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LAW REVIEWS AND THEIR RELEVANCE TO MODERN LEGAL PROBLEMS

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There was a time when the articles published in student-edited law reviews were intended to influence real world decisions in the practice of law. In its very first issue, the *North Carolina Law Review* stated its hope that it would be "of service to the law students, the law teachers, the members of the bar, and to the judges upon the bench, and, through them, to the people of the state."[2] The editors went on to speak of the importance to law student and law professor of

> the opportunity afforded by the Review to learn of the attitude, the needs, and the problems of the attorneys and judges in active practice. It is hoped that those who are daily carrying on the litigation and the legal work of the state may find in the Review a means of expressing their reactions to, and their constructive suggestions for dealing with, the difficulties encountered in the practical administration of the law. Only through this closer contact and understanding can the lawyer, the judge, the law student, and the law teacher effectively unite in what should be a common effort for the solution of modern legal problems.[3]

But law reviews may have changed over the years. Much of the legal scholarship published in law reviews in recent times does not appear to have been intended to be relevant to the day-to-day concerns of practitioners and judges.

A provocative article addressing this issue was published in the *Oklahoma Law Review* in 1998 by an attorney and former law clerk, Michael McClintock. Entitled "*The Declining Use of Legal Scholarship by Courts: An Empirical Study*,"[4] this article explores the complaint that legal scholarship has lost touch with the practice of law and that law reviews have shifted away from practical, doctrinal articles toward

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2. Editorial Notes, 1 N.C.L. Rev. 31 (1922).

3. *Id.* at 31-32.

4. Michael D. McClintock, *The Declining Use of Legal Scholarship By Courts: An Empirical Study*, 51 Okla. L. Rev. 659 (1998).

more obscure, theoretical articles,[5] often using an interdisciplinary analysis.[6] McClintock observes that many of the articles published in law reviews appear to involve academics writing for other academics rather than for practitioners.[7] If law professors are indeed subject to the maxim "publish or perish," it may be, as has been said, that many law review articles are written primarily to be published rather than to be actually read.[8]

McClintock tests his hypothesis on the declining relevance of law reviews[9] by means of a citation survey.[10] In his survey, McClintock searched the opinions of the United States Supreme Court, the lower federal courts, and the state supreme courts for citations of law reviews. This survey revealed a 47.35% decline in the use of legal

5. *See also* Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. Legal Educ. 313, 319 (1989): "Prominent law reviews are increasingly dedicated to abstract, theoretical subjects, to federal constitutional law, and to federal law generally, and less and less to practice and professional issues, and to the grist of state court dockets."

6. Modern legal scholarship often focuses on topics such as "law and economics, legal history, law and literature, law and sociology, and various other 'law and' movements. . . . [M]odern interdisciplinary scholarship . . . looks at the law from the outside, using the tools of social science to advocate legal reform." McClintock, *supra* note 4, at 668.

7. These days law reviews publish fewer articles by judges and practitioners. "Most articles are written by full-time academics." Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. Legal Educ. 313, 320 (1989). Another commentator notes that the infrequent article submitted by a judge or practitioner is "commonly the subject of faculty room sneers and pejorative comments. Law reviews are the property of professors." John E. Nowak, *Woe Unto You, Law Reviews!*, 27 Ariz. L. Rev. 317 (1985).

8. In a widely cited quote, Dean Harold C. Havighurst noted that "law reviews are unique among publications in that they do not exist because of any large demand on the part of a reading public. Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written." Havighurst, *Law Reviews and Legal Education*, 51 Nw. U.L. Rev. 22, 24 (1956). One commentator assures us that: "The only purchasers of law reviews outside of academe are law firms which gladly pay for the volumes even though none reads them." David A. Rier, *The Future of Legal Scholarship and Scholarly Communication: Publication in the Age of Cyberspace*, 30 Akron L. Rev. 183, 191 (1996) (although in a footnote the author admits this statement is hyperbole: "Contemporary law reviews clearly do not go completely unread." *Id.* at 191, n.37).

9. McClintock states that his survey was "conducted to provide empirical verification that legal scholarship has become less relevant to the practice of law." Michael D. McClintock, *The Declining Use of Legal Scholarship By Courts: An Empirical Study*, 51 Okla. L. Rev. 659, 684 (1998).

10. For another example of a citation survey *see* Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 U.C.L.A. L. Rev. 131 (1986).

scholarship by these courts over the past two decades with "the most notable decline occurring in the past ten years."[11] McClintock concludes:

> [A] decline in citation [by courts], when combined with the pleas of judges and practitioners for more 'practical' articles, is persuasive evidence that the bar is finding legal sholarship less relevant to the practice of law. . . . If student edited law journals do not respond to the bar's requests for 'practical' articles, then the dialogue between practitioners, judges, and academics . . . may soon come to an end.[12]

Having regularly searched the secondary sources for analysis of North Carolina law during my legal career, I have often been disappointed that there were not more practical, doctrinal articles to be found in the law reviews of our state's law schools. I wondered if McClintock's finding regarding declining use of legal scholarship by the courts would hold true for the North Carolina courts and the North Carolina law reviews. To address this question I performed a computer-assisted search of the text of opinions of the North Carolina Supreme Court for selected years from 1960 to 2000.[13] I searched for all citations of the *North Carolina Law Review*,[14] the *Wake Forest Law Review*,[15] the *North Carolina Central Law Journal*,[16] and the *Campbell Law Review*.[17] The results of this citation survey[18] are as follows:

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11. Michael D. McClintock, *The Declining Use of Legal Scholarship By Courts: An Empirical Study*, 51 Okla. L. Rev. 659, 660 (1998).

12. *Id.* at 660.

13. I followed these rules in conducting this search: (a) I searched only in the majority opinions of North Carolina Supreme Court cases; (b) I did not count a citation of a law review article if the cite was contained in a quote from another case; (c) multiple cites of the same law review article in the same case counted as one cite; and (d) I did count a law review citation if it appeared in a footnote.

14. Searching for cites to the *North Carolina Law Review* was particularly problematic because of the wide variety of methods the Supreme Court has used to cite this law review in its opinions: e.g., *North Carolina Law Review*, *N.C. Law Review*, *N.C. Law Rev.*, *N.C.L.Rev.*, *N.C.L. Rev.*, *N.C. L. Rev.*, and *N.C.L.R.*

15. The *Wake Forest Law Review* (initially called the *Wake Forest Intramural Law Review*) was first published in 1965.

16. The *North Carolina Central Law Journal* was first published in 1966.

17. The *Campbell Law Review* was first published in 1979. Although my research did not reveal any Supreme Court citations of *Campbell Law Review* in the years selected for this study, the Supreme Court did cite articles from the *Campbell Law Review* once in 1989, once in 1987, three times in 1984 and once in 1982.

18. The *Duke Law Journal* was not included in this survey as I believe the Journal avoids any focus on North Carolina law. Nevertheless a quick search did reveal citations by the North Carolina Supreme Court of the *Duke Law Journal* in the following years: 1990 (1), 1988 (1), 1985 (2), 1982 (2), 1979 (2), 1976 (1), 1972 (1), 1971 (1), 1970 (1), and 1968 (1).

Year	N. Carolina Law Review	Wake Forest Law Review	Campbell Law Review	NCCU Law Journal	TOTAL CITATIONS
2000	2	0	0	0	2
1999	1	1	0	0	2
1998	0	0	0	0	0
1997	0	1	0	0	1
1996	0	0	0	0	0
1995	3	1	0	0	4
1994	5	0	0	0	5
1993	4	0	0	0	4
1992	8	6	0	0	14
1991	4	3	0	0	7
1990	6	2	0	0	8
1985	5	5	0	0	10
1980	15	7	0	0	22
1975	13	7	n/a	0	20
1970	12	3	n/a	0	15
1965	26	n/a	n/a	n/a	26
1960	9	n/a	n/a	n/a	9

The results of this limited citation survey do appear to conform generally to the findings of the McClintock study, i.e., there appears to be a significant decline in the citation of legal scholarship by the North Carolina Supreme Court over the past four decades with a particularly notable decline occurring in the past ten years. This decline in citation may well indicate a significant decline in the actual use of legal scholarship by the justices on the North Carolina Supreme Court. There are, of course, other possible explanations for these results[19]

19. For instance, it is certainly possible that the justices read and consider law review articles and simply choose not to cite the articles in their published opinions. For a concise discussion of this possibility *see* Gregory Scott Crespi, *The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 S.M.U. L. Rev. 9, 10-11, n. 9 (2000) ("A judge may . . . choose not to cite . . . an article that influenced his analysis because his ruling is less ambiguously supported by case law or statutory authority. He may also choose not to cite an article that he has read and seriously considered but that takes a position opposed to that of his ruling."). It may also be a factor that in recent years the North Carolina Supreme Court has published fewer opinions than in years past. Not including per curiam opinions, the Supreme Court published approximately 70 opinions in 2000, 52 opinions in 1999, and 90 opinions in 1998. The average number of opinions published annually by the Court for the years 1977 to 1990 was approximately 150.

and the irrelevance of law reviews to the practice of law is not established by these results. But it does suggest a divergence of interest and focus between the legal academic community and the practicing bar. It may be worth reconsidering whether our law schools' law reviews could serve as a vehicle for the "closer contact and understanding" that might effectively unite the lawyer, the judge, the law student, and the law teacher in "common effort for the solution of modern legal problems."[20]

Since the initial drafting of this article, I have had the opportunity to ask several judges and attorneys about their thoughts and reactions to this citation survey and its possible explanation.[21] One of the most insightful responses was that of Resident Superior Court Judge, Judicial District 20B, the Honorable Sanford L. Steelman, Jr. Judge Steelman noted, *inter alia*, the significant impact of the way we perform legal research in this age of computers. Judge Steelman observed:

> The first thing that should be considered is the extent to which law review articles are available in computer research databases. When I first came out of law school, our firm had a number of Carolina graduates, and we took the *North Carolina Law Review*. When the issues came in, they were circulated and reviewed by members of the firm. It was a primary source of keeping up with developments in the law. I believe that most lawyers now look to other types of publications, such as *Lawyers Weekly*, and the trial bar publications, for this type of information. It is also my belief that lawyers do most of their research by computer. I do not think that the legal research databases available on the various CD-Rom products includes law review articles. At one time law review articles were shown in the annotations to the statutes, but I do not know whether this is still being done.

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20. For general discussions of the history and possible purposes of law reviews, *see* James W. Harper, *Why Student-Run Law Reviews?*, 82 Minn. L. Rev. 1261 (1998); Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 Stan. L. Rev. 1131 (1995); Robert Weisberg, *Some Ways to Think About Law Reviews*, 47 Stan. L. Rev. 1147 (1995).

21. I also sought the input of those who make the decisions as to what articles are published in the law reviews. In spring of 2001, I mailed letters to the articles editors for the *North Carolina Law Review*, the *Wake Forest Law Review*, the *Campbell Law Review* and the *North Carolina Central Law Journal*, seeking their thoughts and comments on the thesis that the decline in citation indicates that legal scholarship is becoming less relevant to the practice of law. Unfortunately, I received no responses from any of these student editors. I certainly understand that law students serving as law review editors are overburdened even without responding to this interesting but tangential matter. Nevertheless, it would be fascinating to learn how the student editors of the law reviews view the issue.

Judges rely heavily upon the law that is cited to them by the attorneys. If the lawyers do not cite law review articles, then most judges are not likely to dig them out for themselves. I will admit that I no longer subscribe to the *North Carolina Law Review*, and cannot ever recall using a law review article in reaching a decision in a case. Nevertheless, it is not clear whether the decline in citation of law review articles is due to their lack of relevance, or simply due to changes in research technique.

The dynamics of judicial decision-making have changed dramatically over the last 30 years. The *corpus juris* of this State has grown dramatically in the 25 years that I have practiced law. There are more and more reported decisions, and in theory, more and more legal issues have now been resolved by the Courts. If there is an appellate decision that contains controlling authority, then there is no need to look to secondary sources, such as law review articles. This trend is compounded when you consider that in addition to the judicial decisions from the North Carolina Courts, we now have ready access to the reported decisions of other states, and possibly other countries. With these vast resources available, it is very likely that a decision on a point of law can be found. These resources are now available to anyone with a computer and modem. In the past, these resources were only available at the law schools. The law reviews were a good way to disseminate the decisions from other states, comparing and contrasting them with the law of our own state—but attorneys can now do this comparing and contrasting themselves.[22]

22. Letter from the Honorable Sanford L. Steelman, Jr. to Thomas L. Fowler.