ESSAY

LAW REVIEWS: A FORAY THROUGH A STRANGE WORLD

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* This unambitious little piece was written in the Fall Term of 1993, while I was serving as the Max Rheinstein Visiting Professor of Comparative Law at the University of Chicago School of Law. It was intended to inform European lawyers about what I regard as a typical aspect of American legal culture. The article was published as part of a book which is entitled *Amerikanische Rechtskultur und europäisches Privatrecht-Impressionen aus der Neuen Welt* (edited by Reinhard Zimmermann), published by J.C.B. Mohr (Siebeck) in Tübingen, early in 1995. That book also contains essays by Joachim Zekoll, Shael Herman, and Mathias Reimann on Louisiana as a mixed legal system, on the history of the idea of codification in the United States, and on whether American private law can serve as a model for the new European *ius commune*. After that book had appeared, English and American friends and colleagues repeatedly asked me to publish an English version of my law review article in an American law review. I finally acceded to those requests, not without some trepidation in view of the fact that the article had been written for a European audience and that, essentially, it constitutes an outsider's view of the American law review enterprise. Professor Harold J. Berman of the Emory University School of Law very kindly arranged for Roland C. Munique, an Emory Law School student, to produce the present translation. I am very grateful to Mr. Munique for his work and to Professor Berman (Atlanta) and Paul Farlam (Regensburg) for their contributions to the final (American) version of this article. Even though I cannot, sadly, thank thirty-six natural persons and seven workshops for their input, *see infra* note 93 and accompanying text, this introductory footnote should be considered a very modest and imperfect attempt to comply with at least one of the conventions of a proper American law review article.

Editor's Note: This Article has been translated from German into English. As it was originally written for a European publication, it does not conform to *Blue Book* citation conventions.

I. "THE MOST REMARKABLE INSTITUTION"—INTRODUCTION

In a spirited contribution to the *Times Higher Education Supplement*, Wolf Lepenies recently told the "Grimm tale of too many books."[1] More and more of them are being written and fewer and fewer people are reading them. It is as though every bookstore has sunk to the level of a modern Antiquariat. A particular type of superfluous book, characteristic of German academic life, is the *Festschrift*, the publication of which should be stopped immediately; "*il y a déjà assez de livres*." Yet it seems that there is no way to stop them. There is no doubt that the flood of publications is continually swelling. Many authors appear to be unaware that not everything that is thought must be said, not everything that is said must be written down, and not everything that is written down must be published.

As usual, the United States of America is also, in this respect, somewhat ahead of us. In the United States, it is not *Festschriften* that have broken out like an "epidemic,"[2] but rather law reviews. In the introductions to American law written by Peter Hay[3] and Dieter Blumenwitz,[4] the law reviews are only lightly touched upon, yet they are one of the most remarkable institutions of American legal culture.[5] They also deserve to be noted in Europe, for American

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[1] Wolf Lepenies, *Grimm Tale of Too Many Books*, TIMES HIGHER EDUC. SUPP., Aug. 27, 1993, at 12.

[2] Lepenies, *supra* note 1.

[3] PETER HAY, AN INTRODUCTION TO U.S. LAW 12 (2d ed. 1991); PETER HAY, EINFÜHRUNG IN DAS AMERIKANISCHE RECHT 15 (2d ed. 1987).

[4] EINFÜHRUNG IN DAS ANGLO-AMERIKANISCHE RECHT 98 (4th ed. 1990).

[5] "The American law review properly has been called the most remarkable institution of the law school

law is not only, at least originally, European law outside of Europe,[6] but it also now, in turn, exerts its influence on European law in many different ways. Wolfgang Wiegand has even labeled the reception of American law in Europe "an irreversible process."[7] Law study in American universities, he argues, is comparable in prestige to the study of the *ius commune* in Northern Italy during the Middle Ages.[8] We will not pursue this argument. Nor shall we discuss particular aspects of this "reception" phenomenon,[9] seek to outline the American system of private law, or detail its contents. For that one may refer to the above-mentioned works of Hay and Blumenwitz, as well as to a pertinent volume in the Kluwer series.[10] What this Article provides is merely a foray through the world of American law reviews. This foray is mostly informative in nature and should facilitate the orientation of the outsider. If, at the same time, some traces of the spirit of American law and some characteristics of its development become apparent, that will follow from the central significance of this type of publication. Is American law in fact as "pragmatic" as is asserted time and again? This is one of the central questions that will appear in an unfamiliar light in the following pages.

II. "LAW REVIEW'S EMPIRE"—AN OVERVIEW OF THE JOURNAL LANDSCAPE

1. General Law Reviews

Whoever stands for the first time before the journal collection of a well-stocked library of an American law school will, as a rule, be thunderstruck by the sheer mass of what is there.[11] Even elite institutions of higher learning

world." Earl Warren, *Messages of Greeting to the U.C.L.A. Law Review*, 1 UCLA L. REV. 1 (1953). *See also* Roger C. Cramton, *The Most Remarkable Institution: The American Law Review*, 36 J. LEGAL EDUC. 1 (1986).

[6] *See generally* Reinhard Zimmermann, *Europäisches Privatrecht und Europa*, 1 Zeitschrift für Europäisches Privatrecht, 439 (1993).

[7] Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229, 247 (1991).

[8] *Id.* at 232.

[9] *See* Rolf Stürmer, *Die Rezeption US -Amerikanischen Rechts in der Bundesrepublik Deutschland, in* FESTSCHRIFT FÜR KURT REBMANN 839 (1989).

[10] INTRODUCTION TO THE LAW OF THE UNITED STATES 992 (David S. Clarke & Tugrul Ansay eds., 1992).

[11] For example, in 1992, the library of the University of Chicago Law School was composed of 505,807 volumes and was ranked tenth among American law school libraries (the leader was Harvard with 1,490,728 volumes). Julie Hanrahan, *1991-92 Statistical Survey of ABA Law School Libraries and Librarians*, 85 L. LIBR. J. 643, 647 (1993). The total budget for the Chicago Law School Library in 1991-92 amounted to $1,809,552 (which only put Chicago in 39th place). First place in this category also went to Harvard with a budget of $6,906,157. *Id.* at 672.

cannot afford to subscribe to all the law journals in the United States. This is especially true when one include the journals of bar associations, from the *American Bar Association Journal* to the *New York State Bar Journal* and the *Journal of the State Bar of California*, all the way to the *Virgin Island Bar Journal*, the *Beverly Hills Bar Association Journal*, and the *Colorado Lawyer*. As a rule they pursue no scholarly agendas but rather serve the interests of the legal profession. Thus, they cannot be compared with the *Deutsche Richterzeitung* (*DRiZ*) and *Zeitschrift des Deutschen Notarvereins* (*DNotZ*), or even with the *Neue Juristische Wochenschrift* (*NJW*), *Juristenzeitung* (*JZ*) or the *Monatsschrift für Deutsches Recht* (*MDR*). In the following discussion, they will not be considered further.

But even law reviews in a narrower sense—i.e., those whose characteristic feature is their affiliation with a law school[12]—can barely be collected in their entirety in libraries like those of the Universities of Chicago or Michigan at Ann Arbor. There are simply too many titles on the market. It is not easy to determine exactly how many there are. In 1937, there were fifty law reviews;[13] by the middle of the 1980s, there were about 250.[14] In two articles published in 1990, 307 and 314 titles, respectively, were named.[15] Since then, the number has risen, gradually reaching 350. Thus, one can assume that every law school publishes at least one law review.[16] That is true, in any event, of the 153 institutions which are members of the Association of American Law Schools[17]—

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[12] Following American usage, this Article will henceforth refer to "law school" in order to describe a law faculty in its entirety. "Faculty" is the term usually employed for the members of law school's.

[13] John Jay McKelvey, *The Law School Review*, 50 HARV. L. REV. 868 (1937).

[14] Cramton, *supra* note 5, at 2.

[15] *See* James Leonard, *Seein' the Cites: A Guided Tour of Citation Patterns in Recent American Law Review Articles*, 34 ST. LOUIS U. L.J. 181, 183 (1990); Geoffrey Preckshot, *All Hail Emperor Law Review: Criticism of the Law Review System and Its Success at Provoking Change*, 55 MO. L. REV. 1005, 1009 (1990).

[16] By 1972, 138 of the then 149 American Bar Association (ABA)-accredited law schools (when this Article was written, there were 176 such institutions) had their own law reviews. *See* Olavi Maru, *Measuring the Impact of Legal Periodicals*, 1 AM. B. FOUND. RES. J. 227, 227 (1976). Jordan H. Leibman and James P. White assume that, in light of the 153 schools that are members of the Association of American Law Schools, there are 153 "principal" law reviews—i.e., law reviews which are not specialized. *See* Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 387 (1989). In addition, there are the "specialized" law reviews. *See infra* notes 19-37 and accompanying text.

[17] *See* ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 1993-94, at 23-129 (1993) ("AALS DIRECTORY"). Not all ABA-accredited law schools are members of the Association of American Law Schools (AALS); 18 law schools simply have the status of "fee-paid" schools. *Id.* at 130-37. Conversely, according to my knowledge, all members of the AALS are accredited by the ABA. On the process of law school accreditation through the ABA, see COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS

from the C. Blake McDowell Law Center of the University of Akron, Ohio (*Akron Law Review*) to the Benjamin N. Cardozo School of Law of Yeshiva University, New York (*Cardozo Law Review*). There is the *Arkansas Law Review*, the *Nebraska Law Review*, the *Kentucky Law Journal*, and the *Montana Law Review*. The *Arizona Law Review* is published by the University of Arizona in Tucson, Arizona; and the *Arizona State Law Journal* from Arizona State University is published in Tempe, Arizona. The University of Oklahoma in Norman, Oklahoma produces the *Oklahoma Law Review* and the Oklahoma City University in Oklahoma City issues the *Oklahoma City University Law Review*. The *Alaska Law Review* is not produced in Alaska but rather in North Carolina at the Duke University School of Law. The *Indiana Law Journal* is published by the Indiana University School of Law in Bloomington, Indiana and the *Indiana Law Review* by the Indiana University School of Law in Indianapolis. Rutgers University School of Law in Camden, New Jersey is responsible for the *Rutgers Law Journal*; Rutgers University School of Law in Newark, New Jersey is in charge of the *Rutgers Law Review*. Also located in Newark, New Jersey is the Seton Hall University School of Law, which publishes the *Seton Hall Law Review*. Drake University in Des Moines, Iowa and the University of Puget Sound, Tacoma, Washington each have their own law reviews as do Pace University and the Potomac School of Law (respectively in White Plains, New York and Washington D.C.). There is a *Case Western Law Review* on the market, a *University of Arkansas at Little Rock Law Journal*, a *Touro Law Review*, and a *Pacific Law Journal* (which devotes itself to neither maritime law nor pacifism but rather carries the name of the University of the Pacific McGeorge School of Law, Sacramento, California). Confusingly, there is not just the *Loyola Law Review* but also the *Loyola of Los Angeles Law Review* and the *Loyola of Chicago Law Journal*. The *New York University Law Review* is not to be confused with the *New York Law School Law Review*. And just under the letter "W" there is a comparatively exotic

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1993-94 (AMERICAN BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR & NAT'L CONFERENCE OF BAR EXAMINERS ed., 1993). Every accredited law school is re-evaluated once every seven years on the basis of a "visitation" that has been jointly carried out by the ABA and the AALS for the last 20 years or so. For a description of this process, see Betsey Levin, *The AALS Accreditation Process and Berkeley*, 41 J. LEGAL EDUC. 373, 380-84 (1991).

Levin's article is, incidentally, about the "Boalt Affair," which created quite a stir. The AALS committee had expressed its concerns about possible race and sex discrimination in connection with the appointment of faculty members after a "visitation" to the University of California Law School at Berkeley. *Id.* at 383-84. Is such an intervention from the AALS legitimate or does it constitute an infringement on the autonomy of the faculty? Does this involve an attempt to force a member-school into the strait-jacket of "political correctness"? Compare the controversy between Paul D. Carrington, *Accreditation and the AALS*, 41 J. LEGAL EDUC. 363 (1991) and Marjorie M. Schultz, *Debating P.C. on "PC,"* 41 J. LEGAL EDUC. 387 (1991).

collection of titles such as the *Wake Forest Law Review*, *Washburn Law Journal*, *Wayne Law Review*, *Western New England Law Review*, *Western State University Law Review*, *Whittier Law Review*, *Willamette Law Review*, and *William Mitchell Law Review*.[18] The publication of at least one law review is clearly a prestige symbol that a law school cannot do without. It procures for the school, at least in its own eyes, a place in the realm of legal scholarship.

2. Specialized Law Reviews

It is well known that in the realm of scholarship there are unofficial hierarchies. Harvard is one of the Grand Princes of American legal scholarship; hence Harvard brings out not just one journal but ten: the *Harvard Civil Rights-Civil Liberties Law Review*, the *Harvard Environmental Law Review*, the *Harvard Human Rights Journal*, the *Harvard Human Rights Yearbook*, the *Harvard International Law Journal*, the *Harvard Journal of Law and Public Policy*, the *Harvard Journal of Law and Technology*, the *Harvard Journal on Legislation*, the *Harvard Women's Law Journal*, and, pre-eminently, of course, the venerable *Harvard Law Review*. Columbia, Georgetown, and Berkeley (University of California) offer at least seven titles each. This is indicative of a significant trend affecting the landscape of law journals. American law schools try to adorn themselves, if at all possible, with more than one law review; but since law reviews that are numbered two, three, four, and so on will not be able to compete successfully with the first, there is a pressure to specialize.[19] As a rule, the first journal is of a general nature, while others focus on a specific area of the law or on various topics that are thematically or methodologically related. These new specialized law reviews cover an extraordinarily wide range of topics.

Leaving aside the entire area of public law, journals dedicated to social problems of disadvantaged groups constitute one main type. Questions about discrimination in general are dealt with by *Law and Inequality*, published twice a year by the University of Minnesota, while (radical) strategies for a cure are developed in the *Yale Journal of Law and Liberation*. The *Harvard Blackletter Journal*, published once a year, deals specifically with problems of "persons of

[18] They are edited by the law schools of, respectively, Wake Forest University (Winston-Salem, North Carolina); Washburn University (Topeka, Kansas); Wayne State University (Detroit, Michigan); Western New England College (Springfield, Massachusetts); Western State University (Fullerton, California); Whittier Law School (Los Angeles, California); Willamette University (Salem, Oregon); and the William Mitchell College of Law (St. Paul, Minnesota).

[19] *See* Mike Antoline, *A Burst of Specialty Alternatives*, STUDENT LAW., May 1989, at 27.

color" (it is "committed to facilitating and maintaining sophisticated legal dialogue on topics of interest to persons of color generally and to the African American community specifically"[20]), as does the *Black Law Journal* (from the University of California at Los Angeles) and *Howard Scroll: The Social Justice Review*. Americans who are of Latino extraction are the focus of the *Chicano-Latino Law Review* (from UCLA) and the *La Raza Law Journal* (from the University of California at Berkeley), while the *American Indian Law Review* of the University of Oklahoma College of Law offers a forum for discussion of legal problems pertaining to Native Americans. *Toward an Asian American Legal Scholarship* is the program-matic title of the first article of the newly-founded *Asian Law Journal* at Berkeley.[21] The *Wisconsin Multi-Cultural Law Journal* makes the com-prehensive claim to embrace all minorities in American society.[22]

A whole group of journals, including the *Berkeley Women's Law Journal*,[23] *Columbia Journal of Gender and Law*, and *Harvard Women's Law Journal*, each published once a year, are focused on issues concerning women and the law. In 1991, the Tulane Law School (in New Orleans) founded the *Journal of Law and Sexuality* to deal with "Lesbian and Gay Legal Issues," a topic that the *Stanford Journal of Law, Gender, and Sexual Orientation* also covers. And finally there is, according to the American way of thinking, not just discrimination based upon race, background, sex, or sexual orientation, but also discrimination based upon the age of a person ("ageism").[24] Therefore, sooner or later a law review, namely *The Elder Law Journal* of the University of Illinois at Urbana-Champaign's College of Law, had to deal with "issues of particular significance to older Americans."[25]

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[20] *Editorial Policy*, 10 HARV. BLACKLETTER J. iv (1993).

[21] Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structionalism, and Narrative Space*, 1 ASIAN L.J. 1 (1994).

[22] Linda S. Greene, *Introduction*, WIS. MULTI-CULTURAL L.J. 1-2 (1991).

[23] "The *Berkeley Women's Law Journal* is guided by an editorial policy which distinguishes us from other law reviews and feminist journals. Our mandate is to publish research, analysis, and commentary that address the lives and struggles of underrepresented women, such as women of color, poor women, lesbians, and disabled women." 8 BERKELEY WOMEN'S L.J. 1 (1993).

[24] For the repercussions of the Age Discrimination in Employment Act of 1986 on universities (which were exempted for seven years from the abolition of the mandatory retirement age), see Anthony R. Baldwin, David S. Day & Judith A. McMorrow, *Will There Be Life After Law School? The Impact of Uncapping the Mandatory Retirement Age*, 41 J. LEGAL EDUC. 395 (1991); David S. Day, Thomas C. Langham & Suzan F. Pearson, *Senior Law Faculty Attitudes Toward Retirement*, 41 J. LEGAL EDUC. 397 (1991); Judith A. McMorrow & Anthony R. Baldwin, *Life After Law School: On Being a Retired Law Professor*, 41 J. LEGAL EDUC. 407 (1991).

[25] Richard L. Kaplan, *Foreword*, 1 ELDER L.J. (1993).

A further group of specialized law reviews—for example the *University of Michigan Journal of Law Reform* and the *Harvard Journal on Legislation*—deal with the politics of law in the broadest sense, while the *Maryland Journal of Contemporary Legal Issues* deals exclusively with "socially compelling issues." Many of these publications are interdisciplinary in approach. Interdisciplinary studies have even given rise to a journal named simply "Law &."

Specialized areas of the law are covered by the *Columbia-Volunteer Lawyers for the Arts Journal of Law and the Arts*, the *Cardozo Studies in Law and Literature* (from Yeshiva University), the *Yale Journal of Law and the Humanities*, the *Cardozo Arts and Entertainment Law Journal* (Yeshiva University),[26] the *Hastings Communications and Entertainment Law Journal* (with articles about the draft of a uniform defamation act as well as gambling and the law), the *Loyola (!) Entertainment Journal*, and, perhaps less astonishingly, in view of its geographic location, the *Miami Entertainment and Sports Law Review*. In the United States, there are at least two other specialized law reviews dedicated to the emerging subject of sports law: the *Seton Hall Journal of Sports Law* and the *Marquette Sports Law Journal*, published by the Marquette University School of Law in Milwaukee in conjunction with its National Sports Law Institute. Light is shed, in the latter journal, on legal problems associated with the purchase of racehorses (under the title *Horse Sense and the Uniform Commercial Code*[27]), and an historical overview is given of cases involving baseball;[28] the former deals with the "emerging reckless disregard standard" in connection with liability for sports injuries,[29] and topics like horse drugging,[30] sports gambling,[31] and the baseball labor market[32] are also illuminated. In addition, one learns from Aileen Riggin Soule *What the*

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[26] A special issue in 1993 deals with European broadcasting matters (with a reprint of a series on East-European broadcasting laws translated into English). *See* 11 CARDOZO ARTS & ENT. L.J. 275, 417 (1993).

[27] *See* John J. Kropp et al., *Horse Sense and the UCC: The Purchase of Racehorses*, 1 MARQ. SPORTS L.J. 171 (1991).

[28] *See* Richard L. Irwin, *A Historical Review of Litigation in Baseball*, 1 MARQ. SPORTS L.J. 283 (1991).

[29] *See* Mel Narol, *Sports Participation with Limited Litigation: The Emerging Reckless Disregard Standard*, 1 SETON HALL J. OF SPORTS L. 29 (1991).

[30] *See* Luke P. Iovine, III & John E. Keefe, Jr., *Horse Drugging—The New Jersey Trainer Absolute Insurer Rule: Burning Down the House to Roast the Pig*, 1 SETON HALL J. OF SPORTS L. 61 (1991).

[31] *See* Lawrence S. Lustberg, *Sentencing the Sick: Compulsive Gambling as the Basis for a Downward Departure Under the Federal Sentencing Guidelines*, 2 SETON HALL J. OF SPORTS L. 51 (1992); Thomas J. Ostertag, *From Shoeless Joe to Charley Hustle: Major League Baseball's Continuing Crusade Against Sports Gambling*, 2 SETON HALL J. OF SPORTS L. 19 (1992).

[32] Stephen L. Willis, *A Critical Perspective of Baseball's Collusion Decisions*, 1 SETON HALL J. OF SPORTS L. 109 (1991).

Olympics Meant to Me.[33] The advisory body associated with the *Marquette Sports Law Journal* includes many prominent figures, among them the owner of the Chicago White Sox and the president of the Atlanta Hawks.[34] In mid-1994, the *Sports Lawyers Journal* appeared, published by the Tulane Law School.

Medical law, in the broadest sense, is also well represented. The *American Journal of Law and Medicine*, which is published jointly by the Boston University School of Law and the American Society of Law and Medicine, leads this field of study.

About fifty law schools in the United States are associated with religious groups,[35] of which the largest subgroup is the Roman Catholic Church's Society of Jesus (the Jesuits). It is not surprising, therefore, that a series of canonical or interdisciplinary theological-legal journals were founded: *The Jurist* (Catholic University of America), *The Journal of Law and Religion* (Hamline University), *The Journal of Church and State* (Baylor University), and *Catholic Lawyer* (St. John's University School of Law), the last of which is "devoted to timely legal problems having ethical, canonical, or theological implications."[36] (The *Catholic University Law Review* and the various Loyola law journals and reviews that have previously been mentioned although published by sectarian schools, do not belong in a list of "religious" law reviews but should be considered general law reviews.)

Another group of law reviews is dedicated to more conventional legal themes. In this category one can mention: *University of Louisville Journal of Family Law, Hofstra Property Law Journal, Hofstra Labor Law Journal, Berkeley Journal of Employment and Labor Law, Bankruptcy Developments Journal* (Emory University School of Law), *Journal of Dispute Resolution* (University of Missouri—Columbia School of Law), *Columbia Business Law Journal, Boston College Industrial and Commercial Law Review, Journal of Law and Commerce* (University of Pittsburgh School of Law) and *Journal of Corporation Law* (University of Iowa College of Law). Professionally edited publications include: *American Business Law Journal, UCC (Uniform Commercial Code) Law Journal, Business Lawyer, Commercial Law Journal,*

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[33] 2 SETON HALL J. OF SPORTS L. 343 (1992). Soule was a three-time medal winner in the 1920 and 1924 Olympic Games; in 1991, at the age of 86, she won six gold medals at the Masters Swimming Nationals in Kentucky. *Id.* at 343 n.*.

[34] *See* 1 MARQ. SPORTS L.J. vii (1991).

[35] For details, see Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 STAN. L. REV. 1859 (1993).

[36] 35 CATH. LAW. i (1991).

Securities Regulation Law Journal, Tax Lawyer, Antitrust Law Journal, Antitrust Law and Economics Review, Antitrust Bulletin, Banking Law Journal and *Family Law Quarterly.*

3. *Law Reviews Oriented Towards International Law*

Reviews devoted to international law constitute by far the largest group of specialized law reviews, with more than thirty-five titles.[37] Such international law reviews are published by Boston University, Brooklyn, California Western, Case Western Reserve, Connecticut, Cornell, Dickinson, Emory, Florida, Fordham, Harvard, Houston, Indiana, Michigan, Stanford, Texas, Virginia, Wisconsin, and Yale. The term "international law" applies not only to public international law but also to what is called "private international law."[38] A sample survey from the year 1991-92 of the law reviews referred to above, however, shows that topics of the law of nations are clearly in the forefront. Occasionally, legal problems of international or foreign trade, economic law, and media law are discussed;[39] and every now and then, one will find an article on conflicts of laws.[40] But comparative law lies outside the editorial framework. This is also true of the *American Journal of International Law*, published by the American Society of International Law, and the *International Lawyer*, published by the American Bar Association.[41] The same goes for the so-called "transnational" law reviews, such as those published by Columbia,[42] Vanderbilt,

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[37] *See generally* John King Gamble, Jr. & Natalie S. Shields, *International Legal Scholarship: A Perspective on Teaching and Publishing*, 39 J. LEGAL EDUC. 39 (1989).

[38] Which does not mean (at least not in the first place) conflict of laws.

[39] *See, e.g.*, Paul D. Callister, *The December 1989 European Community Merger Control Regulation: A Non-EC Perspective*, 24 CORNELL INT'L L.J. 97 (1991); Donald C. Clarke, *Regulation and its Discontents: Understanding Economic Law in China*, 28 STAN. J. INT'L L. 283 (1992); Andrew T. Griffin & Larry D. Soderquist, *Private Companies in the Soviet Union: Cooperatives in the Era of Perestroika*, 32 HARV. INT'L L.J. 201 (1991); Matthew S.R. Palmer, *Privatization in Ukraine: Economics, Law and Politics*, 16 YALE J. INT'L L. 453 (1991); Carol D. Rasnic, *Germany's Legal Protection for Women Workers vis-à-vis Illegal Employment Discrimination in the United States: A Comparative Perspective in Light of* Johnson Controls, 13 MICH. J. INT'L L. 415 (1992); David E. Van Zandt, *The Regulatory and Institutional Conditions for an International Securities Market*, 32 VA. J. INT'L L. 47 (1991).

[40] *See, e.g.*, Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991). One may also find four essays on the overarching theme *in New Directions in Choice of Law: Alternatives to Interest Analysis. See* 24 CORNELL INT'L L.J. 195 (1991).

[41] *International Lawyer* is, moreover, affiliated with the Southern Methodist University School of Law (Dallas, Texas). The New York State Bar Association publishes the *New York International Law Review.*

[42] "This journal is dedicated to the concept of 'transnational law', as articulated by the late Philip C. Jessup, Judge of the International Court of Justice. 'Transnational law' includes: '[A]ll the law which regulates actions or events that transcend National frontiers . . . . [I]t includes both civil and criminal aspects, what we know as public and private international law, and it includes national law both public and private . . . .

Suffolk University, and Touro College.[43] Thus, volume 30 of the *Columbia Journal of Transnational Law* offers only two articles in the non-public law area—on insider trading in France and on the Software Directive of the European Community. More articles on international trade and business law can be found in the *University of Pennsylvania Journal of International Business Law*, *Northwestern Journal of International Law and Business*, *Law and Policy in International Business* (published by the Georgetown University Law Center), *George Washington Journal of International Law and Economics*, *North Carolina Journal of International Law and Commercial Regulation*, *Syracuse Journal of International Law and Commerce*, and *Maryland Journal of International Law and Trade*. But these publications only partly emanate from so-called elite universities.

Finally, comparative law comes into its own in a series of law reviews, although only in connection with "international law" and for the most part, as far as the quantity of articles is concerned, in a subordinate position. Such "international and comparative" law reviews (or journals) are published by the University of Georgia School of Law in Athens, University of California, Hastings College of the Law, New York Law School, Boston College Law School, Temple University School of Law, Loyola of Los Angeles Law School, University of Arizona College of Law, Indiana University School of Law, and Tulane University School of Law. The Duke University School of Law in Durham, North Carolina, some time ago founded the *Duke Journal of European and Comparative Law* and the University of Pennsylvania publishes the *Comparative Labor Law Journal*. Each of the following law reviews concentrates on a particular geographic region of the world: *Pacific Rim Law and Policy Journal*, *University of Miami Inter-American Law Review*, *Boston College Third World Law Journal*, and *Columbia Journal of Chinese Law*.

Transnational situations . . . may involve individuals, corporations, states or other groups.'" 31 COLUM. J. TRANSNAT'L L. (1993) (quoting Philip C. Jessup).

[43] As well as for the *New York University Journal of International Law and Politics*, the *American University Journal of International Law and Policy*, the *Denver Journal of International Law and Policy*, and *International Legal Perspectives*, published by Northwestern School of Law of Lewis & Clark College (Portland, Oregon).

III. "KEEPING UP WITH HARVARD"—THE ORIGIN OF LAW REVIEWS

As is the case with so much that characterizes contemporary American law schools—such as the so-called "Socratic" method of teaching[44]—the law review's position as the distinctive medium for American legal scholarship goes back to the revolution of legal education initiated by Christopher Columbus Langdell near the end of the nineteenth century and thus to Harvard Law School.[45] Eight students (among them John Henry Wigmore[46]) established the *Harvard Law Review* on the basis of an informal student discussion group in 1887.[47] Their initial goals were quite modest: "Our object, primarily, is to set forth the work done in the school with which we are connected," they wrote, "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."[48] But they also offered, especially to their own professors, a suitable organ of publication, and the *Harvard Law Review* soon became an integral part of the "Harvard system"[49] which it propagated. Other leading law schools took it over. This led to a scientificization of legal education[50] which was bound to induce the creation of scholarly periodicals modeled on the *Harvard Law Review*: first at Yale (1891), then at Pennsylvania (1896), Columbia (1901), Michigan (1902), and Northwestern University in Chicago (1906). This prefigured the future development: a modern law school must have its own law review based on the Harvard model. This was the identity card that showed that one "belonged." At the same time, however, the most astonishing characteristic of American law reviews, from a European perspective, was thus entrenched: publication not by

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[44] A caricature is provided by James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679 (1991).

[45] See, above all, Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 769 (1985).

[46] Author of the renowned ten volume work on the law of evidence, JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (3d ed. 1940) (first published in 1905). On Wigmore, see WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER (1977); KURT SCHWERIN, JOHN HENRY WIGMORE: AN ANNOTATED BIBLIOGRAPHY (1981).

[47] Swygart & Bruce, *supra* note 45, at 770.

[48] 1 HARV. L. REV. 35 (1887).

[49] On the establishment of which (by C.C. Langdell) see ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s (1983); ARTHUR E. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967, at 162 (1967); JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 20 (1978).

[50] See the recent work by Mathias Reimann, *A Career in Itself: The German Professoriate as a Model for American Legal Academia*, *in* THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920, at 165 (Mathias Reimann ed., 1993).

the professors but by a group of students at the particular school. This remains the case today. The law reviews are still, in the words of Oliver Wendell Holmes, "'[the] work of boys'"[51]—24-to-26-year old students with a college degree, a legal education of two to three years, and hardly any prior professional experience.[52]

How does one become an "editor" of a law review today, and what tasks does one thereby undertake? It used to be customary for only the best students to be taken onto the editorial board after their first year, with the criterion for selection being purely academic performance. Although selection criteria vary considerably from law school to law school, today only some of the available places are achieved by "grading on."[53] A further group of "editors" are selected on the basis of writing ability via an essay competition, which is called "writing on"—the evaluation of the submitted articles being made by the "senior editors," who are third-year students. Every now and again, a student succeeds in becoming an editor through the submission of a publishable short article ("note" or "comment"), which is usually referred to as "publishing on." And finally there are a number of leading law reviews which have a category of places reserved for historically under-represented groups.[54] It is disputed which groups should be eligible for this category, and different determinations are made from law school to law school. Women and ethnic minorities, in particular African-Americans, Hispanics, and Native Americans, are included, as are, occasionally, homosexuals and the handicapped,[55] as well as the catch-all category, "the socioeconomically disadvantaged and other persons who can demonstrate that some personal characteristic, experience or achievement would lend diversity to the law review."[56] Thus, affirmative action has been introduced into the composition of the editorial boards of many law reviews: something in

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[51] *See* Charles E. Hughes, *Foreword*, 50 YALE L.J. 737 (1941) (quoting Justice Oliver Wendell Holmes).

[52] The vast majority (roughly 90-95%) of the 300-350 law reviews in the United States are edited by students. In particular, all the titles that have already been mentioned are of this type (unless the contrary has expressly been stated).

[53] On which, in particular, see Leibman & White, *supra* note 16, at 398; E. Joshua Rosenkranz, *Law Review's Empire*, 39 HASTINGS L.J. 859, 892 (1988). Roger Cramton (at that time the President of AALS) regretted this deviation from the plain "merit system," believing it contributed to the decline in the quality of law reviews. Cramton, *supra* note 5, at 5.

[54] *See* Frederick Ramos, *Affirmative Action on Law Reviews: An Empirical Study of its Status and Effect*, 22 U. MICH. J.L. REFORM 179 (1988).

[55] Charles Edward Anderson, *Scholarly Schism*, 75 A.B.A. J., Sept. 1989, at 50.

[56] *Id.* For example, the Columbia Law Review decided "'[to] set aside five extra places . . . [for which] preference . . . will be given to gay, handicapped and poor applicants, as well as women and members of minority groups.'" Stephen Labaton, *Law Review at Columbia in a Dispute on Bias Plan*, N.Y. TIMES, May 3, 1989, at B1.

which Harvard, again, was the pioneer.[57] At least two leading law reviews have generally liberalized the entrance criteria and thus substantially increased the size of their editorial boards in recent years.[58]

During their first year as members of a law review (i.e., during their second year of study), the editors are, as a rule, under an obligation to write short contributions, the best of which are published as "notes" or "comments." The students can thereby, at the same time, qualify for membership of the management of the law review ("the editorial board"). At the end of the academic year, some are chosen out of the circle of first-year editors, and they remain in office for one year—until the end of their third year of study. After the successful completion of their studies, they leave not only the law review but also the law school with their Juris Doctor (J.D.) degrees.

The division of responsibility within the law review varies from law review to law review. In every case, an "editor in chief" (or "president") is at the top of the hierarchy. In addition, there are generally "executive editors," "managing editors," "articles editors," "notes editors," "book review editors," "symposium editors," "senior editors," "associate editors," and "editors" (or "staff"). Sometimes there is even an "admissions committee."[59] These titles reflect not only the strictly hierarchical structure of the law review but also the departmental responsibilities governing distribution of the work. Since this work is extensive and time-consuming and must be carried out together with regular studies, it is no wonder that the law review boards have grown bigger and bigger. In volume 102 of the *Yale Law Journal*, from the "editor in chief" down to the "editors" no less than 135 names are cited, while volume 45 of the *Stanford Law Review* mentions 151 student editors. Even a "low impact journal" such as the *Southern Illinois University Law Journal* lists 63 names in volume 17.[60] Thus, with close to 350 student-edited law reviews, more than 10,000 law students are annually channelled into the law review system.

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[57] *See* Gail Appleson, *Harvard Law Review Adopts Minority Plan*, 68 A.B.A. J., Mar. 1982, at 249; *see also* Cramton, supra note 5, at 6 (speaking of the "fall of the citadel").

[58] *See* Max Stier, Kelly M. Klaus, Dan L. Bagatell & Jeffrey J. Rachlinsky, *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467, 1472-73 (1992). The two law reviews responsible for liberalizing the entrance criteria are the *Yale Law Journal* and the *Stanford Law Review*. *Id.*

[59] In a spirit of egalitarianism, the *Harvard Law Review* has stopped mentioning these differentiations on its staff page.

[60] Even "specialty journals" can have an astonishingly large number of editors. Thus, Volume 15 the *Harvard International Law Journal* (admittedly one of the most important) has 124 editors.

IV. "THE WORK OF BOYS"—THE EDITING AND FORMATTING OF LAW REVIEWS

1. Selection of Contributions

Every American law review consists of essentially two parts: firstly, academic articles (usually unsolicited ones) that are in most instances written by university professors but also by judges, lawyers, and other members of "practical" legal callings, and which are printed in the front part of the law review; and, secondly, "notes" or "comments," which are written by students of the law school and which deal with current questions of law, court decisions, legislative initiatives, and other problems of more narrow focus. In addition, there are book reviews and review essays, at least in the leading law reviews, which are dedicated to critical and detailed evaluation of significant books. Finally, scholars have recently been given the opportunity to submit shorter articles, which do not have the same weight or format as a traditional article under such titles as "Commentary," "Essay," or "Correspondence."[61] So-called "Symposia," in which a special theme is illuminated in several contributions solicited for that purpose, are also popular. Many law reviews annually publish such a "symposium issue." In contrast to German practice, court decisions are not printed in American law reviews, even in excerpted form.

All of these parts of the law review must be planned, the essay competitions for the purpose of replenishing the supply of editors have to be carried out, and the "notes" have to be written, selected, and published. Above all, the submitted articles must be examined, selected, and editorially supervised.[62] For the leading law reviews, even examination and selection are a labor of Sisyphus. Six hundred to twelve hundred manuscripts are submitted each year,[63] of which only a fraction can be accepted and printed. Volume 106 (1992-93) of the *Harvard*

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[61] *See* Lee E. Teitelbaum, *Correspondence: Moral Discourse and Family Law*, 84 MICH. L. REV. 430 (1985) (This was the first such publication. Teitelbaum states in this context: "few forms have been as resistant to innovation as the law review"). See also the six articles in Volume 24 of the *Connecticut Law Review*, with an introduction by Erik M. Jensen. Erik M. Jensen, *Law Review Correspondence: Better Read than Dead?*, 24 CONN. L. REV. 159 (1991).

[62] Leibman & White, *supra* note 16, at 402.

[63] *Id.* at 416. It is normal for an author to send his article to between ten and twenty different journal editorial staffs at a time in order to place his or her article in the most prestigious journal possible. The formal and informal journal "rankings," *see infra* notes 172-73 and accompanying text, help the author do this. There is no need to worry that an article will not be published in the United States, in view of the enormous variety of "general" law reviews. See also the critical remarks of Erik M. Jensen, *The Law Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL EDUC. 383 (1989).

Law Review contains no more than nine articles of the classic law review caliber, filling 767 of the 2,044 pages. It is no wonder that the articles editors of law reviews consider "tact in dealing with outside authors" to be the most important quality needed for fulfillment of their task.[64] At the side of practically every law review stands a group of faculty advisors who can be consulted in the selection process. How much influence they can, want to, and actually do have on the content of the law review varies from editorial board to editorial board and from law review to law review.[65] Again and again, one reads horror stories in which only the intervention of a faculty member prevents the worst from occurring.[66] And it is clear that it is often easier for professors of the home faculty to get an article into the home law review. It is all too understandable that students find it difficult to rebuff them.[67]

2. *The Editorial Process*

Once an article is accepted, the process of "editing" begins. It is astonishingly laborious and involves a whole series of correction processes. First, the article is fitted to the style and format of the respective law review. With respect to style, the *Texas Law Review Manual on Usage and Style*[68] plays a sinister role. One review condemned it somewhat drastically, although not inappropriately, as "one of the most pernicious collections of superstitions that has ever been taken seriously by educated people."[69]

Ahead of the others, however, stands a blue book with the title *The Bluebook: A Uniform System of Citation* (the "*Bluebook*"), which had its origin—it could hardly be otherwise—with the Harvard Law School. It came into being in 1926 as a modest brochure of 26 pages,[70] swelled to ever greater scope from new edition to new edition, and perfected the uniformity of citation conventions in detail. Law review after law review subjected themselves to the

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[64] *See* Leibman & White, *supra* note 16, at 398.

[65] *See* John G. Kester, *Faculty Participation in the Student-Edited Law Review*, 36 J. LEGAL EDUC. 14 (1986); Leibman & White, *supra* note 16, at 408.

[66] *See* Preckshot, *supra* note 15, at 1007; Leonard, *supra* note 15, at 185.

[67] *See* Leibman & White, *supra* note 16, at 405; Preckshot, *supra* note 15, at 1016. *See also* Ira Mark Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. LEGAL EDUC. 681, 685 (1983) (with reference to the eye-catching example of the *Virginia Law Review*, in which, during the period under investigation, 1,326 of 1,926 published pages were reserved for members of the Virginia Law School); Rosenkranz, *supra* note 53, at 869.

[68] TEXAS LAW REVIEW: MANUAL ON USAGE & STYLE (6th ed. 1990).

[69] James Lindgren, *Fear of Writing*, 78 CAL. L. REV. 1677, 1678 (1990).

[70] As to the following discussion in the text, see James W. Paulsen, *An Uninformed System of Citation*, 105 HARV. L. REV. 1780 (1992).

dictates of the Harvard *Bluebook* and practitioners and courts followed its prescripts, giving rise to the verb "to bluebook" an article. The fifteenth edition, which appeared in 1991, was published by the Harvard Law Review Association in conjunction with the sister institutions of Columbia, Yale, and Pennsylvania. It appears every five years in a new revision and further refinement. In the meantime, it has become 343 pages long and so complex and unwieldy that a former "editor" of the *Harvard Law Review* has brought a guide to its use onto the market.[71] The *Bluebook*, with its pedantic obsession with detail and zeal for regulation, has driven generations of reviewers to scorn and sarcasm,[72] and generations of authors and (presumably) editors of law reviews to despair. One is instructed when to begin a footnote with "*see*," "*see also*," and "*cf.*," and the subtle differences between "*but see*" and "*but cf.*" are explained.[73] Nor do the rules lack instructions for the citation of pop music and films ("DAVID BOWIE, THE RISE AND FALL OF ZIGGY STARDUST AND THE SPIDERS FROM MARS (RCA Records 1972)"[74]; "CASABLANCA (Metro-Goldwyn-Mayer 1942)"[75]). Certain illustrious authors have apparently succeeded in obtaining departures from the rules, even with publications in the *Harvard Law Review*;[76] but only recently was there open rebellion against the tyranny of the *Bluebook*. The editors of the *Chicago Law Review* created their own greatly simplified citation conventions in the so-called *Maroon Book*.[77] Some law reviews have now switched from the *Bluebook* to the *Maroon Book*.

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[71] *See* ALAN L. DWORSKY, USER'S GUIDE TO A UNIFORM SYSTEM OF CITATION: THE CURE FOR THE BLUEBOOK BLUES (1988); *see also* Paulsen, *supra* note 70, at 1781.

[72] *See* Paulsen, *supra* note 70, at 1780 (mentioning reviews of the Bluebook which treat it as a religious treatise or as an adventure story).

[73] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 22 (15th ed. 1991) ("THE BLUEBOOK").

[74] THE BLUEBOOK, *supra* note 73, at 124. However, "[i]f a particular song or musical work is referred to, cite it by analogy to rule 15.5.1: KATE BUSH, *The Man with the Child in His Eyes*, *on* THE KICK INSIDE (EMI Records 1977)." *Id.*

[75] THE BLUEBOOK, *supra* note 73, at 124. Contrast the useful citation rules for foreign jurisdictions. *See id.* at 219-58.

[76] Paulsen, *supra* note 70, at 1783-84 (referring to Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955)).

[77] THE UNIVERSITY OF CHICAGO MANUAL OF LEGAL CITATION (University of Chicago Law Review & University of Chicago Legal Forum eds., 1989). *See* Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1343 (1986) ("The pyramids in Egypt are the hypertrophy of burial. The hypertrophy of law is *A Uniform System of Citation*."). But see the reply in Book Note, *Manual Labor, Chicago Style*, 101 HARV. L. REV. 1323, 1326 (1988) ("The *Maroon Book* ends up as a Critical Legal Studies version of the Code Napoléon, grounded in an apparent belief that the negative effects of rules can be ameliorated by relentlessly emphasizing their arbitrary and contingent nature."). Just for Louisiana, there is a *Guide to Louisiana and Selected French Legal Materials and Citations*, written by M.A. Cunningham, 67 TUL. L. REV. 1305 (1993).

From the perspective of an author, particularly a European author, the process of editing is, as a rule, uncommonly annoying. It is true that at the end there is externally an almost spotless product: the published article contains hardly any typographical errors or inconsistencies of citation. In addition, print, script, paper, and other technical details, down to the title heading of every page, are of the best quality, not only in the leading law reviews but in many others as well. Furthermore, American law reviews are very modestly priced[78] and therefore have to be heavily subsidized by their respective law schools (although the *Harvard Law Review* is an exception). On the other hand, if things go badly (as they usually do) the author has had to proof-read his product four, five, or more times, continually eradicating mistakes occurring from the rearrangement of citations according to the *Bluebook* system; he has reversed stylistic corrections that have been made to his article and has provided the reasons for doing so; and he has given "his" editor the opportunity (if necessary by sending him many costly photocopies) to check all references in the footnotes.[79] In short, he has spent a considerable amount of time introducing a young American law student to some of the fundamentals of legal scholarship.

To a certain degree, that also reveals the point of the entire system. The advocates of the present-day law review system continue to emphasize the high educational value of editorial activity for the students:

> The American law review properly has been called the most remarkable institution of the law school world. To a lawyer, its articles and comments may be indispensable professional tools. To a judge, whose decisions provide grist for the law review mill, the review may be both a severe critic and a helpful guide. But perhaps most important, the review affords invaluable training to the students who participate in its writing and editing.[80]

Whatever one may make of that,[81] it remains certain that being a member of a law review can bring a student significant career advantages. Many law firms

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[78] At the time this Article was written, a subscription to the *Harvard Law Review* was priced at $36 (plus $6 for shipping out of the country). 106 HARV. L. REV. ii (1993). A subscription to the *University of Chicago Law Review* was listed at $35 (plus $4 for shipping out of the country). 60 U. CHI. L. REV. iv (1993). A subscription to the *Stanford Law Review* was priced at $35 (plus $5 for shipping out of the country). 45 STAN. L. REV. iii (1993).

[79] *See* Elyce H. Zenoff, *I Have Seen the Enemy and They Are Us*, 36 J. LEGAL EDUC. 21, 22 (1986).

[80] Warren, *supra* note 5, at 1. *See also* Harold C. Havinghurst, *Law Reviews and Legal Education*, 51 NW. U. L. REV. 22 (1956); Scott M. Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093, 1099 (1986); Ronald R. Rotunda, *Law Reviews—The Extreme Centrist Position*, 62 IND. L.J. 1, 4 (1986). *See also* the references in Leonard, *supra* note 15, at 184-86 n.13.

[81] *See* Cramton, *supra* note 5, at 9 ("a vast monument of wasted effort"); Rosenkranz, *supra* note 54, at

attach considerable value to such membership when they decide whom to hire; some are even said to narrow the growing field of candidates from the outset by using this criterion.[82] The majority of active professors at the University of Chicago Law School were on the editorial board of one of the leading law reviews (as a rule, Harvard, Yale, Stanford, or Chicago) as students and consider that fact important enough to be mentioned in the short biographies produced for the faculty brochure.[83] Law schools everywhere promote themselves through the reviews published under their auspices;[84] law reviews are obviously an important factor in the recruitment of students. At the same time, this provides an incentive to law schools to increase the number of law reviews in order to open up the possibility for a continually growing circle of students to crown their legal education through participation on a law review.

3. *Uniformity of Style and Form*

The traditional law review system also has its critics in America. Their ancestor is Professor Fred Rodell of Yale Law School, who (naturally, in a law review article) briefly and succinctly summarized his view as follows: "There are two things wrong with almost all [law review] writing. One is the style. The other is its content."[85] In recent times, the critical voices have increased. The style favored by generations of editors is criticized as "overly tentative, pompous, pedantic, and uninteresting;"[86] and with regard to content, law reviews offer "little more than a thorough treatment of trivialities."[87] On the whole, the

899; John Henry Schlegel, *An Endangered Species?*, 36 J. LEGAL EDUC. 18 ("the notion that the law review was . . . designed as a special educational experience is preposterous").

[82] Preckshot, *supra* note 15, at 1009; Stier et al., *supra* note 58, at 1487-90.

[83] The University of Chicago Law School, The Glass Menagerie 1993-94.

[84] See the references in Rosenkranz, *supra* note 53, at 885-87 nn.83-98.

[85] Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936) ("Rodell, *Goodbye*"). *See also* Fred Rodell, *Goodbye to Law Reviews Revisited*, 48 VA. L. REV. 279, 279 (1962) ("Rodell, *Revisited*"). For fundamental criticism from the "establishment" perspective, see Cramton, *supra* note 5; from an "anti-establishment" point of view, see Rosenkranz, *supra* note 53; E. Joshua Rosenkranz, *The Empire Strikes Back*, 22 ST. MARY'S L.J. 943 (1991). The current law review system has been defended from the students' perspective by Phil Nichols, *A Student Defense of Student Edited Journals: In Response to Professor Roger Cramton*, 1987 DUKE L.J. 1122; *see also* Stier et al., *supra* note 58.

[86] Leibmann & White, *supra* note 16, at 389. *See also* Posner, *supra* note 78, at 1349 ("a lowest-common-denominator style"); Preckshot, *supra* note 15, at 1011-14; Rodell, *Revisited*, *supra* note 85, at 287-88 ("Without a style that conceals all content and mangles all meaning, or lack of same, beneath impressive-sounding but unintelligible gibberish, most of the junk that reaches print in the law reviews and such scholarly journals could never get itself published anywhere—not even there."); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 943 (1990) ("The way law review articles are written may be the primary reason that they are so widely unread.").

[87] Leibmann & White, *supra* note 16, at 389. *See also* Rodell, *Revisited*, *supra* note 85, at 43 (law re-

average law review article corresponds to what a student regards as scholarship. This criticism cannot simply be brushed off. A foreign observer cannot fail to be struck by the extensive uniformity of what is presented in the law reviews.[88] One can recognize the typical law review article almost immediately. It is extraordinarily long, and it goes into the topic it selects in the greatest detail. The law review, after all, is not read by specialists of a particular field, but is directed to a general legal readership. If one divides the aforementioned 767 pages that were reserved for articles in the 1992-93 volume of the *Harvard Law Review* by the number of articles in that law review,[89] one gets an average of eighty-five pages per article. But there are also articles that are more than one hundred pages long. They have almost the length of a monograph.

The typical law review article is broken down into several segments, almost always called "parts." In the introductory portion of the article, an overview of the essay is given after a short introduction to the author's theme and hypothesis. In the conclusion, one will find a summary of the author's argument.[90] All claims, frequently even those of a somewhat trivial nature, are supported by footnotes.[91] As a result, the article will often be burdened with armchair and routine scholarship, and is brimming with references. The current record for the number of footnotes is 4,824 which were dispersed through 491 pages of text.[92] As a rule, there is a footnote at the beginning that gives thanks and occasionally recounts the story of the origin of the article. The author of an article in Volume 103 of the *Harvard Law Review* thanks no fewer than thirty-six people and

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view writers are "blithely continuing to make mountain after mountain out of tiresome technical molehills"); Zenoff, *supra* note 80, at 21 ("Published articles lack originality, are boring, too long, too numerous and have too many footnotes, which are also boring and too long . . . ."); Preckshot, *supra* note 15, at 1014; Lasson, *supra* note 86, at 931; Arthur Austin, *Commentary on Jensen's Commentary on Commentary*, 24 CONN. L. REV. 175, 176 (1991) ("'law reviews are the scandal of legal publishing'") (quoting Patricia Bellew Gray, *Harvard's Faculty Stirs a Tempest with Plans for New Law Journal*, WALL ST. J., May 10, 1988, at 1). *See also* Stier et al., *supra* note 58, at 1469 ("Evaluations of the law reviews' content have been almost universally negative.").

[88] This is confirmed by Posner, *supra* note 78.

[89] *See supra* Part IV.2.

[90] A satire is offered by Adam Winkler & Joshua Davis, *Postmodernism & Dworkin: The View from Half-Court*, 17 NOVA L. REV. 799, 799 (1993) ("In Part I of the Essay, we present the first major part of our argument. In Part II, we present the next major aspect of our argument. . . . Finally, in the conclusion, we conclude our Essay.").

[91] See Posner, *supra* note 77, at 1350, with his rule 13 of the "anti-lessons that our heavily student-influenced legal culture enforces": "Cite authority for every proposition, however obvious; maximize the ratio of citations to pages."

[92] *See* Arnold S. Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y.L. SCH. L. REV. 209 (1987); *see also* Lasson, *supra* note 86, at 937-38.

seven workshops for their input.[93] The style of the typical law review article is abstract, colorless, and long-winded—in contrast to English legal literature. Humor and pithy formulations are obviously regarded as unacademic.[94] Incidentally, this stands in marked contrast to the style of instruction.

V. JURISPRUDENCE WITHOUT LAW—THE CONTENT OF LAW REVIEWS

1. "Look at Me" Erudition

The same is true of the content of the articles. In an often-cited article entitled *Der Rechtskulturschock*, ("The Legal Culture Shock") Michael Martinek has described the operation of American law schools and the adjustment problems of German postgraduate students.[95] Common sense and concreteness rather than abstract scholarship are, in his view, characteristic of American legal education, and the German lawyer must completely immerse himself into the strange, pragmatic mentality of the case-law method of thinking. The contrast with the impression of American legal thought given by the law reviews could not be greater. Of analysis of concrete cases and decisions there is for the most part nothing; problems of the practical application of the law recede into the background; and there is hardly any trace of the influence of common sense and pragmatism—quite the opposite. One encounters a distinctive inclination to theorize, to think in terms of abstract concepts, and to develop ever-new "paradigms."[96] This kind of literature hardly seems to relate to the practical activity of lawyers. Thus, a prominent author wrote about his own work, "[a]lthough a couple of cases are mentioned, it is in no serious sense meant to be a contribution to the discussion of any of the contemporary doctrinal issues of undoubted importance to our society."[97]

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[93] *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 407 (1989).

[94] "[I]t seems to be a cardinal principle of law review writing that nothing may be said forcefully and nothing may be said amusingly." Rodell, *Goodbye*, *supra* note 85, at 38.

[95] Michael Martinek, *Der Rechtskulturschock*, 1984 JURISTISCHE SCHULUNG 92.

[96] *See* Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 336 (1989) ("We write . . . about metalaw . . . [i.e.] about the deep structures of law, its normative resonances, metaphorical power, and dialogic quality."); Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1655 (1993) ("Posner, *Legal Scholarship*") ("But in declining as a service profession while growing overall, academic law has, at least, become a good deal more—academic.").

[97] Sanford Levinson, *Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010, 2012 (1993) (referring to Sanford Levinson, *The Audiences for Constitutional Meta-Theory (Or, Why and to Whom Do I Write the Things I Do?)*, 63 U. COL. L. REV. 389 (1992)).

It is therefore not surprising that American judges increasingly feel themselves left in the lurch by legal scholarship. The leading law reviews are no longer the "severe critic" or "helpful guide" that they were in the time of Earl Warren;[98] rather they are, in the opinion of District of Columbia Circuit Court Judge Silberman, "'dominated by rather exotic offerings of increasingly out-of-touch faculty members.'"[99] "Despite a challenging, important array of issues, despite the mass of materials the law reviews generate, and despite diligent searching, I am disappointed not to find more in the law reviews that is of value and pertinence to our cases," writes Judge Judith S. Kaye.[100] James J. White, a law professor at the University of Michigan Law School, describes the phenomenon of intellectual exhibitionism:

> When she is dressed up in her best dress, my four-year-old granddaughter is fond of holding out her arms and squealing: 'Look at me; look at me.' Much legal writing published in the elite and other journals falls into the 'look at me' category. It is not intended for lawyers; it is not principally to educate the author; it is merely to exhibit the beauty of the writer's intellect to an adoring audience.[101]

Judge Harry T. Edwards, a respected federal judge who was an active lecturer for ten years at the Harvard and Michigan Schools of Law, has given the most emphatic expression of this smouldering dissatisfaction: his article *The Growing Disjunction Between Legal Education and the Legal Profession*[102] has triggered an animated controversy.[103] "Many law schools," Edwards writes, "—especially the so-called 'elite' ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy."[104] A sign of this is the blossoming of the "law and" subjects. "Our law reviews are now full of mediocre interdisciplinary articles," Edwards argues.[105] "Too many professors are ivory tower dilettantes, pursuing whatever

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98 *See supra* note 80 and accompanying text.

99 Stier et al., *supra* note 58, at 1470 (quoting U.S. v. $639,558, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring)).

100 Judith S. Kaye, *One Judge's View of Academic Law Writing*, 39 J. LEGAL EDUC. 313, 320 (1989). Kaye was a judge (and is now Chief Judge) on the Court of Appeals of the State of New York.

101 James J. White, *Letter to Judge Harry Edwards*, 91 MICH. L. REV. 2177, 2185-86 (1993).

102 91 MICH. L. REV. 34 (1992).

103 *See* Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993) (with no fewer than eighteen articles from judges, practitioners, and university professors, among them the article by James J. White mentioned above).

104 Edwards, *supra* note 102, at 34.

105 *Id.* at 36. For commentary, partly in agreement and partly critical, see Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993) ("Posner, *Deprofessionalization*"); Posner, *Legal Scholarship*, *supra* note 86, at 1647.

subject piques their interest, whether or not the subject merits scholarship and whether or not they have the scholarly skills to master it."[106] The conspicuous act of turning to other disciplines[107] is connected to the idea that "law" in America is somehow not traditionally taken seriously as an autonomous academic "science"[108] with its own distinctive claim as the subject of study and research in a modern university; and to the perception that the requisite knowledge could be imparted just as well in a practical apprentice-ship.

2. *"Law and . . ." i: Critical Schools*

What are the main currents of the new, American "law and . . ." erudition?[109] One of them is the "law and feminism" school.[110] Legal feminism is defined as "a woman-centered methodology of critically questioning our ideological premises and reimaging the world,"[111] or as a "self-consciously critical stance towards the existing order with respect to the various ways it affects different women 'as women.'"[112] The feminists' classic claim for equal rights[113] has been replaced by a cultural feminism that stresses the "nurturing

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[106] Edwards, *supra* note 102, at 36.

[107] "Virtually every field of human knowledge is being mined for what it can contribute to our understanding of the processes of law and of legal issues." Lee C. Bollinger, *The Mind in the Major American Law School*, 91 MICH. L. REV. 2167, 2167 (1993). *See also* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-87*, 100 HARV. L. REV. 761 (1987) ("Posner, *The Decline of Law*").

[108] Martinek, *supra* note 95, at 94.

[109] An overview is offered by Larry Alexander, *What We Do, and Why We Do It*, 45 STAN. L. REV. 1885, 1888-98 (1993) (under the sub-heading "The New Kids on the Block"); Gary Minda, *Jurisprudence at Century's End*, 43 J. LEGAL EDUC. 27, 36-49 (1993); and, especially in the area of labor law, Matthew W. Finkin, *Reflections on Labor Law Scholarship and Its Discontents: The Reveries of Monsieur Verag*, 46 U. MIAMI L. REV. 1101 (1992)..

[110] *See, e.g.*, Colloquy, *Centennial Celebration: A Tradition of Women in the Law*, 66 N.Y.U. L. REV. 1545 (1991); Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1985); Symposium, *Women In Legal Education—Pedagogy, Law, Theory, and Practice*, 38 J. LEGAL EDUC. 1 (1988); Symposium, *Civic and Legal Education, Panel One: Legal Education, Feminist Values, and Gender Bias*, 45 STAN. L. REV. 1525 (1993); Deborah L. Rhode, *The "No Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731 (1991).

[111] Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 4 n.3 (1988).

[112] Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 833 (1990).

[113] Regarding the various schools of legal feminism and their development, see Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826 (1988) (reviewing CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987)); Kenneth Lasson, *Feminism Awry: Excesses in the Pursuit of Rights and Trifles*, 42 J. LEGAL EDUC. 1 (1992); Alexander, *supra* note 109, at 1889-95; Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies and Legal Education or "The Fem-Crits Go To Law School,"* 38 J. LEGAL EDUC. 61 (1988). Equality in the conventional sense would, according to the modern feminists, mean equality granted by men within a world fashioned by men: "If we treat women the same as men, we must ignore our own unique child-bearing capacity. Why should men be the measure? Why should we have to argue for 'special treatment' for women if we acknowledge that women and men are different from one another?" Bender, *supra* note 111, at

and caring nature" of women,[114] and by the somewhat shrill voices of the radical feminists, who maintain the essential sameness of prostitution, marriage, and sexual harassment.[115] "Critical Race Theory" involves concerns similar to those of Legal Feminism. It also points out that equality in the traditional sense leads to incorporation into a fundamentally foreign reality (in this case not a male one, but rather a white one), and that therefore the main task of the movement is to change this reality.[116] Another school stressing sexual orientation, still *in statu*

19-20. *See also* Catherine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991). But do *biological* differences really play the decisive role? This is also claimed by the critics of feminist jurisprudence: "The mere fact that the mother carries with her a supply of milk makes it clear that she is the better candidate for staying with the child, consequently leaving the male of the species to engage in a broad class of explorative activities." Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981, 990 (1992) ("Epstein, *Gender*"). See also the arguments of GARY BECKER, A TREATISE ON THE FAMILY 30 (1991) and RICHARD A. POSNER, SEX AND REASON (1992). For a contrary view, see Gillian K. Hadfield, 106 HARV. L. REV. 479, 480 (1992) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)), who makes reference to "previously neglected archeological and ethnographic records [which show] the importance of women's gathering activities in foraging societies." Are the differences between the roles of men and women thus merely "socially constructed," as the feminists frequently claim? But what does that mean? *See* Richard A. Epstein, *The Authoritarian Impulse in Sex Discrimination Law: A Reply to Professors Abrams and Strauss*, 41 DEPAUL L. REV. 1041, 1047 (1992) ("Epstein, *A Reply*"). For the "equal treatment versus special treatment" conflict within the feminist movement, see Menkel-Meadow, *supra*, at 72-75; Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 54 STAN. L. REV. 1547 (1993).

[114] *See* Carol GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY IN WOMEN'S DEVELOPMENT (1982); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Bender, *supra* note 111, at 28-30.

[115] CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 59 (1987). See further CATHERINE MACKINNON, ONLY WORDS (1993).

[116] *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758; Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39; Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). See also the overview by Alexander, *supra* note 109, at 1895-98, as well as the principled criticism of Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989), on which, see the five retorts in Colloquy, *Responses to Randall Kennedy's Racial Critique of Legal Academia*, 103 HARV. L. REV. 1844 (1990); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705; as well as Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); on which, in turn, see Stephen L. Carter, *Academic Tenure and "White Male" Standard: Some Lessons from Patent Law*, 100 YALE L.J. 2065 (1991). Issue 3 (May 1994) of the California Law Review was a symposium issue dedicated to Critical Race Theory.

The parallels between Legal Feminism and Critical Race Theory appear clearly in Symposium, *Excluded Voices: Realities in Law and Law Reform*, 42 U. MIAMI L. REV. 1 (1987), and in Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1352 n.15 (1992). Delgado, however, points out that "outsiders" currently have a "substantial presence" in the elite journals. Almost three-quarters of all articles on civil rights published between 1985 and 1990 in the *Harvard Law Review*, *Yale Law Journal* and *University of Pennsylvania Law Review* were written by women or non-white males.

nascendi, will presumably draw up a similar agenda from a homosexual perspective.[117]

The Critical Legal Studies (CLS) Movement views law as, in essence, politics. It denies the possibility of a specifically legal argumentation, which it treats as a conventional rhetorical maneuver disguising the perpetuation of the relations of domination.[118] A famous proposal by Harvard professor Duncan Kennedy would break up the illegitimate hierarchies in law schools through uniform pay and job rotation of all employees from the custodian to the dean.[119] "Deconstruction" has become the focus of CLS in its more recent, post-structuralist phase.[120]

Representatives of the Law and Literature movement advocate, on the one hand, the application of methods of literary criticism to legal texts in order to decipher legal rhetoric; on the other hand, they try to deepen the understanding of legal questions by discussing their treatment in works of literature.[121] Law

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[117] *See* RUTHANN ROBSON, LESBIAN OUT(LAW): SURVIVAL UNDER THE RULE OF LAW (1992); WILLIAM B. RUBENSTEIN, LESBIANS, GAY MEN, AND THE LAW (1993); Elvira R. Arriola, *Coming Out and Coming to Terms with Sexual Identity*, 68 TUL. L. REV. 283 (1993) (reviewing LILLIAN FADERMAN, ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA (1991)); Symposium, *Sexual Orientation and the Law*, 79 VA. L. REV. 1419 (1993).

[118] See Louis B. Schwartz, *With Can and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413 (1984) and John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984), as well as the other articles in this symposium issue of the *Stanford Law Review* (which was no less than 674 pages long). *See also* ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); Duncan Kennedy & Karl Klare, *Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984); Mark Tushnet, *Critical Legal Studies: An Introduction to it Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516 (1991) ("[C]ritical legal studies is a political location for a group of people on the Left who share the project of supporting and extending the domain of the Left in the legal academy. On this view the project of critical legal studies does not have any essential intellectual component."). The style of the adherents of the CLS Movement is described by Tushnet (who is himself a CLS scholar) in the following terms: "'the general statements . . . are expressed in extraordinarily dense language . . . [of] near impenetrability. Yet if the language is simplified, it may seem rather banal . . . .'" Schwartz, *supra*, at 420 (quoting Tushnet).

[119] *See* Schwartz, *supra* note 118, at 413 (recounting lecture by Duncan Kennedy at the University of Pennsylvania Law School).

[120] Minda, *supra* note 109, at 43-44.

[121] *See* the contributions to Colloquy, *Law as Literature*, 60 TEXAS L. REV. 373 (1982); Symposium, *Interpretation*, 58 S. CAL. L. REV. 1 (1985). *See also* Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1 (1988); David O. Friedrichs, *Narrative Jurisprudence and Other Heresies: Legal Education at the Margin*, 40 J. LEGAL EDUC. 3, 9-11 (1990); Judith M. Schelly, Note, *Interpretation in Law: The Dworkin-Fish Debate (or, Soccer Amongst the Gahuku-Gama)*, 73 CAL. L. REV. 158 (1985); Stanley Fish, *Not of an Age, But for All Time: Canons and Postmodernism*, 43 J. LEGAL EDUC. 11 (1993); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985).

and Storytelling is based on the recognition that what we call law is constituted of many different personal "stories"; and that the institutions of the law acquire meaning for the individual person only when they become a part of his own story.[122] Therefore, representatives of the Storytelling Movement seek to transmit personal experience and thereby to adorn legal "discourse" with ingredients such as "emotion and desire."[123]

This is not the place to deal more closely with these "non-traditional" forms of jurisprudence or even to evaluate them. All of them have given rise to intensive discussions and exist in the meantime in many different shades. Their borders are fluid; thus a number of representatives of Legal Feminism hail from the CLS Movement; and "storytelling" is a frequently-chosen form of expression for those who want to draw attention to the experiences of women or persons of color who have to live in an environment dominated by white men.[124] The possible connections between Law and Storytelling and Law and Literature are obvious. In contrast to the widespread application of political theory in the context of constitutional law, these trends are not, in principle, limited to one legal area; they promise new perspectives for private law as well. Still, it remains to be seen what a feminist jurisprudence can contribute to a resolution of private law disputes.[125] This paper can only point to these trends in American law review

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[122] *See* Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); Mark G. Yudof, *"Tea and the Palaz of Hoon": The Human Voice in Legal Rules*, 66 TEXAS L. REV. 589 (1988); James R. Elkins, *The Stories We Tell Ourselves in Law*, 40 J. LEGAL EDUC. 47 (1990); Andrew W. McThenia, Jr., *Telling A Story About Storytelling*, 40 J. LEGAL EDUC. 67 (1990) as well as the other contributions to Symposium, *Pedagogy of Narrative*, 40 J. LEGAL EDUC 1 (1990) (with an extensive bibliography). *See also* Philip N. Meyer, *Convicts, Criminals, Prisoners, and Outlaws: A Course in Popular Storytelling*, 42 J. LEGAL EDUC. 129, 132 (1992) ("In contrast to most approaches to Law and Literature or Law and Popular Culture, my course is not really 'about' anything at all."); Gerald Torres & Kathryn Milun, *Translating* Yonnondio *By Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 630 (examining the "pragmatics of 'legal' storytelling"); James R. Elkins, *A Bibliography of Narrative*, 40 J. LEGAL EDUC. 203 (1990).

[123] Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 (1991). For criticism, see Richard Epstein, *Discussion - Panel Two: Legal Scholarship and Disciplinary Politics*, 45 STAN. L. REV. 1671, 1678 (1993). Searching for a "new ideology of reason and emotion" in legal education are Angela P. Harris & Marjorie M. Schultz, *"A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1774 (1993). "Rich discourse" and "thick description" are expressions currently in vogue.

[124] *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) ("The stories of outgroups aim to subvert [the] ingroup reality."); Kathryn Adams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

[125] Richard A. Epstein, *Legal Education and the Politics of Exclusion*, 45 STAN. L. REV. 1607, 1624 (1993). *But see* Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848; Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist*

literature of the past twenty-five years that have increasingly come into the limelight—and give an impression of how much and in what a surprising way the American and European legal cultures have departed from each other.

"The project is to realize the unalienated relatedness that is immanent within our alienated situation."[126] "The practical and theoretical solutions to the problem of overcorrecting and undercorrecting contract converge with the implications of the attempt to soften the antagonism between contract and community."[127] "The first purpose of this essay is to put forward the global and critical claim that by virtue of their shared embrace of the separation thesis, all of our modern legal theory . . . is essentially and irretrievably masculine."[128] "Thus, modern radical feminism is united among other things by its insistence on the invasive, oppressive, destructive implications of women's material and existential connection to the other."[129] "[T]he story portrays gender as so complete and natural as to render invisible the processes through which gender is socially constructed by employers."[130] "Another objective is to provide an analysis of the legal role in the production of gendered identity that will invigorate the liberatory potential of the social construction thesis . . . . In the following sections, I will argue that legal rules . . . encode the female body with meanings."[131] "Outside my office door I can hear a Caribbean voice and an African-American voice involved in deep discussion. . . . Each accent is thick

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Analysis of Contract Law, 140 U. PA. L. REV. 1029 (1992). For Critical Race Theory, see, for example, Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157.

126 Peter Gabel & Duncan Kennedy, *Roll over Beethoven*, 36 STAN. L. REV. 1, 1 (1984). "It is not inconsistent to, on the one hand, realize the projective temporal character of human existence, in which no one is identity, and the living subject is continually not what he or she is by moving into the next moment in a creative and constitutive way." *Id.* at 19. Gabel and Kennedy also discuss the "intersubjective zap." *Id.* at 4. The editors of the *Stanford Law Review* eagerly explain that "'[i]ntersubjective zap' is a sudden, intuitive movement of connectedness. It is a vitalizing moment of energy (hence 'zap') when the barriers between the self and the other are in some sense suddenly dissolved. Relative understanding of another person is *not* what is meant by the phrase." *Id.* at 54. Reference is also made to an essay by Peter Gabel entitled *Ontological Passivity and the Constitution of Otherness within Large-Scale Social Networks: The Bank Teller*, (June 1, 1981) (unpublished manuscript on file with *Stanford Law Review*).

127 Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 645 (1983). *See also* Lasson, *supra* note 86, at 946 n.104.

128 Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988). See also the stylistic analysis of Lasson, *supra* note 86, at 947-48.

129 West, *supra* note 128, at 29.

130 Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1805 (1990). On which, see Epstein, *Gender*, *supra* note 113; Epstein, *A Reply*, *supra* note 113, at 1048.

131 Mary Joe Frug, *A Postmodernist Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1049 (1992).

and deeply divergent both from the other and from the generic standard of the evening news. . . . As I eavesdrop . . . I think, 'I want to live in a country that sounds like this. . . .'"[132] "The New Voice of Color;"[133] "The Cognitive Dimension of the *Agon* Between Legal Power and Narrative Meaning;"[134] "Pragmatist and Poststructuralist Critical Legal Practice;"[135] "Epistemological Foundations and Meta-Hermeneutic Methods: The Search for a Theoretical Justification of the Coercive Force of Legal Interpretation;"[136] "Rodrigo-s Chronicle;"[137] "The Tropical Bedroom;"[138] "Trashing;"[139] "Whiteness as Property."[140] One would not be able to find such texts and titles in the *Juristenzeitung* or in the *Law Quarterly Review*.

3. *"Law and . . ." ii: Economic Analysis of the Law*

Law and Economics, another of the "new" interdisciplinary subjects, has not (or not yet?) been accepted by us to the same extent as in the United States. It differs in many respects from the previously mentioned schools of thought. Authors of Law and Economics literature are typically from the "right" side of the political spectrum; their approach to research lacks the anti-authoritarian, anti-establishment tendency which is characteristic of representatives of Critical Legal Studies, Law and Feminism, or Law and Storytelling. Not by chance were two of the leading representatives of the Chicago School of economic analysis of the law appointed by President Reagan to be federal judges. Moreover, Law and Economics studies have produced much more specific results and have strongly influenced a number of legal subjects, such as modern antitrust law. Their influence has remained undiminished for more than twenty years, overshadowing that of all the other movements, as was demonstrated by a quantitative study based upon the frequency of citations.[141] Morton Horwitz, a legal historian who belongs to the CLS school, wrote in 1980 that "[f]uture legal

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132 Matsuda, *supra* note 123, at 1376.

133 Johnson, *supra* note 116, at 2007.

134 87 MICH. L. REV. 2225 (1989) (by Steven L. Winter).

135 139 U. PA. L. REV. 1019 (1991) (by Margaret Jane Radin & Frank Michelman).

136 68 B.U. L. REV. 733 (1988) (by Lisamichelle Davis).

137 101 YALE L.J. 1357 (1992) (by Richard Delgado).

138 57 U. CHI. L. REV. 773 (1990) (by Norval Morris).

139 36 STAN. L. REV. 293 (1984) (by Mark G. Kelman).

140 106 HARV. L. REV. 1709 (1993) (by Cheryl I. Harris). In this essay from the *Harvard Law Review* (which is published with the word "Black" always capitalized, while "white" is left in lower-case letters), the view that "being white" is a property right is developed over the course of eighty-four pages.

141 *See* William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385 (1993).

historians will need to exercise their imaginations to figure out why so many people could have taken most of this stuff so seriously,"[142] but at least up to now his prognosis has not been confirmed.

Law and Economics scholarship also, of course, exists in many different shades. These variations have in common an emphasis on market efficiency as one of the decisive criteria, if not the decisive one, for the assessment of legal regulations and for the regulation of legal conflicts.[143] Only economic analysis, in the view of their supporters, gives the activity of lawyers a scientific foundation. Like the other "Law and . . ." subjects previously mentioned, Law and Economics is universal in its claim;[144] it considers itself to be competent to embrace not only economic law in the narrow sense but also the "classical" private law fields right up to family law.[145] In his most recent book, Richard Posner has even undertaken an economic analysis of sex; the work is titled *Sex and Reason*, and it has caused waves in all of the leading law reviews.[146] Law and Economics is, incidentally, one of the few subjects which has several independent reviews, not edited by students, devoted to it—reviews that can

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[142] Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 905 (1980). On Horwitz, who became well-known particularly as the author of two works under the title "The Transformation of American Law" (1760-1860, published in 1977; 1870-1960, published in 1992), see Daniel R. Ernst, *The Critical Legal Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019 (1993).

[143] *See generally* RICHARD A. POSNER, AN ECONOMIC ANALYSIS OF THE LAW (1986); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); R.H. Coase, *Law and Economics at Chicago*, 36 J.L. & ECON. 239 (1993) (one of several articles printed in this issue of the John M. Olin Centennial Conference in Law and Economics at the University of Chicago). *See also* Gary Minda, *The Lawyer-Economist at Chicago: Richard A. Posner and the Economic Analysis of Law*, 39 OHIO ST. L.J. 439 (1978); Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making*, 61 N.Y.U. L. REV. 554 (1986); George L. Priest, *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, 90 YALE L.J. 1284 (1981); *Symposium on Post-Chicago Law and Economics*, 65 CHI-KENT L. REV. 3 (1989).

[144] "Indeed, for some professors and some law schools, every course has become a law and economics course." Eleanor M. Fox, *The Good Law School, The Good Curriculum, and the Mind and the Heart*, 39 J. LEGAL EDUC. 473, 480 (1989).

[145] *See* BECKER, *supra* note 113, at 30.

[146] *See, e.g.*, Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479 (1992) (book review) (from the feminist perspective); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L. J. 333 (1992) (book review) (from the perspective of "gay jurisprudence"); Robert P. George, *Can Sex Be Reasonable?*, 93 COLUM. L. REV. 783 (1993) (book review) (from the Catholic-Natural Law perspective, making the legitimate point that Posner denies the possibility of non-instrumental rationality); Martha Ertman, *Denying the Secret of Joy: A Critique of Posner's Theory of Sexuality*, 45 STAN. L. REV. 1485 (1993) (review essay) (from the lesbian perspective); Martin Zelder, *Incompletely Reasoned Sex: A Review of Posner's Somewhat Misleading Guide to Economic Analysis of Sex and Family Law*, 91 MICH. L. REV. 1584 (1993) (book review) (from the perspective of economic analysis); Martha Nussbaum, *"Only Gray Matter?" Richard Posner's Cost-Benefit Analysis of Sex*, 59 U. CHI. L. REV. 1689 (1992) (book review) (from a philosophical point of view).

compete in reputation with the law reviews. Among these, the oldest are *The Journal of Law and Economics*, which has appeared since 1958, and *The Journal of Legal Studies*, [147] founded in 1972.[148]

VI. "THE GROWING DISJUNCTION"—SOME OBSERVATIONS FROM A TRANS-ATLANTIC PERSPECTIVE

1. Three Characteristics of Law Review Scholarship

When one looks over American law reviews, one will first be struck by the strong fragmentation of legal scholarship in the United States. There are not only the traditional boundaries between disciplines which also hamper the discourse in Europe (i.e., private law, comparative law, and legal history;[149] in contrast to Continental European legal scholarship, on the other hand, the separation of public and private law in the United States is much less pronounced), but, in addition, there are a multitude of schools that have, in some cases, very little to say to each other.[150] There is a deep ideological rift between the Critical Schools and Economic Analysis—when Feminists and Critical Race Theorists emphasize concern, correct consciousness, and sensitivity, they create an aura of exclusiveness, which leads all too easily to insularity;[151] and to many lawyers not trained in economics, the pre-suppositions of the Law and Economics school are suspect and its methods incomprehensible.

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[147] Not to be confused with *Legal Studies, The Journal of the Society of Public Teachers of Law* (England).

[148] Both are edited by the University of Chicago Law School (faculty, not students). There are three more major journals in the field of Law and Economics (none of them edited by students): the *Journal of Law, Economics and Organization*; the *International Review of Law and Economics*; and *Research in Law and Economics*.

[149] American legal history searches for interdisciplinary cooperation nearly exclusively with history and the social sciences. That emerges, for example, from the focus of the *Law and History Review*. *See also Forum*, 50 WM. & MARY Q. 1 (1993); Lawrence M. Friedman, *American Legal History: Past and Present*, 34 J. LEGAL EDUC. 563 (1984); Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986).

[150] *See also* Fox, *supra* note 144, at 480.

[151] *See* Richard A. Epstein, *Legal Education and the Politics of Exclusion*, 45 STAN. L. REV. 1607 (1993); *see also* Alexander, *supra* note 109, at 1893-94 ("Additionally, a considerable amount of this literature seems determined to ignore the arguments of opponents, and takes on instead the smug air of preaching to the converted . . . . At least some feminist jurisprudes would contend that to say that feminist jurisprudence fails as rational discourse is nothing more than to invoke traditional 'phallologocentric' standards of rationality, whereas it is part of the message of feminist philosophy that women have their own methodology of reasoning and knowing.").

Secondly, it is clear that traditional doctrinal scholarship has lost much of its significance. Its share of published articles in the leading law reviews has dropped from almost 60% in the period from 1976-80 to 34% in the period from 1986-90;[152] and if one takes into account that the latter percentage comprises doctrinal scholarship in all legal subjects, it clearly indicates what every glance into the Harvard, Yale, or Stanford law reviews confirms: private law scholarship in the conventional sense can hardly be found in these publications.[153] Doctrinal scholarship—that is, the analysis of legal problems in a manner conducive to facilitating the practical application of the law—is often treated with a certain amount of condescension, or even disdain, at the elite universities,[154] and this assessment is reflected in the publication decisions of the student editors matriculated at these universities. An article on the protection of debtors in the assignment of claims or on particular problems in the doctrine of mistake in contract law appears to be unsuitable for a tenure piece;[155] rather, a

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[152] *See* Landes & Posner, *supra* note 141, at 407; *see also* Posner, *Deprofessionalization*, *supra* note 105; Mary Ann Glendon, *What's Wrong with the Elite Law Schools*, WALL ST. J., June 8, 1993, at A14 ("the ratio of 'practical' to 'theoretical' articles has dropped in the past 25 years from 4:1 to 1:1"). In the present context, reference is only made to the leading (and trend-setting) law reviews and law schools. It may be surmised that traditional legal analysis has at least in part shifted to the second and third tier institutions. *See* Posner, *Deprofessionalization*, *supra* note 105, at 1923; Landes & Posner, *supra* note 141, at 410. This is also a sign of the dwindling prestige of "doctrinal scholarship." *See* Edwards, *supra* note 102, at 36.

[153] The decline of the "legal treatise" as a literary form is closely connected with this phenomenon. *See* A.W. Brian Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981) (concerning the United States, see pages 668 (rise) and 674 (fall)). Such textbooks in the conventional sense do not (at the elite universities) enjoy great prestige and are rarely used for teaching purposes. Typical in that respect is LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 676 (2d ed. 1985). *See also* Mary Irene Coombs, *Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 118 (1988); Leonard, *supra* note 15, at 181.

[154] *See* Edwards, *supra* note 102, at 34-35; Posner, *Deprofessionalization*, *supra* note 105, at 1923; Donald B. Ayer, *Stewardship*, 91 MICH. L. REV. 2150 (1993). Sometimes, one will find an openly-expressed cynicism towards legal scholarship and even towards law. *See* Simpson, *supra* note 153, at 677; Paul O. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); 35 J. LEGAL EDUC. 1, 180 (reactions to Carrington article). The condition of legal scholarship in America is discussed by Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981); Richard A. Posner, *The Decline of Law as an Autonomous Discipline*, 100 HARV. L. REV. 761 (1987); Posner, *Legal Scholarship*, *supra*, note 96.

[155] *See* White, *supra* note 101, at 2185. American law professors are often appointed at a relatively young age. They typically have attended an elite university and they have not only achieved remarkably good grades but also served on the editorial staff of the general law review of their law school; they have subsequently clerked for a year each with a prominent federal court judge and a Supreme Court Justice; they have practiced for one or two years and then have been named as assistant or associate professors. After a period of two to four years they are promoted to (full) professor and obtain "tenure." Teaching ability, as assessed by student evaluations and the publication of at least one large-scale article in a leading law review play important roles in the selection of professors for tenure. A doctorate is not required. The connection between scholarly essay-literature and the pressures of "publish or perish" is discussed by John S. Elston, *The Case Against Legal Scholarship or,*

young academic must master the business of "paradigm shifting" if she wants to draw attention to herself through a law review article.

Thirdly, the insularity of American legal scholarship is remarkable.[156] Comparative law plays the role only of an outsider. And indeed, hardly any advance in understanding will be gained for Critical Race Theory or Legal Feminism from French, German, or English legal scholarship. Likewise, America undoubtedly leads in the area of economic analysis of law. But even articles on statutory interpretation and on the persuasive force of arguments from analogy in recent issues of the *Harvard Law Review*,[157] for example, do not make use of the rich experience of European legal scholarship in these areas.[158] American scholarship is not as unquestionably superior in every respect as American scholars sometimes seem to assume.[159]

2. *Career Traditions*

Law in the United States is big business.[160] The number of lawyers rose from 169,000 (one lawyer per 790 residents) in 1947-48 to an impressive 777,000 in 1990-91 (which equals a ratio of 1:320).[161] In 1986, the yearly expenditure for "legal services" amounted to fifty billion dollars (for the then-650,000 lawyers).[162] Some law firms employ more than a thousand lawyers.[163]

If the Professor Must Publish, Must the Profession Perish?, 39 J. LEGAL EDUC. 343 (1989); Kenneth Lasson, *Scholarship Run Amok: Excess in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 935 (1990). The recruitment of law professors in the United States has been discussed more recently by James Gordley, *Mere Brilliance: The Recruitment of Law Professors in the United States*, 41 AM. J. COMP. L. 367 (1993).

156 This is also criticized by Harold J. Berman in *The State of International Legal Education in the United States*, 28 HARV. INT. L.J. 240 (1988) ("provincialism").

157 *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1992). On Cass R. Sunstein ("perhaps . . . the hero of contemporary legal thought"), see Mark Tushnet, *The Bricoleur at the Center*, 60 U. CHI. L. REV. 1071, 1116 (1993).

158 *But see, e.g.*, Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992) (with a comparative reference to the interpretation of the *lex Aquilia*). Such an approach, however, constitutes a notable exception in modern American literature.

159 *See, e.g.*, Posner, *Deprofessionalization*, *supra* note 105, at 1930 ("American universities are the finest in the world."); Posner, *Legal Scholarship*, *supra* note 96, at 1647 ("the American university is without peer in the world"); *id.* at 1680 ("At this very moment the world is remaking itself in the image of the United States. There is no other large country in which people live as well and with as much freedom."). On the University of Chicago and its Law and Economics program, see the assessment, also not tainted by any false modesty, of Coase: "[W]e all know that the University of Chicago has not suffered from the usual human limitations. . . . It started at the top." Coase, *supra* note 143, at 239.

160 *See* Cramton, *supra* note 5, at 1.

161 *See* the references provided by Ayer, *supra* note 154, at 2151.

162 *See* Cramton, *supra* note 5, at 1

Legal education is carried on in 176 law schools, with the largest having over one hundred teachers.[164] The law schools train about 40,000 students a year,[165] for a good portion of whom there is no real need. Only students of the elite universities can confidently look forward to entering professional life.[166] It is therefore extraordinarily important to be accepted by a good university. The decision is facilitated by the famous "rankings" that are published annually. In 1993, Yale ranked ahead of Harvard, Stanford, Chicago, Columbia, New York University, Michigan, Virginia, Duke, Georgetown, Pennsylvania, Berkeley, Northwestern, Cornell, and Texas.[167]

Having studied at an elite law school is also the best starting point for a career as university teacher[168]—at any rate, as long as that career is not to end up in the sticks. It is said that almost a third of all active American law professors in 1975-76 were educated at Harvard, Yale, Columbia, Michigan, or Chicago.[169] The percentage has certainly not dropped today. In 1985-86, sixty-five percent of active law deans had received their degrees from Harvard, Yale, Columbia, New York University, or Michigan.[170] Law reviews play a significant role in this career framework. It is just as important for students to accede to membership on the editorial board, or perhaps even to be elected editor in chief, senior articles editor, or senior notes editor, of the law review of an elite university as it is for the ambitious professor to be published there. Of course, there

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[163] *See* Fox, *supra* note 144, at 480.

[164] According to the AALS Directory, the Harvard Law School has 110 faculty members ("law teachers") (which number includes *emeriti*, unless they have moved to another law school); the Georgetown University Law Center has 124 faculty members. AALS DIRECTORY, *supra* note 17, at 76-78. The law schools at Chicago and Berkeley list 66 and 94 names respectively. *Id.* at 45-46, 36-38. In contrast, the University of Idaho College of Law has a faculty of only 28, and the University of Hawaii William S. Richardson School of Law has 24 people. *Id.* at 82, 78.

[165] In 1992, 128,212 J.D. students attended ABA-accredited law schools; 39,425 of them were awarded the J.D./LL.B. degree in that year. *See* AMERICAN BAR ASS'N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 66 (1992).

[166] Many of them, however, have a mountain of debt (often up to $100,000) because of the high cost of studying.

[167] *See Special Report*, U.S. NEWS & WORLD REP., March 22, 1993, at 1. The so-called Gourman Report gave the following rankings: Harvard, Michigan, Yale, Chicago, Berkeley, Stanford, Columbia, Duke, Pennsylvania, Cornell, New York University, Texas, University of California Los Angeles, Northwestern, Virginia. A RATING OF GRADUATE AND PROFESSIONAL PROGRAMS IN AMERICAN AND INTERNATIONAL UNIVERSITIES (Jack Gourman ed., 6th ed. 1993).

[168] For a poignant and instructive essay on the selection of law teachers, see Gordley, *supra* note 155.

[169] *See* Ronald F. Phillips, *The Origins and Destinations of Law School Deans*, 38 J. LEGAL EDUC. 331, 332 (1988).

[170] *Id.*

are also rankings for law reviews. They are based on frequency of citation.[171] In the 1980's, the *Harvard Law Review* led the list, followed by the law reviews of Yale, Stanford, Columbia, California, Chicago, Virginia, Cornell, New York University, and Vanderbilt.[172] In addition, the law reviews of Michigan and Pennsylvania are as a rule considered to be among the leading law reviews. Thus, their significance for legal scholarship is obviously great.[173] Conversely, another study has shown that the majority of law reviews are only seldom cited, and a third of all titles listed there were not cited at all.[174]

The productivity of individual faculties is also variable. The University of Chicago leads in this respect, followed by Yale, the University of Southern California, Harvard, Stanford, Columbia, Northwestern University, the University of Illinois, New York University, Michigan, and the University of California, Los Angeles.[175] On the other hand, a large portion of American law professors are apparently unimpressed by the motto "publish or perish" once a positive tenure decision has been taken. According to a 1985 investigation,[176] forty percent of all American "senior law faculty members"[177] published nothing at all during the period of 1980 to 1983. Fifty of the 169 law schools (as of the beginning of the 1980s) only had four or fewer publications to their credit. One can hardly wish for a change in this state of affairs, since in any event the

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[171] On the problematic nature of "citation studies," see Stier et al., *supra* note 58, at 1474; Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1449, 1453 (1991); Leonard, *supra* note 153, at 187; Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540 (1985).

[172] The Executive Board, *Chicago-Kent Law Review Faculty Scholarship Survey*, 65 CHI.-KENT L. REV. 195, 204 (1989); *cf. previously* Olavi Maru, *Measuring the Impact of Legal Periodicals*, 1 AM. B. FOUND. RES. J. 227 (1976).

[173] See generally the references in Swygert & Bruce, *supra* note 45, at 739. Opinions vary as to the influence of law reviews. Compare the literature quoted by Bart Sloan, *What Are We Writing For? Student Works as Authority and Their Citation by the Federal Bench, 1986-1990*, 61 GEO. WASH. L. REV. 221, 223 (1992); Louis J. Sirico & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986); Stier et al., *supra* note 58, at 1467; Kaye, *supra* note 100, at 313; Schuck, *supra* note 96, at 336. Student "notes" are also cited by courts, though not often. For details see Sloan, *supra*, at 220.

[174] *See* Leonard, *supra* note 15.

[175] *See* The Executive Board, *supra* note 172, at 208.

[176] *See* Michael I. Swygert & Nathaniel E. Gozansky, *Senior Law Faculty Publication Study: Comparison of Law School Productivity*, 35 J. LEGAL EDUC. 373 (1985); David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993 (1991). *But see* David H. Kaye & Ira Mark Ellman, *The Pitfalls of Empirical Research: Studying Faculty Publication Studies*, 36 J. LEGAL EDUC. 24 (1986) (identifying problems with the methodology of Swygert and Gozansky).

[177] "To identify law teachers who were beyond tenure and normal promotion considerations, we defined 'senior law faculty' as those men and women who were listed in the 1980-81 AALS Directory of Law Teachers, and who, according to that directory, had attained the rank of full professor prior to 1976." Swygert & Gozansky, *supra* note 176, at 376.

avalanche of publications grows rapidly. In the period from 1954-55 to 1984-85, twenty of the leading law reviews have swollen by an average of 477 pages.[178] Some law reviews have a yearly size of more than 2,000 pages; the 1992-93 *Harvard Law Review* and *Yale Law Journal* are respectively 2,044 and 2,257 pages thick. The 1990-91 *Yale Law Journal* actually had 2,820 pages. Even a relatively obscure periodical like the *Nova Law Review* had 1,494 pages in 1992-93. By 1983, the total number of pages produced by law reviews was estimated to be 150,000.[179] Today the number exceeds 250,000.[180] Only a computer can cope with this abundance of information.

3. *American Law Reviews and the Foreign Jurist*

One of the notable features of the American journals continues to be that most law reviews are directed towards the same, namely a non-specialized, circle of readers. That corresponds, to be sure, with the fact that most courts are courts of general jurisdiction; but it also contributes to the fact that only a few journals are regularly noticed. "Keeping up with Harvard" is the motto that has marked the development of law reviews from the beginning, and it is basically responsible for the conspicuous uniformity of the journals-landscape today. This has not substantially been changed by the tendency to found new specialized law reviews[181]—the general law reviews are clearly superior in prestige to their smaller, specialized sisters.[182] From time to time there are suggestions to create a greater number of journals that are published by university professors rather than students, and contributions to which are thus approved by peers.[183] Although such journals exist,[184] they have not been able thus far to shake the traditional, and internationally unique, law review system.

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178 *See* Zenoff, *supra* note 79, at 21.

179 *See* Josh E. Fidler, *Law-Review Operations and Management*, 33 J. LEGAL EDUC. 48 (1983).

180 This figure given by Leonard, *supra* note 15, at 184 n.6, is too low as it is based on a study of merely 250 law reviews.

181 *See supra* Part II.2.

182 *See also, e.g.*, Leibman &White, *supra* note 16, at 387; Rosenkranz, *supra* note 53, at 914; Stier et al., *supra* note 58.

183 *See, e.g.*, Cramton, *supra* note 5, at 9; Afton Dekanal, *Faculty-Edited Law Reviews: Should the Law Schools Join the Rest of Academe?*, 57 UMKC L. REV. 233 (1989); Posner, *The Decline of Law*, *supra* note 107, at 779.

184 See those listed *supra* at the end of Part II.2, as well as those mentioned in the following paragraphs. Others include the *Law and Society Review* (in its twenty-seventh year of publication in 1993) and *Law and Contemporary Problems* (in its fifty-sixth year of publication in 1993, it is published by the Duke University School of Law; Issue 4 of volume 55 (1992) was dedicated to the theme "International Regulatory Competition and the Securities Laws" and four essays discuss European Community Law). The first issue of the *Columbia Journal of European Law* was published in 1994.

In light of what has been said so far, what advice can be given to a foreign observer who wants to be kept up to date? As far as comparative law is concerned, the *American Journal of Comparative Law*, edited by Richard Buxbaum (Berkeley) and published by the American Association for the Comparative Study of the Law,[185] is of central importance. It is, so to speak, the sister of the *American Journal of International Law*.[186] The central organ of the American Society for Legal History has for some time been the *Law and History Review*, and no longer the *American Journal of Legal History*[187] which, however, continues to be published by the (faculty, not the students of) Temple University School of Law in Philadelphia. The *Journal of Legal Education*,[188] a publication of the Association of American Law Schools, provides good insight into everything that interests American law professors in their capacity as teachers of the law. The *Michigan Law Review* dedicates an entire issue every year to reviewing current legal literature.[189] The two leading Law and Economics journals, published by faculty members of the Chicago School of Law,[190] have already been mentioned, as have a number of (less influential) specialized journals.[191] There is no equivalent to a journal like the German *Archiv für die civilistische Praxis*. Those who are interested in the development of American private law are ill-served by the journals market. They will find rather little in the leading law reviews, and the less prestigious journals—which are also usually general in nature—are simply too numerous to furnish a reliable and manageable orientation. Interesting from a European perspective, though hardly typical from an American point of view, are the three most important periodicals of the only civil law jurisdiction in the United States: the *Louisiana Law Review*, the *Tulane Law Review*,[192] and the *Tulane Civil Law Forum*.[193] One will

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185 A *Comparative Judicial Review* is being published (in the form of a yearbook) by the Pan American Institute of Comparative Law, who have an editing address in Florida.

186 *See supra* text accompanying note 41.

187 Compare also the *Georgia Journal of Southern Legal History*, published by the Georgia Legal History Foundation since 1991.

188 It aims "to foster a rich interchange of ideas and information about legal education and related matters, including but not limited to the legal profession, legal theory, and legal scholarship." 46 J. LEGAL EDUC. vi (1993).

189 *See 1993 Survey of Books Relating to Law*, 91 MICH. L. REV. 1107 (1993) (with the following categories: I. The Courts and the Constitution—eight titles; II. Law and Equality—six titles; III. Sources of Authority—five titles; IV. Legal History—three titles; V. Crime and Punishment—three titles; VI. Problems of Proof—two titles; VII. International and Comparative Law and Politics—five titles; VIII. Commerce, Economics, and Law—three titles; IX. Lives in the Law—three titles; X. Law and the Environment—three titles).

190 *See supra* notes 147-48 and accompanying text.

191 *See supra* Part II.2.

192 Until volume 62 (1987-88) the title page stated that it was "[d]evoted to the Civil Law, Comparative

therefore largely have to console oneself with the fact that law reviews are published in order to be written, not to be read.[194] Like the German *Festschriften*?

Law, and Codification." Thereafter it proclaimed to be: "[a] National Law Journal Distinguished for Coverage of Civil and Comparative Law." 63 TUL. L. REV. i (1989). Volume 66 contains the symposium "Relationships Among Roman Law, Common Law, and Modern Civil Law" in honor of Peter Stein. *See* 66 TUL. L. REV. 1587 (1992). Generally speaking, however, it is getting harder and harder to differentiate the *Tulane Law Review* from other American law reviews.

[193] "Dedicated to preserving and advancing the civilian tradition and to strengthening Louisiana-s links with Europe." 6/7 TUL. CIV. L. FORUM i (1991-92). The *Tulane Civil Law Forum* is edited by professors from the Tulane Law School. Volume 6/7 (1991-92) contains essays dedicated to the memory of F.F. Stone.

[194] *See* Havinghurst, *supra* note 80, at 24. *But see also* Stier et al., *supra* note 58, at 1467.