rank anxiety."[54]

Surely the reason has something to do with the fundamental insecurity of the legal academy.[55] Certaintly Brian Leiter is right to say that the legal academy "often lacks expert mediators,"[56] and we all know it. Such insecurity is entirely natural in a field of scholarship that is so parasitic on insights from other disciplines in which most law professors are not thoroughly grounded, whose own internal methods often reduce to little more than "case-law journalism,"[57] and that either does not contain a canonical body of literature,[58] or in any event certainly does not require its resident scholars to master it through a doctoral process or any other mechanism.[59] It is even more natural if, as Schlag argues, it is safer to worry more about "how well or how badly we are doing [legal scholarship] relative to everybody else" than about whether the entire enterprise of legal scholarship is itself problematic.[60]

Finally, this fixation with rankings is still more natural if, as we might frankly acknowledge, the legal academy tends to be populated by individuals who are skilled, first and foremost, at jumping through hoops. As Charles Lawrence wrote some time ago, "[l]aw school faculties recruit and hire those candidates who have followed their own footsteps on a prescribed path of high LSAT scores, superior grades at prestigious law schools, editorships on prestigious law reviews, and prestigious judicial

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Lincoln's Lawyer's Cat: The Future of Legal Scholarship, 39 CONN. L. REV. CONNTEMPLATIONS 11 (2007), http://conntemplations.org/comments.php?y=07&m=05&entry=entry070505-120000.

[53] *See* Hunter, *supra* note 18.

[54] Schlag, *supra* note 51.

[55] *See generally id.*

[56] Leiter, *supra* note 21, at 54. I am not sure I agree with the somewhat narrow reasons why he suggests this is so. In effect, Leiter blames this on law students and the media. They are excellent targets, but I tend to assume that the fault lies in ourselves.

[57] Schlag again. *See* Schlag, *supra* note 51, at 27.

[58] Although efforts have been made to arrive at one, as well as to study canonicity in American legal scholarship more generally. *See* LEGAL CANONS (Jack Balkin & Sanford Levinson eds., 2000); THE CANON OF AMERICAN LEGAL THOUGHT (David Kennedy & William W. Fisher eds., 2006).

[59] David Lodge's academic comedy CHANGING PLACES contains a parlor game played by English professors, called "Humiliation," in which the object of the game is to name a literary classic that one has not read, with the winner being the person who displays the most embarrassing ignorance. One academic wins the game, and loses his chances at professional advancement, when he admits he has not read *Hamlet*. *See* DAVID LODGE, CHANGING PLACES: A TALE OF TWO CAMPUSES 135–36 (1975). This is a game that law professors would be well advised not to play.

[60] Schlag, *supra* note 51, at 34.

clerkships."[61] We are used to being evaluated and praised, and we have never lost the taste for it. Hence the epigraph to this paper. The legal academy is, truly, a collection of JD-carrying Lisa Simpsons. We are never happier than when a gold star is being put on our papers: by our local colleagues, by professors at elite institutions, and even (or especially) by student law review editors at the "right" journals.[62] It is natural, then, that we should turn our attention to building newer and more elaborate evaluation systems for ourselves—especially in an online age that, as I have suggested, disrupts the old evaluation systems.

Another useful way of thinking about both the online age and our present rank anxiety—two highly related phenomena, as I hope I have shown—comes from the notion of the "economy of prestige," which has been used by James English to describe the culture of prize-giving.[63] English argues, in short, that the very act of criticizing prizes—for the biases implicit in selecting them and for the very absurdity of awarding them—"is itself a fundamental and even in many circumstances an obligatory part of the game, a recognizable mode of complicitous participation" in the cultural function of creating prestige as a form of cultural capital.[64]

We might profitably view the struggle between the old and new gatekeepers of the legal academy, and the endless concern with rankings, in this light. By routing around the old gatekeepers, we are in effect signaling our continued fascination with the status they can confer. By glomming onto the online media and the egalitarianism they represent, the old gatekeepers—perhaps including this law review—both co-opt the new media and attempt to retain their traditional gatekeeping status. By critiquing existing forms of ranking (and proposing new ones), we similarly are validating ranking as an activity just as much as we are attempting to undermine the existing forms of ranking. We might thus develop on Balkin by saying that "routing around" and "glomming on" are not two *separate* characteristics: they are, in fact, intimately related aspects of the system of legal scholarship as a form of cultural capital. My embarrassing revelation about my own relationship to the online age, and

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[61] Charles R. Lawrence, *"Justice" or "Just Us": Racism and the Role of Ideology*, 35 STAN. L. REV. 831, 855 n.88 (1983).

[62] In fairness, this concern with the markers of status is hardly limited to the legal academy, although, for the reasons I have offered, it might be especially acute in that field. For a discussion of the "widespread concern with status and the measurement of status in our society" and an attempt to relate it to the legal academy's rankings fixation, see Michael E. Solimine, *Status Seeking and the Allure and Limits of Law School Rankings*, 81 IND. L.J. 299, 306–08 (2006).

[63] *See generally* JAMES F. ENGLISH, THE ECONOMY OF PRESTIGE: PRIZES, AWARDS, AND THE CIRCULATION OF CULTURAL VALUE (2005). Michael Madison has already argued for the relevance of English's work to the world of law reviews, and the newer world of online legal scholarship. *See* Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige, and Open Access*, 10 LEWIS & CLARK L. REV. 901, 905–07 (2006).

[64] ENGLISH, *supra* note 63, at 189.

that of many of my online colleagues—that we are both critics of existing forms of prestige and eager supplicants for them—is thus perhaps not as embarrassing as I had feared. The online and offline players are each engaged in the same cultural capital game, and it is the only game in town.

Given this fix, I end with very little by way of prescription.[65] I remain an optimist about the contribution that the online age of legal scholarship can make to legal scholarship as a whole, and equally optimistic about the value of the online age in breaking down old hierarchies and offering young scholars new means of circulating their ideas outside the usual restrictive fora. But I also must acknowledge that the online age is not so separate from the old gatekeepers as it may want to seem, and that this will be increasingly true as the old gatekeepers find new ways of participating in the online age, or turn SSRN and other creatures of the online age into new means of "processing professional prestige."[66] Whether online or off, the legal academy is too insecure, and too concerned with the making and trading of prestige as a cultural good, to stop just because it has found new and better means of distributing the underlying work itself. Prizes there must be. The online age may substantially democratize the process, although even that is uncertain, but it certainly will not eliminate it. To the contrary, it is an increasingly important part of the game. One might hope that we could simply stop playing the game altogether; that we could care only about the underlying work, not where it appears or who has certified it as great, and that we might devote somewhat less time to measuring each other, or to measuring those measures. I might also hope to be the world's first 200-year-old man. But I am betting neither will happen.

Still, there may be some light at the end of the tunnel.[67] In his study of the culture of prestige, English writes that the nature and volume of public criticism of prizes has reached such a point that we may finally witness "the weakening of the collective magic by which aesthetics has for so long been levitated, the gradual revelation of a hidden support system extending upward from the ground of social practice to the higher level of art."[68] To quote Louis Menand, this "willingness to speak without embarrassment about the significance of prizes and awards, and about the whole economy of cultural production and consumption, may, paradoxically, signal the demise of the prize system."[69] Perhaps a similar fate awaits the legal academy. Maybe if we can "speak without embarrassment" about the role of both the old gatekeepers and the new online age in the production of

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[65] *Cf.* Schlag, *supra* note 51, at 29 ("[W]hen was the last time you saw a law review article end on the note, 'Oh, my god, we are all so totally fucked'?!").

[66] Madison, *supra* note 63, at 913.

[67] Thus proving Schlag's point yet again. *See supra* note 65.

[68] ENGLISH, *supra* note 63, at 245.

[69] Louis Menand, *All That Glitters: Literature's Global Economy*, NEW YORKER, Dec. 26, 2005, at 136, *available at* LEXIS, News Library, NEWYRK File.

prestige, and acknowledge the role of rankings—"good" ones and "bad" ones—in generating the same cultural capital, the whole game will lose some of its luster. Until then, as Getman observed, we will remain caught exquisitely between egalitarianism and elitism, openly championing one and privately craving the other.

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Essay

De Jure [sic] Park

DR. RONEN PERRY*

This Essay, solicited by the Connecticut Law Review for the inauguration of its online companion CONNtemplations, discusses the main structural deficiencies of student-edited general interest paper-based law reviews, namely that they are student-edited, general interest and paper-based.

I. INTRODUCTION

The roots of the American law review may be traced back to the 19th century. The *University of Pennsylvania Law Review*, established in 1852 as the *American Law Register*, is probably the oldest continuously published legal periodical in America.[1] However, it began as a practitioners' journal and became affiliated with an academic institution only in 1896.[2] The gradual proliferation of academic law journals started in 1887, with the establishment of the *Harvard Law Review*, the first student-edited legal periodical to last more than a few years.[3] At present,

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[1] Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 31–32, 35–36 (1996); William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228 & n.3 (1965); Lowell J. Noteboom & Timothy B. Walker, *The Law Review – Is It Meeting the Needs of the Legal Community?*, 44 DENVER L.J. 426, 426 (1967); Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 755–57, 780–81 (1985).

[2] Swygert & Bruce, *supra* note 1, at 755–56, 781.

[3] *See id.* at 769–87.

there are nearly 200 ABA-approved law schools in the United States.[4] Each publishes or sponsors a general interest student-edited paper-based legal periodical, also known as the school's "flagship journal."[5] Very often the general interest law review is accompanied by specialized, peer-edited or online legal periodicals.

The traditional student-edited general interest paper-based law review, one of the pillars of American legal scholarship and education, is unfit for life in the modern academic world. Yet it still exists, much like the dinosaurs in Michael Crichton's *Jurassic Park*.[6] In my view, it must evolve or be extinct.[7] This Essay discusses the main structural deficiencies of flagship journals, namely that they are student-edited, general interest and paper-based. I am grateful to the editors of *Connecticut Law Review* for this opportunity to share my raw thoughts on the subject, and obtain useful comments through the newly established online companion to their print edition. I am honored to share this virtual podium with my distinguished colleagues, Alfred L. Brophy and John Doyle.

II. STUDENT-EDITED

For a non-American scholar, and even for American scholars in all disciplines but law, the most intriguing feature of the American law review is the absolute control by second and third-year students of the entire publication process. Law students are the gatekeepers and ultimate fashioners of legal scholarship. They appraise the relative worth of numerous submissions, select a handful for publication, and edit them. This is uncommon in other jurisdictions, or in other disciplines, where academic periodicals are normally peer-reviewed and peer-edited.

There may be several reasons for this unique reality. First, reviewing and editing academic manuscripts is time consuming, so law professors gladly renounced this task. Nowadays, when the number of annual submissions to general interest law reviews may range from hundreds to thousands, they are unwilling to resume it. Second, law review

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[4] *See* American Bar Association, ABA Approved Law Schools, http://www.abanet.org/legaled/approvedlawschools/approved.html (last visited Apr. 29, 2007).

[5] The Northeastern University School of Law is the only exception. However, the students at this school intend to establish their own journal shortly. *See* e-mail from Sue D. Zago, Associate Director of the Northeastern University School of Law Library, to Law-Lib Electronic Discussion List (Mar. 3, 2007, 06:35 AM), *available at* http://lawlibrary.ucdavis.edu/Lawlib/Mar07/date.asp (follow "Estimate of librarian's time to support law review" hyperlink).

[6] MICHAEL CRICHTON, JURASSIC PARK (1990).

[7] The view presented in this Essay is relatively optimistic. In a well known article, Bernard Hibbitts anticipated the complete demise of law reviews. *See generally* Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615 (1996), *available at* http://www.law.pitt.edu/hibbitts/lastrev.htm. In a way, my Essay endeavors to help law reviews survive. Unlike Hibbitts, I assume that academic periodicals, and their reputational hierarchy, serve important goals: they indicate the intrinsic value of academic manuscripts and their relative quality.

membership enhances and refines law students' professional skills. It is thus considered a valuable educational tool, which is part and parcel of the law school experience.[8]

Still, the flaws of student-run academic periodicals are well known. It is often said that even students with excellent credentials are not qualified—after one or two years of law school—to run an academic periodical.[9] First, it seems quite odd that "novices judge the works of their academic seniors."[10] Students do not have an adequate background in each and every field of legal and interdisciplinary scholarship, which is required to evaluate scholarly manuscripts on various unrelated topics, and to select those of best academic quality. Hence the review process is biased. Submissions are evaluated less on their substantive merit and more on simplistic criteria that are used as proxies for substantive merit, such as the prestige of the school from which the author graduated or with which she or he is currently affiliated, the author's prior publication record, or the prominence of the scholars whose comments are acknowledged in the asterisk footnote.[11]

Second, students lack the expertise and experience required to edit papers accepted for publication. Since they spend two years at most as law review editors, they do not gain much experience along the way. Many

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[8] *Cf.* Christian C. Day, *The Case for Professionally Edited Law Reviews*, 33 OHIO N.U. L. REV. (forthcoming 2007), abstract available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946794 (manuscript on file with Connecticut Law Review); Hibbitts, *supra* note 7, at 622. As law review membership signals excellence and a willingness to work hard, and given its presumed educational value, it is often a prerequisite for interviewing by potential employers, or at least a strong determinant in employment decisions. *See* Russell Korobkin, *Ranking Journals: Some Thoughts on Theory and Methodology*, 26 FLA. ST. U. L. REV. 851, 854 (1999). *But cf.* E. Joshua Rosenkranz, *Law Review's Empire*, 39 HASTINGS L.J. 859, 860 (1988) (contesting the educational value of law review membership).

[9] *See* Day, *supra* note 8, at 13–24; Bernard J. Hibbitts, *Yesterday Once More: Skeptics, Scribes and the Demise of Law Reviews*, 30 AKRON L. REV. 267, 291–92 (1996); John G. Kester, *Faculty Participation in the Student-Edited Law Review*, 36 J. LEGAL EDUC. 14, 16 (1986); Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 389 (1988); James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 527, 535 (1994); James Lindgren, *Student Editing: Using Education To Move Beyond Struggle*, 70 CHI.-KENT L. REV. 95, 95 (1994); Jonathan Mermin, *Remaking Law Review*, 56 RUTGERS L. REV. 603, 606–07 (2004); Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132–34 (1995); Clarence M. Updegraff, *Management of Law School Reviews*, 3 U. CIN. L. REV. 115, 119–20 (1929); Richard A. Posner, *Against the Law Reviews*, LEGAL AFF., Nov.-Dec. 2004, at 57. For counter-arguments *see, e.g.*, Wendy J. Gordon, *Counter-Manifesto: Student-Edited Law Reviews and the Intellectual Properties of Scholarship*, 61 U. CHI. L. REV. 541 (1994); John Paul Jones, *In Praise of Student-Edited Law Reviews: A Reply to Professor Dekanal*, 57 UMKC L. REV. 241 (1989); Phil Nichols, Note, *A Student Defense of Student Edited Journals: In Response to Professor Roger Cramton*, 1987 DUKE L.J. 1122 (1987).

[10] Afton Dekanal, *Faculty-Edited Law Reviews: Should the Law Schools Join the Rest of Academe?*, 57 UMKC L. REV. 233, 235 (1989).

[11] *See, e.g.*, Arthur D. Austin, *The "Custom of Vetting" as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1, 5–7 (1989); Richard A. Bales, *Electronically Submitting Manuscripts to Law Reviews*, 30 STETSON L. REV. 577, 582 (2000). Lindgren suggests that the author's identity and biography be concealed from the reviewers. Lindgren, *supra* note 9, at 538. However, this would not make students more equipped to assess submissions' quality.

authors complain that students tend to "over-edit," sometimes to the detriment of the manuscript.[12] A more acute problem is that student editors focus mainly on technical matters such as style, citation form and accuracy, and the like. Peer-reviewed journals usually provide more substantive feedback, helping authors to refine their manuscripts.

Apparently, these flaws call for a categorical shift to faculty-edited peer-reviewed journals,[13] but this option is impractical and unwarranted. It is impractical because, as stated above, faculty members might not be willing to assume all editorial tasks. It is unwarranted for two reasons. First, researchers *should* generally focus on the substantive advancement of human knowledge, whereas editing involves many administrative and technical matters. Second, the proposed shift would deprive students of the educational benefits of law review membership. So, in my view, excluding students would be tantamount to throwing the baby out with the bathwater.

There are, however, more plausible solutions. Student-reviewed student-edited journals and faculty-edited peer-reviewed journals are the extremes. Many alternatives lie in between. My colleague, Alfred L. Brophy, seems to support a middle-ground solution. Brophy does not advocate the abandonment of student-edited law reviews, but he has consistently called for more faculty involvement in the review process.[14] I think we can take this proposal one step farther and try to delineate the boundaries of student power. The most promising alternative to the traditional student-run law review is a peer-reviewed journal, jointly edited by students and faculty.[15] The term "jointly edited" means actual cooperation between faculty and students, not necessarily formal assignment of editorship to both.

This model has been implemented successfully in other jurisdictions. In Israel, for example, peer review is the norm. While there may be some variance in faculty impact on ultimate editorial decisions, no offer to publish a paper can be extended in the absence of a mostly positive report from an external referee. This does not mean that *any* submitted paper is sent out for peer review. In-house editorial board members, usually law students supervised or guided by a faculty member, are still responsible for

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[12] *E.g.*, Dekanal, *supra* note 10, at 236.

[13] *Cf.* Dekanal, *supra* note 10, at 237–38 (proposing the establishment of more faculty-edited peer-reviewed journals).

[14] Alfred L. Brophy, *Law [Review']s Empire: The Assessment of Law Reviews and Trends in Legal Scholarship*, 39 CONN. L. REV. 101, 107–08 (2006); Alfred L. Brophy, *Mrs. Lincoln's Lawyer's Cat: The Future of Legal Scholarship*, 39 CONN. L. REV. CONNTEMPLATIONS 11, 26 (2007), http://conntemplations.org/comments.php?y=07&m=05&entry=entry070505-120000; Alfred L. Brophy, *The Emerging Importance of Law Review Rankings for Law School Rankings, 2003-2007*, 78 U. COLO. L. REV. 35, 53 (2007); Alfred L. Brophy, *The Relationship Between Law Review Citations and Law School Rankings*, 39 CONN. L. REV. 43, 57–58 (2006); *see also* Day, *supra* note 8.

[15] *But cf.* Day, *supra* note 8, at 13–43 (advocating professionalized student-edited journals); Dekanal, *supra* note 10, at 238–39 (advocating peer-reviewed student-edited journals).

an initial rough screening. But this screening is based on qualities that may be appraised by exceptional students, such as structure, coherence, clarity, style, depth, apparent innovation (as opposed to mere summary of existing knowledge), and the like. Peer review is used for a more profound examination of the content. The referee is generally a law professor with relevant expertise. The report may corroborate or contradict the students' intuition, and is given considerable weight in the final decision. As is customary in peer-reviewed journals, the editors are not limited to only two types of editorial decisions (acceptance or rejection), and frequently use intermediate options, such as conditional acceptance, or an invitation to revise and resubmit, thereby ensuring that substantive comments will be seriously dealt with. Student editors write editorial letters whenever necessary, based on the referees' reports and their own comments. A faculty adviser or editor usually oversees and refines these letters. Student editors are also responsible for cite checking (substance and form) and proofreading of final drafts.

A similar model has been used for decades by leading law reviews in Australia[16] and in Canada.[17] The underlying principle is quite simple: let students perform every task not requiring unique academic expertise, with minimally required faculty supervision, and let faculty appraise academic quality (in the narrowest sense) and propose substantive revisions.[18] That way we can enjoy the best of all worlds: professional quality control, efficient allocation of resources (researchers focusing solely on the advancement of knowledge), and educational benefits.[19]

III. PAPER-BASED

In the beginning, there was no alternative to paper. Law reviews were published in print and circulated to subscribers through "snail mail." With the advance of technology, electronic venues of publication and dissemination have gradually become more available. In his renowned article *Last Writes? Reassessing the Law Review in the Age of*

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[16] *See, e.g.*, Melbourne University Law Review, http://mulr.law.unimelb.edu.au/ (last visited Apr. 28, 2007); Sydney Law Review, http://www.law.usyd.edu.au/slr/ (last visited Apr. 28, 2007).

[17] *See, e.g.*, McGill Law Journal, Submissions: The Evaluation Process, http://lawjournal.mcgill.ca/ensubmissions.php (last visited Apr. 27, 2007); Osgoode Hall Law Journal, Submission Guidelines, http://www.ohlj.ca/english/submissions.htm (last visited Apr. 27, 2007).

[18] True, multiple-submission is forbidden in Australia, Canada, and Israel as in most countries. One may argue that peer review is impractical in a multiple-submission regime, where an author is free not to accept an offer to publish his or her paper. But this problem can be solved. If a certain article passes the first screening the author may be contacted and informed that the article will be sent to peer review only if the author promises to accept an offer extended by that journal within, say, seven days.

[19] It appears that several student-edited journals already use peer review to a certain extent. *See, e.g.*, Harvard Law Review, Guidelines for Submitting Manuscripts: Review Process, http://www.harvardlawreview.org/manuscript.shtml (last visited Apr. 27, 2007) ("[M]any pieces go through substantially more stages of review, including . . . faculty peer review[.]").

Cyberspace,[20] Bernard J. Hibbitts identified three stages in the development of electronic dissemination of legal scholarship.[21] First, two commercial databases (Lexis and Westlaw) started to provide online access to the full texts of law review articles. Second, many law reviews have begun to provide *free* online access to their own content at their official websites without discontinuing their print editions.[22] Third, several law-school-related journals have started publishing exclusively online. The number of online publications has increased dramatically in the last decade.[23] Nowadays, 40% of law and technology journals publish exclusively online.[24]

During the last few years two noteworthy developments have taken place. First, several companies, most notably SSRN and Bepress, have started providing *free* online access to legal manuscripts, published and unpublished.[25] These companies provide not only access, but also e-mail notifications about new papers. Certain journals might expect authors whose papers were accepted for publication to remove such papers from these free-access repositories.[26] But most understand the promotional value of such access and allow or even encourage authors to post their papers. Second, several general interest law reviews have started publishing online companions to their print editions. The online companion usually consists of comments and responses to papers published in the print edition, and preliminary reflections on various law-related topics. Prominent examples include *The Pocket Part*

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[20] Hibbitts, *supra* note 8.

[21] *Id.* at 654–64.

[22] *See, e.g.*, NYU Law Review, Issues, http://www.law.nyu.edu/journals/lawreview/issues/ (last visited Apr. 28, 2007). For a partial list of law reviews freely available online see Library of Congress, *Law Reviews Online*, http://www.loc.gov/law/guide/lawreviews.html (last visited March 22, 2007). Unfortunately, the Library of Congress has missed *Connecticut Law Review*, which provides free, online access to articles dating back to 2001. Connecticut Law Review, Issue Archive, http://www.connecticutlawreview.org/archive.html (last visited Apr. 28, 2007).

[23] Fifty American e-journals were listed in John Doyle's database on March 22, 2007, of which only two (*Richmond Journal of Law & Technology* and *Rutgers Law Record*) have been publishing online for more than a decade (the *Journal of Online Law* started in 1995 but ceased publication in 2001). *See* Washington & Lee Law School, Law Journals: Submissions and Ranking, http://lawlib.wlu.edu/LJ/ (last visited Apr. 28, 2007).

[24] According to the Washington & Lee Law School databases, there were thirty-six American journals specializing in law, science and technology in March 2007. Fourteen were published exclusively-online. *See* Washington & Lee Law School, Law Journals: Submissions and Ranking, *supra* note 23.

[25] *See* Bepress Selected Works, http://works.bepress.com/ (last visited Apr. 28, 2007); Social Science Research Network, http://www.ssrn.com (last visited Apr. 28, 2007).

[26] The *California Law Review* used to ask authors to remove any drafts posted on SSRN upon publication by the journal. *See* Posting of Gordon Smith, Missteps @ Cal. L. Rev., to Conglomerate, http://www.theconglomerate.org/2003/11/missteps_cal_l_.html (Nov. 20, 2003). It appears, however, that even the *California Law Review* has changed its policy since. *See* e-mail from Jean Galbraith, Editor-in-Chief of the California Law Review to Dan Hunter, Associate Professor of Legal Studies and Business Ethics, Wharton School of Business, University of Pennsylvania (March 31, 2004), *available at* http://commons.umlaw.net/index.php?title=California_Law_Review.

(accompanying the *Yale Law Journal*),[27] the *Harvard Law Review Forum*,[28] *First Impressions* (supplementing the *Michigan Law Review*),[29] *Colloquy* (accompanying the *Northwestern University Law Review*),[30] *PENNumbra* (supplementing the *University of Pennsylvania Law Review*),[31] and *In Brief* (accompanying the *Virginia Law Review*).[32] *Connecticut Law Review* has joined this avant-garde group with the inauguration of *CONNtemplations*.[33]

While the content of most general interest law reviews is now available both in print and online, none has adopted an exclusively online publication policy so far. This may seem odd. Paper-based publication is much more expensive than online publication. The production costs of print journals include paper, printing, binding, and shipping. These are so high that most law reviews are not profitable enterprises, and are subsidized by law schools under the assumption that they serve some educational goal.[34] The advantages of online publication for the publisher are quite clear, and have already brought about significant changes in other branches of the publishing industry.[35] Moreover, the use of paper and ink involves externalized costs such as environmental harms,[36] and ever-mounting expenditure on handling and storage by libraries and individuals.[37]

One may argue that a shift from paper-based to online publication entails other costs, including the establishment and maintenance of dynamic websites with database applications. I believe that the special costs of the print edition are much higher than the special costs of the online edition.[38] More importantly, many law reviews simultaneously publish in print and online, so they already bear the costs of online publication. A transition to exclusively online publication would only save costs.

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[27] Pocket Part, http://www.thepocketpart.org/ (last visited Apr. 28, 2007).

[28] Harvard Law Review Forum, http://www.harvardlawreview.org/forum/aboutforum.shtml (last visited Apr. 28, 2007).

[29] First Impressions, http://www.michiganlawreview.org/index-fi.htm (last visited Apr. 28, 2007).

[30] Collquy, http://northwestern-colloquy.typepad.com/ (last visited Apr. 28, 2007).

[31] PENNumbra, http://www.pennumbra.com/ (last visited Apr. 28, 2007).

[32] In Brief, http://virginialawreview.org/ (last visited Apr. 28, 2007).

[33] CONNtemplations, http://www.conntemplations.org.

[34] Alfred Brophy reports that the costs of printing and mailing a single volume (five issues) of the *Alabama Law Review* add up to $35,000. *See* Brophy, *Mrs. Lincoln's Lawyer's Cat*, *supra* note 14, at 19.

[35] *See, e.g.*, Katharine Q. Seelye, *Los Angeles Times Reduces Size of its National Edition*, N.Y. TIMES, Mar. 2, 2005, at C5, *available at* LEXIS, News Library, NYT File.

[36] The use of recycled paper may reduce environmental harms but increase paper price.

[37] For an interesting discussion of law review storage, see generally Kincaid C. Brown, *How Many Copies are Enough? Using Citation Studies to Limit Journal Holdings*, 94 L. LIBR. J. 301 (2002).

[38] I cannot provide empirical evidence to substantiate my intuition at this stage.

Online publication is not only more economical, but also much faster, making it more responsive to current events and more attractive to authors. Today, an author may wait several weeks before an article—already in its final law review form—becomes publicly available. Online publication shortens this interval. It saves the time of printing, binding, handling and shipping. It may also break the current interdependence of papers that are to be included in a single issue. A paper may be published whenever it is ready, without having to wait for others.[39] Electronic publishing also enables refinement of articles after their official publication.[40]

Online publishing is clearly more attractive for readers. First, it makes manuscripts more accessible. An online version is more easily obtained than a print version, even where both are available. Tangible volumes must be physically searched for at the library when it is open, and they are sometimes borrowed, misplaced or destroyed. More importantly, libraries can provide online access to various journals even where budgetary constraints and space limitations preclude access to print editions of the same journals. In fact, online publishing often makes the trip to the library redundant, as it allows access from home. Easy access is not only beneficial for readers, but also for authors, whose manuscripts thereby gain more exposure and impact. Second, an electronic version is a more convenient research tool. It can be easily scanned, searched, quoted and referenced. Third, electronic versions take up much less physical space and are more portable than print. Readers can hold and carry an enormous collection of manuscripts on their laptops or personal digital assistants. Fourth, online publishing enables editors to produce reader-friendly layouts, including hyperlinks, flexible font size, multimedia content and so on.[41] Fifth, readers may be given an opportunity to take part in an ongoing discourse about published papers through online discussion forums and the like. Unsurprisingly, empirical studies show a strong preference by users for electronic access to academic periodicals.[42]

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[39] *But cf.* John Doyle, *The Business of Law Reviews*, 39 CONN. L. REV. CONNTEMPLATIONS 30, 34 (2007), http://www.conntemplations.org/comments.php?y=07&m=05&entry=entry070504-120000 ("[E]lectronic journals that simply add new articles on a rolling basis are difficult to deal with from a control point of view.").

[40] *Id.* at 34–35; Hibbitts, *supra* note 7, at 663.

[41] *See* Hibbitts, *supra* note 7, at 663.

[42] *See* Sandra L. De Groote & Josephine L. Dorsche, *Measuring Use Patterns of Online Journals and Databases*, 91 J. MED. LIBR. ASS'N 231 (2003), *available at* http://www.pubmedcentral.gov/articlerender.fcgi?tool=pubmed&pubmedid= 12883574 (finding that users prefer online resources to print); Sandra L. De Groote & Josephine L. Dorsche, *Online Journals: Impact on Print Journal Usage*, 89 BULL. MED. LIBR. ASS'N 372 (2001), *available at* http://www.pubmedcentral.nih.gov/articlerender.fcgi?tool=pubmed&pubmedid=11837259 (showing clear preference for online over print journals); David H. Morse & William A. Clinworth, *Comparing Patterns of Print and Electronic Journal Use in an Academic Health Science Library*, ISSUES SCI. & TECH. LIBRARIANSHIP, Fall 2000, *available at* http://www.library.ucsb.edu/istl/00-fall/refereed.html (showing that users accessed the electronic versions of 194 biomedical journals available both online and in print more than ten times as often as the print versions during a six-month study period); COLLECTION MANAGEMENT INITIATIVE,

For all that, the most prestigious venues for scholarly publication in law are still paper-based. More accurately, they are available both in print and online. How can this be explained? One possible explanation is the apparent perpetuity of paper. It may be argued that while electronic access is contingent on the survivability and continuous reliability of electronic databases, and subject to software and hardware failures, computer viruses, hacking, etc., paper has already proved to be a long-lasting and reliable medium. Accordingly, the renowned maxim "Publish or Perish" may be paraphrased into "Publish on Paper or Perish." This argument is clearly flawed. Electronic versions of legal documents are usually available through various independent databases. Presumably, most databases have reliable backups, and some have mirrors and external electronic archiving.[43] So the risk of losing an article published exclusively online is negligible. On the other hand, history shows that hardcopies may be lost forever.[44]

Another explanation is that the costs related to paper-based publishing force editors to conduct a more rigorous screening process. If they could publish whatever they wished without caring about the cost, they would not be as meticulous. Publication in print thus serves as a signal for better quality. This argument must also be rejected. All journals, print or electronic, bear similar costs in preparing selected articles for publication,[45] so skillful screening is still mandated by budgetary constraints. More importantly, changes in journal quality may be sensed by the academic community, and quantified in various ways.[46] Therefore, each journal has a strong reputational incentive to adhere to the highest standards possible regardless of the publication method.

A third explanation is that reading from paper may be a deep-rooted habit. Many distinguished law professors have been using print journals for years. They used them when they studied law, edited law reviews,

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UNIVERSITY OF CALIFORNIA, PRELIMINARY RESULTS FROM THE COLLECTION MANAGEMENT INITIATIVE'S JOURNAL USE STUDY AND USER PREFERENCE SURVEY (2003), http://www.slp.ucop.edu/consultation/slasiac/042903/CMI_SurveyResultsForSLASIAC04-29-03.doc (finding that (1) for most disciplinary areas, the ratio of digital to print use of journals available in both forms was about 10 to 1, and (2) 84% of U.C. faculty and students agreed with the statement that "electronic journals are a suitable alternative to print journals"); UNIVERSITY OF HONG KONG LIBRARIES, 2005 USER SURVEY REPORT 40–41 (2006), *available at* http://lib.hku.hk/survey2005/full.doc (showing that library patrons, and academic staff in particular, prefer online journals to print).

[43] For example, the Berkeley Electronic Press has been using the Portico archiving service (http://www.portico.org/) and the LOCKSS preservation system (http://www.lockss.org) for its journals.

[44] *See* Wikipedia, Library Fires, http://en.wikipedia.org/wiki/Library_fires (last visited Apr. 29, 2007).

[45] It is very likely that the market-value of such labor (even if not actually paid for, as in student-edited journals) is much higher than printing costs.

[46] *See* Ronen Perry, *The Relative Value of American Law Reviews: A Critical Appraisal of Ranking Methods*, 11 VA. J.L. & TECH. 1 (2006); Ronen Perry, *The Relative Value of American Law Reviews: Refinement and Implementation*, 39 CONN. L. REV. 1 (2006).

practiced law, and conducted research. Old habits die hard, and as long as there is demand for print editions, there must be supply. This argument has some merit. Still, consumers' preferences are rapidly changing. As indicated above, most patrons of academic journals already prefer electronic versions, and their proportion seems to be growing. If demand for print editions consistently decreases, they must ultimately vanish. At any rate, it is doubtful whether society needs to accommodate inefficient habits. Old-fashioned readers may print online articles for their personal use at their own expense.

Some of my colleagues maintain that hardcopies are preferable because "they can be read everywhere, even in bed or at the beach, and uninterruptedly, without having to be recharged." This argument seems inapplicable to legal periodicals. After all, how many scholars read law review articles in bed or at the beach? Be that as it may, this argument hinges on technological obstacles that will surely be overcome in the future. Tablet PCs already emulate the traditional reading experience in many respects, and battery life is gradually getting longer.

In sum, there is no convincing reason for the continuation of print editions. Any preference for paper is either irrational or outdated. Nonetheless, it still exists. Many scholars, probably with overrepresentation on appointments committees, have an irrational preference for paper. So legal academia may be said to suffer, to a decreasing extent, from a "paper bias." My hypothesis is that the market is consequently trapped in a fragile inefficient equilibrium. Law reviews are practically facing a prisoner's dilemma. All journals are aware of the advantages of online publishing. But each knows that given the "paper bias," transitioning to an exclusively online format will put it at a significant disadvantage vis-à-vis other journals competing for the same authors and readers. Consequently, none makes the required shift.

I predict that this inefficient equilibrium will eventually break. As soon as one of the top-ten journals makes the rational decision to discontinue its print edition, the reputational value of paper will drop dramatically, and other journals will immediately follow suit. Put differently, once the market is signaled by a top journal that a print edition has no additional value, no journal will be willing to bear its costs. It is hard to say when this will happen. At the moment, top general interest paper-based law reviews seem to be very lucrative businesses. Still, print edition subscriptions are gradually and consistently declining.[47] This trend may continue to the point where a print edition becomes unprofitable even for elite journals.

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[47] *See* Doyle, *supra* note 39, at 33–34.

IV. GENERAL INTEREST

Another notable feature of the paradigmatic law review is non-specialization. In other disciplines there may be a few general interest journals, but the vast majority of first-rate articles are published in specialized outlets. The quality of each journal is usually assessed relative to journals of the same specialization. For example, most business journals specialize in one area, such as accounting/finance, entrepreneurship, human resources, information systems management, international business, marketing, operations management, organizational behavior, or strategic management.[48] Similarly, most psychology journals specialize in one area, such as abnormal psychology, behavioral psychology, biopsychology, clinical psychology, cognitive psychology, comparative psychology, developmental psychology, educational psychology, or social psychology.[49] Eighty years ago, a distinguished law professor at Northwestern University envisaged a similar fragmentation in the law review world: "A few [journals] could be specialized. For example, the *Harvard Law Review* might become what is consistent with its traditions, a journal of legal history; the *Yale Law Journal* might become a journal of jurisprudence; and the *Columbia Law Review* might become a journal of commercial law."[50] Obviously, this has not happened yet.

Clearly, generality is not a critical flaw. Students' absolutism and devotion to paper are much worse. Still, in my view, law review specialization would be a warranted development.[51] First, from a reader's perspective, the proliferation of legal research makes it practically impossible to keep track of cutting-edge scholarship in each field. Leading general interest law reviews receive hundreds of submissions annually, of which they select a very few for publication.[52] Thousands of well written and well researched papers on numerous unrelated topics are, therefore,

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[48] *See, e.g.*, Frank L. DuBois & David Reeb, *Ranking the International Business Journals*, 31 J. INT'L BUS. STUD. 689, 703 (2000); Donald R. Lehman, *Journal Evolution and the Development of Marketing*, 24 J. PUB. POL'Y & MARKETING 137 (2005); Vivien Beattie & Alan Goodacre, A New Method for Ranking Academic Journals in Accounting and Finance (University of Stirling Accounting, Finance and Law Working Paper No. 01/2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=685116, Western Libraries, Journal Rankings in Business, http://www.lib.uwo.ca/business/Rank.html (last visited Apr. 29, 2007).

[49] For a list of the major branches in psychology see About: Psychology, http://psychology.about.com/od/branchesofpsycholog1/ (last visited Apr. 29, 2007). For a list of the most influential journals by category see American Psychology Association, Journals of the Century, http://www.apa.org/monitor/nov01/journals.html (last visited Apr. 29, 2007).

[50] Albert Kocourek, *The Law Review*, 21 ILL. L. REV. 147, 153 (1926).

[51] I am aware, of course, of the growing number of specialized law journals. However, the traditional general-interest law review is usually the flagship journal of the respective school, and most scholars still aspire to publish with a general-interest review.

[52] For example, the *Stanford Law Review* reports more than 3000 submissions per-annum. *See* Post of Charles Sullivan, Ranking Law Reviews as the August Window Opens, to Concurring Opinions, http://www.concurringopinions.com/archives/2006/08/ranking_law_rev.html (Aug. 3, 2006, 8:43 AM).

scattered among hundreds of journals. The average reader, interested in a specific branch of law, cannot systematically monitor all journals for relevant articles. Assuming that she could receive periodic updates on new articles that meet her professional interests,[53] it would still be very difficult to ascertain the relative worth of each paper and decide which merits reading. Specialization enables readers to pinpoint relevant manuscripts more easily, and with a more reliable approximation of relative quality.[54] Moreover, in the current state of affairs, private subscribers, organizations, and non-law libraries are practically forced to pay for content they do not truly need.[55] Specialization facilitates more personalized, hence cost-effective, acquisitions.[56]

Second, from an author's perspective, the current structure of the law review market creates an unwarranted subject-matter bias. Law reviews already tend to publish too many articles on "favored" topics (usually trendy, sensational or core-curricular), while neglecting others that may be as important but—perhaps temporarily—less privileged.[57] For example, constitutional law seems to be overrepresented in top journals, while tort law is underrepresented. Articles on more esoteric subjects, such as Roman law, are lucky to get published at all. Put differently, scholars do not gain the appropriate reputational benefits for writing thought-provoking, well researched articles on non-popular topics. The same is true for non-popular research perspectives and methodologies. Scholars are thus impelled to design their research in accordance with the ephemeral taste of the masses, or be denied the opportunity for a reputable placement.

This problem is exacerbated by the current tendency to rank legal periodicals by different citation-based measures.[58] These rankings are biased in favor of journals that publish more articles on popular topics, and

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[53] Such as those currently distributed by SSRN or Bepress.

[54] Journals that specialize in a certain field can be compared with each other more easily than general journals with different subject-matter distributions. *See, e.g.*, Gregory Scott Crespi, *Ranking International and Comparative Law Journals: A Survey of Expert Opinion*, 31 INT'L 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. & POL'Y REV. 273 (1998).

[55] E.g., business students may be interested in law review articles about commercial law. A business school library must, therefore, retain access to numerous general-interest journals that may include these articles.

[56] Law libraries, on the other hand, need to provide access to articles on various topics. So subscribing to a general-interest periodical, either print or electronic, or providing access to a general-interest periodical through Lexis or Westlaw cannot be deemed redundant.

[57] *See, e.g.*, William J. Turnier, *Tax (and Lots of Other) Scholars Need Not Apply: The Changing Venue for Scholarship,* 50 J. LEG. EDUC. 189, 190–98, 211 (2000) (showing that a few areas of legal research, and constitutional law in particular, get a lot more attention than all others from top general-interest law reviews); *see also* Leo P. Martinez, *Babies, Bathwater, and Law Reviews,* 47 STAN. L. REV. 1139, 1143 (1995) (noting that law reviews often publish what is "hot," rather than what is the best scholarship).

[58] I admit to be partly responsible for this tendency.

against journals that publish more articles on esoteric subjects.[59] Excellent articles on unpopular topics may rarely be cited, while run-of-the-mill articles on popular subjects may frequently be cited. The continuous use of citation-based ranking methods may induce editors of general interest journals to publish (and authors to submit) mediocre articles on popular subjects rather than creative, innovative, profound, and well written manuscripts on less popular subjects.[60] Law review specialization gives authors the opportunity to be appraised with reference to their true peers, and puts the emphasis back on relative quality.[61]

Third, from an editorial perspective a specialized journal seems to be a more sensible enterprise than a general interest journal. There may be specialists in a particular branch of law, but no one is an expert in all branches. So it should be much easier to assemble and administer an editorial board that needs to appraise and edit papers in a specific field than an editorial board that ought to handle an open-ended array of topics and research methods on a rolling basis.

Admittedly, there are hundreds of specialty law journals in America today. A few of them, like the *American Journal of International Law* or the *Journal of Legal Studies*, are highly reputable and very influential. However, all law schools (but one) still have general interest journals, and the legal academia (authors, appointments committees, etc.) categorically favors these journals despite their inherent subject-matter bias. This unhealthy reality, where authors who specialize in different fields do not compete on equal terms for a few slots in general interest journals, and editors work on numerous unrelated topics, must change.

V. CONCLUSION

In this Essay I have endeavored to show that student-edited general-interest paper-based law reviews suffer from three basic structural problems: they are student-edited, general interest, and paper-based.[62] Law reviews need to remodel or fade away. Given the undisputed prestige of general interest journals in the legal academia, I am fairly skeptical about the prospects of full specialization in the law review market in the coming years.[63]

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[59] *See* Korobkin, *supra* note 8, at 869.

[60] *Id.*

[61] *Cf.* Carlin Meyer, *Not Whistlin' Dixie: Now, More than Ever, We Need Feminist Law Journals*, 12 COLUM. J. GENDER & L. 539, 539 (2003) (explaining that feminist and women's law journals "have published articles that would not otherwise have been read, covered issues largely untouched by more traditional reviews, and reviewed books that might otherwise have gone unreviewed").

[62] For a critical appraisal of law reviews' style and contents, see Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936); Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279 (1962).

[63] In fact, one may point to opposite changes. For example, the *Lewis & Clark Law Review* was founded as the *Journal of Small and Emerging Business Law*, and shifted to a general-interest form in 2004. *See* Lewis & Clark Law Review, http://law.lclark.edu/org/lclr/ (last visited Apr. 29, 2007).

However, this warranted change will ultimately occur. In the nearer future law reviews will transition to an exclusively online format, and rely more heavily on faculty input in the review process. Those that do not adapt to the growingly competitive environment will be left behind.

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Essay

Thoughts on the New Era of Law Review Companion Sites

MATTHEW T. BODIE*

I. INTRODUCTION

Some revolutions begin with great fanfare; others start unnoticed. The rise of the blogger is perhaps the most heralded development in the world of legal education since the first rankings of *U.S. News & World Report*. The number of legal bloggers, as determined in the latest online census, stands at over 300.[1] Symposia on the growth of legal blogs have been held, written about, and "live-blogged."[2] The focus on blogging within the law coincides with the larger cultural attention being paid to bloggers across the spectrum.

The new crop of law review online "companions," in contrast, simply has been noted. When a law review launches a companion, the new site is mentioned in a blog post and may also be added to the blog roll.[3] But there

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[1] Posting of Daniel J. Solove, Law Professor Blogger Census (Version 5.1), to Concurring Opinions, http://www.concurringopinions.com/archives/2006/10/law_professor_b_6.html (Oct. 5, 2006, 2:55 AM). This was a substantial increase from the 235 bloggers of the March 2006 census. Posting of Daniel J. Solove, Updated Law Professor Blogger Census, to Concurring Opinions, http://www.concurringopinions.com/archives/2006/03/updated_law_pro.html (Mar. 17, 2006, 1:41 PM).

[2] *See, e.g.*, Bloggership: How Blogs Are Transforming Legal Scholarship, Berkman Center for Internet & Society at Harvard Law School, http://cyber.law.harvard.edu/home/bloggership (last visited Apr. 25, 2007); Posting of Ann Althouse, Live-blogging the Bloggership conference!, to Althouse, http://althouse.blogspot.com/2006/04/live-blogging-bloggership-conference.html (Apr. 28, 2006, 7:46 AM).

[3] *See, e.g.*, Posting of Orin Kerr, Virginia Law Review's "In Brief," to The Volokh Conspiracy, http://volokh.com/posts/1169619687.shtml (Jan. 24, 2007, 12:21 AM).

has been little attention paid to the overall phenomenon. In part, I believe this is because the role of the law review companion is still undefined and its future uncertain. These sites may simply become a repository for .pdfs of published articles, along with a light garnish of commentary that "raises questions." On the other hand, these sites may develop into online presences of their own—formidable players in legal cyberspace.

In this Essay I lay out a structural analysis of the online companion. I begin with a brief descriptive discussion of the companion, including its design, content, and readership. I conclude with suggestions for such companions to consider in developing their approach for the future.

II. THE PHENOMENON OF THE ONLINE COMPANION

The online companion is a very recent phenomenon, dating back less than two years. Almost all law reviews now have web sites, whether they be independent or part of the law school's collection of sites. But a law review web site simply lists contact information, methods for submissions, tables of contents, mastheads, and sometimes synopses or full-length e-versions of works published in the print version. Such sites contain no independent content and are simply designed to facilitate different types of interaction with the journal itself.

On October 18, 2005, the *Yale Law Journal* launched *The Pocket Part*, an online companion to its print journal.[4] In its news release, the *Journal* stated that its purpose in creating *The Pocket Part* was to "bring the best of the print Journal's content to the web and create an interactive forum for debate and discussion under the banner of the academy's most respected home for legal scholarship."[5] *The Pocket Part*'s primary content would initially be short responses to articles in the print journal. It later added a new set of original content—short essays written with an eye towards cyberspace style and substance. *The Pocket Part* has its own website[6] which highlights current articles and provides a subject-matter archive.[7]

The Pocket Part established the model for other online companions to follow. Although the number of companions will certainly grow, as of this writing there were eight (not including *CONNtemplations*):

- *Environmental Law Online* (*Lewis & Clark Law School*)[8]

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[4] News Release, Yale Law Journal Unveils Online Publication: "The Pocket Part" (Oct. 19, 2005), *available at* http://www.yale.edu/opa/newsr/05-10-19-03.all.html.

[5] *Id.*

[6] The Pocket Part, http://www.thepocketpart.org/ (last visited Apr. 25, 2006). While *The Pocket Part* has its own url, it has been integrated into the *Yale Law Journal*'s site and uses the same interface. *See id.*

[7] The Pocket Part, Pocket Part Archive, http://yalelawjournal.org/pocket_part_archive.html (last visited Apr. 25, 2006).

[8] *Environmental Law Online*, http://www.elawreview.org/elaw/ (last visited Apr. 26, 2007).

- *Harvard Law Review Forum*[9]
- *First Impressions* (*Michigan Law Review*)[10]
- *Colloquy* (*Northwestern University Law Review*)[11]
- *See Also* (*Texas Law Review*)[12]
- *PENNumbra* (*University of Pennsylvania Law Review*)[13]
- *In Brief* (*Virginia Law Review*)[14]
- *The Pocket Part* (*Yale Law Journal*)[15]

Although these companions generally share features with *The Pocket Part*, there are some important differences. Almost all of them have electronic versions of articles from the print journal along with short responses published only on the companion site.[16] Some of the sites also include original content. For example, *PENNumbra* hosts online debates between two or more professors that include an opening statement, a rebuttal, and closing statements by each side.[17] *First Impressions* is unique in that it consists only of responses to a particular symposium topic; the topics chosen generally relate to a recent change in the law.[18]

As *First Impressions* indicates, an online companion need not merely be a place for electronic versions of print articles together with short response pieces. Indeed, these "companion" sites do not have a monopoly on law journal web presence. For example, the *New York University Journal of Law & Liberty* has hosted a series of online symposia on its "blog."[19] The *Hofstra Law Review* has started an "Ideas" section consisting of five to ten-page essays, published both in print and on the

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[9] Harvard Law Review Forum, http://www.harvardlawreview.org/forum/HLRforum.shtml (last visited Apr. 25, 2007).

[10] First Impressions, http://www.michiganlawreview.org/index-fi.htm (last visited Apr. 25, 2007).

[11] Colloquy, http://northwestern-colloquy.typepad.com/ (last visited Apr. 25, 2007).

[12] See Also, http://www.texaslrev.com/seealso/ (last visited Apr. 26, 2007).

[13] PENNumbra, http://www.pennumbra.com/ (last visited Apr. 26, 2007).

[14] In Brief, http://virginialawreview.org/index.php (last visited Apr. 26, 2007).

[15] The Pocket Part, *supra* note 6.

[16] *Michigan Law Review*'s *First Impressions* seems to be the only exception to this.

[17] PENNumbra, Debates, http://www.pennumbra.com/debates/ (last visited Apr. 26, 2007).

[18] First Impressions, http://www.michiganlawreview.org/index-fi.htm (last visited Apr. 26, 2007) ("This extension of our printed pages aims to provide a forum for quicker dissemination of the legal community's first impressions of recent changes in the law.").

[19] New York University Journal of Law & Liberty, Blog, http://www.law.nyu.edu/journals/lawliberty/blog.htm (last visited Apr. 27, 2007).

web.[20] However, I wish to focus exclusively on the online law review "companion" since it can be categorized based on the simple grounds of nomenclature. Why have these law reviews all created websites called "companions," in a relatively short burst of activity?

The companions themselves discuss several goals as the motivating factors behind their creation. First, several cite to the need to be more current. Given the lag time between submission of a law review article and publication, a scholarly work in a print law review will not appear until months after its initial creation.[21] One benefit of online media is the near-instantaneous publication such media afford. Second, the companion offers the opportunity to add additional content without taking up additional print-journal space. The cost of printed law review pages renders additional published content quite expensive.[22] An online companion site can offer additional content without taking up space in the journal proper. Finally, some of the sites specifically mention the rise of blogs as a motivating factor behind the online companion. For example, *First Impressions* states that its purpose is "to fill the gap between the blogosphere and the traditional law review article."[23] Given the extensive number of law professor blogs, as well as the growth of practitioner blogs, the online companion offers a site with which bloggers can interact in a dynamic fashion.

Timeliness, cyberspace, and the blogosphere are the influences, but they dictate very little about the form or content on the companion. Why then is there such similarity, at least to this point? Almost all online companions have an "article-and-response" section. Stand-alone online content is, to this point, fairly sparse. These patterns are completely understandable. The companion is intended to be an add-on to the parent law review, not a font of new material. The title *Pocket Part* is revealing, as it "refers to the pockets attached to the back covers of legal publications that hold updates to, and commentaries on, those texts."[24] The companion is intended to derive its substance from the review itself. Response essays are not only quick to write—they also draw additional attention to the

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[20] Hofstra Law Review, Ideas, http://law.hofstra.edu/Academics/Journals/-LawReview/lrv_ideas.html (last visited Apr. 27, 2007).

[21] Tim McCarten, *Legal Scholarship Goes Online*, 59 VA. L. WLY., Feb. 9, 2007, http://www.lawweekly.org/?module=displaystory&story_id=1503&edition_id=53&format=html (noting that "online companions can truncate the publication process, which may take as much as a year from the point of an article's submission to its publication.").

[22] *See* Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 785–86 (2006), *available at* http://www.lclark.edu/org/lclr/objects/LCB_10_4_Litman.pdf ("The only significant expense noted in the budget document [of law reviews] is the cost of printing and mailing issues, which is contracted out to either Darby or Hein, who calculate the charge on a per-page per-subscriber basis.").

[23] First Impressions, *supra* note 10.

[24] News Release, *supra* note 4.

original article. It is no surprise that companions have used the article-and-response format for their primary content.

Why not simply include the responses in the print journal? Space is one answer; the responses would take up additional and precious room. However, the typically brief responses would not necessarily take up that many printed pages. Instead, I believe that companions are primarily efforts to draw attention to the review from online players such as bloggers, media, and other online institutions.[25] The article-and-response format has several factors that make it more attractive to the online crowd. First, the articles themselves are now online and available. Second, the responses provide easier "entry" into the article by providing a brief synopsis and highlighting areas of controversy. Third, the responses provide some degree of conflict—a necessary component in creating dramatic interest. Finally, several of the companion sites allow comments from readers. The traditional print medium does not afford readers the opportunity to participate directly and immediately in the online conversation.

Figure 1 represents an illustration of this model.[26] The online companion draws its primary content from the traditional print review, and it draws its primary readership from blogs, the media, and other online institutions. However, as I note in the diagram, it is possible that the model is more dynamic than that. Because the companions rely on bloggers and other online players to drive their audience, it makes sense for the reviews to reach out to those players for content as well. Many of those providing responses or other original content to these companions have law-related blogs—including many of the writers in this inaugural edition of *CONNtemplations*.[27] In addition, interest in the print content should ultimately drive readers to the online edition. A short responsive piece will often be a useful interpretive aid in reading an article, and savvy readers will know that the companion is a place to look for such insights. Thus, the more dynamic model involves interactions between the review,

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[25] The Concurring Opinions blog recently solidified this relationship by announcing that it would carry content from several law review online companions at its site. Posting of Daniel J. Solove, Announcing the Law Review Forum Project, to Concurring Opinions, http://www.concurringopinions.com/archives/2007/04/announcing_the.html (April 24, 2007, 1:04 AM).

[26] Table 1 is available on p.10 of this Essay.

[27] Stephen Vladeck, Paul Horwitz, and I all blog at PrawfsBlawg (http://prawfsblawg.blogs.com/prawfsblawg/); Steve also blogs at National Security Advisors (http://www.natseclaw.com/) and Paul blogs at Dorf on Law (http://www.michaeldorf.org/). Al Brophy is a blogger at PropertyProf Blog (http://lawprofessors.typepad.com/property/) and at MoneyLaw blog (http://money-law.blogspot.com/) and has guest-blogged numerous times. Ronen Perry also blogs at MoneyLaw blog as well as the Haifa Faculty of Law blog (http://haifalawfaculty.blogspot.com/). John Doyle has pioneered the tremendously influential online citation rankings for law reviews. *See* Washington & Lee Law School, Law Journals: Submissions and Rankings, http://lawlib.wlu.edu/LJ/ (last visited Apr. 26, 2007).

the companion, and online institutions that are more complicated than one might initially expect.

Like blogging, I believe the online companion will not be a long-term equilibrium state. There is so much inherent flexibility in the online experience that the online companions will continue to experiment and develop as time moves forward. However, there is a value to continuity, or at least to predictability of content. One of the great values of the law review is its stability: its substance has been cite-checked; its content will remain available in libraries and online; and it will follow a particular convention in style and structure that makes the information more accessible to those familiar with its form. This stability is important. Continual experimentation imposes information costs. Deviation too far from the form could cause confusion and may drive readers away.

III. SUGGESTIONS FOR THE COMPANION'S FUTURE

Online companions have the capacity to develop into a formidable online presence. They carry the name of a law review—and judging by the thousands of submissions, authors want to publish in law reviews. At the same time, they have much greater flexibility than the print journal when it comes to form and even substance. The online companion could publish a variety of different content types all under the same website and institutional supervision.

However, the online companion also has several weaknesses. Publishing in the companion is not nearly as prestigious as publishing in the print journal. Response articles are useful and can be provocative, but they are somewhat limited in form and audience. Although law review staff could publish content from their own members, such content is time-consuming and would not offer as much prestige as publishing a note in the traditional review. And unlike blogs, online companions in their current configuration are unlikely to draw a community of readers on their own. Blogs retain a core audience because of their narrower focus and their frequent (generally daily) updates with fresh content. Online companions are updated much less often and have "thicker" content requiring more time and interest to digest. Perhaps some professors will take the time to check out each companion site on a regular basis. But in the main, online companions will need other online players to drive the audience to their sites.

With these strengths and weaknesses in mind, the following are some suggestions for the near future of online companions.

Develop the "companion essay"—original content that combines certification with snappiness. Although it may sound like a strange notion, I believe there is room for a new form of scholarly writing that combines traditional review values with the new world of the legal blogosphere. One

might call it the "companion essay." It is a short piece designed for a legal audience that presents one opinion, one narrative, or one bit of empirical investigation quickly and succinctly. It is accessible without being facile. It is shorter than a traditional essay, but more sophisticated than an op-ed and more scholarly than a blog post.

The companion essay would fit nicely within the current constellation of legal writing. Some blog posts come close to what the "companion essay" achieves. However, blog posts generally have a short shelf life, and they are not constructed with the care that is put into a companion essay. Blog posts are written by individuals and are generally not run through any formal editing process. A companion essay would give bloggers the opportunity to turn a particularly thoughtful or important post into something more—something that will receive more care in the editing and more attention once it has come out. It would be a way for bloggers to differentiate particularly thoughtful or important content from the ongoing accumulation of blog postings.

The companion essay would also be a different animal than the op-ed piece, as it would generally be a bit longer and aimed at a narrower audience. It would be an op-ed for the legal world—or more specifically, the world of legal scholarship. That is not to say that only professors would write such pieces. In fact, as some online companion editors have expressed, such essays offer the opportunity for practitioners and other legal professionals to participate in the world of legal scholarship. But such pieces would be more sophisticated than a traditional op-ed, as the audience would be more sophisticated. Instead of rounding out the legal edges in the piece, the companion essay could focus on the edges themselves and highlight complicated issues for discussion amongst experts.

The companion essay is not a new idea; in fact, some of the most popular content from online companions has been these "tweeners."[28] But developing this format more explicitly and more directly would help the new format take hold. The companion essay would allow for more substantive discussions than most blogging allows and would give the author the imprimatur that would get more attention than a simple blog post. And if the submission and editing process were handled correctly, these articles would be much more timely and accessible than most law

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[28] For example, Ellen Podgor's piece in *The Pocket Part* on white collar crime received extensive play in the blogosphere. Ellen S. Podgor, *Throwing Away the Key*, 116 YALE L.J. POCKET PART 279 (2007), http://thepocketpart.org/2007/02/21/podgor.html. For discussions of Podgor's article, see Posting of Jeralyn Merritt, Rethinking Draconian White Collar Sentences, to TalkLeft, http://www.talkleft.com/story/2007/2/23/23560/2562 (Feb. 23, 2007, 22:56 EST); Thinking about the criminalization of business, Houston's Clear Thinkers, http://blog.kir.com/archives/2007/03/thinking_about_19.asp (Mar. 6, 2007, 4:41 AM); *Yale LJ Pocket Part* explores white-collar sentencing, Sentencing Law & Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2007/02/yale_lj_pocket_.html (Feb. 22, 2007, 7:39 AM).

review articles.[29] They would be a way for legal scholars to disseminate their ideas more quickly and to a broader audience.[30] And it might also be a way for practitioners, judges, government officials, and business leaders to get involved in the conversation with scholars and students. The trickiest part would be sorting through to get the best and most appropriate content. But if the online companions clearly indicate the type of format they are looking for, the content will surely follow.[31]

Make the companion's content available and searchable. Although some have argued that online companion content should also be included in the journal's print edition,[32] the cost of journal pages makes online publishing a more attractive alternative. However, excluding companion content from the print edition does not mean that the content should be excluded from the Westlaw and Lexis/Nexis online databases. These databases remain the primary source for online content searches. If the content is not there, many legal readers will not find it. Thus far, it seems that reviews are doing this, but it is important to keep on this course. In addition, companion editors should take steps to ensure that their content is searchable as well as ranked highly by internet search engines. Perhaps a "Google Law Search" or even "Google Law Review Search" may be in the future. Until then, companion sites may need to configure their content so that it is searchable by the relevant search tools available on the web.

Reach out to the broader online community. Online companions were created in part to provide a way for law reviews to interact with the legal blogosphere. Companions have a symbiotic relationship with legal bloggers, as bloggers route readers to the companions' content and, in turn, bloggers have often provided that content. The relationship between

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[29] One question to be resolved would be the citation format used in companion essays. Law review editors might prefer traditional Bluebook formatting. However, *The Pocket Part* posts both the traditional format (with footnotes and Bluebook formatting) as well as an online version in .html with hyperlinks to web sites. *See* Podgor, *supra* note 28 (.html and .pdf versions). Although more time consuming, posting both versions would give readers a choice of their preferred format. Consistency among the journals on submission style would also be helpful, as it would give potential authors the opportunity to submit their piece to a number of online companions without significant changes between different versions.

[30] Adam Liptak recently fed the fire of anxiety over the relevance of law reviews to the rest of the legal world. Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8, *available at* LEXIS, News File, NYT Library.

[31] One important proviso should be noted. Law professors are still grappling with the extent to which blogs and other shorter works should be considered "scholarship." In my view, it is short-sighted to view the label as determinative of how the work is treated. A companion essay would be something more than a blog post, but something less than a traditional law review essay. Whether this "counts," and for what, is something to be determined. The companion piece may be a way for law professors to get more recognition for their online presence, since such pieces receive the certification of the law review. But the question is a tricky one, and law reviews should handle this process with an eye towards the prestige afforded to the content.

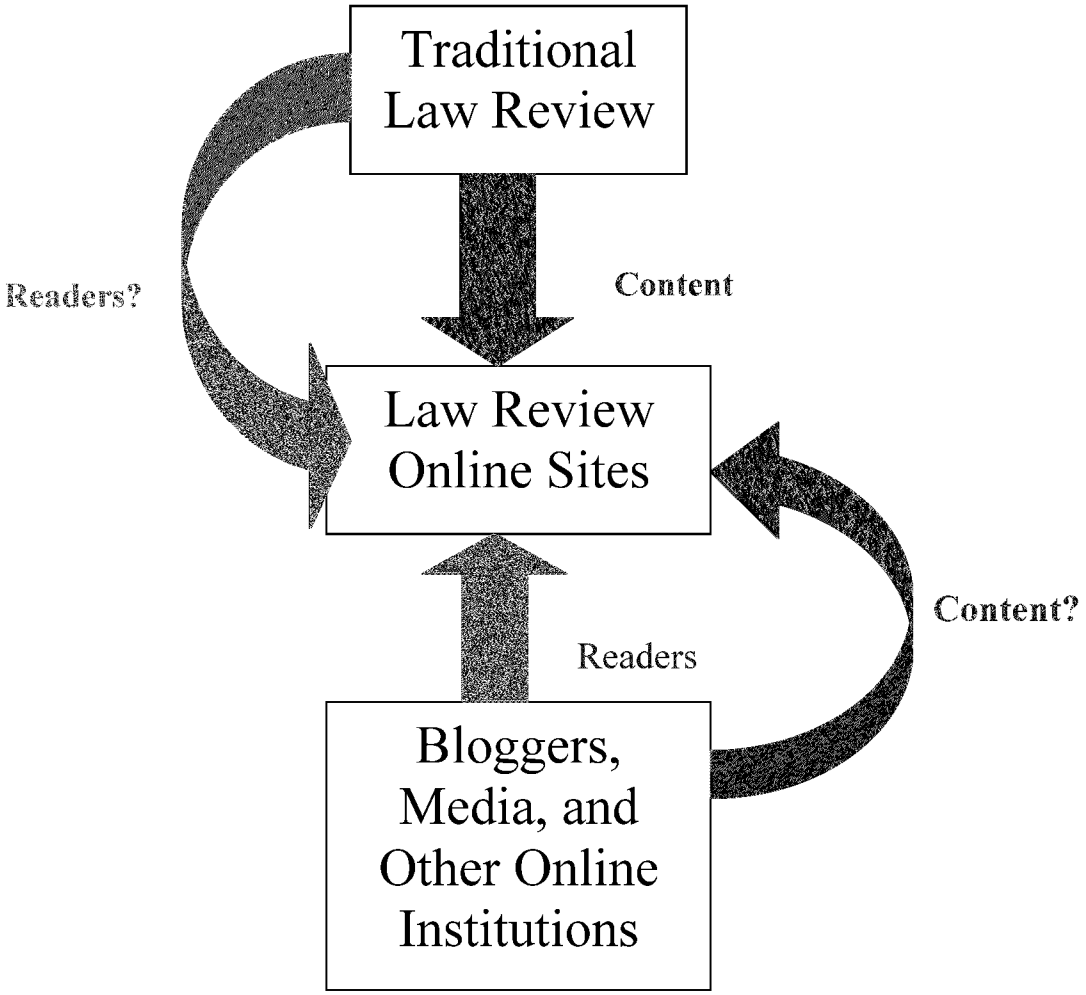
[32] Posting of Anthony Ciolli, Five Tips for Law Review Online Supplements, to First Movers, http://firstmovers.blogspot.com/2007/01/five-tips-for-law-review-online.html (Jan. 24, 2007, 10:10 AM).

companions and bloggers is critical. Without blogs, the online companions would have a much more difficult time getting out word of mouth on the content they provide. At this point, online companions have not developed enough of a unique readership to stand on their own.

However, editors of the online companions would be short-sighted to end their horizon at the law professor blogosphere. Companions should cultivate other institutional players on the web that also have an interest in their content. Practitioners are one example. The "companion essay" is more accessible for practitioners, and online companion sites could solicit essays that would show how the print review's content is relevant outside the academy walls. Along with practicing lawyers, however, online companions could also court judges, government officials, non-profit advocacy groups, and others who work in the law. Drawing these folks into the conversation might be a way to bridge the "gap" between the law reviews and the rest of the legal world. But online companions cannot simply hang out their shingle and wait for the world to arrive. These relationships must be pursued actively and creatively. Solicitations are a place to start. But reviews should endeavor to establish lasting relationships with other institutional players—relationships that extend beyond this year's masthead. Professors at the home institution may prove instrumental in making some of these connections. However, student editors should also consider establishing some permanent ways for the review to interact with various online constituencies. As just one example, an online companion could enlist the Federalist Society and the American Constitution Society in an annual online debate/symposium on the highlights from the year's Supreme Court term.

In closing, I would like to thank the inaugural editors of *CONNtemplations* for the opportunity to participate in this symposium. I applaud them for taking the leap into this new and uncertain world of the online law review. Online law review companions may be the start of a new revolution in legal scholarship – or they may not. It is hard to predict what the online legal world will look like in two years, let alone ten. But I hope that law review editors realize that they are not in this alone. There are many institutional resources to draw on, at their home institution and far beyond. By working with others in this new world of accessibility and collaboration, law reviews will find that not only is their influence magnified manifold, but they have also brought a whole new level of depth and deliberation to the ongoing legal discourse.

Figure 1.


Traditional Law Review
Content
Readers?
Law Review Online Sites
Content?
Readers
Bloggers, Media, and Other Online Institutions