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Reflections about Law Reviews and American Legal Scholarship

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Richard S. Harnsberger*  

Reflections About Law Reviews and American Legal Scholarship  

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I. INTRODUCTION

There is in no other profession and in no other country anything equal to the student-edited American law review, nurtured without commercial objective in university law schools alive to the imperfections of the law, and alert to make space for the worthy commentary of an unknown student as well as for the worthy solicited or unsolicited manuscript of renowned authority. . . . Time is with the law reviews. An age that churns up problems more rapidly than we can solve them needs such fiercely independent problem-solvers with long range solutions.1

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1. Judge Roger Traynor, To The Right Honorable Law Reviews, 10 UCLA L. Rev. 3, 8-10 (1962).
When the editor-in-chief of the *Nebraska Law Review* asked me to write an article for this issue, I decided the occasion was appropriate to describe law reviews and then discuss some of the principal criticisms aimed against them: law reviews have obscure writing, are full of useless theoretical articles, are poorly edited by immature students who are ill-prepared to judge good scholarship, have an excessive number of board members, have insufficient faculty involvement, and contain too many footnotes. The last criticism is easy to answer. Read only the text. The other criticisms raise more complicated problems.

This commentary begins by describing a typical law review institution and the reasons why students join. Then, it sets out in some detail harsh attacks made by Professor Fred Rodell of Yale, Dean Roger Cramton of Cornell, and Judge Harry Edwards, a former professor at both Harvard and the University of Michigan before his appointment to the United States Court of Appeals for the District of Columbia Circuit. Lastly, this article examines reasons for the noticeable shift from "practical" to "theoretical" commentary in the nation's law reviews, and, in addition, the allegation that this switch has made the reviews useless to lawyers and judges.

I admit a bias. I very much like law reviews, the *Nebraska Law Review* in particular, because the articles have been of great help to me. One can take special pride in noting that between 1989 and 1991, the article most cited by all the courts in the United States was published in our *Review.*

II. A CURIOUS WAY OF DOING THINGS

Law reviews are a unique institution found only in American law colleges. They are run completely by students who publish between two and eight issues each year. Some schools have a number of reviews. For instance, Harvard has twelve publications; Columbia,

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3. Roger C. Cramton, "The Most Remarkable Institution": The American Law Review, 36 J. Legal Educ. 1, 1 (1986). For a well written rejoinder to Cramton's indictment of the student editors, see Philip M. Nichols, A Student Defense of Student Edited Journals: In Response to Professor Roger Cramton, 1987 Duke L.J. 1122 (stating that at the time he wrote the rebuttal, Philip Nichols was editor-in-chief of the *Duke Law Journal*).

Michigan,6 and Yale,7 eight; Stanford,8 five; and Cardozo,9 four. It is quite a surprise to discover the number of these publications. The Harvard Law Review was first published in the spring of 1887. By 1928, forty-two years later, thirty-three student reviews had emerged. By 1944, just before most of the schools closed during World War II, there were fifty-five reviews in operation.10 The most recent figures I have seen were compiled by Professor Michael Hoffheimer,11 who lists


10. For a comprehensive history of law reviews, see Michael I. Swygert & Jon W. Bruce, The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews, 36 Hastings L.J. 739 (1986).

It is remarkable that almost all of the law reviews follow the same general model, although variations do exist. The Chicago-Kent Law Review, for example, uses a Faculty Symposium Model. A committee comprised of three faculty and two students chooses topics for this “all-symposium” journal. The Review usually pays contributing authors honoraria. Randy Barnett, Beyond the Moot Law Review: A Short Story With a Happy Ending, 70 Chi-Kent L. Rev. 123 (1994).

Journals also are categorized as refereed or nonrefereed periodicals. An author submitting an article to a refereed journal cannot simultaneously submit it elsewhere. The piece usually is sent to two faculty members in the same field who are ignorant of the author’s identity. This process makes timely publication impossible. Even worse, valuable faculty time is spent reading rather than writing. Further, many do not believe the materials found in the refereed periodicals are of any higher caliber than those found in the nonrefereed periodicals.

172 general student-edited law reviews in the country, plus 242 special focus student-edited journals.12

It is estimated these periodicals turn out 150,000 to 190,000 pages each year, so it is clear that the reviews themselves are an important part of the legal service industry. They remain, however, only a fraction of the $100 billion spent each year for legal services (a figure that does not include the cost of house counsel).13

The student-edited law reviews are supported partly by subscription proceeds, but most of the costs are paid by the parent law school. Offices, secretarial help, and word-processing equipment usually are provided. Most schools grant stipends or scholarships to editors, and the editors also commonly earn hours of credit to fulfill graduation requirements.

Reviews are divided into two parts. The first component contains what are called "lead articles." Most of these are authored by law professors, but judges, attorneys, and persons from disciplines other than law also contribute. The second component consists of student written work, i.e., comments, casenotes, essays, and book reviews. No item is printed unless the law review editors decide it is correct in fact and form and suitable in subject matter.

It is said that law reviews do not take stands on political questions, but that is untrue. When a review selects articles in one particular area rather than another, it immediately becomes an important actor in our continuing national dialogue. Certainly the law reviews have provided a meaningful and important forum for feminists, supporters of critical legal studies, critical race scholars, and the law and economics movement.14 I have read of only two exceptions to the "don't be explicitly political" maxim. The first occurred when forty-four editors of the Harvard Law Review, "speaking for themselves," published a statement critical of the Vietnam War; the second when the Georgetown Law Journal protested apartheid in South Africa by refusing to renew the University of South Africa's subscription.15

12. In addition, there are 187 nonstudent-edited peer review and trade journals. Hoffheimer, supra note 11, at 29-41. This brings the total number of journals listed by Professor Hoffheimer to more than 600.
15. See E. Joshua Rosenkranz, Law Review's Empire, 39 Hastings L.J. 859, 922 (1988). Rosenkranz levels a number of criticisms at law reviews, and his article was published despite objections by some members of the Hastings Law Journal.
There are three methods of selecting members for a review—"grade-on," "write-on," or "publish-on." At this institution, all students in the upper ten percent scholastically at the end of the first year are invited to become members. In addition, we have a write-on procedure in which any student who passed the first year without being on academic probation can enter the competition, which is judged solely by the current editorial board. Our review has no procedure to gain admission by submitting a student note that is accepted for publication.

Before discussing the purpose of a law review, one further observation should be made. The editor-in-chief of the Nebraska Law Review is chosen by all members, and she sets the tone for the enterprise. She is the governing authority. For instance, in the event of a conflict between an editor and an author who has submitted a manuscript for publication, her decision is final. One can only wonder about this strange and remarkable circumstance of student oversight and control.

Consider the following scenario. Professor Roger Law Bright (Phi Beta Kappa, Order of the Coif, law review at Elite Law School, B.C.L. Oxbridge) is hired by our law college to teach jurisprudence. Susan Bluebook, a bright but inexperienced second-year student whose application for admission to Oxbridge was refused, is a law review editor. Roger is evaluating a paper Susan has submitted to him for three hours of credit for independent research. At the same time, as an editor Susan is evaluating a manuscript written by Roger in the style advocated by the critical legal studies movement. Roger's future salary, but more importantly his chances for promotion to associate professor and the likelihood of eventually gaining tenure are dependent upon Susan's evaluation. A month passes, and then Susan reports...
that Roger’s work is overly polemical and unpublishable. Her appraisal embarrasses Roger and may irrevocably harm his career in academe. Of course, with sufficient patience and enough postage stamps, Roger eventually will get his work published somewhere. Nevertheless, later publication cannot solve his predicament because regardless of what happens at this point, Roger has been repudiated by his own school’s law review. Such role reversal would be regarded as bizarre in other departments of a university and in the great centers of learning abroad.

III. WHY DO STUDENTS JOIN LAW REVIEWS?

Law schools enjoy a symbiotic relationship with judges and the practicing bar. The schools act as the initial gatekeeper for the legal profession by utilizing entrance examinations to screen persons who show little or no aptitude for law. They then rank their students in numerical order each year according to grades and cumulative class standing.

All this is very helpful to law firms and to judges because the data enable them to reduce the number of potential employees they need to interview. But the best help of all to employers is the certification “law review student.” This guarantees that the “school within the school” has trained the student to perform many of the tasks judges and lawyers want employees to do. It is this ultimate law review credential that truly saves employers tremendous amounts of time, money, and energy.

In the final analysis, it is true that most students join a law review board because membership is a tremendous asset in the job market. Of course, some join because they think a law review experience is the best education the school has to offer. Others enjoy the prestige of being known as a “law review student.” There is also a real feeling of personal satisfaction when a huge amount of hard work results in a published article.

I might say parenthetically that it is possible to resign from a law review board and yet be successful, even attain fame and great prestige. One very prominent jurist, Judge Learned Hand, quit the Harvard Law Review after working on only four of eight issues. Hand said he was at Harvard “to get a legal education, not to edit or write parts of a magazine . . . .”19

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IV. IS CRITICISM OF LAW REVIEWS JUSTIFIED OR IS IT "FULL OF SOUND AND FURY, SIGNIFYING NOTHING?"  

The criticism of law reviews has been bitter, and, not surprisingly, most of it has come from law professors. I will focus on the attacks made by Professor Rodell, Dean Cramton, and Judge Edwards, as they are among the most critical and most celebrated.

The best known, or perhaps most notorious article assailing the reviews was published in 1936 by Yale Law School Professor Fred Rodell, who at that time was twenty-nine-years-old. His now famous quip was that "[t]here are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground." Because this piece prepared the way for the attacks that followed, we should take a brief look at his complaints. First, he complained that the reviews lack humor. But, since Rodell wrote, there have been some very funny exceptions.

20. William Shakespeare, Macbeth act 5, sc. 5.
21. Justice Holmes called the student-written notes in the reviews "the work of boys." He was once heard to say, "I don't mind when the lads say I was wrong; it is when they say 'Mr. Justice Holmes was correct' that I find them insufferable." Paul A. Freund, Oliver Wendell Holmes, in 3 The Justices of the United States Supreme Court 1789-1978: Their Lives and Major Opinions 1759 (Leon Friedman & Fred L. Israil eds., 1980). Holmes' comments remind me of the lawyer who remarked, after the Supreme Court agreed with his arguments, "I still think I was right." Charles Evans Hughes, Foreward, 50 Yale L.J. 737 (1941).

Of all the law review critics, Chicago-Kent Professor James Lindgren probably has been the most severe. As recently as 1994, he said that "[o]ur scholarly journals are in the hands of incompetents.... They select articles without knowing the subject, without knowing the scholarly literature, without understanding what the manuscript says, without consulting expert referees .... Then they try to rewrite every sentence." James Lindgren, An Author's Manifesto, 61 U. Chi. L. Rev. 527, 527 (1994).

Boston University Professor Wendy J. Gordon answers Professor Lindgren. She thinks Lindgren "is a bit overheated," but she agrees, as I do, that his comments are thoughtful, and he does have a point, i.e., the task of publishing law reviews can be done better. Wendy J. Gordon, Counter-Manifesto: Student-Edited Reviews and the Intellectual Properties of Scholarship, 61 U. Chi. L. Rev. 541 (1994).

Yale Professor Geoffrey Hazard says that it generally is agreed that the principal value of law reviews is to educate students. "But it has not been satisfactorily explained why it is any more necessary to publish the product of a student legal writing program than to publish the briefs written for intramural moot court competitions." Geoffrey C. Hazard, Jr., Research in Civil Procedure 135 n.82 (1963). See also Arthur Nussbaum, Some Remarks About the Position of Student-Editors of the Law Review, 7 J. Legal Educ. 381 (1955); Carol Sanger, Editing, 82 Geo. L.J. 513 (1993).

23. Id. at 38.
24. See "Do We Have to Know This for the Exam?", 7 Const. Commentary 223 (1990). This one-page article shows the votes by a disoriented Supreme Court in a bound-
Among other complaints, Rodell thought the reviews were too polite. Writers do not say what they are really thinking. Rodell suggested the following as a representative example: "Justice Fussbudget, in a long-winded and vacuous opinion, managed to twist his logic and mangle his history so as to reach a result which is not only reactionary but ridiculous."25

Personally, I was taught lack of civility is more a vice than a virtue. Certainly many of us have said "Your Honor" to people who ordinarily would not be considered deserving of the greeting. In an article immediately following Rodell's, Garrard Glenn pointed out that civility makes life more pleasant and does not involve any sacrifice of convictions. Glenn thought, and I agree, that "[i]t may be tiresome to say 'I submit that this is erroneous' instead of saying 'It is a lie'. . . ." but the indirect language does make our lives more comfortable.26

Professor Rodell makes a number of further charges: the sentences are too long, awkward constructions abound, and such common usage as "I" or "me" is regarded as shocking form.27 But the major indictments are really two. First, footnotes are far too numerous and usually are excuses "to let the law review writer be obscure and befuddled in the body of his article and then say the same thing at the bottom of the page the way he should have said it in the first place."28 Second, things are unlikely to change because everybody connected with a law review has "some sort of bread and butter, in a nice way of course, and all of them—professors, students, and practicing lawyers—are quite content to go on buttering their own and each other's bread."29 Professor Rodell believed that the choice jobs for student-editors after graduation, the promotions for professors, and the free grub work for law firms made change inconceivable.

27. Rodell, supra note 22, at 39. This practice began to change in the 1950s. Judge Jerome Frank wrote that in his previous books, he shunned the first-person pronoun by saying "the writer" when he meant "I." He concluded, "[t]hat assumption now seems to me a mistake." See JEROME FRANK, COURTS ON TRIAL, at vii-viii (1950).
29. Id. at 45.
Professor Rodell remarked that the reviews had been panned before to no avail, and he correctly predicted that his commentary would have no effect. He added that he would write no more law journal articles. Rodell broke the promise twenty-five years later when, at the invitation of the Virginia Law Review, he wrote a sequel to his original piece.

The next big blast came in 1986 from Roger Cramton, a past president of the Association of American Law Schools and former dean of Cornell Law School. His comments are among the most critical. While Professor Rodell was a nonconformist, somewhat of a maverick, Dean Cramton was part of the elite within the bar—prominent, well-known, and well-respected. His comments got attention. Cramton’s main points include (1) consultation between law review editors and faculty has declined substantially; (2) students do not have sufficient background to recognize the merit of submissions; (3) with open admissions policies, law review students are only marginally better than the rest, and giving them a superior educational experience cannot be justified; and (4) democratizing the law review experience by doubling the size of staffs and selecting some members after “arduous competitive writing exercises” has not only removed meritocracy from the process, but has resulted in much wasted time. Dean Cramton observed that judging competitive writing contests does “not contribute in any way to publication of student notes or editing of lead articles.”

In the final analysis, Dean Cramton did acknowledge that law review work is a valuable educational experience, but he also observed that unless matters change, there would be head-on challenges to the student-edited law reviews. He believed these challenges would come from learned societies and from law faculties. The dean ended his commentary by writing, “change is underway.” He then noted that the increased separation between the law schools and the legal profession may lead to tensions and conflicts that radically alter future arrangements.

And that brings us to Judge Harry Edwards. His important and provocative 1992 article in the Michigan Law Review castigated, in

30. Id. at 38.
31. Id.
32. Id.
34. Cramton, supra note 3, at 6-9.
35. Id. at 9.
36. Id. at 5.
37. Id. at 9.
38. Id. at 9-10.
39. Id. at 10.
40. Id.
blunt terms, both the legal profession and the law schools. Interest-
ingly, the resulting howl came almost entirely from the usually quiet academic world. My first reaction when I read the piece was that I had not seen such disapproval since reading Judge Jerome Frank's *Courts on Trial* in 1950. Frank argued that legal education should be connected more closely to what lawyers were doing. He wanted more practical legal education and proposed that the core of a law school "would be a sort of sublimated law office." The pressure from others of like mind in the bar resulted in the establishment of clinical programs that give legal education a more "practical" look.

Judge Edwards' focus is similar to Judge Frank's. Edwards makes the point that there is a profound "disjunction between legal education and the legal profession." Because of the disjunction, scholarship in the law schools is not even close to the real world. Law journal articles are theoretical dialogues, mostly between professors, and thus the literature is not merely unhelpful to lawyers and judges, but is useless.


42. The response to the judge's article was truly amazing. For instance, in an extraordinary gesture, the *Michigan Law Review* dedicated an entire issue to a symposium about Judge Edwards’ views. Symposium, *Legal Education*, 91 Mich. L. Rev. 1921 (1993). The authors included some of the nation’s best known law professors—George Priest, Paul Brest, James Boyd White, Barbara Bennett Woodhouse, Paul Reigold, Sanford Levinson, Derrick Bell, Pierre Schlag, Robert Gordon, Nadine Strossen, Lee Bollinger, and James White. Judges Richard Posner, Louis Pollak, and James Oakes also participated. Finally, Judge Edwards himself wrote a postscript to his original article. For a synopsis of the commentary in the symposium issue, see Michael J. Saks et al., *Is There A Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 Suffolk U. L. Rev. 352, 356-59 (1996). This article was first published in 1994 but was reprinted because erroneous data appeared in the original.

43. Frank, supra note 27. The judge asked

[w]hat would we say of a medical school where students were taught surgery solely from a printed page? No one, if he could do otherwise, would teach the art of playing golf by having the teacher talk about golf to the prospective player and having the latter read a book relating to the subject.

*Id.* at 229.

44. *Id.* at 238.


46. Edwards, *Disjunction*, supra note 41, at 34.

47. *Id.* at 35.
The judge explicitly said he was aiming at the “elite” law schools, but it is clear he attacked all of us. There is an enormous trickle down effect in the world of legal education. As Professor Graham Lilly points out, a mere five of the 175 accredited law schools graduate almost one-third of all the law professors, and the top twenty schools produce a remarkable sixty percent.

V. FROM PRACTICAL TO THEORETICAL SCHOLARSHIP

The content of the nation’s law reviews depicts fairly well what is happening in the law colleges. Therefore, an examination of the criticisms necessitates a look at changing law review purposes and at the various philosophical movements in the world of law school academe after World War II. The story is best told chronologically.

In an earlier time, the chief purposes of a law review were to give news of the institution and assist practitioners. The first *Harvard Law Review* stated that its object, primarily, is to set forth work done in the school with which we are connected, to furnish news of interest to those who have studied law in Cambridge, and to give, if possible, to all who are interested in the subject of legal education, some idea of what is being done under the Harvard system of instruction. Yet we are not without hopes that the Review may be serviceable to the profession at large.

This seems to describe a student newsletter rather than a scholarly periodical.

In 1922, the *Nebraska Law Review* was established. The purpose set forth was a narrow one: “to state and criticize Nebraska law in selected fields, in such a way as to be of service to the profession. The citation of Nebraska cases will be exhaustive; the law of other jurisdictions will be stated only for comparison.” A cursory look at the first twelve volumes of the *Review* shows the Nebraska law faculty was very capable of carrying out that goal. Roscoe Pound had left Nebraska for Northwestern, but excellent and well-known professors remained. Among the early contributors were Warren Seavey, L. Dale Coffman, Maurice Merrill, Dean Henry Foster, and Lawrence Vold. The subjects were the bread and butter stuff of the practice; they included the law of covenants, quiet title, agency, execution of deeds,

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48. *Id.* at 34.
49. Lilly, *supra* note 13, at 1453-54. Professor Lilly states that 87% of the professors at the top 20 schools graduated from one of these national law schools, and then he quotes the following from an ABA report: “Were we biologists studying in-breeding, we might predict that successive generations of imbeciles would be produced by such a system.” *Id.* at 1454.
50. *Notes, 1 Harv. L. Rev.* 35 (1887).
51. The original name of the *Review* was the *Nebraska Law Bulletin*. It became the *Nebraska Law Review* in 1941.
corporate organization, the parol evidence rule, intent to pass title, landlord and tenant law, the rule in *Shelley's Case*,53 criminal procedure, conditional sales, and counties to which summons may issue. David Fellman, my undergraduate political science teacher and a distinguished scholar at Nebraska and later at the University of Wisconsin, contributed an article about the Nebraska law of due process.

Within a decade, however, all this had changed at Harvard, Nebraska, and the other law schools. During the same year that Roscoe Pound made his famous 1931 criticism of Realism,54 Judge Benjamin Cardozo made less publicized observations.55 Cardozo recognized that law teaching had become a specialized branch of the legal profession whose function was to study the history of the law and to investigate its current circumstances. Second, he noted judges had become too burdened to do this work and to philosophize intensely. It logically followed that in the future the task of deep meditation would fall upon the law schools. The transition created great distrust in the bar because judges and practitioners no longer could feel sheltered from those they regarded as "eggheads." Innovative thinking by nonpractitioners and new theories would challenge the established order. As described by Justice Cardozo,

[most of the essays in the law reviews are written by law teachers, though there have been notable exceptions.

... [John Dewey said] "Every thinker puts some portion of an apparently stable world in peril, and no one can predict what will emerge in its place." Teachers being notoriously given to thinking, one can never know what they may do in unsettling the foundations of the established legal order.

... The leading cause [of distrust and prejudice] ... has been a dislocation of existing balances, a disturbance of the weights of authority and influence. Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of the universities.

... This change of leadership has stimulated a willingness to cite the law review essays in briefs and in opinions in order to buttress a conclusion. More and more, law reviews are becoming the organs of university life in the field of law and jurisprudence. The advance in the prestige of the universities has been accompanied, as might be expected, with a corresponding advance in the prestige of their organs.

... No longer is [a judge's] material confined to precedents in sheepskin. ... "[H]e may use any material .... " He may look to law or to literature, to economics or to philosophy, to saints or to sinners, to workers or to...

53. When I was a law student, one of my professors was said to have read and understood James Joyce's *Finnegan's Wake*, the rule against perpetuities, and the rule in *Shelley's Case*. For a parody about the latter rule, see Andrew J. McClurg, *Alphabet Soup*, A.B.A. J., Oct. 1997, at 16.


If Cardozo was right, and I think history demonstrates he was, then it follows that by the 1930s, the reviews had become an important voice in our ongoing national seminar. Today, the articles in the reviews continue to be influential. It therefore follows that student law review editors must answer the charges made against them.

One accusation is that editors are young and inexperienced—how can they identify a good article from a bad one? With no background, a young law student cannot possibly fathom a new and major contribution to legal literature. This criticism may be true, but I think the matter is almost always overcome by consultation with a faculty member who specializes in the topic.

So now the students face the principal and much more serious indictment: the ratio of "practical" to "theoretical" articles has dropped from 4-5:1 to 1:1,57 and editors are to blame. To understand the student defense to this charge, a bit of history is helpful. Before World War II, law professors and law students wrote materials helpful to all branches of the profession, but the clear trend since the war has been to use the journals for dialogues between law professors or for exchanges between the law schools and other people in the university, chiefly in the economics department, but also scholars doing research in fields such as philosophy, sociology, and political science.

The origin of this shift away from concentrating on law for practitioners and judges began between 1937 and 1942, when Supreme Court decisions confirmed the constitutionality of Franklin Roosevelt's

56. Id. at viii-x.

57. MARY ANN GLENDON, A NATION UNDER LAWYERS 204 (1994). In my opinion, none of the critics has provided a thoughtful discussion of why an evenly balanced ratio of practical to theoretical articles is problematic.

On May 28, 1994, Professor Glendon, who is the Learned Hand Professor of Law at Harvard Law School, gave a commencement address at Catholic University. During her address, she said "[t]he production of scholarship [by the nation's 6000 law professors] that is useful to the bench and bar (or even about law at all!) no longer commands the prestige it once enjoyed. Suffice to say that we professors are experiencing our own version of life at the edge of chaos." Mary Ann Glendon, Law in a Time of Turbulence, in 60 VITAL SPEECHES OF THE DAY 620, 621 (1994).

New Deal and, in doing so, completely altered our constitutional structure.\footnote{See Robert L. Stern, The Commerce Clause and the National Economy, 1933-1946, 59 Harv. L. Rev. 645, 683 (1946).} The New Deal created a massive federal bureaucracy, and the numerous administrative agencies caused the emphasis to shift abruptly from private to public law.

In the legal education world, the first major response to this monumental change was made by Myres McDougal, a Yale law professor, and Harold Lasswell, a Yale political scientist. They urged a complete revision of the pre-World War II curriculum. The emphasis now was to be on training students "for policy-making.\footnote{Harold D. Lasswell & Myres S. McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale L.J. 203, 206 (1943)(emphasis omitted).} Professor Robert Stevens called the Lasswell-McDougal article a \textit{tour de force}—it changed the thinking in the law schools and clearly marked the start of the post-Realist period. The Lasswell-McDougal proposals were adopted by some schools, but on the whole, the article "itself, in terms of producing radical change in legal education, was almost completely unsuccessful.\footnote{STEVENS, supra note 45, at 265.}

In this context, the experience at the Nebraska College of Law is interesting. Dean Frederick Beutel assembled a fine group to reopen the school after the war. Edmund Belsheim had shared a suite of rooms with Myres McDougal at Oxford, and they had been assigned to the same law tutor.\footnote{Id. at 266.} Dean Beutel's views and those of his colleague, Professor Julius Cohen, were close to McDougal's; they foresaw that post-war legal education demanded "that the law schools now become policy-wise.\footnote{See Myres S. McDougal, Life With Edmund Belsheim, Advoc., Autumn 1985, at 8.} The new curriculum at Nebraska was fundamentally

\footnote{60. Harold D. Lasswell & Myres S. McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale L.J. 203, 206 (1943)(emphasis omitted).}
\footnote{61. Id. at 266.}
\footnote{62. Id. at 266.}
\footnote{63. See Myres S. McDougal, Life With Edmund Belsheim, Advoc., Autumn 1985, at 8.}
\footnote{64. Julius Cohen, Crisis in Legal Education, 15 U. Chi. L. Rev. 588, 592 (1948). See also Frederick K. Beutel, Changes Necessary in the Law Curriculum to Meet the Role of Lawyers in Modern Society, 9 Law. Guild Rev. 89 (1949); Frederick K. Beutel, The Law Schools and the New Profession of Social Technique, 1 Am. J. Econ. & Soc. 93 (1942); Frederick K. Beutel, The New Curriculum at the University of Nebraska College of Law, 25 Neb. L. Rev. 177 (1946)[hereinafter The New Curriculum]; Julius Cohen, Factors of Resistance to the Resources of the Behavioral Sciences, 12 J. Legal Educ. 67 (1959). For further commentary on the innovative programs at Northwestern and Nebraska, see STEVENS, supra note 45, at 224 n.58, 227-28 n.80; Carl Circo, 1903 & 1946: The Making and Remaking of the University of Nebraska College of Law, 57 Neb. L. Rev. 44, 61-75 (1978).}
\footnote{66. Harold D. Lasswell & Myres S. McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale L.J. 203, 206 (1943)(emphasis omitted).}
different than the pre-war one. It was a four-year program designed to give basic training in how to become a lawyer, with an additional emphasis on giving useful background in the social sciences. From 1949 until 1959, a sociologist was a member of the law faculty, and an innovative “Legislative Laboratory” was part of the curriculum. It was a good program. I was there, so I know. But by the early 1960s, the College had returned to a three-year program, and many of the innovations of the Beutel period were abandoned. Nonetheless, neither Nebraska nor any other law school ever returned to a pedagogical approach of almost exclusive practical training.

The obstacle to the policy-makers’ approach was that law students are interested in becoming lawyers, not in learning to make public policy. But even though the McDougal, Lasswell, Beutel, and Cohen-type proposals were short lived in action, the desire for change, this time radical change, did not die. It cropped up again in the 1970s when the writings of Roberto Unger, Duncan Kennedy, and Morton Horwitz gave rise to the critical legal studies movement (CLS).65 A law professors’ crusade springing from deep disenchantment, the movement had little impact outside the law schools.66 Unger, Kennedy, and Horwitz were like three men in a rowboat attacking a battleship. Inside academe, however, their ideas caused several fairly large controversies. If the following definition is accurate, it is immediately apparent why the majority of practitioners and judges were less than enthusiastic about CLS scholarship. In fact, conservative law teachers and members of the bar were downright hostile. One CLS group put its formative statement this way:

The central focus of the critical legal approach is to explore the manner in which legal doctrine and legal education and the practices of legal institutions work to buttress and support a pervasive system of oppressive, inegalitarian relations. Critical theory works to develop radical alternatives, and to explore and debate the role of law in the creation of social, economic and political relations that will advance human emancipation.67


Dean Fraser at Minnesota said there was no doubt in his mind “that students can do as effective law study after two years of college work as they can after four.” Fraser, An Integrated Course of Training for Lawyers, 34 Handbook, Ass’N of Am. L. Schs. 60, 62 (1936). In 1963, Professor David F. Cavers of Harvard proposed a plan for two-calendar-year legal education based on six trimesters. See David F. Cavers, A Proposal: Legal Education in Two Calendar Years, 49 A.B.A. J. 475 (1963).


66. Kronman, supra note 58, at 242. See also id. at 249, 253-54, 261.

Orthodoxy and traditional legal doctrines were to be jettisoned to end "domination" of the poor and the oppressed. The existing legal structure sheltered the top; now it was necessary to shield the "bottom." The mere recital of the purposes is sufficient to show that the considerable amount of theoretical literature produced by the movement was of little interest or value to judges.

While CLS lost momentum, the influence of Unger and his associates did not die. Again a scholarship tree shriveled, but the ideas sprang up in somewhat different models. People who formerly would have been CLS members became critical race scholars or feminist scholars. The overall theme of feminism is that women are subordinated in capitalist (and other) societies, and their position must be changed. The CLS movement and feminism are both revolutionary in the sense that the objective is radical change. The feminism movement gained greatly in strength during the 1970s and 1980s, when women in vastly increasing numbers chose to make a career in the legal profession.

In 1968, women accounted for less than ten percent of the students enrolled in approved schools; a decade later, it was more than a third. This, together with the inclusion of minorities, constitutes the most extraordinary development in the history of legal education, and it brought an entirely new form of theoretical scholarship to the law reviews. Gender issues moved to the forefront, and articles in the form of story-telling became popular. Of course, it appears self-evident that narrative fiction is hardly what Judge Edwards turns to when he has a concrete case to resolve. Nevertheless, feminist literature has directed attention to issues about women at work, in the


69. See CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997). Professor Derrick Bell wrote the Foreward. Each of the book's seven parts is followed by suggested readings, and an extensive bibliography is included. Id. at 399-410.
home, in sports, and in the Armed Forces, as well as topics focusing on
gender, sexual identity, social attitudes, marriage, reproduction, child
support, child care, abortion, relations between the sexes, standards
for prosecuting sexual harassment charges, spousal abuse, child
abuse, poverty, health care, old age, retirement income and pension
reform, and many other issues of public responsibility affecting almost
everybody's welfare. In addition, women have made great inroads to-
ward ending Anglo, male domination of law school faculties, the judici-
ary, and legal jobs.

Professor Owen Fiss points out that in the late 1970s, feminists led
by Professor Catharine McKinnon caused two major shifts in legal
paradigms affecting women. First, the concept of equality for women
departed from its focus on antidiscrimination regarding individuals
and gravitated toward the group approach of removing social subordi-
nation. Second, feminists began to express vehement hostility to a so-
cial structure that results from the objectification of women into
sexual objects for male gratification. This, of course, lead to vigorous
campaigns against pornography during the past two decades.72

Some critics assert feminist scholarship emphasizes problems
faced by educated American women who become lawyers, account-
ants, professors, and executives, and fails to adequately address the
difficulties of unskilled women who earn low wages and receive lim-
ited (or no) benefits working in private households, nursery schools,
day care centers, laundries, and the fast food industry.73

Another major reason for the vast increase in theoretical law re-
view literature is “law and (blank)” scholarship. The possibilities are
endless.74 Once we fill in the blank, we have a specialized course in
the law school. The most prominent of the interdisciplinary “law and
(blank)” subjects is law and economics. This movement's goal is the
economic analysis of law. One of its foremost parents is Judge Rich-
ard Posner of the United States Court of Appeals for the Seventh Cir-
cuit and a former law professor at the University of Chicago. His 1992
book, Sex and Reason,75 shows the extremes to which economic stud-
ies can be taken. The judge presents what he calls “the economic the-
ory of sexuality,”76 but as often is the case with economic analysis,

72. Owen M. Fiss, Liberalism Divided: Freedom of Speech and the Many Uses of
73. See, e.g., David Frum, Why Good Help Is Hard to Find, Women’s L.Q. 4-6 (Winter
74. See supra notes 4-9. The possibilities are countless. Several additional examples
include Law and Inequity: A Journal of Theory and Practice; Law & Sexuality: A
Review of Lesbian and Gay Legal Issues; Santa Clara Computer & High Technol-
ogy Law Review; and Texas Review of Law and Politics.
76. Id. at 3.
little attention is given to the moral aspects of sex. Judge Edwards probably would say he could learn a great deal from the book, but on the other hand, it is doubtful he would regard it as useful in his day to day work. Professor William Eskridge considers the book an important contribution to the law of sexuality in general and the law of homosexuality in particular. Still, he acknowledges that sexuality cannot be a morally indifferent object of study, and a cost-benefit approach to the subject is doomed.

Unquestionably, law and economics has impacted antitrust practice and contributed significantly to communications law, transportation law, commercial damages, and environmental regulation. As Judge Posner points out, it has armed divorcing women with an interest in their husbands' professional degrees. Even criminal sentencing has been affected. And, because of law and economics, law students taking a course in contract law now study transaction cost economics; in Torts, least cost avoiders; in Corporations, capital asset pricing. In Water Law, Planning, and Policy (a course I taught for many years), students need to understand concepts such as marginal cost pricing, equimarginal value in use, market transfers, cost-benefit analysis, Pareto criterion, water banking, externalities, the problem of the commons, Barnett's Lunch Law, effluent taxes vs. market incentives, and class action techniques.

Law and economics scholarship has been beneficial to legal scholarship, but if interdisciplinary work leads almost completely to the academic side of our assignment and away from the task of educating students to become lawyers, then we should rethink the matter. I have several reservations. Even though numerous benefits have resulted from interdisciplinary work, some people fear that professors will want each discipline to become a separate department of the law school. This, of course, would lead to what Paul Carrington at one

80. Id. at 1926.
82. Assume half a dozen or more people eat lunch together, and the bill always is divided evenly, rather than apportioned on the basis of what each person ordered. It follows that if six or more people go to lunch, each will order the most expensive thing on the menu. The rule has important applications not only to individual behavior, but also to the behavior of Congress and state legislatures.
time called "graduatization" of law schools. Second, Dean Kronman has a point when he states that the ascent of the law and economics movement has done more than anything in the last twenty-five years to undermine what he calls the law training of lawyer-statesmen. Reliance on economic models sometimes blinds us to the virtues of character, prudence, and practical wisdom.

Another objection is that sound decisionmaking depends upon more than studying the effects of efficiency and distribution. In short, students should focus on more than the size of capital and how the shares will be distributed. One economist set up an illustrative case in which use of DDT in food production damaged the penguin population. Then he said that his criterion was oriented to humans and that damage to penguins, sugar pines, and geological marvels simply was irrelevant. He concluded penguins were important because people enjoy seeing them walk about the rocks, but that he had "no interest in preserving penguins for their own sake." I, of course, disagree. If people want to preserve penguins regardless of economic considerations, and I think they do, then there must be concern for noneconomic judgments.

In summary, we have observed that following World War II, law reviews became much more theoretical and thus considerably less valuable to practitioners and judges. Some, like Judge Edwards, believe this abandonment of "doctrine" for "theory" is unfortunate and has resulted in a significant disjunction between legal education and the legal profession. A number of scholars are not persuaded that the judge's charges are supported by the evidence, but others see the matter differently. His point is well taken that law schools are professional schools and occupy a favored position in the universities to a large extent because they are backed by bar associations. For that reason, law reviews cannot distance themselves too far from the discipline of the name they bear and to which they owe an explanation for the condition Judge Edwards, and many others, deplore.

It also should be observed that, beginning in the 1950s, legal scholarship showed a vigorous expansion of interest in issues of governmental practice. Instead of focusing on "how things are" articles, law reviews began to devote more space to commentary that centered on social policies. A quick perusal of the law reviews for the past four decades depicts some of the most popular subjects—discrimination on the basis of race, color, creed, religion, gender, sexual orientation, age,

84. See Kronman, supra note 58, 225-40.
86. Support for my view is found in Saks et al., supra note 42.
or national origin; urban crime; capital punishment; familial relations; abortion; the Establishment Clause; and protection of the poor, the physically ill, the criminally accused, and the infirm. In connection with these matters, the law reviews became teachers in the ongoing, often painful, national dialogue. The women's movement, civil rights groups, critical legal studies, and the law and economics movement crowded out practical law review pieces. I think this is the explanation student editors would give for the decreasing ratio of practical to theoretical articles. It is not the fault of the editors, but that of their mentors, the professors who write and submit the articles. The editors say submit a practical article and we will consider publishing it.

In connection with the struggle to balance the theoretical and practical, I also should note that many of the tensions Judge Frank and Judge Edwards describe arise because the law colleges have a split set of characteristics. The schools are located in universities where academicians focus on the question “Why.” But some circumstances arise when professional schools should show how practitioners approach a problem.

Regarding this never-ending matter about how much practical training should be offered, the law school faculties are a house divided. For instance, some schools employ “anything but law” teachers, who are referred to as ABL faculty. They are employed mostly in the elite schools and teach mostly the “law and (blank)” courses, chiefly Law and Economics. They want to be known to their colleagues as academicians, not as lawyers. I am confident, however, they realize that if ABL is carried too far, the Bar eventually will impose some voice in law school curricula. In a final confrontation, the Bar has the trump-card—authority to admit applicants to the practice of law. Not even the heavily-endowed schools are exempt from the risk that the Bar will intervene in curriculum matters. Therefore, more and more faculty members support the move toward clinical education that satisfies some of Judge Edwards' concerns. After all, when most law school deans address alumni and bar association groups, they yearn to describe some activities at the school that directly relate to the practice of law.

87. The ABL characterization is attributed to Professor Jay Westbrook of the University of Texas at Austin. See Johnson, supra note 13, at 1239.
VI. YET ANOTHER ACCUSATION: LAW REVIEWS ARE THE CAUSE OF THE SUPREME COURT'S POOR LITERARY STYLE

At this point, the students think they have provided adequate explanation for the modern ratio between practical and theoretical articles only to face with disbelief the indictment that they are responsible for the poor literary style in opinions of the United States Supreme Court. The charge was made by Justice Ruth Bader Ginsburg in a 1994 *New York Times* interview. The Justice said that because law review trained clerks write a Justice's initial opinions, "[i]t is scarcely surprising that the standard opinion style has become that of student-run reviews: bland and bloodless, prolix, platitudinous, always erring on the side of inclusion, full of lengthy citations and footnotes—and above all dull."89

The clerks' obvious defense to Justice Ginsburg's assertion is that the fault is with the Justices. They sign the opinions and hold them out to the public as their own work. Some time ago I predicted that the writing techniques of the Justices would improve as the number of signed opinions decreased. In the 1986 Term, Chief Justice Rehnquist's first, there were 152 signed opinions. By 1992 Term, the number was 114; 1993, 87; 1994, 86; 1995, 79; and, by 1996, 86. My prophecy, of course, proved wrong.

It also should be pointed out that Justices like Holmes, Cardozo, and Hughes would be dumbfounded to learn that the law clerks have such a leading role in the screening of cases that the Court will hear and the drafting and designing of the opinions. Those justices would reduce the role of the clerks drastically. Professor Philip Kurland of the University of Chicago expressed the matter aptly when he said "I think Brandeis would be aghast."90

VII. A FINAL COMPLAINT: A GREAT DEAL OF LAW REVIEW LANGUAGE IS INCOMPREHENSIBLE

This complaint is justifiable—law review language frequently is incomprehensible. The following examples are set forth to illustrate the


90. *Schwartz*, *supra* note 89, at 50. See also *Tony Maure*, *Justices Give Pivotal Role to Novice Lawyers*, *USA Today*, Mar. 13, 1998, at 1A.
point. None are atypical. The first two were written by renowned authorities in the law and economics movement.

The first is a definition of what the authors call Pareto optimality:

Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could not compensate those who lost from it and still be better off than before.91

The second example was written by Judge Posner. It may perplex the uninitiated.

The principal benefit of prohibiting abortions is the value of each fetus saved times the number saved, the latter being a function of the percentage of abortions that prohibition actually prevents or deters, which we are assuming (probably extravagantly) to be 30 percent, and the number of abortions required to reduce the population by one, which I am assuming to be 1.85. The benefits of the prohibition are therefore v, that value of one fetus saved, times .16n (.3/1.85 = .16), where n is the average number of abortions that would be performed each year but for the prohibition.92

I simply have not had time to figure out what the judge means. But, if this is what the law review students are reading, it adds weight to Justice Ginsburg's complaint of indoctrination. Judge Posner perhaps wants a deserved appointment to the Supreme Court and wrote the paragraph to prove that he is well-qualified. It may show him too much so.

After the Judge Posner example is received in evidence, the students object on the ground that all illustrations of incomprehensible language are by law and economics scholars. The decisionmakers then rule that from the hundreds of available samples, the law review critics may introduce one. They select the following passage:

Of course, no political discourse can pass into nonmeaning. Its goal, Marx stated explicitly, is to reach the goal of interpretation: interpreting the world in order to transform it according to our needs and desires. Now, from the position of the post-Freudian, post-phenomenological analyst—a position which is really an untenable locus of rationality, a close proximity of meaning and nonmeaning—it is clear that there is no World (or that the World is not all there is) and that to transform it is only one of the circles of the interpretation—be it Marxist—which refuses to perceive that it winds around a void.93

92. Posner, supra note 75, at 286.
Professor Sidney DeLong is called as an expert witness and, having read the passage, testifies that "even though I know the meaning of all the words used, even though I can identify the subjects and verbs of all the sentences, I haven't the faintest idea of what she means. Not even a little bit. Not a single thought. None. Zip. Nihil."  

VIII. EXPERT TESTIMONY IN OPPOSITION TO ABOLISHING LAW REVIEWS

For the students in the dock, an excellent closing defense of their law reviews will be formidable endorsements by some of the most prominent and respected people in the legal profession. Imagine some of the judges whose statements might be put before the decisionmakers. The first testimony is given by a judge on the Court of Appeals of the State of New York, Judge Stanley Fuld.

Such [the law journal articles discussed by the judge] . . . has earned the real respect of the bench. We admire the law review for its scholarship, its accuracy, and, above all, for its excruciating fairness. We are well aware that the review takes very seriously its role as judge of judges—and to that, we say, more power to you. By your criticism, your views, your appraising cases, your tracing the trends, you render the making of "new" law a little easier. In a real sense, you thus help to keep our system of law an open one, ever ready to keep pace with challenging patterns.

Justice Douglas liked law reviews. He wrote that he had "a special affection for law reviews. . . . [I] have drawn heavily from them for ideas and guidance as practitioner, as teacher, and as judge."  

Another judge of the Court of Appeals of New York wrote, "[t]here can be no question that academic writing has established its impact on the law."

At this point in the hearing, the law review students will call two former Chief Justices of the United States Supreme Court. First, Charles Evans Hughes, who states that "in confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed, in a good law journal."

The next witness is Chief Justice Earl Warren, who stated that [t]he American law review properly has been called the most remarkable institution of the law school world. To a lawyer, its articles and comments may be indispensable professional tools. To a judge . . . the review may be both a

94. Id.
96. Douglas, supra note 58, at 227.
98. Charles Evans Hughes, Foreward, 50 YALE L.J. 737 (1941).
severe critic and a helpful guide. But perhaps most important, the review affords invaluable training to the students.99

A surprise witness will close the testimony for the law review students. Justice Felix Frankfurter will tell the decisionmakers that he agreed to testify to quell the story that he turned down an offer to become a member of the Harvard Law Review.100 He testifies that the myth began because his situation was confused with that of Judge Learned Hand, who we recall, quit the Review at Harvard.101 Justice Frankfurter now sets the record straight when he affirms that he served on the Harvard Law Review, and as evidence of his continuing strong support, relates that he sat on the United States Supreme Court from January 1939 to August 1962, during which time forty-one of his forty-two clerks had law review experience.102 All but three graduated from Harvard.103 He concludes by informing the decisionmakers that his practice of hiring law review members is typical of all Supreme Court Justices, and he cannot think of a better defense than that for the students.

IX. A POSSIBLE, BUT UNLIKELY CHANGE OF CIRCUMSTANCES

I expect no significant changes in American law reviews unless law schools follow the national trend of periodic post-tenure review of every professor. The performance assessments might be routine, say, every five years, or triggered by a certain number of unfavorable evaluations within a specified period. Such a periodic evaluation, I surmise, would be based on the historical three-legged stool—teaching, scholarship, and service. A post-tenure appraisal would greatly increase the number of thoughtful articles from which the law reviews

101. See GUNTHER, supra note 19.
103. Id.
could choose, as there are 4201 professors, 1186 associate professors, 661 assistant professors, and 180 deans in ABA accredited law schools. No longer would there be a complaint of an oversupply of student-edited journals.

Professors George Schatzki and Paul Carrington discussed post-tenure evaluations at the 1990 meeting of the AALS and concluded the process could be benign, provided policy implementation awaited the death of any person subjected to it.

X. CONCLUSION

Prominent professors foresee different futures for the law schools. Some see institutions that have no special responsibility to prepare students for the practice because "[l]aw professors are not paid to train lawyers, but to study the law and to teach their students what they happen to discover." Other professors predict the law schools will resemble the university model with a curriculum consisting of minigraduate courses in applied economics, social theory, and political science. Possibly these ideas are limited to the schools Harry Wellington, former dean at Yale, thinks are superior to the rest. His view is that

[there are a dozen or so university law schools in the county that can properly claim to be more than trade schools. A trade school is an institution that views its purpose as graduating students who will pass a bar examination. Schools that are more than trade schools share this purpose, but they are centrally concerned with knowledge through teaching and research. Among the twelve or so law schools with these larger aspirations, Yale rightly is regarded as the most ambitious.]

Dean Wellington says today's law professors must get a grip on the limits of law by being sophisticates in the social sciences, political phi-

104. These numbers were obtained from the AALS on April 8, 1997.
I agree with Judge Posner when he writes that

[the professor] who makes it his business to be learned in the law and expert in parsing cases and statutes is made by Dean Wellington to seem a paltry fellow, a Philistine who has shirked the more ambitious and challenging task of mastering political and moral philosophy, economics, history, and other social sciences and humanities so that he can discourse on large questions of policy and justice.109

I do not believe the prediction that the law schools will become compartmentalized is well-founded. Rather, I foresee that most schools will recognize that their primary mission is the training of students to become lawyers. That is what the majority of the students expect when they arrive to study. Law reviews play an important role in the pursuit of that goal, but regrettably, too few students have the experience. A former dean of the Northwestern Law School once wrote, in oft-quoted language, that "[w]hereas most periodicals are published primarily in order than they may be read, the law reviews are published in order that they may be written."111 There is truth in the remark even though we know it was made somewhat tongue-in-cheek.

Despite criticisms such as those made by Judge Edwards, all branches of the profession extensively delve into law reviews. When confronted with a problem, my lifelong habit is to first browse the law review literature.

In addition to educational and research functions, the reviews help fulfill other objectives. They reflect contemporary scholarship and are repositories of knowledge that we pass from one generation to the next. Most importantly, law reviews represent the public interest by providing a forum for calm, well-reasoned, and thorough analysis of what courts and legislatures are doing and how well they are doing it.

Some law school deans and professors urge doing away with student-edited reviews and replacing them with faculty journals. Others suggest dividing the law reviews into two parts: the faculty would select and edit lead articles; students would retain supervision of the casenotes, comments, and book review sections.

Both notions seem imprudent. When professors spend substantial amounts of their time and energy culling over and polishing other people's articles, teaching and service suffer. Abandoning student-controlled reviews would remake the nature of law schools, to no clear or certain advantage.

109. Id.
110. Id. at 1119.
After reading and reflecting upon American law reviews for more than fifty years, I am convinced the student-run reviews are a unique and uniquely American tradition that is best left as is.