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Babies, Bathwater, and Law Reviews*

Leo P. Martinez**

There is more than meets the eye with the decades old debate about the worth of law reviews—or less.¹ From Fred Rodell's polemic to the present, there has been a consistent clamor for the abolition of the hated law reviews and their imperious stewards, the despised law review editors.² Even a friend and faculty colleague, who is the former editor-in-chief of the *California Law Review* (but who will remain unnamed), states in no uncertain terms that law reviews are "boring and mostly a waste."³ The thought expressed by my colleague is not new. John Henry Schlegel essentially described legal scholarship as an "open scandal" characterized by a "boring sameness."⁴ The enmity which exists within the academy between the professoriate and the law reviews

* My colleague, Richard L. Marcus, is the inspiration for this title. The title is but a small variation of his own in Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOKLYN L. REV. 761 (1993).

** Academic Dean and Professor of Law, University of California, Hastings College of the Law. This commentary is dedicated to my late father, Leopoldo Martinez, who, with the exception of a few polite glances at my own work, never read a law review article in his 83 years. My thanks to my colleagues Ash Bhagwat, Brian Gray, David Faigman, Mary Kay Kane, Rick Marcus, Calvin Massey, and Eileen Scallen for their insights and comments on this piece. Mistakes and sardonic comments are my own.

1. An excellent background of the origins of law reviews and a functional working definition is contained in Michael I. Swygert and Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 739-91 (1985).

2. David P. Bryden, *Scholarship About Scholarship*, 63 U. COLO. L. REV. 641 (1992) (noting the problems faced by law professors in improving legal scholarship); James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 537-38 (1994) (suggesting various reforms for the law review process); John E. Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 326-27 (1985) (condemning traditional legal writing); Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936) (the classic criticism of the utility of law reviews); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988) (critiquing standard legal scholarship); Carol Sanger, *Editing*, 82 GEO. L.J. 513, 525 (1993) (suggesting that student editors should give much greater deference to authors). The list goes on. My own favorite is Richard Delgado's piece criticizing not the existence of law reviews but rather the use of them in the evaluation of underrepresented scholars. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 572-78 (1984); see also Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1372 (1992) ("Almost a decade later many of the actors have changed, but the situation is not greatly different.").

3. An unscientific polling of my colleagues reveals that the esteem in which the law reviews are held is uniformly low among those who participated on law reviews in responsible editorial or managerial roles.

4. John Henry Schlegel, *Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology*, 34 J. LEGAL EDUC. 103, 103 (1984). This was also Rodell's thesis. Rodell, *supra* note 2, at 45 ("[law reviews are] spinach").

is all the more surprising given the high proportion of law review editors who now find themselves law professors.⁵

At the outset it is necessary to mention that this commentary is not a criticism of the way student editors run the law reviews, nor is it intended to chronicle the many injustices undoubtedly done in the past and to be done in the future to legions of would-be authors.⁶ It is moreover not a criticism of content or style. Rather, in the space of these few pages, the author comes to the conclusion that law reviews and their editors are not the bane of academic existence, but in fact are a much misaligned institution deserving of some improvement, deserving of some praise, but decidedly not deserving of abolition.

I. INTRODUCTION

Use of law reviews is a means to a pedagogical end—the training of students in careful, albeit anally retentive, reading of minutia.⁷ In *The Right Stuff*, Tom Wolfe notes that, like the champions selected by ancient nations to wage war on the nation's behalf, the original seven Mercury astronauts were lavished with riches based not on actual accomplishments but for the potential each had to accomplish greatness.⁸ Thus, the original astronauts were provided reward before accomplishment—“[a] blazing aura was upon them all.”⁹ Today, law review participation accomplishes much the same.¹⁰ On the basis of grades after only one year of law school, or on the basis of a single writing, or even on the basis of willingness to participate on a law review, a student formerly indistinguishable from her peers is given that coveted resume entry which opens doors hitherto undreamed, a modern gladiator rewarded before entering the lion's den of law practice.¹¹

Viewed from this perspective, it would be surprising if law review editors did not develop a certain amount of arrogance in the process. One of the most vocal critics of the law reviews, Professor James Lindgren, in an uncommon display of honesty, admits that he too engaged in wanton editing, unmindful of

5. Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 509 (1980) (finding 39% of law professors held positions on law reviews).

6. James Lindgren has compiled an amusing collection of stories. Lindgren, *supra* note 2, at 528-31. I admit deriving a certain amount of sadistic pleasure in the tantrums (justified) of a colleague whose piece on law reform was “corrected” by his student editor with all references to that topic changed to “legal” reform.

7. See George L. Priest, *Triumphs or Failings of Modern Legal Scholarship and the Conditions of Its Production*, 63 U. COLO. L. REV. 725, 727 (1992).

8. TOM WOLFE, *THE RIGHT STUFF* 101-04 (1979).

9. *Id.* at 100.

10. “[Law Review editors] are the big snots around the school.” James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1700 (1991).

11. JOEL SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL* 176-85 (1978) (noting the unfortunate level of importance placed on law review membership); Priest, *supra* note 7, at 727 (discussing the importance of editing experience for students). Seligman expresses the view that membership on a law review gives its participants an edge, not in the Tom Wolfe sense of prizes won too soon, but rather in the sense of exposure to a valuable lesson not available to all. SELIGMAN, *supra*, at 185.

the fragile egos of the professoriate of which he was not then a member.¹² Perhaps the uneasy relationship in the academy between the professoriate and the law review editors is a predictable result of the collaboration of the large egos necessary to produce a scholarly product.¹³

II. HUMBLE BEGINNINGS AND MODEST GOALS

At first, law reviews aspired to nothing more than serving the profession. With uncharacteristic humility, the editors of the *Harvard Law Review* expressed their interest in advancing the subject of legal education while still retaining "hopes that the *Review* may be serviceable to the profession at large."¹⁴

Its original goal of serving the profession seems but a curious anachronism. Since the original Harvard pronouncement, the role of the law review has evolved. Today, law reviews are seen as a training ground for nascent lawyers, a requisite law student ticket punch on the route to legal stardom, a primary vehicle for the professoriate to attain tenure if not academic stardom, and, oh yes, a service to the profession. In truth, the law reviews serve these and sundry other purposes. Alas, they serve some well and some not so well. Still, with some exceptions, a nagging voice tells us that the reviews have drifted in an uncertain direction. We are told that the law reviews serve little purpose, that the articles selected for publication are not relevant to reality, and that the cure for all ills is increased faculty participation.

III. SOME OBSERVATIONS

A. *Misplaced Expectation and Lofty Purpose*

The preceding would be of only mild interest if the system of student-edited law reviews were not so influential in the advance of legal scholarship and in the awarding of tenure to the supposed professionals in the academy. In my judgment, this is the worst development associated with law reviews. However, the fault lies with the professoriate, not with the law reviews.¹⁵

Rodell characterized law review articles as adept navel gazing.¹⁶ While apparently intended as criticism, the characterization is apt. One significant role played by law reviews is allowing room for professorial introspection. Thinking and writing about what we do is a valuable undertaking. Examining

12. Lindgren, *supra* note 2, at 527-28.

13. See Sanger, *supra* note 2, for an articulate account of the difficulties inherent in the writer/editor relationship and her suggested solutions.

14. 1 HARV. L. REV. 35 (1887) (editor's note). Indeed, more than one reader of law reviews has expressed the wish that law reviews return to a more simple regime. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 42-57 (1992). Judge Judith Kaye, on the other hand, seems to overlook the increasing self indulgence of the reviews. Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 320 (1989) (noting the concern that academics write only for themselves).

15. Elyce H. Zenoff, *I Have Seen the Enemy and They Are Us*, 36 J. LEGAL EDUC. 21, 23 (1986) ("[T]he law reviews' flaws may lie not in our students but in ourselves.").

16. Rodell, *supra* note 2, at 43.

one's views and exposing them to the review of others, at least in theory, increases the vitality of the profession and the store of knowledge. As Dean Kronman sums up: "[It] is essential that the scholar bring into the classroom the spirit of his work"¹⁷

The law reviews also provide a forum which allows us to question orthodoxy. Richard Delgado, for example, is unrelentingly critical of attempts to stifle thought as expressed in law reviews. He asks with barely disguised contempt whether "the campus atmosphere [is] in danger of declining into a modish liberal orthodoxy with free speech and inquiry the victims."¹⁸ In the same way, inquiry and the existence of numerous approaches to law should be able to coexist without doing any meaningful harm.¹⁹

With the foregoing in mind, it is clear that the focus of legal scholarship as informing the tenure promotion process is much too narrow.²⁰ Yet the so-called power ceded to law review editors is easily recaptured. The law review editors should not inadvertently be given the power of tenure decisions, whether by their choice of publishing undeserving material or of not publishing deserving work. We should simply not rely on law review publication as a tenure criterion given the seeming accident of placement. If we lay aside tenure promotion considerations, as surely we can, we can perhaps return to the original function of tenure as allowing freedom of thought.²¹ To be sure, some excellent scholarship would still be published, just as some not so good scholarship will find its way into print.²²

B. *Selection of Articles and Narrow Interests*

Despite the existence of over 800 law reviews, there is a real perception that the selection of articles is not scientifically weighted toward the best a particular journal can publish. Instead, articles are chosen on the basis of the perceived prestige of the author, or worse, on the basis of the editors' perceived notion of what is on the cutting edge. Not surprisingly, some subjects get little exposure. Professor Lindgren acerbically observed that the *Yale Law Journal*

17. Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 968 (1981); see also Mary Kay Kane, *Some Thoughts on Scholarship for Beginning Teachers*, 37 J. LEGAL EDUC. 14, 19 (1987) (noting the excitement inherent in scholarly dialogue); Rubin, *supra* note 2, at 1905 (explaining the importance of developing discourse to speak effectively to decisionmakers). I don't agree with the assessment that there is little utility in one's own intellectual inclinations. See John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343, 344 (1989).

18. Richard Delgado, *Legal Scholarship: Insiders, Outsiders, Editors*, 63 U. COLO. L. REV. 717, 720 (1992).

19. Barbara D. Underwood, *Against Dichotomy*, 90 YALE L.J. 1004, 1006 (1981).

20. Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 949 (1990).

21. ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 5-6, 47-49 (Louis Joughin ed., 1969).

22. "[F]or every pure scholar we have a dozen-and-a-half of the innocent ersatz, for every diamond a heap of rhinestones." Lasson, *supra* note 20, at 927.

had not published a piece on wills in his lifetime.²³ Worse, the selection of articles has led many to criticize the law reviews as out of touch with the problems of the law and the legal profession.²⁴ In many ways the criticism of law reviews as irrelevant to the profession is not so much a criticism of the reviews themselves as it is of the direction of legal thought. Rodell's criticism of content is a commentary of what fodder the law reviews have available for publication.

Law reviews tend to publish what is currently "hot." The difficulty with this approach is that the best material, if not in a vanguard area, is doomed to obscurity. A colleague tells me that while he writes in two distinct subject areas, his best writing is in the field that is not hot. Thus, what he views as his second-best material has been published in the elite reviews. His best material has been relegated to secondary reviews. But student editors are not completely to blame for favoring "hot" topics, as they are shaped by their teachers and by their teachers' perception of what is hot. The reality, whatever the reason, is that reliance on the law reviews for a determination of the best work is misplaced.

A difficulty, beyond the lack of perspective student editors may have, is that there are no consumers of law reviews.²⁵ The reason may be rooted in the low readership of individual articles. It may also be rooted in the proliferation of the law reviews and the sheer inability to read them all. It may be their uneven quality.²⁶ In any event, little market pressure guides or shapes the direction of law reviews. Any sense of purpose is overwhelmed by the randomness which reigns.²⁷ Perhaps introspection by definition leads to a necessarily incoherent and ununified body of knowledge. I'm not sure where this leads, except to a realization that if we're free to pursue the ideas which intrigue us, the institution of law reviews will necessarily reflect scholarly forays in many directions. This is not bad.

23. Lindgren, *supra* note 2, at 532. To be fair, in the same year as Lindgren's observation, the *Yale Law Journal* published a book review concerning the spectacular will contest involving the Johnson & Johnson pharmaceutical fortune. John H. Langbein, *Will Contests*, 103 *YALE L.J.* 2039 (1994).

24. Edwards, *supra* note 14, at 42-57 (1992) (arguing in favor of practical scholarship); Stanley H. Fuld, *A Judge Looks at the Law Reviews*, 28 *N.Y.U. L. REV.* 915, 917-18 (1953) (commenting on simpler days in the debate); Gordon, *supra* note 10, at 1698-1700 (criticizing academic schools of thought).

25. Nowak, *supra* note 2, at 321 ("We do not need to worry about the consumers of law reviews because they really do not exist."); Priest, *supra* note 7, at 728 ("[T]he vantage of the reader . . . does not reflect the principal operative force in the production of legal scholarship."). While at least one work refutes this notion, the point is that there is no unified pressure to give direction to the content of law reviews. See Max Stier, Kelly M. Klaus, Dan L. Bagatell & Jeffrey J. Rachlinski, *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 *STAN. L. REV.* 1467, 1504 (1992).

26. See Lasson, *supra* note 20, at 928 ("Slop fills the law reviews."). I happen to be of the view that poor scholarship by prominent scholars serves a purpose: The less accomplished are encouraged to contribute when they see the frighteningly low standard required for publication.

27. See Christopher D. Stone, *From a Language Perspective*, 90 *YALE L.J.* 1149, 1149 (1981) (noting that current legal scholarship lacks "any unifying sense of place and purpose").

C. Faculty-Edited Reviews

The solution to the law review mess, some say, would be a shift to faculty-edited reviews. While the suggestion has some appeal and has seen some success in a few faculty-edited journals, for a number of reasons I fear that it is not a course that will yield any meaningful solution. The current faculty-edited journals are, for the most part, specialty journals. Obviously, the difficulties associated with a faculty-edited journal diminish with specialty publications. Thus, my comments are directed to the possibility of faculty-edited law reviews of general interest.

First, the pay is lousy. By this I mean that the psychic income derived from a faculty member's participation as an editor of a law review is little recognized.²⁸ While other disciplines count participation in faculty-edited journals as a matter of great prestige, the same cannot yet be said of law. If prestige is the currency of the profession, wealth-maximization principles militate against faculty participation as editors of law reviews.

Second, there is the matter of volume. It is estimated that there are in excess of 800 law reviews containing annually over 5000 articles.²⁹ To expect a handful of faculty to cull through twenty or thirty articles for the purpose of selecting five or six for publication is unrealistic. If, as is the case with many of the more elite law reviews, the number of submissions is on the order of hundreds, the task becomes impossible.³⁰ That student editors keep up is astounding.³¹

Third, faculty are busy³² and have their own biases.³³ Time pressures would not allow most to be active contributors to the effort. Moreover, the editorial decisions of law review content would remain highly subjective and hostage to the whim of the editors. Substitution by faculty would just substitute one bias for another—the reviews would still depend on someone's viewpoint.³⁴ My comments can be verified with a cursory look at the available

28. Bruce Ackerman recognizes that a law professor's income can be measured in terms of fame and freedom in addition to cash. Bruce A. Ackerman, *The Marketplace of Ideas*, 90 YALE L.J. 1131, 1132 (1981). Presumably editorial participation would reduce freedom and not provide much cash. Fame would be the only possibility. It is not yet present.

29. Lasson, *supra* note 20, at 926, 928.

30. Erik M. Jensen, *The Law Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL EDUC. 383, 383 (1989) (noting that "some journals now collect more than 1,000 submissions annually"). Every one of the 153 law schools accredited by the Association of American Law Schools has at least one law review—Harvard has nine. Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 387 (1989). Leibman and White noted that there were over 950 legal journals listed in the Current Legal Index in 1988. *Id.* at 388 n.11.

31. On reflection, this idea lessens the pain felt with respect to my own unsuccessful submissions.

32. Writing and teaching are time-consuming activities no matter what fun is made of law professors' leisure. Robert H. Abrams, *Sing Muse: Legal Scholarship for New Law Teachers*, 37 J. LEGAL EDUC. 1, 7 (1987) (describing activities undertaken by law professors); Gordon, *supra* note 10, at 1688-89 (poking fun at professorial activities).

33. See Abrams, *supra* note 32, at 12-13 (noting the concerns of scholars with unpopular views during the tenure process).

34. To reemphasize, these comments are perhaps better aimed at the difficulty of faculty-edited general law reviews. Obviously the difficulties attributed to volume and bias, read expertise, diminish with specialty journals.

faculty-edited reviews. While a number of excellent journals exist, there are also a number of faculty-edited journals which are no improvement on the student-edited equivalents. If the number of faculty-edited law reviews were to increase, there is no reason to suppose there would be a marked improvement in the quality of articles.

IV. CONCLUSION

Criticism of the institution of law reviews is perhaps the ultimate in navel gazing. Criticism of the process is a meaningless exercise—it may even be pointless.³⁵ After all, “[l]egal scholarship is what legal scholars do.”³⁶ Does it really matter whether one article is “better” than another, whether one law review is “better” than another, or whether one regime of law reviews is “better” than another?³⁷ The short answer is no. We have come too far and there is simply too much inertia to overcome. Student-edited reviews are a real fact of life. It was too late in Rodell’s day to change the system.³⁸ It is certainly too late today.

35. Delgado, *supra* note 18, at 722-23 (arguing against evaluating scholarship as an institution).

36. Arthur A. Leff, *Afterword*, 90 *YALE L.J.* 1296, 1296 (1981).

37. Underwood, *supra* note 19, at 1004 (noting that all academics “share the aspiration to improve law”).

38. Rodell too recognized the futility of attempting change. Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 *VA. L. REV.* 379 (1962).

