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## All Hail Emperor Law Review: Criticism of the Law Review System and Its Success at Provoking Change

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# All Hail Emperor Law Review: Criticism of the Law Review System and its Success at Provoking Change

Among those features of the American law school environment which have enduring quality, one is steadfast in its ability to weather criticism and controversy with exceptional vigor and without significant change. No dean possesses the same teflon surface, nor does any professor have more fond alumni than the Law Review. This Comment will discuss some of the published criticism of the law review system and also express some ideas as to why that criticism has so little effect.

Criticism of the law review system does not overwhelm the researcher.<sup>1</sup> Since the beginning of student-edited law reviews in the late 1800s,<sup>2</sup> published articles about law reviews would cover few pages in a bibliography.<sup>3</sup> These articles tend to be short and to the point. While commentators each express an individual view, several general themes or areas of criticism tend to recur. This writer has separated these areas into: the operation of the law review, the number of law reviews, law review style, and law review content.<sup>4</sup> This designation is entirely arbitrary and purely for the purpose of

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1. If the reader is such a researcher and the only interest in this article is to pirate "a fat footnote . . . a mother lode, a vein of purest gold[,]" he is directed to *infra* note 64 where he may mine to his heart's content and thus be spared the necessity of actually reading this Comment. Fuld, *A Judge Looks at Law Review*, 28 N.Y.U. L. REV. 915, 919 (1953).

2. The first student-edited law review was published in 1875 by students of Union University and titled *Albany Law School Journal*. Swygert & Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 764 (1985). This publication failed to live more than one year, and there followed a hiatus of ten years before the publication of the *Columbia Jurist* by students at the Columbia Law School. *Id.* at 764, 766. The *Columbia Jurist* survived until 1887 and died about the same time as the first issue of the *Harvard Law Review* (dated April 15, 1887). *Id.* at 768 n.244. For a more complete history of student-edited law reviews, see *infra* note 66.

3. D. DJONOVICH, LEGAL EDUCATION; A SELECTIVE BIBLIOGRAPHY 146-49 (1970).

4. One commentator limited his criticism to two areas: "There are two things wrong with almost all legal writing. One is its style. The other is its content." Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936). This writer, however, feels a finer examination is in order, despite the fact that Rodell seemed to have gotten

providing a structure for this Comment. Further, the areas described are not clearly separated from one another as the following text will both illustrate and explain.

One final area, the purpose of law reviews, overshadows all the others. Flaws can be tolerated, errors excused, if the purpose of an endeavor is noble and worthwhile. This Comment will further explore the avowed purposes of the law review system and discuss alternative purposes that perhaps have had the greatest effect in the stability and longevity of the law review system.

## I. CRITICAL REVIEW OF LAW REVIEWS

### A. Student Operation of Law Reviews

The modern operation of a law review commonly follows the example laid down by the *Harvard Law Review*. That is, most law reviews are run by the students of the sponsoring law school.<sup>5</sup> Student operated law reviews constitute a unique aspect of American legal publications that other countries do not generally follow. Law review staff are chosen by various methods with the most common being some sort of writing competition coupled with classroom grades.<sup>6</sup> Selection for law review membership occurs either at the end of the first year, or at the beginning of the second.<sup>7</sup> The editorial officers are usually chosen from the staff by the graduating officers.<sup>8</sup> Therefore, most editors are students with one year of experience as a law review member and two years' contact with the law as students. Whatever training the new editorial officers receive is largely "collected in an operations manual or its equivalent which serves as a guide for . . . management."<sup>9</sup> In addition, student-editors are generally between twenty-four and twenty-six years old and have little experience outside the college arena.<sup>10</sup> As a consequence, the

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the gist of law review criticism in these two areas.

5. See Cramton, *"The Most Remarkable Institution: " The American Law Review*, 36 J. LEGAL EDUC. 1 (1986).

6. Fidler, *Law-Review Operations and Management*, 33 J. LEGAL EDUC. 48, 52-53 (1983). This article details an empirical study of 162 student-edited law reviews which responded to a questionnaire. *Id.* at 50.

7. *Id.* at 52-53 ("57.1 percent of the responding publications select their staff, at least in part, at the end of the first year. Another 34.9 percent select their staff at the beginning of the student's second year in law school.").

8. *Id.* at 58 (70.7% of reviews surveyed used this method of editorial selection).

9. *Id.* at 49. See also Killeen, *Editing a Law Review-Remarks to the Twenty-Fifth National Conference of Law Reviews*, 15 GONZ. L. REV. 1 (1979).

10. Most students begin college at age eighteen and graduate four years later at age twenty-two. Entering law school immediately thereafter would make a third-year

training or experience in the art of the law, or lack thereof, possessed by such student-writers and editors has been the subject of comment from the first student-published review.

Justice Holmes referred to law reviews as the "work of boys" and objected to having his opinions approved as "a correct statement of the law" by student notes.<sup>11</sup> More recent commentary has been less strident but based on more than simple distaste for criticism by legal neophytes.

The claim that student-editors can recognize whether scholarly articles make an original contribution throughout the domain of the law is now viewed by legal scholars as indefensible. Horror stories abound, such as the one<sup>12</sup> involving a celebrated article in the past decade, an article that was rejected by some forty student-edited publications. So, too, was the incident involving a famous Oxford legal philosopher whose brilliant article was substantially rewritten by a student editor, resulting in its withdrawal, intervention by a leading faculty member at the school, and prolonged negotiations before the article was finally published as originally written.<sup>13</sup>

Or, in the words of another commentator,

[s]tudents may not have acquired the knowledge and maturity to handle those trends [in the law] adequately as independent editors. Sometimes I have also been under the impression that student-editors, if confronted with articles deviating from the typical pattern, are too much influenced by the desire to 'play safe' and consequently reject the author's offer.<sup>14</sup>

The student operation principle is not without its defenders. Judge Traynor's comment on the student-editor was that

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law student-editor between twenty-four and twenty-six years old. However, this generalization as to age does not always hold true. A small but significant number of law students are older than the norm. Some of these older students gain law review editorial positions. This, of course, does not mean these older students have any more expertise in the law than younger student-editors.

11. Huges, *Forward*, 50 YALE L.J. 737 (1941).

12. There are certainly more than one anecdotal incident concerning the student-editor/lead-article author conflict which have found their way into print. See Cahan, *Law Review: Living With the Pressure to Publish or Perish*, 14 STUDENT LAW., Sept. 1985, at 5. It would neither be possible, or especially helpful, however, to make an extensive listing of specific editor/author spats here.

13. Cramton, *supra* note 5, at 7-8 (footnotes omitted).

14. Nussbaum, *Some Remarks About the Position of the Student-Editors of the Law Review*, 7 J. LEGAL EDUC. 381 (1955) (written by a retired Columbia Law School Professor).

the average apprentice in an American law school has long since reached the age of discretion and he is no ordinary student. He has behind him at least one undergraduate degree and very likely a substantial work record and a period of military service; moreover, he may be not only married but a parent.<sup>15</sup>

However professors and judges view the student-editors' work, the stress of producing a professional publication affects the student law review members themselves. One third-year law student observed, "I watched the changes that came over my friends that first semester on law review. . . . They seemed crazed. They lost all sense of proportion."<sup>16</sup> Several commentators have characterized the law review experience as an intense form of a general socialization experience law students are subjected to by the process of legal education:<sup>17</sup>

Membership in law review may be seen as providing a particularly intense socialization experience. The work demands are great and the technical competence is highly visible. Rewards—present and future—are clear and tangible. Informal access to faculty is much greater and is organized around joint and cooperative tasks, so that role modeling is likely to occur. . . . There was a feeling of being more "elitist" than before coming to law school.<sup>18</sup>

A hierarchy of status can be found within the law review itself. In those schools which have a split in the selection methods, some staff selected by grades and other staff selected by writing competition, each group has a different status.<sup>19</sup> The elitist nature of law review has not gone unnoticed. The advent of race, gender, and ethnic consciousness has induced some reviews to allot staff positions to students by means designed to ensure

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15. Traynor, *To the Right Honorable Law Reviews*, 10 UCLA L. REV. 3, 8 (1962). This generalization of the average law review student-editor may be out-of-date, certainly with respect to gender, as women now compromise a significant percentage of the law student body.

16. Cane, *The Role of Law Review in Legal Education*, 31 J. LEGAL EDUC. 215, 228 (1981).

17. See *id.* at 228-29; Nader, *Law Schools and Law Firms*, 54 MINN. L. REV. 493 (1970) (legal practice in general); Taylor, *Law School Stress and the "Deformation Professionnelle,"* 27 J. LEGAL EDUC. 251 (1975) (law school in general). The socialization aspect of the Law Review experience can be considered an intellectual form of hazing, where the value of the work is measured more in the doing than what is actually done.

18. Taylor, *supra* note 17, at 259.

19. Cane, *supra* note 16, at 222.

representation of what have been perceived as under-represented groups.<sup>20</sup> These changes, however, have not disturbed the status enjoyed by members of the law review; it has only had the effect of expanding the diversity of those members.

The law review selection process, the work experience, the tedious citation checking assignments, laboriously researched and footnoted articles where even the most trivial of legal points requires endless authoritative support, and the ever present pressure of a deadline work to create a "club" of law review members<sup>21</sup>—an intellectual "Marine Corp" of graduates who have suffered the common experience and survived. Much like the real Marines, there are no ex-law review members, only former law review members who now have gone on to other positions.

### B. Number of Law Reviews

One criticism of the Law Review system is based on the sheer weight of numbers. How many law reviews are enough? How many are too many? In 1937, there were fifty law reviews published by law schools in America.<sup>22</sup> Since that time there has been a significant increase in the number of school-affiliated, student-operated reviews. In 1986, one commentator counted 250 law school-affiliated reviews<sup>23</sup> and noted that one estimate set the number of pages of law review text published yearly at over 150,000.<sup>24</sup> A present review of the Index to Legal Periodicals reveals over 300 law school affiliated periodicals which publish at least two issues per year from 179 Colleges and Universities.<sup>25</sup>

20. See Cramton, *supra* note 5, at 7 n.25. Harvard Law Review began a selection process which was "designed to ensure adequate representation of minorities and women." *Id.* at 6-7. The policy was immediately controversial and was attacked as being "a mechanism for the distribution of 'goodies' in the legal community." *Id.* at 7 n.25. I agree with this criticism.

21. Cane, *supra* note 16, at 228-29 (perceiving law review as a "club" for students on the traditional path of legal education and future employment).

22. Comment, *The Law School Review*, 50 HARV. L. REV. 868 (1937).

23. Cramton, *supra* note 5, at 2 n.7 (1986) (author examined the Index to Legal Periodicals for this information).

24. *Id.* at 2 n.8 (citing Fidler, *Law Review Operations and Management*, 33 J. LEGAL EDUC. 48 (1983)).

25. The Index to Legal Periodicals, October 1989 supplement, lists 307 periodicals under college or university affiliation. It is interesting to note that there are only 174 American Bar Association approved schools in the United States (not counting the single approved military school). AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1988: LAW SCHOOLS AND BAR ADMISSION REQUIRE-  
Published by University of Missouri School of Law Scholarship Repository, 1990

Forty percent (73) of those schools publish two or more reviews, or journals, and these account for sixty percent (205) of the total number of reviews. A select few schools, twelve in number, collectively publish 60 journals, or reviews, which account for one-sixth the total nationwide.<sup>26</sup> The present leader is Harvard. Harvard publishes the Harvard Law Review, the Harvard Civil Rights-Civil Liberties Law Review, the Harvard Journal of Law and Public Policy, the Harvard Journal on Regulation, the Harvard Environmental Law Review, the Harvard International Law Journal, the Harvard Journal of Law and Technology, and the Harvard Women's Law Journal. These eight publications represent some 5,000 to 6,000 pages of articles, comments, casenotes, essays, book reviews and poetry<sup>27</sup> per year and all are student operated. Certainly, the editors of these publications have no problem finding material to fill the space between the first and the last page; the name Harvard on the cover ensures more articles than space to print.<sup>28</sup>

Not only has the number of law reviews increased but the average length of each issue is longer. In the thirty-year period between 1954 and 1984, Harvard increased the size of its review thirty-four percent.<sup>29</sup> A similar increase in volume size is apparent for a great number of other law reviews.<sup>30</sup>

MENTS 1 (1988).

26. Those twelve are, in descending order of magnitude of publication: Harvard Law School (8), New York University School of Law (7), University of California-Berkeley Boalt Hall Law School (6), Columbia University School of Law (5), Boston University School of Law (5), Yale Law School (5), Notre Dame University Law School (4), Temple University Law School (4), Boston College Law School (4), University of Virginia School of Law (4), University of California-Los Angeles Law School (4), and University of California-Hastings Law School (4).

27. The inclusion of poetry in law reviews is a recent occurrence and is generally limited to "progressive" publications such as the *Harvard Women's Law Review* and the *Yale Journal of Law and Feminism*. See *Poetry*, 12 HARV. WOMEN L.J. 181 (1989); *Magazine and Manifesto*, 18 STUDENT LAW. Oct. 1989, at 5 ("[F]uture issues may include poetry, art, and photographs.").

28. Prestige is a marketable quantity in the academic world, as it is in the commercial world, the value of which Harvard has just decided to realize by changing its policy about the use of the Harvard name. Harvard now plans to sell licenses to use its name on such things as T-shirts, sweatshirts, coffee mugs and like items. See *Seat of Higher (L)earning*, TIME, Dec. 25, 1989 at 69.

29. Zenoff, *I Have Seen the Enemy and They Are Us*, 36 J. LEGAL EDUC. 21, 21 n.1 (1986) (while it is refreshing to see *Pogo* quoted in any form, Professor Zenoff errs slightly in the matter of verb tense; the correct quote is "I have seen the enemy and they is us.") (emphasis added).

30. *Id.*

In 1956, when there were fewer student publications than now, an adviser to the American Bar Association Council on Legal Education and Admissions to the Bar wrote:

[T]here are too many law school reviews and that these have been established without any demonstrated need. . . . At least half of the law school reviews could, in my judgement, be abolished, or else issued when they have something worthy of publication, or combined with others, without injury to the cause of sound legal education. As it is, many are published regularly in order to preserve the postal mailing rates, and not because the content is of any great value. . . . But generally speaking, too many of the reviews are rehash and regurgitations that are not worth the expense incurred—either as teaching tools or as advertising media.<sup>31</sup>

Without question, some commentators would preserve a published law review "no matter how slender its resources or its subscription list."<sup>32</sup> Yet, if law reviews are to have any value based on content, there must be a saturation point somewhere. Based on the historical record, it would be dangerous, if not foolish, to predict anything but an increase in the number of law reviews in the future.<sup>33</sup> With the advent of the computer age, the "Herculean" task of "wad[ing] through 4,000 volumes, 90 per cent of which is no use whatsoever,"<sup>34</sup> places the saturation point for the number of law journals and reviews well below what is now being produced and far beyond the wildest dreams<sup>35</sup> of the most ardent law review admirer.

### C. Law Review Style

Legal writing style, specifically law review style, has attracted some vicious and well deserved criticism. In his famous (infamous?) article *Goodbye to Law Reviews*,<sup>36</sup> Fred Rodell had this to say:

[I]t seems to be a cardinal principle of law review writing and editing that nothing may be said forcefully and nothing may be said amusingly. This, I take it, is in the interest of something called dignity. It does not matter

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31. Hervey, *There's Still Room For Improvement*, 9 J. LEGAL EDUC. 149, 151 (1956).

32. Traynor, *supra* note 15, at 5.

33. Havighurst, *Law Reviews Legal Education*, 51 NW. U.L. REV. 22, 25 (1956) ("Since there are so few law schools now without a legal journal, it is unlikely that many more will come into existence.").

34. Mewett, *Reviewing the Law Reviews*, 8 J. LEGAL EDUC. 188 (1955).

35. Or nightmare, depending on your viewpoint.

36. Rodell, *supra* note 4, at 38.



that most people—and even lawyers come into this category—read either to be convinced or to be entertained. . . .

Suppose a law review writer wants to criticize a court decision. Does he say "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"? He may think that but he does not say it. He does not even say "It was a thoroughly stupid decision." What he says is—"It would seem that a contrary conclusion might perhaps have been better justified."<sup>37</sup>

Rodell offers no quarter for the extensive use of footnotes in law review writing either:

Then there is the business of footnotes, the flaunted Phi Beta Kappa keys of legal writing, and the pet peeve of everyone who ever had to read a law review piece for any other reason than he was too lazy to look up his own cases. . . . [T]he footnote foible breeds nothing but sloppy thinking, clumsy writing, and bad eyes. Any article that has to be explained or proved by being cluttered up with little numbers until it looks like the Acrosses and Downs of a cross-word puzzle has no business being written. And if a writer does not really need footnotes and tacks them on just because they look pretty or because it is the thing to do, then he ought to be tried for wilful murder of his reader's (all three of them) eyesight and patience.<sup>38</sup>

Professor Rodell correctly predicted that his comments would have no effect.<sup>39</sup> In a reprise of his original article<sup>40</sup> Rodell appended an update which narrowed his original criticism to center on the quality of writing used in law reviews.<sup>41</sup> "Without a style that conceals all content and mangles all meaning, or lack of same, beneath impressive-sounding but unintelligible gibberish, most of the junk that reaches print in the law reviews and such

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37. *Id.* at 38-39.

38. *Id.* at 40-41. Professor Rodell did not make clear who the three possible readers are, but, it can be assumed that most writers have two parents and a spouse who will dutifully read anything he or she would produce out of love or family obligation. This writer later learned that when authors are being considered for tenure, the number of possible readers could increase somewhat, depending on the particular university or college's tenure review procedure.

39. *Id.* at 38 ("Now the antediluvian or mock-heroic style in which most law review material is written has, as I am well aware, been panned before. That panning has had no effect, just as this panning will have no effect.")

40. Rodell, *Goodbye to Law Reviews-Revisited*, 48 VA. L. REV. 279 (1962).

41. *Id.* at 286.

scholarly journals could never get itself published anywhere—not even there."<sup>42</sup>

When articles are written with any style, other than that preferred by the law review student-editors, deviation from the norm is intolerable. As one editor put it, "the so-called final draft submitted by most authors—particularly student authors—is really a first draft. . . . All manuscripts, regardless of how learned or famous the author, must be approached with the expectation that some rewriting will be necessary."<sup>43</sup> The touch of humor advocated by Rodell will fare hard with law review student-editors, as "an editor should discourage all attempts at humor unless the author turns out to be a genuine wit."<sup>44</sup> Rodell's criticism has yet to bear fruit, and sometimes is regarded as humorously written.<sup>45</sup> Yet one small proposed change endures.

Although superficial, the proposed change concerns the often mechanical and pedantic style of footnote construction employed by most law reviews following the Harvard mode, and *A Uniform System of Citation* ("Bluebook") which is its holy text.<sup>46</sup> In 1986, the students of the University of Chicago Law School created a new system of citation for use in legal writing.<sup>47</sup> The system is simple in comparison to the Bluebook<sup>48</sup> but fails to address the underlying problem. While it is clearly better to cite an authority in a simple manner, the form of citation is not relevant if the authority is needlessly cited in the first place. Harvard need not fear encroachment by the University of Chicago on its citation handbook business, however, because the Redbook<sup>49</sup> has yet to become the citation manual for more than a very few schools.

The failure of any real change in style or departure from the law review style is apparent to the reader of current law reviews. A few random samples will show long, drawn-out sentences and twenty-four dollar vocabulary when simple direct sentences and short, clear word choices would be far better. Extensive footnotes dominate the pages, crowding short snippets of text at the

42. *Id.* at 287-88.

43. Killeen, *supra* note 9, at 5. However, this is the very thing that drives legal scholars crazy. "Nor is it pleasant," writes one commentator, "for a mature scholar to be subjected to the supreme and irrevocable judgment of an incompetently trained student." Nussbaum, *supra* note 14, at 381.

44. Killeen, *supra* note 9, at 8.

45. The Editor's foreword to Rodell's reprise of *Goodbye to Law Reviews-Revisited* referred to that article as a "humorous change of pace from the usual law review make-up." Rodell, *supra* note 40, at 279.

46. *A Uniform System of Citation* has been referred to as the "Kama Sutra of legal citation." Lushing, *Book Review*, 67 COLUM. L. REV. 599 (1967).

47. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343 (1986).

48. For those who doubt, see *The University of Chicago Manual of Legal Citation*, 53 U. CHI. L. REV. 1353 (1986).

49. Because of its red cover.

top of each page so that on page after page footnotes outnumber text ten to one. Of all themes in law review criticism, it is the criticism of style which is most uniformly ignored.

#### *D. Content of the Law Review Article*

The merits of any publication are tied to the content of that publication. Law reviews should be no exception. Professor Rodell's second criticism directly regarded the content of law reviews.<sup>50</sup> While reserving his most vitriolic remarks for style, Rodell spared his colleagues but little when discussing the content of their written work.

Law review writers seem to rank among our most adapt navel-gazers. When they are not busy adding to and patching up their lists of cases and their farflung line of logic, so that some smart practicing lawyer can come along and grab the cases and logic without so much as a by-your-leave, they are sure to be found squabbling earnestly among themselves over the meaning or content of some obscure principle that nine judges out of ten would not even recognize if it hopped up and slugged them in the face. . . . With law as the only alternative to force as a means of solving the myriad problems of the world, it seems to me that the articulate among the clan of lawyers might, in their writings, be more pointedly aware of those problems . . . instead of blithely continuing to make mountain after mountain out of tiresome technical molehills.<sup>51</sup>

Other commentators have remarked that ninety percent of law review articles are "fillers,"<sup>52</sup> or pointed out the redundancy of many different reviews publishing works on the same subject,<sup>53</sup> or that "[p]ublished articles lack originality, are boring, too long, too numerous, and have too many footnotes, which also are boring, and too long."<sup>54</sup> Most damning to the content of law reviews, however, are the comments of one of their defenders. Justice Traynor conceded:

Of course the usual lead article will not be written by one of the top ten stylists of the day. Of course the usual student note will not reveal a legal

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50. See *supra* note 4.

51. Rodell, *supra* note 4, at 43.

52. Mewett, *supra* note 34, at 189.

53. Professor Murray cites as an example *Miranda v. Arizona*, which "spawned 39 'major' articles within 14 months of the decision. . . . In the next three years 33 more followed on the same subject." Murray, *Publish or Perish-By Suffocation*, 27 J. LEGAL EDUC. 566, 568 n.5 (1975).

54. Zenoff, *supra* note 29, at 21.

philosopher fit to be tapped by the shades of the most smashing thinkers of all time. Of course the usual book review will not be composed by one in the throes of writing a great book. Most of the pages will not make good hammock reading. Most of them will lack wit, a gift the gods give cheerily.<sup>55</sup>

## II. PURPOSES OF THE LAW REVIEW SYSTEM

The point of the preceding brief review of law review criticism is not to provide an all encompassing presentation of the flaws and failings of the law review. Without some idea of the prevailing criticism of the law review system, however, it would not be possible to address a related issue that such criticism prompts. Given that similar critical comment has existed and recurred for at least fifty years, the preceding examination leads to the inevitable question . . . why has nothing been done?

A tentative answer to that question is simple. None of the groups involved with and benefited by the present system of law review publication are interested in changing the system. Despite the views of individuals, the vested interests of these groups, specifically authors of lead-articles, student-editors and staff (including alumni), the affiliated law schools, and the practicing bench and bar, are such that no major change in the present system would have a snowball's chance in hell of success. Changes that would have a possibility of actual implementation would either widen the pool of publications, widen the pool of students involved in the law review system, or are aspirational in nature.<sup>56</sup>

Lead-article authors, usually professors and scholars, comprise a large and powerful interest group within the law review system. Without a sufficient pool of authors, student-edited publications would perish from lack of material to fill each issue. Providence has provided, however, the "publish or perish" doctrine so that needy editors should not want for the written word. Considered a cliché, the doctrine demands that an academic must publish scholarly articles to ensure promotion, or "perish" professionally. Cliché or no, there is no doubt that publication in legal journals or reviews is required

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55. Traynor, *supra* note 17, at 4.

56. See Closen, *A Proposed Code of Professional Responsibility for Law Reviews*, 63 NOTRE DAME L. REV. 55 (1988). While this writer supports and concurs with the merits of the code proposed by Professor Closen, it is very doubtful that a set of standards on the quality and nature of what could or could not be printed could be enforced. Questions of academic freedom aside, those law schools operated by governments, a sizable portion, would have difficulty leaping the constitutional hurdle of the first amendment in any case where there was no outright falsification or fraud (plagiarism and other forms of academic dishonesty). It is not the fraudulent or corrupt that causes law reviews problems; it is the mediocre and redundant.

for professional advancement and peer acceptance.<sup>57</sup> Publication by legal scholars is done, for the most part, for the purpose of making a record of scholarship for the next meeting with the tenure committee.<sup>58</sup> The quality of such forced scholarship is immediately suspect,<sup>59</sup> as is the quality of the law reviews which publish such articles. The pressure of the "publish or perish" doctrine is felt and recognized by the scholars themselves.<sup>60</sup> The student-editors, as discussed previously, have little expertise in the fields of law they review in the articles submitted to them for publication. The subtle pressure perceived by the student-editors to use a particular professor's work in the school's review is real.<sup>61</sup> Incidents of overt pressure by scholars are not unknown.<sup>62</sup> Faced with the pressure to produce "scholarship" in the form of law review articles, lead-article writers benefit from law review system's faults. A large pool of law reviews ensures adequate space for every author to find a place to publish. A stilted, "formula" style hides faults on the merits and allows mediocre work to appear alongside superior writing without being too obvious. Student-editors, while sometimes troublesome, lack sufficient experience to recognize the "formula" article which constitutes a waste of space and can be influenced by position, reputation, and overt pressure by faculty of the affiliated school. For most lead-articles authors the law review system fills the need to publish quite well, and it is small wonder that there has been no groundswell for change.

Student staff of law reviews benefit from the present system also. It is true that staff and editors work for any benefit they might receive. The value of law review to a student seeking employment after law school is, however,

57. See Cahan, *supra* note 12, at 5; Murray, *supra* note 53, at 566; Turner, *Publish or Be Damned*, 31 J. LEGAL EDUC. 550 (1981).

58. Murray, *supra* note 53, at 568.

59. *Id.* at 570-71. See also Bard, *Scholarship*, 31 J. LEGAL EDUC. 242 (1981). The concept of "forced scholarship" is not limited to professional legal scholars or lead-article authors. Student-writers labor under the same overseer's whip, except with different rewards at stake (continued membership, recognition of future employers, etc.). One wonders if such student-writers are being broken to the lash so as to make them docile and accepting of the "publish or perish" doctrine when they take their place in the professional legal scholarship community.

60. See Bard, *supra* note 59, at 242; Murray, *supra* note 53, at 566; Turner, *supra* note 53, at 550; Zenoff, *supra* note 29, at 21.

61. Cahan, *supra* note 12, at 5 ("It is good politically to treat [faculty] well,' says Andy Ritter, outgoing topics editor for New York Law School's review. 'You'd have to feel the pressure; it is a day to day thing. It is important to be able to discuss an article with a professor.'").

62. *Id.* ("Professor William Nelson [New York University Law School] threatened to withhold clerkship letters of recommendation for law review editors after they rejected an article he ha[d] submitted to the review.").

such that he would be a fool to refuse the opportunity to work on a law review. Many law firms use membership on a law review as a winnowing factor, to cut down the number of applicants for associate positions. Those firms that do not, *per se*, reject non-law review applicants, value law review membership highly and the coveted "law review member," or "law review editor," translates into professional and financial advantage at graduation. In addition, practicing attorneys who were law review members view other attorneys with similar law review experience as being members of the same "club." This "club" atmosphere is most prevalent in firms that use law review as a prerequisite to hiring, but also extends across firm boundaries into the social-professional arena.

The affiliated law school benefits from the prestige that its law review generates, and vice versa. A prestigious school attracts name authors for its law review and a prestigious journal or review attracts famous and sought after scholars to its affiliated school. The author contends that it is not unknown for a school to create a law review or journal as part of a package to induce a particular scholar to come to that school.<sup>63</sup> In addition, faculty who have law review experience are prone to consider law review experience important in choosing future faculty. What better experience could future faculty have in a law review than from the law review at the school where they will teach? The law school, itself, profits from the law review training ground and the new professors it provides.

The practicing attorney profits from the present law review system by its formula style. Articles which contain extensive and pedantic footnotes are appreciated because in such footnotes are found a great deal of research that is not going to cost the practitioner anything. The tremendous volume of articles is a benefit to the legal profession for the simple reason that for any particular issue, someone has written something about it. Students also use

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63. It is very difficult to determine, without inside information, why legal scholars are induced to come to particular law schools. The *quid pro quo* of such agreements are rarely public knowledge, however, examination of somewhat randomly selected legal journals of recent creation reveal coincidental career moves by closely involved faculty. The *Syracuse Journal of International Law and Commerce* began publication in 1972, within two years of the appointment of L.F.E. Goldie to be director of the Syracuse International Legal Studies Program. Professor Goldie remains the faculty advisor to the journal as of their last publication. Similarly, Leonard L. Riskin joined the faculty of the University of Missouri in 1984, at the same time the Center for Dispute Resolution was created under his directorship. The *Journal of Dispute Resolution* is published under the sponsorship of the Center. It appears that legal publications can, and are, created to assist in recruiting faculty.

such footnotes, but for the practicing attorney articles can save time; and saving time is saving money.<sup>64</sup>

At this point, some comment must be made of the avowed purposes of law review. No mention has yet been made of what have traditionally been cited as the purposes of law review: education of students, quest for scholarship, and service to the legal professional. It is not contended here that such purposes are not valid, nor that specific individuals do not write for these purposes. The present state of affairs, however, leans heavily towards considering these purposes of the law review system as being secondary, or incident to, the vested self-interest of the aforementioned groups.<sup>65</sup> In true

64. For those wishing to save time as well as money as indicated in note 1; see Anderson, *Scholarly Schism*, 75 A.B.A. J., Sept. 1989, at 50; Bard, *supra* note 60, at 242; Cahan, *supra* note 12, at 5; Cane, *supra* note 16, at 215; Closen, *supra* note 58, at 55; Cramton, *supra* note 5, at 1; D.J. Djonovich, *supra* note 3, at 146-49; Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227 (1967); Edwards, *Hail to Law Reviews*, 1 J. MARSHALL J. PRAC. & PROCED. 1 (1967); Fidler, *supra* note 6, at 48; Havighurst, *supra* note 33, at 22; Hervey, *supra* note 31, at 149; Horowitz & Netterville, *Unprivileged Refusal to Reap Where One Has Not Sown*, 12 J. LEGAL EDUC. 201 (1959); Kester, *Faculty Participation in Student-Edited Law Reviews*, 36 J. LEGAL EDUC. 14 (1986); Killeen, *supra* note 9, at 1; Marsh, *The Law Review and the Law School: Some Reflections About Legal Education*, 42 U. ILL. L. REV. 424 (1947); Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093 (1986); Mewett, *supra* note 34, at 188; Moreland, *Unfair Domination of the Law Reviews*, 12 J. LEGAL EDUC. 424 (1960); Murray, *supra* note 53, at 566; Nader, *supra* note 17, at 493; *Legal Publications: A New Growth Industry*, New York Times, Aug. 19, 1988, at B5, col. 3; Noteboom & Walker, *The Law Review—Is It Meeting the Needs of the Legal Community?*, 44 DEN. U.L. J. 426 (1967); Nussbaum, *supra* note 14, at 381; Posner, *supra* note 47, at 1343; Riggs, *The Law Review Experience: The Participant View*, 31 J. LEGAL EDUC. 646 (1981); Rodell, *supra* note 4, at 38; Rodell, *supra* note 40, at 279; Schlegel, *An Endangered Species?*, 36 J. LEGAL EDUC. 18 (1986); Scharztz, *Civilizing the Law Review*, 20 J. LEGAL EDUC. 63 (1967); *Magazine and Manifesto*, 18 STUDENT LAW. Oct. 1989, at 3; Swygert & Bruce, *supra* note 2, at 739; Taylor, *supra* note 17, at 251; *Seat of Higher (L)earning*, TIME, Dec. 25, 1989, at 69; Traynor, *supra* note 15, at 3; Turner, *supra* note 57, at 550; Zenoff, *supra* note 29, at 21.

65. The extent that individuals within these groups are aware of, or even recognize, such vested self-interest is not clear. However, in the expression of the avowed purposes of specific legal publications, or articles, legal writers rarely include such honest statements of intent as: "To satisfy tenure requirements," "To show the Dean I should get a raise," "To fulfill my law review writing requirement," "To have the law school name on a Law Review," or "To establish myself as a marketable expert in this field." It is interesting that only one commentator advocates authors declare their interest in the subject matter of their article. See Douglas, *supra* note 64, at 227. That recommendation would not approach the candor of the above examples

legal scholar fashion, the reader will cry, "What is your authority, where is the proof!" Proof resides both before the reader of this review and other legal journals. Proof resides in the cliché: "Law review articles are meant to be written and not read."<sup>66</sup>

### III. CONCLUSION

Traditionally, legal commentary requires some sort of resolution of the problem stated in the body of the article. The problem outlined here, however, is not so simply and summarily disposed of. The faults of the legal publication system are well known to those familiar with it, as evidenced by the earlier review of past criticism. The more difficult problem is how to deal with the very real factor of self-interest that drives the student-edited publication system and clogs the processes that could lead to reform. There has, in the past, been an "underground" recognition of the self-interest factor within the law review system. Too often, this recognition is coupled with an assertion of freedom from overt self-serving motivations by virtue of the non-commercial status of student law reviews. Or, commentators admit law reviews' faults but forgive them because of the good and noble purposes that they serve. This misperceives the very real rewards that flow from those adept at legal publishing. Without a clear, uncluttered idea of what purpose the law review system actually serves for people in the legal community who have created it, and who benefit by it, it will not be possible to have any change that is contrary to that purpose, however sincere the reformers are.

Until the community of legal scholars penalizes its members for publishing articles for publication's sake; until such time as law review's value to the student is not measured in access to a high paying job; and until such time as deans view the contents of a school's review as being more important than the fact of its flag waving potential, there will always be a powerful and disturbing element of personal self-interest in legal scholarship. If the legal community is comfortable with self-interest as the major factor in legal writing, as it seems to be, then perhaps it has the type of legal publication system it desires (or perhaps deserves). Honesty compels members of the system<sup>67</sup> to echo the cry of the small boy in a well-remem-

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(this author practices what he preaches; see *infra* n. 67).

66. Hopefully, this article will buck the trend, as it was written to provoke thoughtful discussion as to the role and purpose of what is a powerful force in American legal education.

67. Honesty compels this writer to admit that his main purpose in writing this article is to complete the requirements for third-year law review members, thus, gaining two additional credit hours towards graduation and a nifty certificate to frame and add to all the others on the office wall. Informal discussions with other review



bered children's fable. Emperor Law Review parades by us all clothed in the garments of educational purpose, scholarship, and public service; while everyone sees his nakedness, few will say out loud, "Why, he doesn't have any clothes on at all!"

GEOFFREY PRECKSHOT

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members reveal similar motivations, but without the similar candor in print. Whether this lack of candor reveals hypocrisy, or simply good sense, is an open question.