

# *Law "Reviews"? The Changing Roles of Law Schools and the Publications they Sponser*

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# LAW “REVIEWS”? THE CHANGING ROLES OF LAW SCHOOLS AND THE PUBLICATIONS THEY SPONSOR

LESLIE FRANCIS\*

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Law reviews have complex and changing missions. They began as genuine reviews of current law: digests of areas of law or recent legal developments aimed at alumni and practicing lawyers more generally. For this function, citation accuracy and appropriate reliance on authority are central. Thus, insuring the integrity of an article as a report or digest of existing law involves tasks that law students are equipped to learn from and to perform well. Yet this review function has been significantly superseded in the contemporary law academic publishing world for a variety of reasons, not least the easy availability of electronic search engines for lawyers to use in identifying relevant cases themselves but also changing views of the roles of law schools, the nature of legal education, and expectations of law faculty as scholars. Theoretical and interdisciplinary work has become increasingly characteristic of legal scholarship. Even more traditional “doctrinal” scholarship has become increasingly analytical. The appropriate student role in evaluating and editing these types of work is far less clear. Law school education is changing, too, in response to economic pressures and the evolution of the legal profession.

This Essay explores the structure of student editorship in light of the changing missions of law reviews and law schools today. This exploration is very much in the tradition of the early establishment of law reviews, which were seen as a critical component in the social function of law schools and the nature of legal education. Several recent articles have offered heated criticisms of

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current submission and editorial practices, especially the lack of masked<sup>1</sup> and peer reviewing, the submission cycle and the massive flood of multiple submissions, and editorial processes that are frustrating to both authors and editors alike. While I agree with at least some of these criticisms, I also think that they could gain needed insight and direction from reflection on the roles of law reviews and of law schools in their production and support. I am particularly concerned about how the current structure of legal academic publication distorts the role of scholarship in law schools in relation to both faculty and students. I begin with a hopefully enlightening snapshot comparison of the types of publications found in law reviews before 1900; in the years 1925, 1950, 1975, and 2000; and in 2015. I then consider the arguments for masked and peer review of these types of publications. Finally, I argue that law schools must play a far more significant role than they now do in consideration of the functions and effects of the law reviews they publish, for their students, their faculty, and the legal world more generally.

## I. LAW REVIEWS OVER THE YEARS: A SNAPSHOT

This Section presents an overview of how law reviews and their missions have changed. From their beginnings as legal digests aimed primarily at law school alumni or local practitioners, law reviews now take many forms. Because the universe is so vast, this snapshot is perforce selective, as I explain below.

*Methodology*—My data set includes the top ten student-edited law reviews as identified on composite score by the law library at Washington and Lee Law School in 2016.<sup>2</sup> (These were *Harvard Law Review*, *Yale Law Journal*, *University of Pennsylvania Law Review*, *Stanford Law Review*, *Columbia Law Review*, *UCLA Law Review*, *Michigan Law Review*, *Georgetown Law Journal*, *Iowa Law Review*, and *Duke Law Journal*.) I added in the one additional law review ranked in the top ten for impact factor, a frequent measure of scholarly

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1. I prefer the term “masked” to “blind” reviewing, in keeping with the disability rights criticism of the latter term. See, e.g., Berit Brogaard, *Why ‘Blind Alley’, ‘Blind Faith’ and ‘Blind Refereeing’ May be Offensive*, NEW APPS: ART, POLITICS, PHILOSOPHY, SCIENCE (Sept. 4, 2013, 1:19 PM), <http://www.newappsblog.com/2013/09/why-blind-alley-blind-faith-and-blind-refereeing-may-be-offensive.html> [<https://perma.cc/7BUN-G4TL>]. The idea here is that the identity of authors is concealed from reviewers and the identity of reviewers is concealed from authors. *Id.* Part II discusses the advantages and disadvantages of masked reviewing in more detail.

2. *Law Journals*, WASH. AND LEE UNIV. SCH. OF LAW <https://managementtools4.wlu.edu/LawJournals/> [<https://perma.cc/QFA5-DNDM>] (last visited Feb. 12, 2018). Impact factor is widely regarded as one measure of scholarly quality. See, e.g., *Assessing Journal Quality: Journal Quality*, BOS. COLL. LIBRARIES, <https://libguides.bc.edu/journalqual> [<https://perma.cc/4T5G-SQ7S>] (last updated Feb. 2, 2018, 1:35 PM).

importance, the *Cornell Law Review*. Full scanned copies of these publications are available from the HeinOnline database.<sup>3</sup> I then reviewed articles published before 1900 in the three journals established in the 19th century; articles published in 1925 in the seven journals then in print; and articles published respectively in 1950, 1975, 2000, and 2015 in all of these journals. I limited my review to publications identified as “articles,” including those in symposia; particularly in the early years, many of these were quite short. I did not include book reviews, reprints of occasional speeches, student prize papers, student-authored publications, or discussions of the state of the legal profession or legal education. I counted articles published in short installments as a single article; some of these were multi-section doctrinal reviews of an area of the law.<sup>4</sup> In addition, I reviewed initial statements of purpose found in some of these law reviews or on their web sites, together with any available changes and commentary over the years.

I classified the articles reviewed as primarily digest, primarily doctrinal, primarily advocacy, primarily legal theory, or primarily interdisciplinary in nature. I defined the categories as follows. I rated an article as *primarily digest* if it consisted largely of descriptions of one or more cases, statutes, procedures, or legal events such as treaties or wars in a given subject matter or jurisdictional area. I rated an article as *primarily doctrinal* if it developed systematic claims about the state of legal doctrine in a given area of law, including what the law in the area should be.<sup>5</sup> An article was *primarily advocacy* if it had the expressed goal of advancing the position of a particular client, interest group, or political actor or party.<sup>6</sup> Advocacy scholarship is difficult to identify without extensive background knowledge of the author; my criterion for this was whether the authorial footnote indicated an advocacy connection or whether such a connection was explicitly stated within the article. The only articles I found

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3. HEINONLINE, <https://home.heinonline.org/> [<https://perma.cc/T5TM-27AJ>] (last visited Jan. 28, 2018).

4. For example, Christopher Columbus Langdell published an eight-part survey of equity jurisdiction in the *Harvard Law Review* beginning in 1887. Christopher Langdell, *A Brief Survey of Equity Jurisdiction* (pts. I–VIII), 1 HARV. L. REV. 55, 111, 355 (1887–1888), 2 HARV. L. REV. 241 (1888–1889), 3 HARV. L. REV. 237 (1889–1890), 4 HARV. L. REV. 99 (1890–1891), 5 HARV. L. REV. 101 (1891–1892), 10 HARV. L. REV. 71 (1896–1897). Langdell was Dean of Harvard Law School from 1870–1895 and generally credited with the development of the case method of legal education.

5. This characterization benefited from the recent discussion by William Baude, Adam Chilton, and Anup Malani about how to make doctrinal scholarship more rigorous. William Baude et al., *Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews*, 84 U. CHI. L. REV. 37, 38 n.2 (2017).

6. For a discussion of scholarly advocacy of this type, see Rebecca S. Eisenberg, *The Scholar as Advocate*, 43 J. LEGAL EDUC. 391 (1993).

explicitly indicating an advocacy relationship were in a symposium in the *Columbia Law Review* on the law and political parties<sup>7</sup> and an article in the *Cornell Law Review*<sup>8</sup> by the author of the brief for the petitioner in the Violence Against Women Act case<sup>9</sup> before the Supreme Court. Articles that reflected generally on the nature of law or the legal process I classified as primarily *legal theory*. Finally, articles that drew significantly on methodologies from other disciplines to the extent that evaluating their scholarship would have required considerable methodological competence in that discipline, I rated as *primarily interdisciplinary* in nature.

These data are only a snapshot, limited to selected years, selected journals, and my own classificatory judgments. They are presented in chart form in Appendix I. However, I hope they are sufficiently revealing of tectonic shifts in the law review landscape that should inform issues such as whether law reviews use peer review and masked authorship, as well as the roles of law reviews in law schools and legal scholarship.

*Law Reviews in the 19th Century*—Before 1900, only three of the current top law reviews had begun publishing; the first was the *University of Pennsylvania Law Review* in 1852,<sup>10</sup> followed by the *Harvard Law Review* in 1887<sup>11</sup> and the *Yale Law Journal* in 1891.<sup>12</sup> During this time period, nearly all of the articles published were either digests or doctrinal; they were

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7. Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753 *passim* (2000); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775 *passim* (2000). One other article revealed the author's frequent service as an expert witness in cases of the type discussed. The author stated explicitly that he did not believe this service indicated advocacy bias. Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2276 (2000). Another revealed the author's service for a non-profit. David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000). I suspect that this methodology significantly undercuts advocacy scholarship. In the early days of law reviews, many of the articles were published by practitioners or by faculty who were also practicing law; it seems likely that many of the articles were written in support of particular clients but this cannot be determined from the articles themselves. Allegations persist that contemporary legal scholarship is deeply intertwined with advocacy in ways that are not made explicit. See, e.g., Eisenberg, *supra* note 6; *Transcript—Conference on the Ethics of Legal Scholarship*, 101 MARQ. L. REV. 1083, 1109 (2018) (Robin West).

8. Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109 (2000).

9. *United States v. Morrison*, 529 U.S. 598 (2000).

10. 1 AM. L. REG. i (1852).

11. 1 HARV. L. REV. i (1887–1888).

12. 1 YALE L.J. i (1891).

characteristically quite short and divided into separate segments if they were more than about ten pages in length. These early journals sought to showcase their schools' legal education or scholarship and serve their school's alumni.

The *University of Pennsylvania Law Review* began as *The American Law Register* in 1852.<sup>13</sup> In that form, it published abstracts and fuller digests of both American and English decisions, reviews of areas of the law that were not identified by author or only by the author's initials, lectures, notices of new books, and obituaries.<sup>14</sup> It also published occasional short commentaries on the legal profession or discussions of the state of legal education.<sup>15</sup> It began giving full authorial credit in 1871.<sup>16</sup> My classification of articles begins with these fully credited articles and omits very short commentaries even when given authorial credit.

Almost all of the articles in the early days of the *University of Pennsylvania Law Review* were either primarily digests or primarily doctrinal analysis. These dealt with areas in which the law was developing, from tort actions;<sup>17</sup> to new technologies such as street cars, railroads,<sup>18</sup> and telephones; to labor strikes.<sup>19</sup> Many were penned by practitioners who taught at the law school; the school began transforming to full time faculty when William Draper Lewis became Dean in 1896.<sup>20</sup> There were a few scientific reports about toxicology or blood chemistry but no other contributions that relied on learning from other disciplines.<sup>21</sup> The theoretical articles from this period were commentaries on

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13. *Law Review*, UNIV. PA. LAW SCH., <https://www.law.upenn.edu/journals/lawreview/> [<https://perma.cc/3JBF-DS8X>] (last visited Feb. 13, 2018).

14. See Edwin J. Greenlee, *The University of Pennsylvania Law Review: 150 Years of History*, 150 U. PA. L. REV. 1875, 1879 (2002); see, e.g., 2 AM. L. REG. iii (1853).

15. See Greenlee, *supra* note 14, at 1879; see, e.g., *Legal Miscellany: The Law and the Lawyers*, 7 AM. L. REG. 313 (1858) (discussing lawyer's duty of confidentiality); *Legal Studies on the Continent*, 6 AM. L. REG. 577 (1858) (reviewing study of law on the European continent); Emory Washington, *Legal Education*, 21 AM. L. REG. 65 (1873).

16. The initial credited article is J.H. Thomas, *Homestead and Exemption Laws of the Southern States*, 19 AM. L. REG. 1 (1871).

17. See, e.g., *The Doctrine of Negligence*, 9 AM. L. REG. 129 (1861); Christian Koerner, *Negligence and the Rule of Damages in Actions Therefor*, 23 AM. L. REG. 265 (1875).

18. See, e.g., *Liability of Railroad Companies for Negligence*, 16 AM. L. REG. 449 (1868).

19. See, e.g., William Draper Lewis, *Strikes and Courts of Equity*, 46 AM. L. REG. 1 (1898); P. C. Knox, *The Law of Labor and Trade*, 45 AM. L. REG. 417 (1897).

20. *Law School: A Brief History*, UNIV. PA. ARCHIVES & RECORDS CTR., <https://www.archives.upenn.edu/histy/features/schools/law.html> [<https://perma.cc/2QH3-WQB7>] (last visited Feb. 13, 2018). Lewis later founded the American Law Institute at Penn in 1923. *Creation*, AM. LAW INST., <https://www.ali.org/about-ali/creation/> [<https://perma.cc/VQR7-WNM7>] (last visited Mar. 3, 2018).

21. See, e.g., *Forensic Medicine*, 1 AM. L. REG. 11, 11 (1852).

the nature of law or legal history such as comparisons between civil and common law.<sup>22</sup>

In its inaugural issue, the *Harvard Law Review* editorial comment reflected its intended connection to legal education at that institution:

Our object, primarily, is to set forth the 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 done under the Harvard system of instruction.<sup>23</sup>

Most of the articles published in the early years of *Harvard* were, like those in *Pennsylvania*, either primarily digests or doctrinal. Perhaps the most famous of the doctrinal pieces was Warren and Brandeis's "Right to Privacy,"<sup>24</sup> but there were many others of note, such as Holmes's two-part analysis of agency<sup>25</sup> and Langdell's multi-part survey of equity jurisdiction that continued over a number of years.<sup>26</sup> From the beginning, *Harvard* also published frequent jurisprudential pieces; Holmes's "The Path of the Law"<sup>27</sup> is the most well-known example of these but there were also pieces on a wide range of jurisprudential topics such as the role of judicial legislation,<sup>28</sup> the definition of jurisprudential concepts,<sup>29</sup> and various aspects of the development of the common law.<sup>30</sup> There was a distinct trend towards more doctrinal and theoretical pieces as the turn of the century approached in both the *Pennsylvania* and the *Harvard* reviews; this evolution perhaps explains the apparent greater frequency of these types of articles in the latter publication.

The *Yale Law Journal* was the third of the student-edited periodicals to appear in the 19th century. Founded by seven students, it too was composed

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22. See, e.g., *Old Questions—Walker's Theory of the Common Law*, 1 AM. L. REG. 577 (1853).

23. *Notes*, 1 HARV. L. REV. 35, 35 (1887–1888).

24. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890–1891).

25. Oliver Wendell Holmes, Jr., *Agency* (pts. I & II), 4 HARV. L. REV. 345 (1890–1891), 5 HARV. L. REV. 1 (1891–1892).

26. Langdell, *supra* note 4.

27. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1896–1897).

28. See, e.g., Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172 (1891–1892).

29. See, e.g., John C. Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21 (1892–1893).

30. See, e.g., Frederick Pollock, *The Continuity of the Common Law*, 11 HARV. L. REV. 423 (1897–1898).

almost entirely of digests and descriptions of particular legal events of note, along with doctrinal analysis. *Yale* also published occasional general commentaries such as a criticism of then-prevalent law dictionaries for including confusing definitions of non-legal terms.<sup>31</sup> *Yale* also reprinted one brief filed on behalf of the United States in a case before the Supreme Court.<sup>32</sup> One essay published as the Spanish-American War was beginning argued that U.S. “national character” encompasses “[the] duty to sympathize with, and in extreme cases to aid, the struggles of a people resisting atrocious tyranny”; this essay apologized for “departing somewhat from the ordinary range of legal thought . . . in a strictly law journal.”<sup>33</sup> Finally, *Yale* printed an opening address at the meeting of the American Economic Association on the relationship between economic science and government<sup>34</sup> and a history of radicalism and conservatism in American political parties.<sup>35</sup>

*Law Reviews During the 20th Century*—By 1925, the *Columbia Law Review*, the *Michigan Law Review*, the *Georgetown Law Journal*, the *Cornell Law Quarterly*, and the *Iowa Law Bulletin* had joined the initial three.<sup>36</sup> In its inaugural issue, the *Michigan Law Review* stated that its purpose was “to give expression to the legal scholarship of the University” along with other service to the profession and reports on developments in jurisprudence—a role it judged was not “quite the purpose” served by other journals then in the field.<sup>37</sup> *Cornell*, begun in 1915, saw its formation “in the request of our students and in the suggestions of our alumni that the work and interests of the law school be represented by a medium of expression that might periodically reach and be of some service to the hundreds of Cornell lawyers who are widely distributed throughout the country.”<sup>38</sup> *Cornell* planned to engage its faculty with its alumni, provide educational benefit and a scholarly experience for students, and foster needed legal reform, all through the lens of a focus on the law of New York.<sup>39</sup> At its 100th anniversary, *Cornell* reaffirmed its support for its

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31. See, e.g., William C. Anderson, *Popular Words in Law Lexicons I*, 4 YALE L.J. 1 (1894).

32. Judson Harmon, *Brief for the United States in the Case of the United States of America v. the Trans-Missouri Freight Association*, 6 YALE L.J. 295 (1897).

33. Talcott H. Russell, *The National Idea*, 7 YALE L.J. 346, 346–48 (1898).

34. Arthur T. Hadley, *The Relation Between Economics and Politics*, 8 YALE L.J. 194 (1898).

35. Nathan A. Smyth, *Evolution from Radicalism to Conservatism in the History of American Political Parties*, 9 YALE L.J. 31 (1899).

36. See *infra* TABLE 1.

37. *Announcement*, 1 MICH. L. REV. 58, 58 (1902).

38. Edwin H. Woodruff, *Editorial*, 1 CORNELL L. Q. 27, 28 (1915).

39. *Id.*



contributions to students beyond classroom instruction “to shape legal thinking and practice” and “to publish the works of Cornell Law faculty and students.”<sup>40</sup>

In 1925, although many of the articles remained digests or doctrinal analysis, the reviews were beginning to branch out more extensively into theoretical and interdisciplinary work. Doctrinal work was becoming more common than digests particularly in some of the longer-established law reviews. Articles were longer and there were more of them.<sup>41</sup> Also, many reviews were published by volumes linked to an academic rather than a calendar year, likely reflecting the responsibilities of a group of students for each volume. *Penn.*, in 1925, had a noticeably greater group of theoretical articles than in earlier years, such as several on constitutional theory and a highly abstract article on the concept of an act.<sup>42</sup> A two-part article on maritime law, although largely doctrinal, drew heavily from the economic theories of the day in developing its analysis.<sup>43</sup> *Yale* had one article on economic theory;<sup>44</sup> nearly all of its other articles were primarily doctrinal rather than digests.

At mid-century, law reviews were increasingly shifting towards doctrinal articles over articles that were primarily digests. Digests were largely relegated to student-authored sections consisting of both shorter case descriptions and longer, more analytic contributions.<sup>45</sup> By 1950, *Harvard* also had a “comment” section for shorter pieces by lawyers or academics discussing legal cases or issues of the day; this section contained pieces that might have been published earlier as articles that were primarily digest in nature.<sup>46</sup> Symposia were also more apparent; for example, in 1950, *Iowa* had a remarkably prescient five-article set of discussions on the need for national health insurance which I have classified as interdisciplinary because of the extent to which it draws on knowledge of the state of health care and the medical profession.<sup>47</sup> A particularly difficult article to categorize in 1950 was a piece in the *Pennsylvania Law Review* reviewing cases the Supreme Court failed to hear to develop an argument that the Court makes policy by what it fails to decide; I characterized it as more of a digest as it was primarily descriptive of what the

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40. Board of Editors, *Celebrating One Hundred Years*, 100 CORNELL L. REV. 765, 766 (2015). There was no mention of the earlier emphasis on the law of New York.

41. *E.g.*, compare 39 HARV. L. REV. iii (1925–1926), with 2 HARV. L. REV. iii (1888–1889).

42. Albert Kocourek, *Acts*, 73 U. PA. L. REV. 335 (1925).

43. Austin Tappan Wright, *Uniformity in the Maritime Law of the United States* (pts. I & II), 73 U. PA. L. REV. 123, 223 *passim* (1925).

44. See John R. Commons, *Law and Economics*, 34 YALE L.J. 371 (1925).

45. See, *e.g.*, 64 HARV. L. REV. iii (1950–1951).

46. See, *e.g.*, *id.*

47. Robert D. Abrahams, *Foreword*, 35 IOWA L. REV. 161, 162 (1950).

Court failed to do and did not attempt to ascertain the significance of the omissions for the development of legal doctrines.<sup>48</sup> However, it could also be thought of as an early example of an empirical legal study, albeit one that was primarily descriptive. Topics covered by law reviews of course shift with the issues of the day—late 19th century reviews were preoccupied by issues concerning new technologies and the emerging strategy of the labor strike—and law reviews in 1950 were noticeably preoccupied by the aftermath of World War II and the efforts to establish a stable regime of international law.<sup>49</sup>

By 1975, the landscape of law review publication had changed even more markedly, to the extent that the reviews more clearly resemble those of today.<sup>50</sup> The last-established journals in my data set, the *Duke Law Journal* (originally the *Duke Bar Journal*) and the *UCLA Law Review*, had been publishing for twenty-four and twenty-two years respectively. Articles were longer, often necessitating lengthy tables of contents or abstracts—one in the *Harvard Law Review* on reform of administrative law ran to over 150 pages<sup>51</sup>—and there were more of them in most reviews. Articles in a given issue were more likely to be linked by a common theme. For example, the *Pennsylvania Law Review* had a particularly notable set of articles on the adversary system grouped around Judge Marvin Frankel’s Cardozo lecture developing the contention that the adversary system “rates truth too low among the values that institutions of justice are meant to serve.”<sup>52</sup> *Duke* published an extensive interdisciplinary symposium on medical malpractice.<sup>53</sup> Some of these theme issues reflected important events in the life of the law school, like *Yale*’s sesquicentennial symposium in honor of seven professors at that school reaching retirement age at about that time.<sup>54</sup> Even a single case of significance such as the Supreme Court’s split over affirmative action in law school admissions could generate a set of articles from different doctrinal and theoretical perspectives.<sup>55</sup> Taking

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48. Fowler V. Harper & Alan S. Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 *passim* (1950).

49. See, e.g., Louis B. Wehle, *Comparative Law’s Proper Task for the International Court*, 99 U. PA. L. REV. 13 (1950).

50. An exception was the *Iowa Law Review*, which continued to publish articles with a focus on Iowa law, including a symposium on the bicentennial reform of the Iowa criminal code. *Proposed Criminal Law Reform in Iowa: A Symposium*, 60 IOWA L. REV. 429 (1975).

51. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1667–68 (1975).

52. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975).

53. *Symposium on Medical Malpractice*, 1975 DUKE L.J. 1177 (1975).

54. *Yale Law School Sesquicentennial Year*, 84 YALE L.J. 637 (1975).

55. Louis Henkin, DeFunis: *An Introduction*, 75 COLUM. L. REV. 483 (1975).

digests into an entirely different form, *Harvard* was publishing its annual Foreword to the Supreme Court term, a practice begun in the early 1950s as student digests but by 1975 shifting towards extended reflections on a theme characterizing the Court's term, authored by an eminent scholar most frequently from Harvard itself.<sup>56</sup> I did not include these in the classifications as they were not identified as "articles" by the review. *Michigan* published a two-issue project on government information and the rights of citizens that was without a listed author and so not classified thus making this journal's article count for the year especially low.<sup>57</sup> *Georgetown* published a full issue devoted to criminal law and procedure in the United States Courts of Appeals in 1974–1975 as part of its annual circuit notes; these would qualify as digests but are not categorized because no authorship is attributed.<sup>58</sup> Empirical work employing statistical methods was also apparent.<sup>59</sup> Finally, several articles from this year were supported by federal research grants, the first time this appeared in my data set.<sup>60</sup>

*Law Reviews in the 21st Century*—Changes from 1975 to 2000 and 2015 were not as noticeable as in earlier years. No articles appeared that could fairly be characterized as digests: this function was reserved almost entirely for student contributors. Doctrinal articles continued to be lengthy and often either highly theoretical or informed by data analysis.<sup>61</sup> Many drew on analytic structures from fields such as business, economics, political science, psychology, or sociology;<sup>62</sup> I continued to classify them as "doctrinal" if their primary function was to draw on the analysis to make recommendations for understanding or changing doctrines. A number of them self-characterized as

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56. Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT., 463, 463 (1995).

57. *Project: Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971 (1975).

58. 64 GEO. L.J. 165 (1975).

59. Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975); *Editors' Introduction: Statistical Evidence on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 164 (1975); Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975); Anthony Champagne & Amos Danube, *An Empirical Analysis of Decisions of Administrative Law Judges in the Social Security Disability Program*, 64 GEO. L.J. 43 (1975); Julius G. Getman, Stephen B. Goldberg, & Jeanne B. Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465 (1975); Peter Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61 (1975).

60. E.g., Clark C. Havighurst, *"Medical Adversity Insurance"—Has Its Time Come?*, 1975 DUKE L.J. 1233, 1233 (1975).

61. See, e.g., Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 623 (2015).

62. See, e.g., *id.* at 642 (citing to author's dissertation for her Ph.D. in sociology).

advancing a “new” or “novel” theory of the subject matter.<sup>63</sup> Some used data bases of legal cases, other data bases, or systematic interviews with legal actors<sup>64</sup> to shed light on doctrinal or practice shifts.<sup>65</sup> Others used business<sup>66</sup> or social science<sup>67</sup> methods to inform legal doctrines. Many authors publishing in the journals in my data set during this time period were on the equivalent of post-doctoral research fellowships or other kinds of short term appointments at law schools, positions structured to allow the time for extensive scholarly work.<sup>68</sup> *Harvard* continued its practices of publishing the Supreme Court Foreword, many student case notes, and fewer but longer articles.<sup>69</sup> *Yale* appears to have joined this tendency in 2000, including more book reviews and essays as well that were not classified as articles, but published considerably more articles in 2015. *Michigan* was devoting a full issue to a survey of books relating to the law, which were not classified as articles although many are quite substantive discussions of the books reviewed.<sup>70</sup> *Iowa* published by far the largest number of articles for a given year—forty-three—but the year featured several major symposia in honor of the law review’s centennial.<sup>71</sup> Law review authorship also diversified internationally, including scholars from Germany, Israel, Canada, and China.<sup>72</sup>

Perhaps the greatest 21st-century change in the law review publishing market is the entry of for-profit companies into management of the submission system. The bepress system was founded by academics in 1999; it runs the

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63. E.g., *id.* at 639.

64. E.g., Jonathan Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 747 (2015).

65. E.g., David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 664 (2015).

66. E.g., John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307, 312–13 (2000).

67. E.g., Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 628 (2000).

68. E.g., Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015); Kristen E. Eichensehr, *The Cyber-Law of Nations*, 103 GEO. L.J. 317 (2015); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015).

69. See, e.g., David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015). Compare 129 HARV. L. REV. (2015–2016), with 64 HARV. L. REV. (1950–1951).

70. See Linda S. Maslow, *Foreword: The Enduring Value of Books Related to the Law: A Librarian’s Perspective*, 113 MICH. L. REV. 761 (2015).

71. See 100 IOWA L. REV. (2014–2015).

72. Data on file with author.

ExpressO<sup>73</sup> submission system. This system was acquired by the publishing giant Elsevier in 2017.<sup>74</sup> Its competitor Scholastica entered the market in 2011.<sup>75</sup> The vast rush of multiple submissions during set periods has grown exponentially in recent years, but the top law reviews appear to have remained largely above the fray, at least so far as can be ascertained from the data I collected.

*Authorship*—In addition to data about types of articles, I identified the gender and university of every article author in 2015. I collected this additional data in order to see the extent to which these potentially biasing factors might correlate with selection processes and indirectly to test the claim that law review editors who cannot adequately judge articles rely on biased reputational proxies. The data indicate that there is at least a correlation between gender and publication in the law reviews in my data set: 226 authors were male-named and 81 authors female-named. Two law schools with law reviews not in my data set—NYU and Chicago—stood out for the number of faculty members appearing as authors in the journals I surveyed. Most schools with reviews in my data set also had significant numbers of authors publishing in these reviews. However, many of these were publications by the author’s home institution journal; law reviews clearly continue to showcase faculty at their host school along with faculty at other highly ranked schools. Seventy-six universities, one judge, two judicial clerks, one recent graduate of the law school, one governmental agency, and one non-profit were represented among the authors. These data clearly indicate that home institution plays a role; whether this is a problematic form of bias or integral to the function of law reviews within law schools is a question addressed in the final section.

## II. PEER REVIEW AND MASKED REVIEW

“Peer reviewing” means reviewing by people of similar position and competence in the field.<sup>76</sup> While it is controversial and clearly has flaws as currently practiced, it is defended primarily as a form of quality control and

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73. *ExpressO*, BEPRESS, <https://www.bepress.com/products/expresso/> [<https://perma.cc/4XJJ-ZZWG>] (last visited Mar. 9, 2018); *About*, BEPRESS, <https://www.bepress.com/about/> [<https://perma.cc/88LJ-EDNJ>] (last visited Mar. 9, 2018).

74. Lindsay McKenzie, *Elsevier Expands Footprint in Scholarly Workflow*, INSIDE HIGHER ED (Aug. 3, 2017), <https://www.insidehighered.com/news/2017/08/03/elsevier-makes-move-institutional-repositories-acquisition-bepress> [<https://perma.cc/RN7Q-PA8U>].

75. *About Us*, SCHOLASTICA, <https://scholasticahq.com/about> [<https://perma.cc/28LV-VJP6>] (last visited Mar. 9, 2018).

76. See Sara Rockwell, *A Guide for Manuscript Reviewers 2* (HHS Office of Research Integrity 2018), <https://ori.hhs.gov/sites/default/files/prethics.pdf> [<https://perma.cc/4B93-N72E>].

merit-based judgment of selection, whether for articles, grant funding, or other evaluative judgments in the scholarly world. “Masked” reviewing is judged to further impartiality, so that selection may be based on the stipulated criteria rather than on some form of personal connection, reputation, or other basis for judgment thought to be improper.<sup>77</sup> Like peer review, masked review is likely to be imperfect— anonymity may be very difficult to ensure in many scholarly fields—and has flaws. This section outlines the advantages and concerns of each of these practices as they apply in the context of law reviews.

*Peer Review*—In the sciences, manuscript quality and impartial judgment are standard justifications for peer review.<sup>78</sup> The peer review process is characterized as reflecting and setting standards for the field.<sup>79</sup> Ideally, the process should be constructive, providing criticism that can allow authors to improve their work before resubmissions or submissions to other outlets. Reviewers are expected to assess their competence and identify any problematic actual or apparent conflicts of interest before agreeing to do a review. Reviewers generally serve on a volunteer basis; the practice depends on the willingness of many academics to assume their fair share of the burdens of reviewing and to perform the function in a careful and timely way. Reviewers also are expected to respect the confidentiality of authors and the reviewing process and not to advantage themselves or others through what they learn from a review.

There are of course many ways such a trust-based system can go wrong. In small and highly competitive fields especially, reviewers may be able to identify competitors’ work and seek to take opportunistic advantage of the situation with negative reviews, appropriation of ideas, or awareness of likely competitive developments in the field. Reviewers may make commercially-motivated, biased, ideological, mean-spirited, ill-informed, or hasty judgments. Seniority bias, gender bias, and an overall conservative tendency may seriously impact or discriminate against novel voices or perspectives in a field.<sup>80</sup>

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77. See Andrew Tomkins et al., *Reviewer Bias in Single- Versus Double-Blind Peer Review*, 114 PROC. NAT’L ACAD. SCI. 12708, 12712 (2017), <http://www.pnas.org/content/114/48/12708> [<https://perma.cc/A4SN-7PU9>].

78. Rockwell, *supra* note 76, at 2; see also Irene Hames, *COPE Ethical Guidelines for Peer Reviewers*, COMM. ON PUBL’N ETHICS (Mar. 2013), [https://publicationethics.org/files/Ethical\\_guidelines\\_for\\_peer\\_reviewers\\_0.pdf](https://publicationethics.org/files/Ethical_guidelines_for_peer_reviewers_0.pdf) [<https://perma.cc/4QHB-WLF2>]; *Peer Reviewer Instructions: Ethical Responsibilities of Reviewers*, PROC. NAT’L ACAD. SCI., <http://www.pnas.org/page/authors/reviewers> [<https://perma.cc/J8EQ-9FAH>] (last visited Mar. 9, 2018).

79. Rockwell, *supra* note 76, at 2.

80. See Tomkins, *supra* note 77, at 12708.

Negative results may be more difficult to publish. Reviewer selection may have significant effects on acceptance, especially when fields are controversial and contested. Peer review may be inefficient and publication may be significantly delayed as a result.<sup>81</sup> Studies have documented the continued likelihood that errors will persist despite the peer review process but also suggest that the process can be improved and contributes significantly to the overall quality of scientific publications.<sup>82</sup>

Journals today are experimenting with a variety of practices that are designed to address some of these issues with peer review. Some journals are experimenting with a variety of forms of open peer review, including posting potential articles for open commentary.<sup>83</sup> These and related proposals see peer review as part of a cooperative project for improving the quality of publications rather than as a merit-based selection process. They are especially concerned to address ways in which the lack of transparency may conceal bias. Finally, these efforts are part of more general movements towards open science.<sup>84</sup>

*Masked Review*—Single masked review conceals the identity of authors from reviewers. Its goal is to guard against various forms of bias, particularly gender bias, famous-person bias, and institutional-prestige bias.<sup>85</sup> Double masked review conceals both the identity of authors and the identity of reviewers. The identity of reviewers is masked to encourage independent and frank judgment, as well as to guard reviewers against special pleading, attack, reputational harm, and retaliation. Some journals may also mask editors from any knowledge of the identity of authors, relying on submission services or journal managers to maintain the identity separation until final publication decisions are made. Masked review is typically regarded as a complement to peer review, although the two practices could be separated.

Like peer review, masked reviewing is imperfect. Identity may be difficult to conceal, particularly in fields with recognizable research programs or

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81. Steven Lubet, *Law Review vs. Peer Review: A Qualified Defense of Student Editors*, 2017 U. ILL. L. REV. ONLINE 1, 2 (2017), <https://illinoislawreview.org/online/law-review-vs-peer-review/> [<https://perma.cc/CQQ3-UMBX>].

82. See Elizabeth Wager, *Ethics: What is it For? Analysing the Purpose of Peer Review*, NATURE (2006), <http://www.nature.com/nature/peerreview/debate/nature04990.html> [<https://perma.cc/ZYF3-8G7Y>].

83. See Tony Ross-Hellauer, *What is Open Peer Review? A Systematic Review*, F1000RESEARCH (Apr. 27, 2017), <https://f1000research.com/articles/6-588/v1> [<https://perma.cc/LW3R-YBKP>].

84. See Tony Ross-Hellauer et al., *Survey on Open Peer Review: Attitudes and Experience Amongst Editors, Authors and Reviewers*, PLOS ONE (Dec. 13, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5728564/> [<https://perma.cc/XQX7-LQP9>].

85. Tomkins, *supra* note 77, at 12708.

distinctive voices. Articles may have been circulated in advance or published in pre-acceptance venues such as SSRN, making masking difficult when many in the pool of potential qualified reviewers are aware of the work. Even when individual identity is protected, inferences may be drawn about authors (not always reliably) from features such as writing style, examples, or descriptions of study populations. One recent study finds that single blind reviewers are more likely to evidence famous-author or prestigious-institution biases.<sup>86</sup> Although this particular study did not find gender was statistically significant as a predictor of submission acceptance, it did conclude that the literature overall supports a bias in favor of male authors when author gender is known or inferred.<sup>87</sup> Full transparency may help to counter these effects, as gender bias may become apparent in a continuing discursive practice; on the other hand, with full openness commentary may become diffuse and difficult to assess.

*Law Reviews, Peer Review, and Masked Review*—Law reviews have remained largely apart from peer and masked reviewing and these controversies. Some more specialized journals peer review but do not mask.<sup>88</sup> The *South Carolina Law Review* has experimented with peer review as an effort to help student editors make better selection decisions.<sup>89</sup> However, the effort to generalize this practice no longer appears to have an active website and the current submission information for the review does not indicate the possibility of peer review.<sup>90</sup> Of the journals reviewed in the snapshot above, the *Harvard Law Review* and the *Yale Law Journal* have explicit author instructions requiring anonymity in order to ensure that reviewing is masked.<sup>91</sup> There are

86. *Id.*

87. *Id.* at 12710; see also Kanu Okike et al., *Single-blind vs Double-blind Peer Review in the Setting of Author Prestige*, 316 JAMA 1315, 1315–16 (Sept. 27, 2016), <https://jamanetwork.com/journals/jama/fullarticle/2556112> [<https://perma.cc/Z2HH-FPUR>].

88. See *Submissions*, JURIMETRICS, <https://web.law.asu.edu/jurimetrics/JurimetricsJournal/Submissions.aspx> [<https://perma.cc/TWD8-N4PA>] (last visited Mar. 9, 2018); see also *Instructions to Authors*, OXFORD ACADEMIC, [https://academic.oup.com/jlb/pages/General\\_Instructions#ManuscriptRequirements](https://academic.oup.com/jlb/pages/General_Instructions#ManuscriptRequirements) [<https://perma.cc/4AZG-4NAD>] (last visited Mar. 9, 2018).

89. John P. Zimmer & Jason P. Luther, *Peer Review as an Aid to Article Selection in Student-Edited Legal Journals*, 60 S.C.L. REV. 959, 960–61 (2009).

90. The weblink, <http://www.legalpeerreview.org/>, is inactive. The submission information of the *South Carolina Law Review* does not mention peer review. See *Submissions*, S.C. L. REV., <http://sclawreview.org/submissions/> [<https://perma.cc/3DY8-V5TG>] (last visited May 17, 2018). The plan to place a link to a peer review consortium on the law review website appears not to be active at the present time. See Zimmer & Luther, *supra* note 89, at 972.

91. *Submissions*, HARV. L. REV., <https://harvardlawreview.org/submissions/> [<https://perma.cc/83VQ-F5Y9>] (last visited Mar. 9, 2018); *Volume 127 Submission Guidelines*, YALE L.J., [https://www.yalelawjournal.org/files/V127SubmissionGuidelines\\_o2rob71e.pdf](https://www.yalelawjournal.org/files/V127SubmissionGuidelines_o2rob71e.pdf) [<https://perma.cc/BT56-LVCK>] (last visited Mar. 9, 2018).



law reviews beyond the snapshot that state explicitly that they may peer review and that, if they do so, they will double mask the reviewing process.<sup>92</sup> Most journals included in the snapshot make clear that they are student edited and that students make decisions about publications; for example, the *Stanford Law Review* states explicitly, “The *Law Review* is operated entirely by Stanford Law School students and is fully independent of faculty and administration review or supervision. Student *Law Review* editors select, edit, and publish articles and notes on the cutting edge of legal scholarship. They are trained to critically and comprehensively evaluate submissions.”<sup>93</sup> The *Columbia Law Review* “strongly prefers” peer review but “contingent on piece-selection time frames and other extenuating circumstances.”<sup>94</sup> Several other law reviews in this group may use some form of peer evaluation but do not include this in their information for authors. The *Marquette Law Review*, in which this Essay is published, has information for prospective authors that does not include either peer or masked review.<sup>95</sup>

As described in the snapshot, law reviews were typically established by students and seen as part of the student educational process. They were not initially designed to be academic journals publishing original research. Rather, they were designed to be what their titles suggest: reviews of the law in the service of their school’s alumni or members of the bench and bar who might be expected to read them. They published syntheses of areas of the law or discussions of recent decisions. In an age in which electronic searches of legal data bases were not yet possible, they called attention to decisions that might otherwise have been missed. They also published a variety of reflections on law that would today be characterized as “jurisprudence” or “legal theory.” Only rarely did they publish interdisciplinary work.

As such reports of the law, law reviews were governed by a certain kind of authority. They needed to report cases accurately, so the lawyers and judges could rely on the reports they gave. This concept of authority was a great fit for training students, especially in accurate citation and in close reading of cases. But it is a poor fit even for doctrinal scholarship as practiced today, for several reasons. First, what makes good scholarship is not accurate citation; it

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92. *Submissions*, U. CHI. L. REV., <https://lawreview.uchicago.edu/submissions> [<https://perma.cc/B3VS-RKCM>] (last visited Mar. 9, 2018).

93. *About the Stanford Law Review*, STAN. L. REV., <https://www.stanfordlawreview.org/about/> [<https://perma.cc/8NZN-FAVT>] (last visited Mar. 9, 2018).

94. *General Submission Instructions*, COLUM. L. REV., <http://columbialawreview.org/submissions-instructions/> [<https://perma.cc/U5MS-62EF>] (last visited Mar. 9, 2018).

95. See *Why Submit to Marquette Law Review?*, MARQ. L. REV., [http://scholarship.law.marquette.edu/mulr/prospective\\_authors.html](http://scholarship.law.marquette.edu/mulr/prospective_authors.html) [<https://perma.cc/7B8B-VS67>] (last visited Mar. 9, 2018).

is careful analysis and argument. (Of course, inaccurate citation is not a good thing; it is just that accurate citation isn't the primary feature of a good article. It's a presupposition.) Second, accuracy in the citations provided is not a measure of the breadth or depth of the author's analysis. An author might have authority for a particular claim but miss how the claim is undermined by an entire area of thought that the author ignores. Third, and relatedly, even a string citation without an explanation of the methodology used in selecting the citations can serve merely to reinforce an ideological position rather than to provide evidence that has some claim to objectivity. As Baude, Chilton & Malani point out, there may be an entire range of authority that is ignored—and the omission of which passes unrecognized—if a single citation or even a string of citations is taken as support for a doctrinal claim when the methodology of how the citation was selected is unclear.<sup>96</sup> Student editors who have had two years of law school may be poorly equipped to identify such gaps.<sup>97</sup> They are even more likely to be unable to assess adequately the increasing use of methodologies drawn from other disciplines in law review scholarly publications.

In one influential survey, law review editors reported a tendency to rely on authorial credentials when making selection decisions.<sup>98</sup> The authors of the survey hypothesize that reliance on reputation as a proxy is particularly likely when students lack expertise.<sup>99</sup> It is not entirely clear, however, that the data bear this out. In my survey, authors from eighty different venues, including judicial clerkships, law schools, and university departments outside the law school, published articles in these journals in 2015. What is noticeable is that some law schools were significantly overrepresented, although this can be at least partially explained by the tendency of law reviews to publish articles by faculty members at their own institutions.

Thus there are clear quality and bias issues with current law review article selection processes. Peer review or masking, norms in other disciplines, might help despite their flaws. I have not been able to find published accounts of the apparent demise of the South Carolina experiment with peer review, although I would hypothesize from statements on many law review websites that the

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96. Baude et al., *supra* note 5, at 39–40; *see also* Michael L. Closen & Robert M. Jarvis, *The National Conference of Law Reviews Model Code of Ethics: Final Text and Comments*, 75 MARQ. L. REV. 509, 527 (1992).

97. Zimmer & Luther, *supra* note 89, at 962.

98. Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those With All the Power—Student Editors*, 59 S.C. L. REV. 175, 180 (2007).

99. *Id.* at 184 n.45; *see also* Barry Friedman, *Fixing Law Reviews* 15 nn.51–52 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 17-29, 2017), <https://ssrn.com/abstract=3011602> [<https://perma.cc/8R3Q-ANWX>] (relying heavily on the Christensen & Oseid study in recent assessment of the flaws of law reviews).

severe time pressures under which the review process operates and the flood of multiple submissions, combined with the lack of an enforcement regime, would undermine efforts by any single law review to move significantly to peer review. Masking author identity, however, might be more achievable by law reviews acting on their own. I now put these findings in the context of the changing nature of legal education and the roles of legal scholarship.

### III. LAW REVIEWS AND THE CHANGING NATURE OF LEGAL EDUCATION

Legal education today is under significant pressures, to state the obvious. In response to the recession and precipitous declines in available jobs particularly in law firms, law schools have been extensively criticized by professional organizations and by students. Several schools have closed, others have been chastised by the ABA for admitting students who are unlikely to succeed, and many have cut back the size of their entering class in response to declining numbers of applicants judged to be qualified.<sup>100</sup> ABA reports have highlighted what are identified as gaps between the legal academy and the practice of law.<sup>101</sup> ABA accreditation standards now emphasize the role of law schools in teaching professionalism and engaging students in experiential learning.<sup>102</sup> However, despite complex attention to learning outcomes, assessment, opportunities for experiential and pro bono activities, and even writing requirements, the ABA Standards are silent with regard to the role and potential contributions of law reviews to the changing world of law schools.

Students, too, have been highly critical of current law school practices. As reflected in the litigation that has been brought against several law schools, the students' primary concerns are misrepresentation of placement records coupled with high levels of student debt.<sup>103</sup> Concerns about educational quality are

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100. See Rick Seltzer, *Law Schools Under the Microscope*, INSIDE HIGHER ED (Jan. 16, 2018), <https://www.insidehighered.com/news/2018/01/16/aba-letters-accreditation-reflect-contracting-market-law-schools> [<https://perma.cc/8R3Q-ANWX>].

101. AM. BAR ASS'N COMM. ON THE PROF'L EDUC. CONTINUUM, SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, TWENTY YEARS AFTER THE MACCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE CHALLENGES FACING THE ACADEMY, BAR, AND JUDICIARY (Mar. 20, 2013), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/june2013councilmeeting/2013\\_open\\_session\\_e\\_report\\_prof\\_educ\\_continuum\\_committee.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june2013councilmeeting/2013_open_session_e_report_prof_educ_continuum_committee.authcheckdam.pdf) [<https://perma.cc/G77L-WYKG>].

102. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. ch. 3 (AM. BAR ASS'N 2017).

103. Staci Zaretsky, *Twelve More Law Schools Slapped with Class Action Lawsuits Over Employment Data*, ABOVE THE LAW (Feb. 1, 2012, 2:42 PM), <https://abovethelaw.com/2012/02/twelve-more-law-schools-slapped-with-class-action-lawsuits-over-employment-data/?rf=1> [<https://perma.cc/U3LH-MMX8>].

focused on ability to pass the bar and the costs of the degree, which makes economic if not necessarily educational sense.<sup>104</sup>

These moves towards practical and experiential learning have also placed pressure on law faculty. The ABA standards for faculty with respect to scholarship state only that faculty should meet the expectations of their respective schools.<sup>105</sup> Chief Justice Roberts’ comment that most law faculty scholarship is irrelevant drew ire<sup>106</sup> and appears not to reflect his actual citation practice.<sup>107</sup> Yet concerns that tenure standards for law faculty are stiffening, either covertly or overtly, appear regularly in law faculty blogs.<sup>108</sup> Changes towards experiential learning place cross-pressures on faculty, too: needs for changes in course design and pedagogical techniques, teaching that is more labor intensive, and increased teaching responsibilities.

Law reviews could be brought far more to the center in these conflicts, in ways that are revealed by the snapshot above. From their beginning, law reviews played an important role in active engagement of law students in learning the law. Although for some law reviews the practice was the independence of student editors from the beginning, this was not uniform; at all law reviews faculty were involved in the production of the material published in article form. These roles have not been lost entirely in recent years, as several law review centennial celebrations reveal. In reflecting on the origin of the *Columbia Law Review* on the occasion of its 100th anniversary, Barbara Aronstein Black attributed its formation to “[a] certain intellectual restiveness, a sense of needing more than is provided by their school’s formal curriculum—a phenomenon familiar enough to us today.”<sup>109</sup> The centennial issue of the *Iowa*

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104. GALLUP & ACCESSLEX INST., GALLUP, EXAMINING VALUE, MEASURING ENGAGEMENT: A NATIONAL STUDY OF THE LONG-TERM OUTCOMES OF A LAW DEGREE (2018), <https://www.accesslex.org/sites/default/files/2018-01/Examining%20Value%2C%20Measuring%20Engagement%20-%20A%20National%20Study%20of%20the%20Long-Term%20Outcomes%20of%20a%20Law%20Degree.pdf> [https://perma.cc/CA4C-8NUQ].

105. See ABA STANDARDS AND RULES, *supra* note 102, standard 404(a)(3).

106. Debra Cassens Weiss, *Law Prof Responds After Chief Justice Roberts Disses Legal Scholarship*, AM. BAR ASS’N J. (July 7, 2011, 10:29 AM), [http://www.abajournal.com/news/article/law\\_prof\\_reponds\\_after\\_chief\\_justice\\_roberts\\_disses\\_legal\\_scholarship/](http://www.abajournal.com/news/article/law_prof_reponds_after_chief_justice_roberts_disses_legal_scholarship/) [https://perma.cc/L25M-BCZF].

107. Jonathan H. Adler, *Chief Justice Roberts Reads Law Reviews, After All*, WASH. POST: VOLOKH CONSPIRACY (Mar. 21, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/21/chief-justice-roberts-reads-law-reviews-after-all/?utm\\_term=.d6583e9d123c](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/21/chief-justice-roberts-reads-law-reviews-after-all/?utm_term=.d6583e9d123c) [http://perma.cc/5993-THMP].

108. E.g., *Tenure Standards and Recruiting*, PRAWFSBLAWG (Oct. 31, 2014), <http://prawfsblawg.blogs.com/prawfsblawg/2014/10/tenure-standards-and-recruiting.html> [https://perma.cc/PHW9-FUXE].

109. Barbara Aronstein Black, *From the Archives (Such as They Are)*, 100 COLUM. L. REV. 1, 1 (2000).

*Law Review* emphasized its role in teaching analytical and writing skills, “[p]ublish[ing] legal research for the advancement of the law and society,” and “[s]erv[ing] as a window on the quality of the Iowa Law School.”<sup>110</sup> Nonetheless, these educational roles of law reviews have been obscured in the recent controversies. What follows are some suggestions about how they could be recovered and developed in the current climate of legal education.

First, despite the prevalence of electronic search engines and web communication tools such as *Scotusblog*,<sup>111</sup> there remains room for the digesting function with which law reviews began. Search engines are literal tools; they do not pull together materials based on whether they are particularly innovative or relevant for lawyers or public policy makers in a given jurisdiction. They are also responsive rather than proactive; they require those who are interested to perform the search rather than calling the material to their attention. Yet what used to be legislative or statutory notes have largely disappeared from the current law review landscape, as the snapshot reveals. An exception to this is the *Harvard Law Review*, which continues to publish notes on cases, statutes, and other legal developments without an identified author.

Recovering this informative function of law reviews could provide students with important research and writing experiences, ideally in conjunction with faculty experts in a given area of law. A publication challenge is that the value of such information is likely time-limited. A response to this challenge is that publication of a separate online journal has now become common for many law reviews.<sup>112</sup> This is not, however, the primary function of these online venues, which largely feature replies to articles published in the law review, commentary on recent controversies, or articles of more limited scope by

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110. Volume 100 Editorial Board, *A Tradition of Excellence: The Iowa Law Review's Mission and Future*, 100 IOWA L. REV. 881, 881 (2015) (quoting Willard L. Boyd & Randall P. Bezanson, *Iowa Law Review Centennial: Its Mission, History, and Future*, 100 IOWA L. REV. 455, 455 (2015)).

111. SCOTUSBLOG—THE SUPREME COURT OF THE UNITED STATES BLOG, <http://www.scotusblog.com/> [<https://perma.cc/T7Y9-Q4A6>] (last visited Mar. 9, 2018).

112. E.g., *MLR Online*, MICH. L. REV., <http://michiganlawreview.org/category/mlr-online/> [<https://perma.cc/8LS9-ZK5S>] (last visited May 17, 2018); *Harvard Law Review Forum*, HARV. L. REV., <https://harvardlawreview.org/topics/forum/> [<https://perma.cc/KNW2-82FQ>] (last visited May 17, 2018); *CLR Online*, COLUM. L. REV., <http://columbialawreview.org/content-type/clro/> [<https://perma.cc/S9VZ-EY42>] (last visited May 17, 2018); *DLJ Online*, DUKE L.J., <https://dlj.law.duke.edu/dljonline/> [<https://perma.cc/46QM-7ZB3>] (last visited May 17, 2018); *Forum*, YALE L.J., <https://www.yalelawjournal.org/forum> [<https://perma.cc/UJ87-NJNC>] (last visited May 17, 2018); UNIV. PA. L. REV. ONLINE, <https://www.pennlawreview.com/online/> [<https://perma.cc/S3BW-G3YT>] (last visited May 17, 2018); GEO. L.J. ONLINE, <https://georgetownlawjournal.org/glj-online/volumes/106> [<https://perma.cc/M7AA-SLBE>] (last visited May 17, 2018); *SLR Online*, STAN. L. REV., <https://www.stanfordlawreview.org/online/> [<https://perma.cc/455L-QGDC>] (last visited May 17, 2018); *Cornell Law Review Online*, CORNELL L. REV., <http://cornelllawreview.org/clronlineissue/> [<https://perma.cc/38V6-K8KS>] (last visited May 17, 2018).

scholars. Student work or recent developments are infrequent, either in the online venue or in the law review itself. Only one of the journals in my snapshot published writings identifiable with student authors at a rate that indicated more than a third of the 3L students were published.<sup>113</sup> There are unexplored opportunities for law reviews to bring students and faculty together to publish timely materials of this sort in an online format; these publications also could have the advantage of reliability that blog posts often do not.

Second, law reviews might be forthright about their role as venues to showcase the law schools that publish them. Originally, law reviews aimed to put forth the work of their faculty and students. As the data in my snapshot indicate, law reviews still quite clearly are an outlet for faculty at their institution. One criticism of this practice is that it is favoritism: students selecting articles likely feel pressures to publish those by the faculty who teach them.<sup>114</sup> However, this criticism loses significant force if the practice is explicit—that is, if it is clear that decisions to publish home institution writings are not made through the merit selection method that external evaluation or masked review attempt to achieve and instead are deliberately made in a way that reflects affiliation and is designed to showcase local faculty. To be sure,

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113. Iowa published at a rate equivalent to just over 70% of the 3L membership. The remainder ranged from 19% to 31%. The following chart illustrates:

TABLE 1: STUDENT WRITING PUBLISHED IN 2015 IN SELECTED LAW REVIEWS

Law Review	# of students published	# of 3L student members/year	% published
University of Pennsylvania Law Review	11	57	19%
Harvard Law Review	12	46	26%
Yale Law Journal	14	54	26%
Columbia Law Review	13	45	29%
Michigan Law Review	14	49	29%
Georgetown Law Journal	18	59	31%
Cornell Law Journal	10	48	21%
Iowa Law Review	17	24	71%
Stanford Law Review	8	51	16%
Duke Law Journal	12	42	29%
UCLA Law Review	49	11	22%

114. E.g., Neil Hamilton, *The Law Faculty's Ethical Failures Regarding Student-Edited Law Reviews*, 23 PROF. LAW., no. 4, 2016, at 1, 4.

to the extent that law schools publish reviews that are highly rated, faculty at these schools would have an advantage. This advantage would add to the other advantages, including connections and resources, that faculty at highly-ranked law schools already have. The advantage could be tempered, however, by the explicit recognition that publication reflects affiliation rather than the pretense that it does not. Reviews of faculty for promotion or tenure could take this fact into account as appropriate in the standards of the institution in question.

Law review publication of articles by local faculty has the additional advantage of easy interchange between faculty and student editors. Rather than the process of detaching student editing from article authors, it might encourage discursive interactions that would benefit students, faculty, and the work ultimately published. Symposium issues, which are proliferating and which typically also involve invitations to publish rather than peer or masked submission processes, could also benefit from increased faculty-student interaction. Students could work with faculty to select problems, identify contributors, and even develop their own shorter contributions. Increased interaction of students in the article production process thus is another way that law reviews might contribute to experiential learning.

These two suggestions—renewed emphasis on legal updates and faculty-student interaction in the article production process—are not at all radical; indeed, they harken back to the earlier days of at least some law reviews. They have the advantages of integrating law review experience into student learning and of promoting transparency about the relationship between law reviews and their home institutions. Neither addresses the further question of where, and how, other law faculty scholarship should be assessed and published, however. Indeed, to the extent that they take up space in law reviews that is currently allocated to articles, they could make already scarce publication venues even less available. Several approaches to this further question are possible.

A first approach is for law reviews to continue to publish articles in the same way and at the same rate, taking advantage of online venues to reduce publication costs. This article section would not include writings by those affiliated with the law school in question, which would be separately identified. This approach would keep outside opportunities the same and clarify that home institution writings are subject to a different entry process. It would not, however, address other issues of fair selection, such as a bias in favor of institutional reputation or the inexperience of student selectors. Nor would it use article selection and publication to address the separation between law review experiences and other learning experiences that exists at many law schools.

A second approach would change the process for selecting external articles at the law school level. Submissions would be masked, and students and faculty

would be expected to interact in the selection process, so that students can learn how to judge articles from faculty who are expert in the field. This approach appears to exist at several of the journals included in my snapshot.<sup>115</sup> It has the advantage of bringing expertise into selection. It also might bring students and faculty further together and help students to learn how to understand and evaluate law review articles in light of what is good work in a field—a skill that could be helpful to them in later using law review articles in legal practice. It would also give law schools a stake in how the law reviews they publish reflect on their reputation; law schools might come to be associated with law reviews that are particularly excellent in a given area, for example. Law reviews that do not rely entirely on student editors are more likely to move away from accepting articles that are submitted to many reviews at once and to insist that articles be submitted and evaluated on a more year-round basis than in a pressurized submission season. A final advantage of this approach is that it can be achieved on the level of individual law schools. This approach does have some disadvantages, particularly increased faculty time commitments and responsibilities and the risk that student initiative and learning will be marginalized if faculty take over reviews.

To the extent that the role of law reviews changes at individual law schools, other changes may follow. Faculty publication in home institution venues may be valued less highly, even if the review is highly regarded overall; the result might be increased pressures to establish fully peer reviewed law reviews. Professional organizations, such as the AALS or AALS sections might take responsibility for journals in particular subject areas—as *The Law and Society Review*<sup>116</sup> functions today. As they re-evaluate the role of law reviews in legal education, law schools hopefully will contribute to this debate.

*Conclusion*—The current structure of law reviews is deeply problematic. It does not serve students, law faculty, or legal scholarship very well. There is much to learn from the early development and changes in law reviews over the years to inform law schools as they reevaluate the role of their journals in the education they provide their students and in the lives of their faculty.

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115. E.g., HARV. L. REV., *supra* note 91; *Volume 128 Submission Guidelines*, YALE L.J., [https://www.yalelawjournal.org/files/V128SubmissionsGuidelines\\_hr8jesmm.pdf](https://www.yalelawjournal.org/files/V128SubmissionsGuidelines_hr8jesmm.pdf) [<https://perma.cc/PJ4C-VPDG>] (last visited Mar. 9, 2018).

116. *Law & Society Review*, LAW AND SOCIETY ASSOCIATION, [http://onlinelibrary.wiley.com/journal/10.1111/\(ISSN\)1540-5893](http://onlinelibrary.wiley.com/journal/10.1111/(ISSN)1540-5893) [<https://perma.cc/EKY2-GS7L>] (last visited Mar. 9, 2018).



## APPENDIX I

TABLE 2: TYPES OF ARTICLES IN LEADING LAW REVIEWS

Law Review	Year	Digest	Doctrinal	Advocacy	Theory	Interdis	Total # Articles
<b>University of Pennsylvania</b>							291
<b>Law Review</b>	>1900	157	118		13	3	(10/year)
	1925	5	6		4		15
	1950	4	11		3	1	19
	1975		15		5		20
	2000		14		3	2	19
	2015		17		4	7	28
<b>Harvard</b>							242
<b>Law Review</b>	>1900	93	129		20		(11/year)
	1925	12	10				22
	1950	3	20			1	24
	1975		6		1	1	8
	2000		8			1	9
	2015		7		2	1	10
<b>Yale Law Journal</b>							108
<b>Journal</b>	>1900	48	50	1	7	2	(12/year)
	1925	4	20		1	1	25
	1950	3	11		5	1	20
	1975		19		1	3	23
	2000		6		1	1	8
	2015		20			1	21
<b>Columbia</b>							
<b>Law Review</b>	1925	8	22				30
	1950		18		1	1	20
	1975	2	21		2		24
	2000		18		5	4	27
	2015		10			2	12
<b>Michigan</b>							
<b>Law Review</b>	1925	3	14		1		18
	1950	1	20		1		22
	1975	1	7			1	9
	2000		18			4	22
	2015		12		1	1	14

Law Review	Year	Digest	Doctrinal	Advocacy	Theory	Interdis	Total # Articles
<b>Georgetown</b>							
<b>Law Journal</b>	1925	6	5		1		12
	1950	5	5				10
	1975		12			1	13
	2000		12	1		3	16
	2015		17			4	21
<b>Cornell Law</b>							
<b>Review</b>	1925	1	11				12
	1950	4	7				11
	1975		14				14
	2000		15	1		2	18
	2015		14			1	2
<b>Iowa Law</b>							
<b>Review</b>	1925	8	1				9
	1950	1	4			6	11
	1975	3	6		1		10
	2000	2	10		1	2	15
	2015		31		3	9	43
<b>Stanford</b>							
<b>Law Review</b>	1950	3	6				9
	1975	5	29		1	4	39
	2000		20		3		26
	2015		17		1	1	19
<b>Duke Law</b>							
<b>Journal</b>	1975	4	15			3	22
	2000		13				13
	2015		17			4	21
<b>UCLA Law</b>							
<b>Review</b>	1975	2	8		1		11
	2000		18		2	2	22
	2015		17	1		2	20