LAW STUDENTS AND LEGAL SCHOLARSHIP

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Legal scholarship has been largely the provenance of student-run law reviews for at least a century. However, that dominance has become increasingly controversial. In a world of interdisciplinary research, the unusual – shall we say troubling? – lack of peer review puts a shadow over the entire enterprise.[1] "Do you really trust your students to choose your articles?" our colleagues in the social sciences ask. Yes. Yes, we do.

Rather than shrinking from this proposition, law professors should own it. Yes, our students run our field's academic journals, and that is a good thing. A cynic might say we need to make this case just as a matter of realpolitik: law reviews are not going to go away anytime soon. In the alternative, one can make the "thousand articles bloom" argument: there are so many law journals out there, anyone can get published, and from there it's up to other scholars to cite and praise. But student-run law reviews offer benefits that go beyond path dependency and numerosity. They offer a chance for legal academia to inculcate the practice and value of legal scholarship upon a wide swath of their graduates.

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[1] *See, e.g.*, Richard A. Posner, *Against the Law Reviews*, Legal Affairs, Nov.-Dec. 2004, at http://legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp (calling law reviews "so strange, even incomprehensible, to scholars in other fields"); Brian Leiter, *The Scandal of American Law Reviews*, Leiter Reports: A Philosophy Blog, Oct. 24, 2004, at: http://leiterreports.typepad.com/blog/2004/10/the_scandal_of_.html ("In fact, as everyone knows, the majority of the articles that the *Yale Law Journal* and *Harvard Law Review* publish in a given year are intellectually worthless.")

Law school students are in something of a strange place in the academy. They are graduate students, and they are getting the highest degree, presumably, in the field: a "juris doctor."[2] But unlike other doctoral students, the overwhelming majority will not go on to academia; they will go into practice. In the traditional path into legal academia, this dichotomy was embraced: the best students worked on legal scholarship at the law review, then went on to clerk for one of the top judges or justices, and then perhaps practiced a few years as a white-shoe firm before becoming a professor.[3] And scholarship was unapologetically designed to provide guidance to courts and practicing attorneys. The lament over the change from this doctrinally-heavy approach began in the early 1990s and continues through today.[4]

Student-run law reviews are seen as a holdover from that old approach, an outdated model that needs to be turned in. Legal scholarship and legal education have always been hybrid propositions: part graduate education, part professional school; part theoretical, part practical. But that goes not only for professors but for students as well. Law students are graduate students. They are learning professional skills, but they are also learning an academic discipline. Appreciation of and participation in scholarship is a critical part of that instruction.

As law professors have become more theoretical and more interdisciplinary, law students and alums have not always come along for the ride. Prominent reform efforts have focused on making graduates more practice-ready, teaching more legal "skills," and moving

[2] The S.J.D. is perhaps considered the highest degree to be earned in the field, but it is comparatively rare, not a requirement for the legal academy, and now largely pursued by foreign-trained academics. Gail J. Hupper, *The Academic Doctorate in Law: A Vehicle for Legal Transplants?*, 58 J. Legal Educ. 413, 454 (2008).

[3] The highest-regarded graduates were often invited back after their clerkships.

[4] See Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992); Adam Liptak, *Keep the Briefs Brief, Literary Justices Advise*, N.Y. Times, May 20, 2011, at: http://www.nytimes.com/2011/05/21/us/politics/21court.html ("'What the academy is doing, as far as I can tell," Chief Justice John G. Roberts Jr. said, "is largely of no use or interest to people who actually practice law.'").

classes away from esoteric themes.[5] Some of this critique, I think, is related to the growth of critical legal and races studies in the 1980s and 1990s, and has an ideological undertone.[6] And for the most part, the academy has shrugged off the criticism. If anything, becoming less doctrinal and more theoretical (or empirical, perhaps) has been the prestige play for at least the last twenty-five years.[7] As Gordon Smith felt moved to point out, in italics – "*legal scholars often are not writing for practicing lawyers*."[8]

That should not mean, however, that law students should not be involved, either. Law professors are missing an opportunity if they fail to take full advantage of the existing system to instill an understanding of and appreciation for legal scholarship in their students. Law students have three years of professional study. Part of that program of instruction should include an engagement with the most important works in the field. Although this observation is anecdotal, in my opinion law school teaching has become more, not less, doctrinally focused over the last ten years. Yes, there are seminars that cover less doctrinal topics. But in more and more casebooks, problems and examples are replacing law review excerpts. It is almost a point of pride that the legal literature is now too complicated to be grasped by the average student. This should instead be a grave concern. Part of legal instruction must include an ability to parse and utilize legal scholarship.

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[5] *See, e.g.*, William M. Sullivan et al., *Educating Lawyers* 87-125 (2007).

[6] *Cf.* Kimberle Williams Crenshaw, *Twenty Years Of Critical Race Theory: Looking Backwards to Move Forward*, 43 Conn. L. Rev. 1253, 1311 (2011) ("The conservative Crit-baiting isn't quite the preoccupation it used to be, as it turns out, because their ammunition is being reserved for far bigger game than CRT. Apoplectic hand-wringing about the role of the entire Critical project in bringing down Western civilization seems even more absurd than ever before.").

[7] Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. Contemp. Legal Issues 139, 161-62 (2008) ("The scholarship that receives most attention these days, and that brings its authors most renown, is largely disconnected from the required first year curriculum and increasingly remote from all but the most specialized and sophisticated upper class courses.").

[8] Gordon Smith, *Legal Scholarship Matters*, Conglomerate Blog, May 23, 2011, http://www.theconglomerate.org/2011/05/legal-scholarship.html.

The issue is even more pressing when it comes to law reviews. Law review editors are a special subset of law students. Most of them, too, will go on to practice. But they are even more engaged in the scholarly enterprise than their fellow graduate students. They choose which articles to publish and how to edit those works for publication. They work long nights tracking down sources or reviewing countless manuscripts. They are – like it or not – interwoven inextricably with the scholarly enterprise.

Is this a good thing or not? If nothing else, it is a tremendous opportunity – an opportunity to engage a chunk of the legal profession on the importance of what we do. They, like us, care about what a good article is, whether a pin cite demonstrates the proposition, and whether a *cf.* or a *but see* is more appropriate. They are working with us on our scholarship. Instead of treating the process as a necessary evil,[9] we should treat it as a chance to teach our students about what we do and how to do it well.

If we take this seriously – if we take it as part of our mission – what can we do differently to better educate our students and law review editors about scholarship? The most important thing, in my mind, is committing to the notion that law reviews are not necessary evils, or even embarrassing vestiges, but rather partners in the scholarly endeavor. When we start imagining the role of students in law reviews as a legitimate part of legal education and legal scholarship, we will start to think of ways to improve the overall process. To supplement this overall theme, I suggest three more particular reforms to start that conversation.

[9] Stephen Bainbridge has complained about the student-run editing process as part of his recent experiment to opt out of the law review system. Stephen Bainbridge, *Self-publishing Legal Scholarship*, ProfessorBainbridge.com, March 23, 2011, at: http://www.professorbainbridge.com/professorbainbridgecom/2011/03/self-publishing-legal-scholarship.html ("Unlike professional academic presses, which have multiple levels of grown-up editors that must be persuaded and make use of peer reviews, law reviews mostly are staffed by twenty-something second-and third-year law students whose knowledge of the law, legal profession, business, and so on is typically modest at best.").

TAKE STUDENT NOTES SERIOUSLY

Law review editors not only select and edit legal scholarship – they write it as well. Law review notes are direct opportunities for students to participate in the scholarly and professional conversations of the field. It has perhaps become less fashionable for academics to cite student notes, and they matter a lot less than they used to for those students who want to be scholars. But notes remain a way for students to contribute to legal scholarship. Scholars should not shy away from citing well-crafted student pieces that contribute to the conversation. And academics should not be afraid to look at student notes for prospective professors. In return, professors should spend the time and energy to help students work their way through their notes in an engaged and educated fashion. Notes should be written in the third year, when the students have had more education under their belts, and they should be written under the advisement of a professor who helps them understand the existing literature. This may mean that the notes receive substantial credit hours, and that the note is the only substantial project to be worked on, rather than one of two or three substantial papers to be completed that year. From a faculty perspective, credit for advising notes should be more than a pat on the back from the journal advisor; in fact, perhaps notes should be written as part of a course that would provide background understanding and the research tools to complete the job appropriately.

IMPROVE THE ARTICLE SELECTION PROCESS

The law-review article selection process is something of a Wild West: professors send their works to dozens if not hundreds of journals, and then use "expedite" requests to get the attention of law review editors confronted with thousands of submissions. In such an environment, it is not surprising that students would use any heuristic they can find to help them choose the right articles. As a result, we have seen peer review become more a part of the process, both formally and informally.[10] However, the continuing confusion and

[10] See Stephen Bainbridge, *Chicago Law Review Chutzpah*, ProfessorBainbridge.com,

anxiety surrounding the placement game has led to a sense of defeatism in many scholars, at the same time they continue to hope for high placements.

Law professors need to choose a path here. One approach would have professors place articles generally (or even exclusively) with their own school's review. Each school's law journal could be a showpiece for that school's scholars and scholarship. Having the editors in-house would provide professors with a chance to work much more closely with students on the editing process. There would likely need to be some exceptions: for symposia, certainly, but also for specialty journals that would need to look to a wider pool of contributors. But the "flagship" journal could publish scholarship from that school.

The other approach would have professors play a much more involved role in the selection process. Professors could give general advice, provide peer reviews, and oversee the overall selection process. Absolutely critical to this approach, however, would be the need for professors to be completely disinterested in the selection process. In order to preserve the integrity of the selections, professors would be barred from submitting articles to their own journals.[11] Their mission instead would be to assist the editors in selecting the best articles from the available pile.

Thus, my reforms head in two opposite directions: professors would either publish exclusively with their home law journals, or be completely barred from submitting to them. Although each has its own internal logic, either system would be preferable to the mishmosh of conflicting signals we have now. And in both cases, professors would play a stronger role in the selection of scholarship, while at the same time teaching students about choosing good scholarship.

Aug. 5, 2011, at: http://www.professorbainbridge.com/professorbainbridgecom/2011/08/chicago-law-review-chutzpah.html (describing the *University of Chicago Law Review*'s peer review process); Matt Bodie, *Stanford Law Review's Peer Review Process*, PrawfsBlawg.com, Aug. 16, 2011, at: http://prawfsblawg.blogs.com/prawfsblawg/2011/08/stanford-law-reviews-peer-review-process.html (interview with senior articles editor about peer-review process).

[11] Again, there could be exceptions for symposia.

EDUCATE STUDENTS ABOUT SCHOLARSHIP

Ed Rubin has proposed an ambitious reform for legal education. In acknowledging (but then diminishing) the notion that law students subsidize scholarship, Rubin argues that the fault is not with scholarship but rather the curriculum. He contends: "The scholarship is up-to-date with both the current practice of law, in its broadest sense, and with the current theories about what law is, and what it does, in our society. The curriculum has been obsolete, on both these fronts, for close to one hundred years."[12] In order to bring the curriculum into line with scholarship, Rubin proposes that the third year be based around a "capstone" course of ten to fifteen credits in which the student would work directly with a professor on an issue or issues relating to the professor's research.[13] He includes the potential for such capstone courses to encompass a clinical component and (in my view) is somewhat vague about the actual structure of the course. But Rubin's critical insight is that research and teaching are not separate, competing goods; they are synergistic goods that are both necessary to legal education.

Rubin's plan is ambitious, and it may seem to make sense at higher-ranked schools more than lower ones. But I believe such thinking underestimates the interest and perspicacity of students at all levels of the spectrum, and perhaps overestimates the complexity of our craft. Even law professors doing stochastic frontier analysis or multivariate regressions need to translate those results for those that would use the analysis, whether they be other academics in and out of the field, lawyers, courts, agencies, or legislators. Students could be taught the basics of even these complicated techniques, and then be taught how to use the results of such analyses as attorneys, government officials, or businesspeople. Bringing students in on the conversation would provide a richer and deeper educational experience, improve the students' ability to think critically, and increase the appreciation for scholarship among future alums. And it would not be as hard as we think. After all, we spend a large chunk of our

[12] Rubin, *supra* note 6, at 163.
[13] *Id.* at 165-67.

time on scholarship. Bringing it into the classroom, on scales large and small, would work in everyone's interest.

CONCLUSION

The new interdisciplinarity in legal scholarship has brought with it a sense of shame about our discipline's scholarly showcases. I do not intend to claim that the law review selection process is superior to the peer-review process, a claim that would be hard to evaluate empirically. Instead, I contend that the process is a wonderful opportunity to educate our students and, by extension, the profession about the value of our scholarship. As legal education faces a crisis unlike any other in perhaps the last century, now is the time to affirm and expound upon the work we do. If we do not, we cannot blame students and alums when they start asking why they should fund it in the first place.