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How Valid Is the Often-repeated Accusation That There Are Too Many Legal Articles and Too Many Law Reviews?

by

Howard Denemark*

Introduction

Professor Bernard J. Hibbitts's article, *Last Writes? Re-assessing the Law Review in the Age of Cyberspace*,¹ documents numerous complaints of the lack of need for much of legal scholarship and the flaws inherent in student editing even to the point of suggesting that any law reviews at all, as they exist currently, are too many.² The core of Professor Hibbitts's plan is that legal scholars will no longer submit manuscripts to student editors, but will self-publish them on a home page on the Internet without pre-publication editorial controls.³

Electronic dissemination of legal scholarship the availability of law review articles to anyone with a computer and modem is a reality today.⁴ In law and a few other disciplines, some traditional journals are already available on-line. Indeed, some journals now exist solely in electronic versions.⁵ It may give pause to readers who are seeing these words on paper that they are available on-line for free, together with the rest of the *Akron Law Review* issues beginning in the Fall of 1995.⁶ As radical as these changes are, they do not include self-publication, but rather follow the traditional pattern of submitting manuscripts to an editorial board that decides whether or not to disseminate the submitted article under its imprimatur. Professor Hibbitts summarized his motivations for proposing this radical change by pointing out:

Law professors working at terminals with an Internet connection to the Web need not worry any more about whether the subject of a piece is too esoteric, too doctrinal, too complicated or even too impolitic for law review editors; we are free to write and publish

on the topics of our choice. This freedom might give us a useful antidote to the substantive . . . sameness of the reviews as they now exist. On the Web, we need not endure months of frustrating or embarrassing delay while our papers are judged, peer-reviewed, edited or printed in formal journals; we can disseminate our work instantly, as soon as we are satisfied with it. . . . On the Web, we are under no compulsion to tolerate the indignities and inaccuracies of line-editing: we can present our own work in our own terms, in our own "voice," in our own words, in our own ways.⁷

These arguments are his central thrust. Nonetheless, he catalogs, somewhat uncritically,⁸ a long list of complaints directed against law reviews almost throughout their history.⁹ One of those complaints is that there are too many legal articles published in too many law reviews.¹⁰ An examination of this complaint, however, reveals that its origins have little relevance today, and ending the reign of student editors by Internet self-publication may not benefit legal scholarship.

The Complaint Against Law Reviews: Too Much Legal Writing

A. The Original Complaint

The criticism that there are too many law review articles appearing in too many reviews enjoys remarkable longevity. The observation was made in 1906¹¹ when the Index to Legal Periodicals indexed 60 sources,¹² and in 1986¹³ when over 450 periodicals were indexed.¹⁴ Where is the need for this ocean of ink? Is it true that these articles are written not for readers, but for the benefit of the writers, students and professors, who need either distinction in the job market or tenure?¹⁵ Professor Rier, who is familiar with the literature concerning academic writing in science, finds it significant that legal scholars assert that no market of readers exists for legal writing.¹⁶ Other disciplines do not write this way about their scholarly publications.¹⁷

The criticism that there are too many reviews seems to have appeared in print for the first time in the early 1900s.¹⁸ In that era, it is likely that lawyers stayed current with the law by reading almost everything that courts and scholars in their jurisdictions put into print. Such a feat seems unimaginable today, but was a fact for a large part of American legal history.

Good lawyers in Daniel Webster's era read every case that was published by every American appellate court, and English cases as well.¹⁹ Their greatest challenge might have been getting access to printed decisions, not being overwhelmed by their volume.²⁰ It was said of Mr. Justice Joseph Story, who served on the United States Supreme Court from 1812 to 1845, that, "[n]o legal work appeared, that he did not examine."²¹ Indeed, through much of the Nineteenth Century a practitioner could still read literally all the published decisions in his jurisdiction.²² The time when it was possible to stay current with the law may have extended further for those lawyers who limited their practice to certain legal specialties and perhaps longer for those who practiced in sleepier or less populous jurisdictions.²³

Against the expectation of remaining current in virtually all parts of the law of one's jurisdiction, the reviews, which not only summarized existing law but suggested new approaches and changes in the law, were a threat to the bar. No longer could one remain conversant with all areas of practice because the sheer weight of the reading burden made that impossible.²⁴ And if only one in ten, or one in a hundred, ideas put forth by reviews were accepted by the courts, one can understand the frustration of lawyers struggling to read this material while knowing that little of it would ever be successful in court. Historically, the complaint about too many reviews is quite logical when placed in its context of knowing all the law in one's jurisdiction.

It may be doubted that lawyers today consider reading in all areas of law in their jurisdictions a good use of their time. Thus, the criticism that reviews add to the daily burden of lawyers belongs to a bygone era. Today it is easy to ignore articles, indeed, even cases and statutes, that are not in a lawyer's or scholar's current interest.

As early as 1930, one commentator said that most law review readers subscribed to only one of the many available reviews.²⁵ Today, with the increasing complexity and diversity of the law, the number of lawyers and legal scholars who subscribe personally to even one general subject law journal is probably quite low. A hint of this change appears in the great, curmudgeonly diatribe against law reviews, Professor Fred Rodell's *Goodbye to Law Reviews*. Professor Rodell complained:

[T]he only consumers of law reviews outside the academic circle are the law offices, which never actually read them but stick them away on a shelf for future reference. The law offices consider the law reviews much as a plumber might consider a piece of lead pipe. They are not very worried about the literary or social service possibilities of the law, but they are tickled pink to have somebody else look up cases and think up new arguments for them to use in their business, because it means that they are getting something for practically nothing.²⁶

This paragraph was intended as an indictment of the worth of law reviews. Today it would not be so, since the modern criticism of law reviews is that they are not immediately relevant to the concerns of the bar.²⁷ Thus, an assertion that they helped lawyers practice law more efficiently but failed to achieve literary or social service goals would not be a strong criticism today.

What did Professor Rodell want of law reviews, if not to be of use to the bench and bar? Perhaps he saw law change from a field in which lawyers stayed current with the law to one in which they researched their clients' problems as the need arose. If lawyers stay current in many areas of practice, law reviews could be a vibrant public forum rather than dusty tools of research. It may be that lawyers who lived in that transitional time of losing the certainty of knowing the law of one's jurisdiction to knowing only how to research it, would resent law reviews as a symbol and partial cause of that change.²⁸ With that transition made fully and irrevocably by the 1990s,²⁹ the objection to the volume of law review writing cannot be the burden it adds to one's daily reading.

B. The Basis of Today's Complaint

1. Finding Articles

The problem for the 1990s cannot be that articles are too hard to find. Research tools available today are better than ever before. Traditional paper indices like the Current Legal Index and Index to Legal Periodicals are on library shelves. The Index to Legal Periodicals is available on a searchable CD-ROM.³⁰ LEXIS and WESTLAW have a more limited coverage of law review articles, but enjoy the advantage of powerful search capabilities for those articles within their databases.³¹ If the research tools are effective, then the articles one does not read when they come off the presses wait patiently for interested persons to seek them out, and seem to do little harm in the meanwhile. Their silent presence on library shelves cannot motivate the revolutionary change to Internet self-publication.

2. An Over-Abundance of Articles

Another possible opportunity to argue that too much legal writing exists might be that one cannot read every article on a given subject because there are too many duplicative or unworthy articles.³² Thus, a researcher might risk missing the valuable articles because of the unworthy ones.

In the abstract this argument might have some validity, even if only for those who believe they must read each article in a field to be thorough. A thorough reader who undertook to read all of the articles on a given topic would soon find that basic information and arguments were being repeated. A researcher faced with twenty law reviews noting a given case³³ might be able to skim the introductions and conclusions of law review pieces, looking for a sign that this particular one contained some spark of difference from the others.

3. Too Many Reviews

The complaint of "too many articles" is related to the complaint that there are too many journals. In a perfect world, one ought to be able to decide that certain journals have failed to be useful and thus should end their operation. For example, a journal that publishes the twentieth casenote on a given case may be wasting effort, paper and library shelf space.³⁴ A journal that makes a habit of this sort of publication might be judged insufficiently useful to justify continued existence. Moreover, since each school believes it needs one or more law reviews,³⁵ students will be found to write, whether they have any contribution to make or not. So the number of reviews does not simply split up the number of articles among more publications. Rather, it creates new articles that otherwise would not be written.

4. The Difficulty of Paper Copies

Professor Hibbitts states that any future flood of articles will be less offensive because it will not be on paper.³⁶ This argument appears to be premised on the idea that the problems generated by the supposed glut of articles are solely a function of library costs or piles on a desk. To the extent these are the problems Internet self-publication seeks to solve, it is difficult to see why they are not solved to the extent law review articles are compiled on LEXIS and WESTLAW, or by journals that now make their texts available on the Internet.³⁷ Articles available on LEXIS, WESTLAW and the Internet need not clutter a scholar's desk, nor need those journals whose articles are generally available on-line be purchased by libraries. But even if these are great problems, they are substantially unrelated to the role played by student-editors. If students are to continue their reviews for themselves on-line, there is no reason why professors and professionals cannot still submit articles to them for editorial review. Professor Hibbitts correctly points out that it would no longer be necessary to do so,³⁸ but the desirability of editorial control is still an issue.

A Response to Modern Criticisms

The criticism of "too many articles to read" can be valid. Whether the twentieth casenote on even a highly significant case contributes to the advancement of the law is open to question. Skimming introductions and conclusions may not reveal ideas that are truly worthwhile. Moreover, it is not difficult to believe that one could identify journals that produce a large number of repetitive or slipshod articles. Perhaps there is no mechanism for correcting these flaws. A boycott of journals was proposed, but has not appeared to slow the growth of legal writing.³⁹

Two questions remain if the wise philosopher-king or law school accreditation agency were to examine the legal literature and discontinue certain reviews. First, how would writers react to the decrease in printed outlets for their work, and second, would anything of value be lost?

A. The Reaction of Legal Writers

Most legal writers are either students or professors. Some faculty publish out of a sincere desire to disseminate their ideas. However, in recent years the production of articles has become an instrument of evaluating faculty performance. Promotion and tenure have come to depend increasingly on publication, so professors will, indeed must continue to write.⁴⁰ The end of editorial control is unlikely to change the fact that faculty articles will still be judged on length and quantity, as well as quality of support. There will be no less incentive for professorial writing in the era of self-publication.

Students also have a compelling need to participate on law reviews. Consider this statement in a leading manual for would-be law students:

[L]aw schools have . . . created their own corps of elite students that are the pride of the school, the happy hunting ground for employers, the goal of every first year student, and the envy of most second and third year students. It is called law review. . . . Interviewing

partners and judges who guard the entrances to the most prestigious and desirable law firms and judicial clerkships are well aware of the double dose of training that comes from law review experience on top of the normal law school vulcanizing. They are also aware of the rigid selection process for membership, and many are willing to let that screening serve them in filtering out applicants for interviews. There is a certain rational, if unfortunate discrimination in the rash of notices that are posted on the job placement bulletin board every year announcing interviews with law firms "for law review members only."⁴¹

A recent popular guide to legal education put the matter more succinctly, if less colorfully:

Writing for the law review of your school can be important to both your legal education and your career in law. . . . If you are on the law review, employers may assume you are either one of the brightest in your class, or an outstanding writer or both.⁴²

If an era of self-publication comes to legal education, students will still be able to maintain law reviews.⁴³ Indeed, given the distinction and career advantages of law review membership, they would be foolish not to continue the institution.⁴⁴ Even if few students who work on the review achieve publication,⁴⁵ the career benefits accrue to those who serve.⁴⁶ Thus, top students are unlikely to abandon law reviews and publish articles individually, but will continue to rely on the law review institution.

Law schools may also continue to support student journals. One historian has noted that "[v]irtually every law school, no matter how marginal, published a review as a matter of local pride."⁴⁷ More than pride can motivate a school to support its review, since, "there is probably no more effective advertisement of the quality of the law school's wares . . . than a well written and edited law review."⁴⁸ Further, Internet publication might result in the formation of even more student journals. Internet publication costs less than printing and disseminating paper journals by mail.⁴⁹ One objection faculties might have to new student-run journals is their cost, and with a lessening of costs, more publications might be the natural result.

It is proposed, however, that professors distribute their articles unedited on the Internet. Professor Hibbitts himself predicts that the lack of student editorial controls will result in more "productivity."⁵⁰ This seems to be a promise of more articles. Another reason to suspect an increase in the number of articles lies in the traditional function of student editors conducting preemption checks. Today, law review editors search the field of literature to see whether the article submitted adds anything to those articles already available to readers.⁵¹ This preemption check is designed to eliminate some duplicative material from the legal literature.⁵² If editors are no longer conducting preemption checks, scholars are free to post articles that fail to add even the small amount of difference student editors may consider sufficient to justify publication. Far from lessening the number of needlessly repetitive articles one might have to read to survey an entire field, the loss of preemption controls might multiply articles that are only restatements of ideas already adequately expressed.

B. What Might Be Lost: A Benefit of Multiple Articles

Multiple articles are a feature of today's legal literature. One positive feature they bring is a sense of consensus unavailable in a less article-rich environment. Multiple articles alleviate the worry of finding only one or two articles and being left to wonder whether those opinions lie beyond the mainstream of legal thought. They can be a source of security to the reader. Fewer articles might reduce the security of being able to identify consensus.

Even if one concludes that the sense of security that comes from reading multiple articles on a topic comes at too high a price in time and library costs, there is reason to doubt that Professor Hibbitts's proposed solution, Internet self-publication, would reduce the number of articles written. The pressures on faculty to publish will not disappear simply because self-publication becomes the norm.⁵³ Student editors have every incentive to continue their law reviews, on-line or on paper.⁵⁴ Worse for those who believe too many articles are written, students who could not qualify for a golden spot on the law review might turn to Internet self-publication. Thus, students who formerly had no way to disseminate their writing might now begin placing their own unedited efforts on the Internet in the hope of blurring the distinction between themselves and those on law review. Accordingly, it is difficult to see how professorial self-publication on the Internet will answer the criticism that there is too much legal writing thrust upon the legal public.

C. The Possible Impact on Student Writing

1. Loss of Status

An inescapable implication of professors writing for self-publication rather than student-operated reviews is that the student writing in reviews will appear as distinct from professors' writing. This is likely to decrease the status of student writing. It is as if self-publication on the Internet will purport to be the authentic home of scholarship, while allowing students to run law reviews will be tolerated as an outlet for their childish energy. This would be a tragic loss for the law.

Justice Oliver Wendell Holmes may have dismissed reviews as "the work of boys,"⁵⁵ but many courts have disagreed. A 1992 study of federal courts' use of student-written law review works concluded that of approximately 208,000 published opinions in the five-year period under study, between 1,544 and 2,590 opinions cited student writings.⁵⁶ A randomly selected portion of cases citing student works was studied to conclude that slightly less than five percent of cases that cite student works relied on those works "as the foundation of the court's holding or provided a crucial link in the court's reasoning."⁵⁷ Over one-third of citations in the study were to "serve important background or tangential roles in courts' reasoning."⁵⁸ The author of that study concluded that student law review writing has very little chance of effecting the law. "Nevertheless," the author observed, "student works are cited as authority by the federal courts. . . ."⁵⁹

Despite the grim statistics against any given article influencing the growth of the law, one cannot predict from where good ideas will emerge. For example, a student comment in the *Fordham Law Review* was the origin of "market share liability," a new and controversial doctrine in tort law.⁶⁰ The WESTLAW "JLR" data base indicated fifty-eight citations to the student comment. A search of state and federal courts via WESTLAW indicated twelve federal court citations and seventeen state court citations.⁶¹ Plainly, this article influenced the American legal landscape.

The *Fordham Law Review* is probably not generally perceived as one of the three or four top reviews in the United States,⁶² nor is Fordham University School of Law perceived as a school in the highest echelon of legal education.⁶³ The other articles and student-written pieces in that issue of the *Fordham Law Review* received scant attention from the legal community.⁶⁴ One other student-written piece, concerning regulation of the art market in New York, was cited by three other articles. The remainder of that issue of the *Fordham Law Review*, one article written by a professor and another by a member of the bar, one casenote, and a section on recent books,⁶⁵ were never cited by either the legal literature or any court in the WESTLAW data base.⁶⁶

This particular issue of the *Fordham Law Review* is a dramatic example of an inability to predict the usefulness of legal writing. The professor-written and professional-written articles in that issue seem to have gone unnoticed by courts and scholars. But one of the pieces written by a "mere" student have attracted notice while another changed the landscape of American tort law.

Scholars also find value in student notes and comments. Professor Hibbitts himself used at least one student-written publication in *Last Writes?*⁶⁷ In writing on this same topic in another journal I cited one note and one comment.⁶⁸ Separating these valuable publications from the remainder of legal scholarship might lessen their status, discouraging their use in advancing our understanding of the law.⁶⁹

Can this example justify the institution of having perhaps 10,000 student-written articles drafted each year?⁷⁰ Is there not some way our philosopher-king could determine which law reviews do not produce articles that change the legal landscape? In a perfect world one ought to be able to decide that certain journals have failed to be useful and thus should end their operation. A flawless editorial system would publish only those articles that will be useful to lawyers, judges, or perhaps scholars.⁷¹ But predicting which articles will be important in the future is a very uncertain business.⁷²

2. Loss of Articles Concerning Prominent Local Issues

Another category of article that is overlooked by those who claim that there are too many reviews is the treatment of local issues that might escape the notice of writers farther from the locus of the case. For example, a case of assisted conception created new law in Ohio in 1994.⁷³ Shelly Belsito, unable to bear children, had some of her eggs harvested and fertilized with her husband's sperm.⁷⁴ Shelly's sister, Carol, agreed to carry and give birth to the child she considered to be that of her sister and brother-in-law.⁷⁵ Carol was

not married to the child's genetic father, so the hospital informed her that she would be listed as the baby's mother, and the child would be listed as born out-of-wedlock.⁷⁶ Further, since Shelly and her husband were not listed as legal parents, they would be required to adopt their genetic child.⁷⁷ This case attracted significant media attention in Ohio.⁷⁸ Outside Ohio, however, there was little mention of it in the press.⁷⁹

The case was significant because it was a first in Ohio.⁸⁰ The Ohio court rejected a test developed in *Johnson v. Calvert*,⁸¹ an influential California case on surrogate motherhood.⁸²

The criticism of "too many articles in too many reviews" generates the expectation that this case would be the subject of numerous repetitive and useless articles. After all, the topic has genuine human interest⁸³ and made new law. In fact, only two reviews to date have treated this Ohio case of first impression.⁸⁴ The reviews, the *Akron Law Review* and the *University of Dayton Law Review*, cannot be rostered among the nation's most prestigious law journals.⁸⁵ Ohio has nine accredited law schools.⁸⁶ Each one has at least one law review,⁸⁷ and some have more.⁸⁸ Yet, no other publications, in or out of the state, have focused attention on this case. If some law reviews are to be discontinued to unclutter law libraries, Akron's and Dayton's might be some the critics would have suggested, leaving the Belsito case untreated in the legal literature.⁸⁹

The student works addressing Belsito are too recently published to search for citations to it by courts or other scholars. And some uses of articles, such as lawyers planning strategies or arguing the law before the bench, never reveal themselves by citations.⁹⁰ Thus, it is beyond the power to predict whether this note will help judges, practitioners, or scholars in their work. It is certain, however, that the absence of it, or the absence of the review that published it, provides only the most tenuous argument of benefit to bench, bar, or academe.

I looked at the other casenotes written in that issue of the *University of Dayton Law Review*, certain that I would find a case that had been noted in Dayton and in numerous other places. I would then have stated my awareness of this in a footnote. However, to my surprise, my research showed the opposite. Two other casenotes appear in this volume of the review, and the *Index to Legal Periodicals* indicates that those notes are the only ones written on those cases.⁹¹ I carry no brief for the *University of Dayton Law Review*, and the reasons I examined this volume are admittedly unscientific.⁹² Nevertheless, my examination of it leads me to the conclusion that this non-prestigious review is providing a product that is of value to the profession.⁹³

3. Loss of Articles That Otherwise Would Not Be Written

The mainstay of law reviews is the unsolicited manuscript.⁹⁴ But that is not the only type of professional or professorial writing the law reviews publish. Law review editors solicit authors, thereby creating articles that otherwise might not be written. Indeed, the articles appearing in this symposium are solicited. It is safe to say that Professors Rier, Delgado, and others would not have undertaken to write on these topics had editors from the Akron

Law Review not aroused their interest. If these words are being read by anyone at any time and are found to be interesting or important, then an eloquent argument has been made for not separating professional and professorial writing from law reviews. If, as Professor Rier suggests, faculty become peer reviewers for legal publication, then they will be able to select topics and bring interesting articles to light.⁹⁵ If, on the other hand, students remain in control of the process, then they will be the ones to spot opportunities to direct scholarship. But to eliminate editors, as the proposed self-publication scheme would do, is to eliminate the role of those who see an opportunity to create knowledge and solicit qualified writers to do so.

Conclusion

All articles published in law reviews are not of equal value. Some are of inferior quality and will not be used by courts, scholars, or anyone else. In that sense, critics who argue that there is too much legal writing may be correct.

Students have flaws as editors. So do faculty. Under any regime of editors or self-publishers some articles will be good and others, badly written or of no use to anyone. But which ones? It is difficult to imagine that the scholars, lawyers, and judges who complain about too many articles will offer to not cite articles that support their views because there is too much legal writing. So the complaint about too much writing works better in someone else's area of interest than in one's own. It also works better in an earlier era, when lawyers could read all the works of law that were published. In the modern era it is far easier to ignore articles not the subject of one's immediate interest.

Professors and professionals will continue to publish and students will continue to write and edit. Many of the articles on library shelves will be of no use to anyone, but some articles will change the law. If we cannot predict which ones will make a difference and we cannot we should be very circumspect about asserting that there are too many legal articles in too many law reviews.

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1. Bernard J. Hibbitts, Last Writes? Re-assessing Law Review in the Age of Cyberspace (version 1.0, Feb. 5, 1996) <<http://www.law.pitt.edu/hibbitts/last.htm>> at text accompanying nn.54-199. A print version of Professor Hibbitts's article can also be found in the New York University Law Review at 71 N.Y.U. L. Rev. 615 (1996).

2. Id. at text accompanying nn.228-34.

3. Id.

4. For example, the Akron Law Review is a paper journal with its full text available on the Internet for issues released since the Fall of 1995. See <<http://www.uakron.edu/law/alr/alr.html>>.

5. For example, The Boston University School of Law has an exclusively-electronic journal, the Journal of Science & Technology Law (announcement on file with the author). For an extensive though incomplete list of electronic journals, see generally, Office of Scientific and Academic Publishing Association of Research Libraries, Directory of Electronic Journals, Newsletters and Academic Discussion Lists, 105-346 (Ann Okerson, 5th ed. 1995).

A somewhat different phenomenon is a paper journal also available on-line. For example, the Akron Law Review is a paper journal with its full text available on the Internet. See *supra* note 4.

6. See *supra* note 4.

7. Hibbitts, *supra* note 1, at text accompanying n.230.

8. For example, Professor Hibbitts included in his summary of criticisms against law reviews some attacks that appear to be mutually exclusive. In the 1960s, he reports, law reviews were criticized for being "elitist," in that they did not allow all interested students to participate. Id. at text accompanying nn.92-124. Thus, they were unfairly dooming a majority of law students to inferior educations and resumes by denying them the educational benefits of law review. He also related that a criticism of the 1980s was that law reviews had begun admitting students using affirmative action criteria. Id. at text accompanying nn.173-76. The problem with this practice, he reported, was that the quality of law review editing suffered. Id. at text accompanying n.177.

I do not purport to resolve the question of which of these criticisms may be valid, but I note that they conflict. Either all law students are capable of serving on the reviews, in which case the "elitist" selection practices were an evil of law reviews, or selection by

criteria other than grades and writing competitions hurt the quality of reviews, in which case the "elitism" is necessary to safeguard their quality. Professor Hibbitts made no attempt to resolve or even recognize these apparent contradictions, seeking only to collect and pass on the charges made against law reviews.

9. . Id. at text accompanying nn.54-199.

10. Id. at text accompanying nn.57, 82, 117.

11. Frederic C. Woodward, Editorial Notes, 1 *Ill. L. Rev.* 39, 39 (1906) ("Undoubtedly the field for law reviews of a general character is already overcrowded. Moreover, it must be conceded that such reviews, however excellent, enlist the interest of but a small minority of the practicing lawyers of Illinois."). This editorial note was recounted at Hibbitts, *supra* note 1, at n.57 and accompanying text.

12. 3 *An Index to Legal Periodical Literature* v-vi (1919).

13. Roger Cramton, "The Most Remarkable Institution": The American Law Review, 36 *J. Legal Educ.* 1, 8 (1986) (supporting a legal literature of fewer journals with faculty editing because "[t]he extraordinary proliferation of law reviews, most of them student edited and all but a handful very erratic in quality, has been harmful for the nature, evaluation, and accessibility of legal scholarship.").

14. 25 *Index to Legal Periodical Literature* xi-xv (1986).

15. See *infra* notes 39-41 and accompanying text (regarding students needing distinction in the job market); see also *infra* note 38 (regarding professors needing articles for tenure and promotion).

16. David A. Rier, *The Future of Legal Scholarship and Scholarly Communication: Publication in the Age of Cyberspace*, 30 *Akron L. Rev.* 183 (1996).

17. Id.

18. See Hibbitts, *supra* note 1, at nn.57, 82, 117 and accompanying text.

19. See Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 *Wash. U. L. Q.* 9, 19 (1994).

20. The colonial period was marked by a legal world of printed decisions in which, "Few attained currency in manuscript form most probable was verbal circulation in garbled form." Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* 660 (1950); Lawrence M. Friedman, *A History of American Law* 48-93 (2d. ed. 1985). Mr. Friedman states: [c]ase lawcourt decisionsdid not pass easily from colony to colony. There were no printed reports to make transfer easy, though in the 18th Century some

manuscript materials did circulate among lawyers. These could hardly have been very influential." *Id.* at 92.

21. 2 *Life and Letters of Joseph Story* 564 (W. Story ed., 1851).

22. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 *Cal. L. Rev.* 15, 19 (1987).

23. There are a number of jurisdictions using the first digest West published for them, updated with pocket parts and supplemental volumes. So, while New York is on its fourth West's Digest, Arkansas, Connecticut, Hawaii, and Montana, among other states, are still using their first. The combined digests of those four states take less than one-third the shelf space of a full set of New York digests. The implication of this fact is that those jurisdictions still using their first digest have fewer points of law decided, making it practical to update digests dating back to the 1800s.

Presumably, lawyers motivated to educate themselves by reading advance sheets would be more successful in those jurisdictions than would a New York lawyer.

24. Berring, *supra* note 22, at 22. ("By the middle of the twentieth century, an enormous structure of standardized case reporting had evolved. Far too many cases for any individual to master were now available. . . . No longer could memory serve as the lawyer's main tool. A research system was growing from cases organized into like elements and placed into a like format.").

25. Douglas B. Maggs, *Concerning the Extent to Which the Law Review Contributes to the Development of the Law*, 3 *S. Cal. L. Rev.* 181, 190 (1930).

26. Fred Rodell, *Goodbye to Law Reviews*, 23 *Va. L. Rev.* 38, 45 (1937).

27. See Hibbitts, *supra* note 1, at nn.163-65 and accompanying text.; Cramton, *supra* note 13; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *Mich. L. Rev.* 34 (1992).

28. It is doubtful that the law reviews were much of a cause of this change, given the dramatic increase in the volume of reported cases experienced in the United States. The Century Edition of the American Digest noted that American Courts produced one-half million decisions in the 238 years between 1658 and 1896. 1 *American Digest* iii (Century ed. 1897). The number of decisions in the 83 years from 1897 to 1980 was over three million. J. Myron Jacobstein & Roy M. Mersky, *Fundamentals of Legal Research* 7 (1987).

29. Berring, *supra* note 22; at 22; see also Richard A. Posner, *The Future of the Student-edited Law Review*, 47 *Stan. L. Rev.* 1131, 1137 (1995) (In 1995, Judge Posner was able to assert: "Scholarly journals are not meant to be read the way the daily newspaper is read

. . . . The vast majority of articles in scholarly journals are destined to go directly from the subscriber to the library shelf, there to be available for future reference").

30. The H. W. Wilson Company, *The Wilson Disk Guide I-1* (1987).

31. Professor Hibbitts discusses the limitations of the Lexis and Westlaw coverage of law review articles. Hibbitts, *supra* note 1, at text accompanying n.212.

32. Cramton, *supra* note 13.

33. For example, the recent United States Supreme Court decision of *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993) was noted in 20 law reviews, according to the Index to Legal Periodicals. 33 Index to Legal Periodicals 950 (1994) (indexing four notes in its table of cases for this case); 34 Index to Legal Periodicals and Books 969 (1995) (indexing sixteen notes in its table of cases for this case).

34. See *supra* note 33.

35. Friedman, *supra* note 20, at 693; see also John T. Noonan, Jr., *Law Reviews*, 47 *Stan. L. Rev.* 1117, 1117 (1195) ("[L]aw reviews are a necessary element of every respectable law school").

36. Hibbitts, *supra* note 1, at text accompanying n.235.

37. See, e.g., note 4, *supra*.

38. Hibbitts, *supra* note 1, at text accompanying n.228.

39. *Id.* at text accompanying nn.82-84 (citing Alan Mewett, *Reviewing the Law Reviews*, 8 *J. Legal Educ.* 188, 189 (1955); John G. Hervey, *There's Still Room for Improvement*, 9 *J. Legal Educ.* 149, 151 (1956)).

40. See, e.g., *id.*; John W. Creswell, *Editor's Notes*, in *Measuring Faculty Research Performance 1* (John W. Creswell ed., 1986) ("[O]ne campus after another in recent years has begun to place increased emphasis on scholarly research . . . campus after campus has been moving aggressively to upgrade the importance of scholarly productivity as a criterion for academic personnel decisions.") (citations omitted); George Kannar, *Citizenship and Scholarship*, 90 *Colum. L. Rev.* 2017, 2056-58 (1990) (book review) (concluding the professors must write articles as part of their jobs); Howard P. Tuckman, *Publication, Teaching and the Academic Reward Structure* (1976).

41. John F. Dobbyn, *So You Want to Go to Law School* 138-39, 141 (1976); see also Friedman, *supra* note 20, at 693 ("[L]aw review editors were the student elite of their schools. They had the best grades, the best, or only, rapport with the faculty, and went to the best firms when they got their degrees.").

42. Law School Admissions Council, *The Official Guide to U.S. Law Schools* 19 (1997 ed. 1996).

43. "[D]irect professorial publishing on the Web would not in itself prevent law students from continuing to publish a law review, if they or others deemed the educational experience sufficiently useful and important. Law students might, for instance, turn to publishing print or electronic law journals for themselves. . . ." Hibbitts, *supra* note 1, at text accompanying n.243.

44. See *supra* notes 41-42 and accompanying text.

45. One researcher reached the conclusion that fewer than one-half of students on law reviews have their work published. Josh E. Fidler, *Law-Review Operations and Management*, *J. Legal Educ.* 48, 56 (1983). Cramton, *supra* note 13 (accepting the figure used by Joesh E. Fiedler).

46. See *supra* notes 41-42 and accompanying text.

47. See *supra* note 35.

48. Dobbyn, *supra* note 41, at 142.

49. *Scholarly Journals at the Crossroads: A Subversive Proposal for Electronic Publishing* 23-29, 118-39 (Ann S. Okerson & James J. O'Donnell eds., 1995) (discussing extensively the cost savings projected in electronic publication); Andrea Keyhani, *Innovations in Cost Recovery*, in *Scholarly Publishing On the Electronic Networks: Filling the Pipeline and Paying the Piper* 57 (1995).

50. Hibbitts, *supra* note 1, at text accompanying n.255 ("[I]f [law deans and faculties] intervene positively [to bring about Internet self-publication without editorial controls] they will encourage their younger and more ambitious faculty members to unprecedented heights of productivity. . . .").

This may contradict Professor Hibbitts' earlier assertion, made in anticipatory response to the possible objection that the legal community will be flooded with articles in an era of Internet self-publication, that "[m]ost law professors who are inclined to publish are already writing at or near capacity" *Id.* at text accompanying n.235.

51. See Jordan H. Liebman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 *J. Legal Educ.* 387, 404, 414 (1989) (listing as consideration for acceptance "Does the article break new ground or is it duplicative?" and stating that ". . . a manuscript on a topic about which much has been recently written is less likely to be worth publishing than one on a fresh topic.").

52. *Id.* at 404.

53. Professor Hibbitts is aware that professors are made to publish articles for retention, promotion, and tenure. Hibbitts, *supra* note 1, at text accompanying n.85. Indeed, he suggests that promotion and tenure committees consider self-published materials as they would publications in student-run journals. *Id.* at text accompanying n.255.

54. See *supra* notes 41-46 and accompanying text.

55. Charles E. Hughes, *Forward*, 50 *Yale L.J.* 737, 737 (1941).

56. Bart Sloan, *Note*, *What Are We Writing For? Student Works as Authority and Their Citation By the Federal Bench, 1986-1990*, 61 *Geo. Wash. L. Rev.* 221, 230-31 (1992).

57. *Id.* at 241.

58. *Id.* at 242.

59. *Id.* at 251.

60. I learned this fact from a student-written note about student writing. *Id.* at 227-28 n.38 (1992). The piece in question was Naomi Sheiner, *Comment*, *DES and a Proposed Theory of Enterprise Liability*, 46 *Fordham. L. Rev.* 963 (1978).

61. This conclusion is drawn from a citation analysis I conducted. The Westlaw state and federal court databases were used to identify any courts citing that issue of the *Fordham Law Review*. The "JLR" data base of Westlaw was searched for citations, and the result was checked against Shepard's Law Review Citator as an accuracy check.

62. No disrespect is intended for the *Fordham Law Review*. Many fine journals are not recognized as the top in their field. A 1986 law review article that tracked citations to law review articles by the United States Supreme Court identified *Fordham* as tied for 40th place during the three years from 1981 through 1983, together with 14 other journals, for the period under study. That ranking was achieved by three citations. During the period 1971 through 1973, *Fordham Law Review* enjoyed six citations in the nation's highest Court, earning it a tie with 8 other reviews for 29th place. Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 *UCLA L. Rev.* 131, 138, 142-43 (1986). A 1976 study found the impact of the *Fordham Law Review* to be 43rd in the nation. Olavi Maru, *Measuring the Impact of Legal Periodicals*, 1976 *Am. B. Found. Res. J.* 227, 243 (1976).

63. A recent survey of student satisfaction with their law schools placed *Fordham* 102nd in a field of 170. Shanie Latham, *The Happiest Law Students On Earth*, *Nat'l Jurist*, April/May 1996, at 20, 26. The annual U.S. News & World Report survey that purports to evaluate the "quality" of law schools ranked *Fordham* in the second tier of five. Ted Gest, *America's Best Graduate Schools*, *U.S. News & World Rep.*, Mar. 18, 1996, at 79, 83. While the validity of rankings such as these are subject to doubt, they may reflect perceptions of law students, lawyers, and professors.

64. This conclusion is drawn from the citation analysis described supra at note 61.
65. 46 Fordham L. Rev. Part 2, at ii (1978) (table of contents for Part 2).
66. See supra note 61.
67. Professor Hibbitts cited E. Joshua Rosenkranz, Comment, Law Review's Empire, 39 Hastings L.J. 859 (1988). Hibbitts, supra note 1, at n.156 and accompanying text. There may be more student pieces cited in Last Writes However, the author's deviation from Bluebook form requiring authors to indicate student authorship makes identifying student works cited in Last Writes a daunting task.
68. Howard A. Denemark, The Death of Law Reviews Has Been Predicted: What Might Be Lost When the Last Law Review Shuts Down? 27 Seton Hall L. Rev. ___ (forthcoming 1996).
69. Nonetheless, for the reasons discussed earlier, it is unlikely that a decrease in citations by courts and scholarly articles would undermine the determination of law schools to support student reviews. See supra text accompanying notes 40-48.
70. This estimate is stated for the year 1991 in Maru, supra note 62, at 227 n.35.
71. If scholarly legal articles really serve no purpose, then perhaps the fact that some useless articles cite other useless articles is of no consequence. This appears not to be the general assumption of the profession, however, since scholars have published analyses of which law reviews are cited more frequently in law review articles. See, e.g., Maru, supra note 62.
72. See e.g., supra notes 60-69 and accompanying text. The same may be true of other fields of academic endeavor. The Nineteenth Century mathematician George Boole developed a mathematical system for understanding the truth or falsity of statements in a symbolic system of zeros and ones. It was considered interesting enough in its day, but has much greater significance in the computer era, since modern digital computers operate using Boolean algebra. That telephone switching systems and electronic computers would someday depend on Boole's system of symbolic logic could not have been foreseen in Boole's lifetime. 2 New Encyclopedia Britannica, George Boole 372 (15th ed. 1994).
73. Belsito v. Clark, 644 N.E.2d 760 (Ohio C.P. Summit Cty. 1994). This is the only case I researched to make this point. My selection was not scientific: I helped draft an amicus brief on this case, together with Akron professors Wilson Huhn and Malina Coleman. We thought the case was significant and interesting enough to get involved at the trial level.
74. Id. at 761.
75. Id.

76. *Id.* at 762.

77. *Id.*

78. A search on LEXIS, in the "News" library revealed 13 mentions of the case in response to a query "Belsito w/25 baby." Of those mentions, seven were made in Ohio newspapers. The remaining articles were quite brief. LEXIS does not maintain the text of the Akron Beacon Journal, the newspaper with the closest connection to the area. A search of the Akron Beacon Journal for the relevant time period shows front page coverage of the story. See *infra* note 81 and the articles cited within. The Dayton Daily News carried four stories on the case in its "A" section between September and October of 1994: Son Born to Parents, Surrogate in Akron Case, Dayton Daily News, Oct. 13, 1994, at 5B; Genetics Rule, Judge Says, Dayton Daily News, Oct. 12, 1994, at 5B; Judge Must Deliver Before Woman Does; 2 'Moms' Seeking Clarity on Birth Law, Dayton Daily News, Sept. 28, 1994, at 4B; Who's The Mother? Couple Asks Ruling on Test Tube Baby!, Dayton Daily News, Sept. 16, 1994, at 3B. By contrast, the LEXIS News library shows not a single mention of the case in The New York Times, The Wall Street Journal, The Boston Globe, The Boston Herald, the Hartford Courant (selected articles only are made available on the "busdl" file of the "news" library), The New Haven Register, The San Francisco Chronicle, or The Los Angeles Times.

I have no way of knowing how much the content of law review articles is influenced by media coverage of cases, except to note the obvious point that cases that do not come to the attention of law review writers will not be noted. Newspaper readers in Akron and Dayton had an opportunity to learn of the case from their local daily papers and write timely analyses. Readers in New Haven, Connecticut or Cambridge, Massachusetts might never have become aware of the Belsito case.

79. See *supra* note 78.

80. See Michelle Pierce-Gealy, Comment, "Are You My Mother?": Ohio's Crazy-Making Baby-Making Produces a New Definition of "Mother," 28 Akron L. Rev. 535 (1995); Victoria L. Fergus, Note, An Interpretation of Ohio Law of Maternal Status in Gestational Surrogacy Disputes: *Belsito v. Clark*, 644 N.E.2d 760 (Ohio C.P.), 21 U. Dayton L. Rev. 229, 237 (1995) ("The Ohio General Assembly has not specifically addressed the issue involving maternal status in gestational surrogacy cases. The only Ohio court to address this issue has been the *Belsito v. Clark* court.").

81. 5 Cal. 4th 84, 851 P.2d 776 (Bank 1993).

82. Fergus, *supra* note 80, at 243-44. The influence of *Calvert v. Johnson* can be seen in the number of citations to it in courts and law reviews. See 7 Shepard's Pac. Rep. Citations 1526 (1994); 89 Shepard's Pac. Rep. Citations 841 (Ann. Cumulative Supp. pt. 2, no. 3 March 1996); 89 Shepard's Pac. Rep. Citations (Ann. Cumulative Supp. no. 4 April 1996) (for citations in American courts). See also 33 Index to Legal Periodicals 937 (1994), 34 Index to Legal Periodicals and Books 955 (1995), and 89 Index to Legal

Periodicals and Books 182 (no. 1 Oct. 1995) (for citations to 13 law review works analyzing *Calvert v. Johnson*).

83. One need only look at newspaper accounts with their dramatic pictures of the parents-to-be or the new mother holding her technological-miracle baby to understand the human interest of this news story. See, e.g., Sheryl Harris, Ruling Favors 'Real' Mommy, *Akron Beacon-J.*, Oct. 12, 1994, at A1, A8; Sheryl Harris, "Special Delivery": Tiny Subject of Summit's Landmark Court Ruling Arrives, *Akron Beacon-J.*, Oct. 13, 1994, at A1.

84. See *supra* note 80. A search in the "Lawrev" library of LEXIS revealed only one citation, Richard A. Epstein, Surrogacy: The Case for Full Contractual Enforcement, 81 *Va. L. Rev.* 2305, 2307, n.6 (1995) (citing the *Belsito* case briefly in a note). The data base did not include the University of Dayton or Akron law review articles.

85. The Chicago-Kent Law Review citation analysis of the most prestigious law reviews does not include either of these reviews in its study. Collen M. Cullen & S. Randall Kalberg, Chicago-Kent Law Review Faculty Scholarship Survey, 70 *Chi-Kent L. Rev.* 1445, 1452-460 (1996). Since the University of Dayton Law Review began publishing in 1976, it is not treated in the 1976 citation study by the American Bar Foundation. See Maru, *supra* note 62.

86. A.B.A. Comm. on Legal Education, A Review of Legal Education in the United States, 45-47 (1995) (listing nine law schools in Ohio and indicating all are ABA-approved).

87. The University of Akron School of Law publishes the Akron Law Review. Capital University Law & Graduate Center publishes the Capital University Law Review. Case Western Reserve University School of Law publishes the Case Western University Law Review. The University of Cincinnati College of Law publishes the University of Cincinnati Law Review. Cleveland State University Cleveland-Marshall College of Law publishes the Cleveland State Law Review. The University of Dayton School of Law publishes the University of Dayton Law Review. Ohio Northern University Pettit College of Law publishes the Ohio Northern Law Review. The Ohio State University College of Law publishes the Ohio State Law Journal. The University of Toledo College of Law publishes the University of Toledo Law Review. 34 *Index to Legal Periodicals and Books* xv-xxvii (1995).

88. For example, The University of Akron School of Law has the Akron Tax Journal in addition to the Akron Law Review. The Ohio State University has the Ohio State Journal of Dispute Resolution in addition to the Ohio State Law Journal. *Id.*

89. Had I looked at the Spring, 1995 issue of the University of Dayton Law Review, I would have found a casenote on *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993). That note was one of twenty listed in the hardbound volumes of the *Index to Legal Periodicals*. 33 *Index to Legal Periodicals* 950 (1994) (indexing 4 casenotes on this decision), 34 *Index to Legal Periodicals and Books* 968-69 (1995) (indexing 16 casenotes

on this decision, including Bobbie L. Flint, Note, Sex Discrimination: Psychological Injury from Hostile Work Environment Sexual Harassment *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (interim ed. 1993), 20 U. Dayton L. Rev. 1049 (1995)). Perhaps each of those twenty notes fills a need in the legal literature, but one certainly might suspect that there is substantial duplication among those notes. If so, the critics of law reviews might have slated The University of Dayton's law review as one that ought to stop publication, alleging that its work merely duplicates what others have done. That would be a loss to legal scholarship. See *supra* note 73 and accompanying text; *infra* note 93 and accompanying text.

90. See Sloan, *supra* note 56, at 229 n.42 and Maru, *supra* note 62, at 230 nn.13-14 for brief discussions of the weaknesses of citation analysis in determining the impact of legal periodical articles. However, one may search briefs filed with the United States Supreme Court in LEXIS and WESTLAW to determine when a law review article is cited in that forum. Such a search in the LEXIS database reveals sixteen citations to Akron Law Review since 1979 (Lexis BRIEFS library, keywords "Akron L. Rev.").

91. 34 Index to Legal Periodicals and Books and 89 Index to Legal Periodicals and Books Supplements to the date of this research list only one casenote each for the following cases: *Shump v. First Continental-Robinwood Associates*, 644 N.E.2d 291 (Ohio 1994) and *Churhfield v. Monsanto Co.*, 844 F. Supp. 371 (S.D. Ohio 1994). These cases are noted in Cameron A. Sergent, Note, The Current Status of Landlord Liability for Injured Guests of Ohio Tenants: An Evaluation of *Shump v. First Continental-Robinwood Associates*, 21 U. Dayton L. Rev. 209, 249 (1995). In fairness, I should report that I derived the example of twenty casenotes concerning *Harris v. Forklift Systems, Inc.*, by looking beyond the specific issue of the University of Dayton Law Review to Volume 20, which was one of the twenty reviews noting the case. See *supra* notes 33-34, 89 and accompanying text.

92. See *supra* note 73 and *infra* note 93.

93. I must also commend the lead article, Andrew A. Marino and Lawrence E. Marino, The Scientific Basis of Causality in Toxic Tort Cases, 21 U. Dayton L. Rev. 1 (1995). I have written on topics treated in this article (see Howard A. Denemark, "The Search for 'Scientific Knowledge' in Federal Courts in the Post-Frye Era: Refuting the Assertion that 'Law Seeks Justice While Science Seeks Truth,'" 8 High Tech. L. J. 235 (1993); Howard A. Denemark, "Improving Litigation Against Drug Manufacturers for Failure to Warn Against Possible Side Effects: Keeping Dubious Lawsuits from Driving Good Drugs off the Market," 40 Case W. Res. L. Rev. 413 (1990)) and found it useful. I teach about expert scientific testimony in an annual seminar on law, science, and technology, and I may use the article when I prepare my next lecture on the subject. Modesty prevents me from commenting on John S. Zanghi, "Community Standards" in Cyberspace, 21 U. Dayton L. Rev. 95 (1995), since Mr. Zanghi wrote the original draft of that article for my above-mentioned seminar in law, science, and technology.

94. Leibman & White, *supra* note 51, at 395-96.

95. Rier, *supra* note 16, at 210-11.