

## ESSAYS

### ANOTHER LOOK AT PROFESSOR RODELL'S *GOODBYE TO LAW REVIEWS*

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#### INTRODUCTION

ALMOST eighty years ago, in 1936, Professor Fred Rodell of the Yale Law School published a scathing, sometimes tongue-in-cheek critique of legal writing and law reviews under the ominous title *Goodbye to Law Reviews*.<sup>1</sup> The gist of his attack was quite simple:

There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground. And though it is in the law reviews that the most highly regarded legal literature—and I by no means except those fancy rationalizations of legal action called judicial opinions—is regularly embalmed, it is in the law reviews that a pennyworth of content is most frequently concealed beneath a pound of so-called style. The average law review writer is peculiarly able to say nothing with an air of great importance. When I used to read law reviews, I used constantly to be reminded of an elephant trying to swat a fly.<sup>2</sup>

Professor Rodell said his critique “about covers the ground.” The sharp tone of his essay indicates that he could find little redeeming value in law reviews; it also suggests that he would not change his views if con-

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<sup>1</sup> Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38 (1936) [hereinafter Rodell, *Goodbye*].

<sup>2</sup> *Id.* at 38.

fronted with late twentieth-century and early turn of the twenty-first-century law reviews.

Nevertheless, I think the problems that Professor Rodell identified are more subtle than he suggested and sufficiently important to warrant more than the cursory and sometimes slapstick comments that he offers. The most important point that Professor Rodell made is that, too often, law reviews and the articles they contain are irrelevant to law's purpose of serving society. Intensely theoretical, philosophical, and empirical scholarship, which is very much in vogue in the legal academy these days, is rarely of interest or use to wide audiences. It is too abstract. Indeed, it does not even purport to address concrete issues relating to legal practice, procedure, doctrine, legislation, regulation, or enforcement. Yet, many young legal scholars report that they are under pressure to write articles of this sort, and law reviews readily accept their offerings for publication. There is certainly value in some philosophical, theoretical, and empirical scholarship, but it should not be preferred over other forms of scholarship. In order for law reviews to be relevant outside the legal academy, they should *balance* abstract articles with scholarly works that are of interest and use to lawyers, legislators, judges, and regulators who serve society through legal arguments, decision making, regulatory initiatives, and enforcement actions.

In other words, law schools, law reviews, and legal scholars should do a better job in producing scholarship that is of interest and use to wider audiences in society. Professor Rodell complains that a scholar "who writes a law review article should be able to attract for it a slightly larger audience than a few of his colleagues who skim through it out of courtesy and a few of his students who sweat through it because he has assigned it."<sup>3</sup> This quip overstates the problem, but it is a useful starting point.

### I. PROFESSOR RODELL'S THESIS

Professor Rodell argued that "law is supposed to be a device to serve society"<sup>4</sup> and that the scholarship of legal academics should be devoted to achieving this end:

With law as the only alternative to force as a means of solving the myriad problems of the world, it seems to me that the articulate among

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<sup>3</sup> Id. at 41.

<sup>4</sup> Id. at 42.

2014] *Another Look at Goodbye to Law Reviews* 1485

the clan of lawyers might, in their writings, be more pointedly aware of those problems, might recognize that the use of law to help toward their solution is the only excuse for the law's existence, instead of blithely continuing to make mountain after mountain out of tiresome technical molehills.<sup>5</sup>

He did not distinguish between doctrinal and theoretical scholarship, but his sharpest attacks were aimed at narrow doctrinal analyses—he gave the provocative examples of “Some New Uses of the Trust Device to Avoid Taxation” and “The Rule Against Perpetuities in Saskatchewan”—that do little to serve the larger needs of society. On this score, he noted:

It seems never to have occurred to most of the studious gents who diddle around in the law reviews with the intricacies of contributory negligence, consideration, or covenants running with the land that neither life nor law can be confined within the forty-four corners of some cosy concept. It seems never to have occurred to them that they might be diddling while Rome burned.<sup>6</sup>

He ruefully concluded by saying that he “suspect[ed] that the law reviews will keep right on turning out stuff that is not fit to read, on subjects that are not worth the bother of writing about them.”<sup>7</sup>

Interestingly, Professor Rodell never suggested that law reviews should be completely trashed.<sup>8</sup> At first blush, I thought the title of his essay, *Goodbye to Law Reviews*, was meant to signal the demise of law reviews.<sup>9</sup> However, the essay is instead a personal sayonara in which Professor Rodell says that he “probably” will never write another law review article.<sup>10</sup> Notwithstanding this claim, he went on to publish a number of pieces in law reviews for another three decades, although his pieces often were commentaries and personal tributes that were internal

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<sup>5</sup> Id. at 43.

<sup>6</sup> Id.

<sup>7</sup> Id. at 45.

<sup>8</sup> See Mark G. Kelman, *Trashing*, 36 *Stan. L. Rev.* 293, 293 (1984) (defining “trashing” as an interpretive technique used by Critical Legal Studies scholars).

<sup>9</sup> Perhaps the title of the article was meant to recall Robert Graves, *Good-bye to All That: An Autobiography* (Doubleday Anchor Books 1929). Graves's title signaled an adieu to a way of life following World War I and the terrible violence of that period. Writing on the eve of World War II, it is possible that Rodell's choice of title was directed toward his goal of finding for law an ameliorative and purposive role in a world faced with new and worse forms of political violence.

<sup>10</sup> Rodell, *Goodbye*, *supra* note 1, at 38.

to the profession.<sup>11</sup> In 1962, he published an essay in which he offered a revised—but still unflattering—critique of law reviews.<sup>12</sup>

In his 1936 essay, Professor Rodell said:

I am fully aware that content helps to determine style. I am also aware that one of the best ways to palm off inferior goods is to wrap them up in a respectable-looking package. And though law reviews and law writers deserve a round of ripe tomatoes for their devotion to what they solemnly suppose is the best legal style, it is the stuff concealed beneath that style, the content of legal writing, that makes the literature of the law a dud and a disgrace.<sup>13</sup>

In his 1962 essay, he focused his critique on the “style” of the scholarship appearing in law reviews:

I now put the finger on style, not substance, as the greater evil. . . . 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. . . . I doubt that there are so many as a dozen professors of law in this whole country who could write an article about law, much less about anything else, and sell it, substantially as written, to a magazine of general circulation.<sup>14</sup>

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<sup>11</sup> Fred Rodell, *As Justice Bill Douglas Completes His First Thirty Years on the Court: Herewith a Random Anniversary Sample, Complete with Casual Commentary, of Divers Scraps, Shreds, and Shards Gleaned from a Forty-Year Friendship*, 16 *UCLA L. Rev.* 704 (1969); Fred Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 *Colum. L. Rev.* 1323 (1965); Fred Rodell, *To a Younger Colleague, the Light of a Gentle Genius*, 18 *U. Miami L. Rev.* 3 (1963); Fred Rodell, *For Every Justice, Judicial Deference Is a Sometime Thing*, 50 *Geo. L.J.* 700 (1962); Fred Rodell, *A Sprig of Laurel for Hugo Black* at 75, 10 *Am. U. L. Rev.* 1 (1961); Fred Rodell, *A Sprig of Rosemary for Hammy*, 68 *Yale L.J.* 401 (1959); Fred Rodell, *Judicial Activists, Judicial Self-Deniers, Judicial Review and the First Amendment—Or, How to Hide the Melody of What You Mean Behind the Words of What You Say*, 47 *Geo. L.J.* 483 (1959); Fred Rodell, *Justice Douglas: An Anniversary Fragment for a Friend*, 26 *U. Chi. L. Rev.* 2 (1958); Fred Rodell, *George Dession*, 5 *Buff. L. Rev.* 12 (1956); Fred Rodell, *Justice Holmes and His Hecklers*, 60 *Yale L.J.* 620 (1951); Fred Rodell, *Legal Realists, Legal Fundamentalists, Lawyer Schools, and Policy Science—Or How Not to Teach Law*, 1 *Vand. L. Rev.* 5 (1947).

<sup>12</sup> Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 *Va. L. Rev.* 279 (1962) [hereinafter *Rodell, Goodbye Revisited*].

<sup>13</sup> Rodell, *Goodbye*, *supra* note 1, at 42.

<sup>14</sup> Rodell, *Goodbye Revisited*, *supra* note 12, at 287–88.

2014] *Another Look at Goodbye to Law Reviews* 1487

Professor Rodell never really explained how he distinguished between style and content, and he certainly never explicitly stated how he determined whether the content of an article is good. But he was clear in his criticisms of law review style.

The main problem with the style, according to Professor Rodell, was that the arguments in law reviews are not forceful or candid (and footnotes worsen this by obfuscating the writing and making it indirect), and too many articles lack humor and common appeal.<sup>15</sup> He saw law review articles as generally boring and inaccessible to a broader audience of concerned citizens.

Professor Rodell's critiques are obviously overdrawn—undoubtedly to achieve a rhetorical flourish. But some of what he says is poignant. He decries what he sees as pretentious, obscure, tedious, and useless legal writing and protests against law review style requirements that he believes invariably promote the worst in legal writing. The fact that Professor Rodell's critique was first written in 1936 and some of the problems to which he alludes are still with us today suggests that these problems are endemic to the law review enterprise. I sympathize with some of what he has to say.<sup>16</sup> But, for the reasons that I discuss below, I do not agree that almost all law review articles are useless.

## II. COMPLAINTS FROM THE BAR, BENCH, AND ACADEMY

Today, a chorus of judges, scholars, and practitioners sing largely the same tune as Professor Rodell, criticizing the entire law review enterprise. The subtitle of one of Judge Richard Posner's writings, "Welcome to a World Where Inexperienced Editors Make Articles About the Wrong Topics Worse,"<sup>17</sup> perfectly captures what many other critics have said. The litany of complaints is compelling:

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<sup>15</sup> Rodell, *Goodbye*, supra note 1, at 39–42.

<sup>16</sup> See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 45–46 (1992) [hereinafter Edwards, *The Growing Disjunction*].

<sup>17</sup> Richard A. Posner, *Against the Law Reviews: Welcome to a World Where Inexperienced Editors Make Articles About the Wrong Topics Worse*, Legal Aff., Nov.–Dec. 2004, at 57, 57, available at [http://www.legalaffairs.org/issues/November-December-2004/review\\_posner\\_novdec04.msp](http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp). But see Natalie C. Cotton, Comment, *The Competence of Students as Editors of Law Reviews: A Response to Judge Posner*, 154 U. Pa. L. Rev. 951, 959–74 (2006) (rebutting Judge Posner's claims regarding the limitations of student law review editors).

- “[T]oo many articles are too long, too dull, and too heavily annotated.”<sup>18</sup>
- “We’ve asked [student editors] to do a task that they are incompetent to do. And then we’ve given them essentially no supervision.”<sup>19</sup>
- Footnotes have “multiplied out of all control. . . . Noel Coward is supposed to have said that reading footnotes ‘is like going downstairs to answer the doorbell while making love.’”<sup>20</sup>
- “The way law review articles are written may be the primary reason that they are so widely unread. The legal scholar’s standard prose has been criticized as everything from patronizing and pompous patois to unintelligible gibberish.”<sup>21</sup>

Practitioners and judges have observed that law reviews are of decreasing relevance to their crafts. Chief Justice Roberts has commented:

Pick up a copy of any law review that you see, . . . and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.<sup>22</sup>

Justice Breyer has stated, “[T]here is evidence that law review articles have left terra firma to soar into outer space. Will the busy practitioner or judge want to read, in February’s *Harvard Law Review*, ‘The Paradox

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<sup>18</sup> Posner, *supra* note 17, at 58.

<sup>19</sup> James Lindgren, Student Editing: Using Education to Move Beyond Struggle, 70 *Chi.-Kent L. Rev.* 95, 95 (1994).

<sup>20</sup> Seth P. Waxman, Rebuilding Bridges: The Bar, the Bench, and the Academy, 150 *U. Pa. L. Rev.* 1905, 1908 (2002).

<sup>21</sup> Kenneth Lasson, Commentary, Scholarship Amok: Excesses in the Pursuit of Truth and Tenure, 103 *Harv. L. Rev.* 926, 943 (1990) (footnotes omitted) (internal quotation marks omitted); see also Scott M. Martin, The Law Review Citadel: Rodell Revisited, 71 *Iowa L. Rev.* 1093, 1098 (1986) (“[S]ome articles undoubtedly do become lost in a maze of circumlocution.”).

<sup>22</sup> Kenneth Jost, Roberts’ Ill-Informed Attack on Legal Scholarship, *Jost on Justice* (July 19, 2011, 10:56 AM), <http://jostonjustice.blogspot.com/2011/07/roberts-ill-informed-attack-on-legal.html>. This may explain why the Chief Justice cites rock and roll lyrics rather than law review articles. See *Sprint Commc’ns Co. v. APCC Servs.*, 554 U.S. 269, 301 (2008) (Roberts, C.J., dissenting) (“When you [ain’t] got nothing, you got nothing to lose.” (quoting Bob Dylan, *Like a Rolling Stone*, *on Highway 61 Revisited* (Columbia Records 1965)) (internal quotation marks omitted)).

of Extra-legal Activism: Critical Legal Consciousness and Transformative Politics?”<sup>23</sup> Justice Scalia has discounted the worth of legal scholarship.<sup>24</sup> And at a discussion addressing the subject of law reviews, Second Circuit Judge Dennis Jacobs said, “I haven’t opened up a law review in years . . . No one speaks of them. No one relies on them,” while other judges of the Second Circuit “pleaded with the law professors to write about actual cases and doctrines, in quick, plain, and accessible articles.”<sup>25</sup> And former Solicitor General Seth Waxman has said that “no law review today sees its purpose as rendering service to the profession at large—or if it does, it is seriously delusional. The ties between the law reviews and practicing lawyers and judges are much weaker than they once were.”<sup>26</sup>

In his critique of law reviews, Chief Justice Roberts said: “If the academy wants to deal with the legal issues at a particularly abstract, philosophical level . . . that’s great and that’s their business, but they shouldn’t expect that it would be of any particular help or even interest to the members of the practice of the bar or judges.”<sup>27</sup> This critique did not go over well with some commentators.<sup>28</sup> But his views are shared by many other thoughtful lawyers, judges, and academics who have voiced the same concern: For example, Justice Breyer “worr[ies] about the academic world losing touch with the profession.”<sup>29</sup> Second Circuit Judge Reena Raggi says, “If the academy does want to change the world, . . . it does need to be part of the world.”<sup>30</sup> The legal academy and the law reviews cannot easily dismiss these critiques as baseless.

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<sup>23</sup> Stephen G. Breyer, Response of Justice Stephen G. Breyer, 64 N.Y.U. Ann. Surv. Am. L. 33, 33 (2008).

<sup>24</sup> Michael C. Dorf, Justice Scalia Suggests that the Legal Academy Is Out of Touch: Is He Right?, FindLaw (Mar. 8, 2010), <http://writ.news.findlaw.com/dorf/20100308.html>.

<sup>25</sup> Adam Liptak, When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant, N.Y. Times, Mar. 19, 2007, at A8 (internal quotation marks omitted).

<sup>26</sup> Waxman, *supra* note 20, at 1909 (internal quotation marks omitted).

<sup>27</sup> Law Prof. Ifill Challenges Chief Justice Roberts’ Take on Academic Scholarship, ACS Blog (July 5, 2011), <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts-take-on-academic-scholarship> (internal quotation marks omitted).

<sup>28</sup> Danielle Citron, Sherrilyn Ifill on What the Chief Justice Should Read on Summer Vacation, Concurring Opinions (July 1, 2011), <http://www.concurringopinions.com/archives/2011/07/sherrilyn-ifill-on-what-the-chief-justice-should-read-on-summer-vacation.html>.

<sup>29</sup> Breyer, *supra* note 23.

<sup>30</sup> Liptak, *supra* note 25 (internal quotation marks omitted).

### III. SORTING OUT THE PROBLEMS WITH LAW REVIEWS: STYLE AND SUBSTANCE

The complaints from the bar, bench, and academy subsume a number of different problems. It is useful, I think, to consider the problems separately, both better to assess the force of the critics' claims and to consider whether there are any viable solutions.

#### A. Problems Related to Law Review Style Requirements

It is difficult to distinguish problems of *style* and *content* (which I will call *substance*) because they are intertwined. Professor Rodell's complaints about the "style" of writing in law reviews focus on the manner in which legal scholars communicate their messages—that is, without humor or candor, and "beneath impressive-sounding but unintelligible gibberish."<sup>31</sup> Matters of style to Professor Rodell also appear to include footnote and citation forms, the application of *Bluebook* rules, proscriptions against writing in the first person, the use of block quotations, the inclusion of introductions to preview articles, and similar law review requirements that limit how an author may present her or his message.

Law reviews will never achieve the style preferences set by Professor Rodell. Nor should this be our goal. It undoubtedly would be interesting for those who could to publish articles in the *New York Times Magazine* or the *New Yorker*, sans footnotes and with great candor, wit, and flair. The articles would be accessible to wide audiences, and they might be illuminating. And I think that talented legal scholars *should* publish such pieces whenever the opportunity presents itself.<sup>32</sup>

We cannot kid ourselves, however. Journalistic writing of this sort is not rigorous *legal scholarship*. The *New York Times Magazine* does not have the space and is not interested in publishing serious, well-researched, thoughtful, probing, and insightful legal scholarship, whether it be doctrinal, theoretical, or empirical. But there is nothing stopping us from bringing the best of long-form popular journalism (clarity, ac-

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<sup>31</sup> Rodell, *Goodbye Revisited*, supra note 12, at 287.

<sup>32</sup> See, e.g., Kenji Yoshino, *Holding Court*, N.Y. Times, Nov. 10, 2013, (Book Review), at 13 (reviewing Richard A. Posner, *Reflections on Judging* (2013)); Erwin Chemerinsky, Op-Ed., *Justice for Big Business*, N.Y. Times, July 2, 2013, at A25; Jennifer L. Mnookin, Op-Ed., *Clueless 'Science,'* L.A. Times, Feb. 19, 2009, at A21; Noah Feldman, *When Judges Make Foreign Policy*, N.Y. Times, Sept. 28, 2008, (Magazine), at 50; Noah Feldman, *Why Shariah?*, N.Y. Times, Mar. 16, 2008, (Magazine), at 47.



cessibility, simplicity) to legal scholarship: Law reviews should loosen unnecessary style requirements that tend to make articles overly long, too heavily annotated, tedious, and boring. Removing editorial formalism would better serve editors who would have an easier time judging the merit of submissions. It would better serve authors who would no longer feel the need to inflate their articles (to satisfy the perceived expectations of journal editors) but could instead write and organize their articles to be congruent with their core message. And it would better serve readers who could more easily engage with, digest, and perhaps even—dare I say it—enjoy what they read.

Even if the law reviews were to lighten up on style requirements, however, this would not ensure a balance between intensely theoretical and philosophical writings and writings that are more relevant to lawyers, legislators, judges, and regulators.

### *B. Problems Related to the Substance of Law Review Articles*

Even though it is challenging to critique the style and substance of law review articles as if they are entirely distinct, I believe that substance is the more important issue. Good style cannot wholly hide poor substance. And a strong and important thesis can be lost in poor writing. But a well-written article with good substance, that propounds a strong and important thesis, can overcome most dubious law review style requirements. And law reviews have shown that they have the capacity to publish really good substantive pieces. I know because I have read and benefited from such work.

Years ago, when I specialized in labor law, first as a young practitioner and then as an aspiring academic scholar, I routinely read the works of the giants in the field: Professors Archibald Cox, Benjamin Aaron, Russell Smith, Ralph Winter, Harry Wellington, Clyde Summers, and Bernard Meltzer, to name a few. Their writings were thoughtful, insightful, nuanced, sophisticated, accessible, and immensely useful to scholars, students, lawyers, legislators, and regulators.<sup>33</sup> And their legal

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<sup>33</sup> See, e.g., Clyde W. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 Va. L. Rev. 481 (1976); Harry H. Wellington & Ralph K. Winter, Jr., The Limits of Collective Bargaining in Public Employment, 78 Yale L.J. 1107 (1969); Russell A. Smith & Dallas L. Jones, The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law, 63 Mich. L. Rev. 751 (1965); Bernard D. Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965); Benjamin Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851 (1960);

scholarship incorporated important discussions of theory, doctrine, and practice. I have also profited from law review articles published by similarly brilliant scholars in other fields, such as civil procedure, tax, criminal law, evidence, and commercial transactions. So I disagree with Professor Rodell's suggestion that law reviews are largely incapable of publishing articles that are fit to read. He is simply wrong on this point.

### *1. Some Thoughts on Theory*

I have written fairly extensively on the value of theoretical and doctrinal scholarship.<sup>34</sup> Some commentators have interpreted my work as denying the value of all theoretical scholarship.<sup>35</sup> This view of my work is inaccurate.<sup>36</sup> I have consistently espoused the view that theoretical scholarship is undoubtedly valuable, but that there must be a *balance* between theory and practical application. Indeed, I have explained that "I do not doubt for a moment the importance of theory in legal scholarship" because good scholarship routinely "integrates theory with doctrine."<sup>37</sup> I have also explained that I am not opposed to *intensely theoret-*

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Russell A. Smith, The Labor-Management Reporting and Disclosure Act of 1959, 46 Va. L. Rev. 195 (1960); Bernard D. Meltzer, The Supreme Court, Congress, and State Jurisdiction over Labor Relations (pts. 1 & 2), 59 Colum. L. Rev. 6 (1959), 59 Colum. L. Rev. 269 (1959); Archibald Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401 (1958); Archibald Cox, Some Aspects of the Labor Management Relations Act, 1947 (pts. 1 & 2), 61 Harv. L. Rev. 1 (1947), 61 Harv. L. Rev. 274 (1948).

<sup>34</sup> Edwards, The Growing Disjunction, *supra* note 16; see also Harry T. Edwards, Reflections (On Law Review, Legal Education, Law Practice, and My Alma Mater), 100 Mich. L. Rev. 1999 (2002) (following up *The Growing Disjunction* article); Harry T. Edwards, Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession," 69 Wash. L. Rev. 561 (1994) [hereinafter Edwards, Another Postscript] (same); Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript, 91 Mich. L. Rev. 2191 (1993) [hereinafter Edwards, A Postscript] (same).

<sup>35</sup> See, e.g., Jamal Greene, Thirteenth Amendment Optimism, 112 Colum. L. Rev. 1733, 1751 & n.107 (2012) (characterizing me as one of a group of commentators taking the view "that legal scholarship is without value unless it helps a judge resolve cases"); Richard A. Posner, The Deprofessionalization of Legal Teaching and Scholarship, 91 Mich. L. Rev. 1921, 1923 (1993) ("[Doctrinal scholarship] is the only type of legal scholarship that [Judge Edwards] regards as useful or as likely to be well done by law professors . . .").

<sup>36</sup> See Mitchell Nathanson, Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor, 11 J. Legal Writing Inst. 329, 342 (2005) ("[I]n calling for an increase in practical scholars and scholarship, Judge Edwards did not discount the importance of theoretical scholarship in the development of the law. He was simply calling for a better balance between the two.").

<sup>37</sup> Edwards, The Growing Disjunction, *supra* note 16, at 35.

ical scholarship that does not purport to have any practical value so long as other scholars are not discouraged from producing work that is of greater interest and use to wide audiences.<sup>38</sup> Legal scholarship should include a “healthy *balance* of theory and doctrine.”<sup>39</sup>

There are a number of well-known and highly respected scholars whose works often are intensely theoretical or philosophical: Professors Lon Fuller, Jeremy Waldron, Herbert (H.L.A.) Hart, Karl Llewellyn, George Christie, Thomas C. Grey, Edward H. Levi, John Gardner, Frederick Schauer, Jerome Frank, and Ronald Dworkin, to name just a few. Professor Waldron has described the late Professor Dworkin as one of the great legal philosophers of his time. His tribute also sheds light on the value of Professor Dworkin’s theoretical approach:

His work on legal principles galvanized jurisprudence in the 1960s and ’70s. His conception of legal integrity deepened our understanding of the responsibility judges have to the laws as a whole. Above all, he emphasized the obligation of judges never to give up on their sense that the existing law demanded something of them, even in the most difficult cases. He saw ways to unite the study of law, ethics, and political morality that most of us had never dreamed of.<sup>40</sup>

No one can seriously doubt the brilliance of these scholars, nor can anyone really contest the importance of their works on jurisprudence, legal reasoning, law and morality, legal realism, pragmatism, and legal philosophy.<sup>41</sup> Nonetheless, many of the writings published by these scholars are intensely theoretical<sup>42</sup> and, thus, rarely of interest to practicing lawyers, legislators, judges, and regulators.<sup>43</sup>

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<sup>38</sup> Id. at 35–36.

<sup>39</sup> Id. at 36.

<sup>40</sup> Ronald Dworkin, 1931–2013, N.Y.U. Law Mag., Fall 2013, at 44, 45 (quoting statement of Jeremy Waldron), available at <http://blogs.law.nyu.edu/magazine/2013/ronald-dworkin-1931-2013/>. Professor Dworkin had his share of critics, however. See, e.g., George C. Christie, Dworkin’s “Empire,” 1987 Duke L.J. 157, 183–89 (reviewing Ronald Dworkin, *Law’s Empire* (1986)).

<sup>41</sup> The works of a number of these scholars can be found in George C. Christie & Patrick H. Martin, *Jurisprudence: Text and Readings on the Philosophy of Law* (3d ed. 2008).

<sup>42</sup> These pieces do not speak in terms of the specific legal rules and precedents that constrain practicing lawyers and judges, nor do they purport to guide legislators and regulators in their policy-making roles. See, e.g., Ronald Dworkin, *Justice in Robes* (2006); Ronald Dworkin, *Law’s Empire* (1986); Ronald Dworkin, *Taking Rights Seriously* (1978).

<sup>43</sup> See *supra* notes 17–30 and accompanying text.

This is not to deny the important ripple effects that theoretical scholarship can have on judicial decision making, legislation, and modes of practitioner analysis. Surely the theoretical writing of the Legal Realist and Legal Process scholars, Feminists, Critical Race Theory scholars, and Chicago School economists have profoundly affected the legal profession as the nation confronted the terrible economic problems of the Great Depression, the political catastrophe of World War II, the social and moral tragedy of American apartheid, and the changing role of women in society. Giants like Roscoe Pound, Louis Brandeis, Karl Llewellyn, and other great scholars shaped the profession's approach to important legal topics ranging from privacy to statutory interpretation through masterful and masterfully written law review articles.<sup>44</sup>

We can never predict the radiating effects of a new idea. I view intensely theoretical writings as good scholar-to-scholar, brain-teasing scholarship, which advances the thinking of other legal scholars who are interested in abstract work. I also understand that some intensely theoretical writings can have value to law teachers whose work does not focus on theory and philosophy. I sometimes use some of the works of Professor Dworkin in a course called "The Art of Appellate Decisionmaking" to lay the foundation for critiques of existing doctrine and practice.

I thus recognize that it is not possible to draw a clear line, or set firm criteria, to distinguish intensely theoretical or philosophical scholarship that is useless to practicing lawyers, legislators, judges, and regulators from scholarship that incorporates theory in its analysis of concrete issues relating to legal practice, procedure, doctrine, legislation, regulation, or enforcement. It is undoubtedly true, however, that, a bit like Justice Stewart's famous test for obscenity, we can recognize intensely theoretical and philosophical scholarship when we see it.<sup>45</sup> How so? Be-

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<sup>44</sup> See, e.g., *Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound* (P. Sayre ed., 1947); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 *Vand. L. Rev.* 395 (1950); Karl N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 *Colum. L. Rev.* 581 (1940); Roscoe Pound, *Fifty Years of Jurisprudence*, 1937 *J. Soc'y Pub. Tchrs. L.* 17; Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *Harv. L. Rev.* 1222 (1931); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890).

<sup>45</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it."). This is illustrated by Chief Justice Roberts's reference to the sample law review title, "The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria," Jost, *supra* note 22 (internal quotation marks omitted), by Justice Breyer's reference to the

cause it is overly abstract and does not address the important problems faced by practicing lawyers, legislators, judges, and regulators. The simple truth is that abstract theoretical and philosophical scholarship does not have a wide audience in the legal profession. It may help other theoretical scholars to think broadly and deeply about philosophical issues. And it may help some other law teachers in their construction of class materials. But it is insufficient, without more, to “serve society” as legal scholarship ought to do.

The same can be said about diffuse empirical studies:

In recent years, empirical legal scholarship has increased dramatically in methodological sophistication, but in the process has lost some of its relevance to the normative goals that animate legal scholarship. In many empirical studies, the phenomena that are readily measured have a complex relationship with the values that are relevant to legal reform, yet empirical scholars often neglect to explain how their positive findings relate to normative claims. Although some empirical studies offer prescriptions, they often rely on normative premises that are clearly untenable or simply fail to explain how they purport to derive an ‘ought’ from an ‘is.’ Other empirical studies avoid prescription altogether, reporting results without clarifying how they are relevant to meaningful questions about law or legal institutions.

. . . [N]ormative implications should not be an afterthought in empirical research, but rather should inform research design. Empirical scholars should focus on quantities that can guide policy, and not merely on phenomena that are conveniently measured. They should be explicit about how they propose to measure the goodness of outcomes, disclose what assumptions are necessary to justify their proposed metrics, and explain how these metrics relate to the observable data. When values are difficult to quantify, legal empiricists will need to develop

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law review article, “The Paradox of Extra-legal Activism: Critical Legal Consciousness and Transformative Politics,” Breyer, *supra* note 23 (internal quotation marks omitted), and by Lasson’s list of law review titles illustrating his claim that many articles are “overwhelming collections of minutiae,” including: “Epistemological Foundations and Meta-Hermeneutic Methods: The Search for a Theoretical Justification of the Coercive Force of Legal Interpretation,” “Morality or *Sittlichkeit*: Toward a Post-Hegelian Solution,” and “Toward a Legal Theory of Popular Culture.” Lasson, *supra* note 21, at 930 (footnotes omitted); see also Waxman, *supra* note 20, at 1906–07 (“[T]here often seem[s] to be so little connection between the work being done in law schools and published in law reviews and the profession for which law schools prepare their students[.]”).

theoretical frameworks and empirical methods that can credibly connect empirical findings to policy-relevant conclusions.<sup>46</sup>

I agree.

Professor Jamal Greene argues that theoretical scholarship exploring the history and conceptual bounds of constitutional provisions can be valuable because the pursuit of truth is a “fundamental constitutional value,” and “[e]ncouraging scholars to advance colorable arguments about the text and history . . . enriches our collective knowledge” and “lends substance to vital modes of constitutional argument.”<sup>47</sup> I do not doubt any of this. But these points do not justify the legal academy’s preference for abstract theoretical, philosophical, and empirical scholarship over scholarship that is of greater interest and use to practicing lawyers, legislators, judges, and regulators.

There are theoretical works that are intended to address important doctrinal, practice, and legislative issues. For example, Professor Jeremy Waldron’s article on *stare decisis* offers a uniquely good discussion of the rule-of-law justifications for precedent.<sup>48</sup> The article cites the works of numerous legal philosophers, and it does not cite a single judicial decision even though Professor Waldron carefully offers his views on how judges should apply precedent. Judges, law professors, and law students surely can benefit from work of this sort.

Theoretical scholarship is undoubtedly useful to wider audiences if the author carefully integrates theoretical arguments into the doctrinal and institutional framework in which judges, lawyers, legislators, and regulators operate. There are many forms of such scholarship: great treatises, such as *Federal Practice and Procedure*;<sup>49</sup> institutional scholarship that studies legal organizations and institutional structures in conjunction with legislative and regulatory policy choices, enforcement actions, and exercises of political power; doctrinal scholarship that assesses established legal procedures, legal norms, and case precedents, and reflects

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<sup>46</sup> Letter from Joshua Fischman, Assoc. Professor of Law, Northwestern Univ. Sch. of Law, to author (Feb. 12, 2014) (on file with author). Professor Fischman amplifies his views in Joshua B. Fischman, Reuniting “Is” and “Ought” in Empirical Legal Scholarship, 162 U. Pa. L. Rev. 117, 120 (2013).

<sup>47</sup> Greene, *supra* note 35, at 1751.

<sup>48</sup> Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 Mich. L. Rev. 1 (2012).

<sup>49</sup> Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* (1969–2014).

on the need for reform; and empirical scholarship that offers useful insights regarding the efficacy of existing legislation, regulations, legal practice, institutions, and enforcement actions. And much of this scholarship also includes thoughtful historical analyses.

Fortunately, the editors of the *Virginia Law Review* selected three articles to highlight during their Centennial Symposium that are exemplars of legal scholarship that integrates theoretical, doctrinal, and institutional analyses. I will therefore reference these articles rather than pick pieces on my own and risk offending any of my colleagues in the legal academy.

In the first of these articles, *The Mechanisms of Market Efficiency*,<sup>50</sup> Professors Robert Gilson and Reinier Kraakman thoroughly analyze the “efficient capital market hypothesis” that was being used by judges, lawyers, and regulators as the basis for policy making; offer a compelling explanation for the elements that lead to and limit market efficiency; and set forth proposals to facilitate efficiency in the capital market. The article is a “part of the canon of modern corporate law scholarship, one of a handful of articles that has profoundly influenced the way we think about the field.”<sup>51</sup> It is on the list of the 100 most-cited law review articles of all time.<sup>52</sup> And it has been cited in numerous judicial decisions and appellate and trial court filings.

The second article selected by the *Virginia Law Review* editors is Professor Michael McConnell’s piece entitled *Originalism and the Desegregation Decisions*,<sup>53</sup> which challenges the scholarly consensus that *Brown v. Board of Education* was inconsistent with the original understanding of the Fourteenth Amendment. Westlaw indicates that it has been cited in more than 300 law review articles and secondary sources, one U.S. Supreme Court opinion, and several appellate court filings.

In the third article chosen by the *Virginia Law Review* editors, *The Law of Nations as Constitutional Law*,<sup>54</sup> Professors Anthony Bellia and Bradford Clark argue for a revised understanding of how the law of nations influences United States constitutional law. Rather than adhering to

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<sup>50</sup> 70 Va. L. Rev. 549 (1984).

<sup>51</sup> Donald C. Langevoort, Foreword: Revisiting Gilson and Kraakman’s Efficiency Story, 28 J. Corp. L. 499, 499 (2003).

<sup>52</sup> Fred R. Shapiro & Michelle Pearse, The Most-Cited Law Review Articles of All Time, 110 Mich. L. Rev. 1483, 1491 (2012).

<sup>53</sup> 81 Va. L. Rev. 947 (1995).

<sup>54</sup> 98 Va. L. Rev. 729 (2012).

the modern understanding that federal courts have Article III power to adopt the law of nations as federal common law, they argue that the Constitution incorporates the law of nations to define the political branches' foreign relations powers under Articles I and II, even if the political branches have not adopted principles of the law of nations themselves. Thus, according to the authors, courts' obligation to apply traditional rules of the law of nations should be understood as a means of upholding and defining the political branches' powers under Articles I and II, not as judicial power to make federal common law.

All three articles are grounded in theory, but they are not abstract. The theoretical material is offered in the context of doctrinal and institutional frameworks in which judges, lawyers, legislators, and regulators operate. All three articles proffer interesting historical analyses which lend meaning to the authors' positions. Each of the articles concludes with an argument about how its thesis should influence future policy making or legal decisions. As these articles show, even when legal scholarship is heavily laden with theory, philosophy, or empirical data, it may nonetheless attract interest beyond the legal academy if the works are presented in the context of legal arguments about how doctrine, policy, or practice should develop or change.

My quibble is not with scholarship of this sort. Rather, I am concerned that too many members of the legal academy seem to prefer intensely theoretical, philosophical, and empirical scholarship that is too abstract or diffuse to be of much interest or use to lawyers, judges, legislators, and regulators. Such scholarship is not framed to address concrete issues regarding procedure, doctrine, legislation, regulation, or practice. In my view, it makes little sense for the legal academy to *prefer* abstract and diffuse scholarship over concrete scholarship that is of greater interest and use to wide audiences.

## *2. The Need for Balance in Legal Scholarship*

Intensely theoretical, philosophical, and empirical scholarship certainly is not inherently better than the great works that focus on procedure, doctrine, practice, legislation, and regulation. There are many outstanding works of legal scholarship that incorporate doctrine and theory. And, for what it is worth, the list of the most-cited law review articles of all time is not tilted in favor of abstract theoretical, philosophical, and em-



pirical scholarship.<sup>55</sup> One wonders, then, why the obsession nowadays with unduly abstract scholarship *at the expense of* articles that are more useful and appealing to scholars, students, lawyers, judges, legislators, and regulators, who have little use for abstract scholarship?

The thrust of my argument is that great scholarship is inclusive. It addresses procedure, practice, theory, doctrine, legislation, regulation, and enforcement. As Professor Rodell says, “serving society” should be law’s central function. This means that, as a general matter, a unifying focus of legal scholarship and practice should be making law better serve society. In order to prescribe ways effectively to improve law’s ability to serve society, legal scholarship must include works that address, in *concrete* terms, the legal authorities that guide officials who make legal decisions, policies, and arguments. Justice Breyer has argued:

I believe the profession functions best when large numbers of law professors see part of their job as familiarizing themselves with judicial opinions as well as statutes, organizing that mass of legal materials, and criticizing the legal material with an eye towards reform[,] . . . when the practicing lawyers read what the professors write, . . . make known to the bench the views of the professors[, and] . . . when judges . . . take those reforming views into account. When these three branches of the legal profession work cooperatively in this way, the result is a body of law that is continuously modified so that it better reflects the needs of the public, those whom law is meant to serve.<sup>56</sup>

It is not helpful to those who practice law and make legal decisions for the legal academy to prefer abstract scholarship that focuses outside the box of legal tools available to legal practitioners and decision makers.

#### IV. CAUSES OF THIS IMBALANCE IN LEGAL SCHOLARSHIP

Several institutional features cause the elite law reviews<sup>57</sup> to publish a disproportionate number of pieces whose substance and style are not useful or appealing to the practicing community.

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<sup>55</sup> Shapiro & Pearse, *supra* note 52, at 1489–92.

<sup>56</sup> Breyer, *supra* note 23, at 33–34.

<sup>57</sup> We now have sites that “rank” law reviews. See, e.g., Law Journals: Submissions and Ranking, 2006–2013, Wash. & Lee Univ. Sch. of L., <http://lawlib.wlu.edu/LJ/index.aspx> (last visited

*A. Student Editors*

Judge Posner complained that “inexperienced editors make articles about the wrong topics worse.”<sup>58</sup> Professor Rodell lamented that the traditional law review “style” requirements tend to mangle the content of articles.<sup>59</sup> Both critiques ring true. A number of legal scholars encounter law review editors who not only lack experience but are tightly committed to *Bluebook* rules and stilted notions of writing.<sup>60</sup>

I remember one article that I wrote years ago on a difficult and controversial constitutional issue of first impression. In one section of the article, I carefully laid out the applicable case law and relevant policy arguments. I adhered to the well-established law review protocol of footnoting every case and secondary source. At the conclusion of the section, I wrote something like, “After considering the applicable case law and relevant arguments on each side of the issue, it is my view that the Supreme Court should resolve this matter by [X].” The law review editor on my piece expressed concern over my concluding sentence because I had failed to add a footnote with authority for the opinion that I had stated. I told the editor that the sentence required no footnote because it merely expressed my *personal opinion* based on my review of the case law and secondary sources that I had already cited. He seemed perplexed and told me that he would have to confer with the managing editor, as if that would make a difference to me.

Problems of this sort would be mostly amusing but for the impact that law review style requirements have on the submission of articles. When potential authors—especially young scholars who are looking to secure jobs and achieve status in the academy—know that prestigious law reviews prefer articles that are heavily laden with footnotes and steeped in obscure theory, the authors craft their writings accordingly. Many young scholars are loath to venture beyond the norms fixed by the law reviews because they fear that their articles will not be selected for publication. In saying this, I do not mean to deny the importance of justifying argu-

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Sept. 14, 2014); Top Publications – Law, Google Scholar, [http://scholar.google.com/citations?view\\_op=top\\_venues&hl=en&vq=soc\\_law](http://scholar.google.com/citations?view_op=top_venues&hl=en&vq=soc_law) (last visited Sept. 14, 2014).

<sup>58</sup> Posner, *supra* note 17.

<sup>59</sup> Rodell, *Goodbye Revisited*, *supra* note 12, at 287–88.

<sup>60</sup> Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 *Alb. L. Rev.* 565, 568 (2008) (“[S]tudent editors, much of whose time is spent enforcing the rules of the *Bluebook*, are overly influenced by the number and complexity of an author’s footnotes.”).

ments or conforming to citation styles that are clear, accessible, and shared by—to use the currently fashionable term—the discursive community.<sup>61</sup>

The most significant problem with student editors is their limited ability to select articles for publication after having had only two years of legal education. Most would agree that “[s]tudents *do* have low knowledge depth, and the capabilities of individual students vary considerably. . . . [And t]o the extent that specialized knowledge and editorial experience confer unique efficiencies, these are efficiencies that most student-run publications cannot capture.”<sup>62</sup> These are formidable obstacles that have warped the article selection and editing processes and promoted the publication of articles that are of little use to the bar, bench, legislatures, and regulatory bodies. Student editors generally are not innovators. They stick with the style rules that have been handed down to them. Editors who might have the talent to develop new and more appealing protocols for their journals do not have the time to pursue their ideas, nor generally the incentive. They are full-time students who serve as editors for no more than twelve months. And law faculty members are generally unwilling to shoulder the burdens now carried by student editors.

I am quick to add that, over the years, I have had the good fortune to work with some truly outstanding student law review editors. And I have also been aware of situations when some law professors have simply submitted rough drafts of articles to law reviews and were happy to have the editors finish their work. Obviously, these professors trusted the student editors to whom they ceded their work. The truth is that the quality of work done by law review editorial boards varies from year to year, depending upon the leadership abilities, intellectual talents, and dedication of the individual editors.

### *B. Norms and Practices of the Legal Academy*

My concern with law reviews is not that they lack the capacity to publish articles that are substantively strong and useful. Rather, my concern

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<sup>61</sup> In a Westlaw search of the law review database performed on March 5, 2014, the term “discursive community” yielded 110 results.

<sup>62</sup> Cotton, *supra* note 17, at 953; see also Nance & Steinberg, *supra* note 60, at 584–85 (suggesting article selection may be motivated by an author’s credentials or potential to increase journal prestige rather than actual quality of academic writing).

is that law reviews now tend to focus too narrowly on selecting articles for publication. Some prevailing norms and practices in the legal academy exacerbate this problem.

Over the past two decades, a number of preeminent law schools have placed a premium on abstract philosophical, theoretical, and empirical scholarship, even though members of the legal academy have reason to know that much of this work is not useful to most practicing lawyers, legislators, judges, and regulators who employ the law to promote societal well-being. Bright young lawyers who are seeking to enter the academy know that this is the type of scholarship that they must produce in order to be given serious consideration for teaching positions at a number of law schools. The more obscure the better, it sometimes seems. Law review editors have come to understand the law schools' preferences for obscure philosophical and theory-laden material, in part because they have received so many articles of this stripe in recent years. And the law reviews have accommodated these forms of scholarship, largely without protest.

In addition, because young scholars are discouraged from spending any serious time in practice, many know little about the real world of lawyering. A sampling of tenure-track professors hired during the past decade at forty law schools found that the median professor had three years' practice experience.<sup>63</sup> Law schools are also hiring an increasing number of professors who have Ph.D.s in other fields.<sup>64</sup> This is not a bad development, but for the fact that too many of these professors have no real interest in legal practice, procedure, doctrine, rules, and legislation. As Professor Brian Tamanaha observes, "A scholar who specializes in the economic analysis (or history or philosophy) of property law . . . does not necessarily know how to negotiate or draft a commercial real estate transaction or what to do if the deal goes bad."<sup>65</sup>

I have previously observed:

I am . . . distressed that, in recent years, a number of law schools have adopted hiring policies that require teaching candidates to have published major articles before seeking employment in the legal academy. These policies baffle me, for they preclude many bright young law graduates who prefer to focus on practice for a few years from

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<sup>63</sup> Brian Z. Tamanaha, *Failing Law Schools* 58 (2012).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 59.

subsequently entering the teaching profession. This means that the pool of talented law professors with even a serious taste of practice experience is greatly diminished and the gulf between legal education and the practice of law remains too wide.

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Unless law schools ensure that their faculties reflect a real balance of talent—i.e., including professors with strengths in both “impractical” and “practical” scholarship and teaching—the current gulf between the profession and the academy will continue to grow and become even more distressing.<sup>66</sup>

Writing about the plight of failing law schools, Professor Tamanaha observes that “[v]olumes of material are being written by law professors that appear to leave little or no trace. . . . Riding one intellectual fad after another, law professors are spinning wheels going nowhere.”<sup>67</sup> This is because law professors have “no obligation to produce scholarship that is useful for judges and lawyers—although law professors are best positioned, with subject matter expertise and the luxury of time, to provide this essential service to the legal system. Most professors in most academic fields, like law professors, write for each other.”<sup>68</sup> This is a harsh critique, but it is one that has been endorsed by many in the legal profession. Legal scholars who deny that brilliant and useful legal scholarship can include writings other than intensely philosophical, theoretical, or empirical pieces are misguided.

#### V. ARE THERE SOLUTIONS FOR THESE PROBLEMS?

In thinking about possible reforms, it is important to remain mindful that law reviews are not universally bad, nor are the articles that they publish universally uninteresting and useless. The range of merit in law review publications is enormous because there are so many law schools and law journals, talent is not evenly distributed, and article selection and editing processes vary widely.

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<sup>66</sup> Harry T. Edwards, *Renewing Our Commitment to the Highest Ideals of the Legal Profession*, 84 N.C. L. Rev. 1421, 1431–33 (2006) [hereinafter *Edwards, Renewing Our Commitment*] (footnotes and emphasis omitted).

<sup>67</sup> Tamanaha, *supra* note 63, at 56.

<sup>68</sup> *Id.* at 57.

Some critics have pointed out that relatively few law review articles are cited in judicial opinions, as if to suggest that this is proof that most law review articles are not very good.<sup>69</sup> This is a weak argument. The number of articles cited in judicial opinions is not irrelevant, but it is a misleading criterion for measuring the value of law reviews. Good articles are potentially useful to anyone who *reads* them, whether or not they are cited.

In response to the criticisms leveled against law reviews, one student editor has written:

Yes, some journals are “theory-heavy” . . . . But average law reviews and most specialty journals (journals that focus on particular areas, like real estate or intellectual property) are keenly interested in publishing relevant scholarship. . . . Sure, you’ll encounter the occasional oddball pretentious titles. But you’ll also find articles firmly grounded in reality—articles that, as Sherrilyn Ifill of the University of Maryland said, “offer muscular critiques of contemporary legal doctrine, alternative approaches to solving complex legal questions, and reflect a deep concern with the practical effect of legal decision-making on how law develops in the courtroom.” Indeed, many law journal articles are written or co-written by practicing attorneys.<sup>70</sup>

This comment offers a useful perspective but an incomplete rebuttal. It fails to address the critics who suggest that law reviews have little influence in the legal community in part because their circulation numbers are low.<sup>71</sup> There are rejoinders to this claim. First, law review articles

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<sup>69</sup> Brent E. Newton, Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis, 4 Drexel L. Rev. 399, 404 (2012) (“During the first decade of the twenty-first century, on average, . . . the Justices cited 0.52 articles per opinion compared to 0.87 articles per opinion in the early 1970s.”); Thomas A. Smith, The Web of Law, 44 San Diego L. Rev. 309, 336 (2007) (finding that 43% of 385,000 published law review pieces have never been cited even once in other law review articles or reported cases); Michael D. McClintock, The Declining Use of Legal Scholarship by Courts: An Empirical Study, 51 Okla. L. Rev. 659, 660 (1998) (finding that judges’ citations to legal scholarship had decreased by almost 50% over the previous twenty years).

<sup>70</sup> Brian Farkas, Fixing Law Review Critics, Inside Higher Ed (Nov. 30, 2012), <http://www.insidehighered.com/views/2012/11/30/student-run-law-reviews-have-much-contribute-legal-education-essay#sthash.M9BSA41W.dpbs>.

<sup>71</sup> See John G. Browning, Fixing Law Reviews, Inside Higher Ed (Nov. 19, 2012), <http://www.insidehighered.com/views/2012/11/19/essay-criticizing-law-reviews-and-offering-some-reform-ideas> (“Part of the reason why law reviews aren’t influencing judges, lawmakers, or practitioners as much as they should be can be discerned in terms of pure circulation numbers. For a generation, law reviews have struggled with dismal circulation. *The*

can easily be read online, so print subscriptions are a poor measure of readership. Furthermore, even if most law journal articles are not widely read, law reviews nonetheless have educational value: Law professors who publish their writings often pursue research that supports their law teaching, and these professors may also use their published works to supplement class assignments. And students who serve on law reviews are afforded opportunities to produce notes and comments on a variety of legal issues and to gain experience in editing. Whatever we may think of law reviews, I strongly disagree with critics who claim that we should simply abolish all such journals.<sup>72</sup> Throwing the baby out with the bath water is not a viable solution.

It is hard to imagine the Supreme Court reaching its decision in *Goldberg v. Kelly*,<sup>73</sup> applying the Due Process Clause to protect the dignity of public-assistance recipients, without the groundbreaking analysis of Professor Charles Reich in *The New Property*, published in the *Yale Law Journal*.<sup>74</sup> Likewise, it is hard to imagine the decisions in the “Steelworkers Trilogy,”<sup>75</sup> in which the Court firmly endorsed arbitration as the preeminent method for resolving grievance disputes between parties to collective bargaining agreements, without the seminal work of the great labor law scholars of the time.<sup>76</sup> But these examples are in short supply.

I do not blame the law reviews for law schools’ preferences in favor of abstract philosophical, theoretical, and empirical scholars and schol-

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*Harvard Law Review*, arguably the most prestigious and widely circulated law review, had a circulation of 10,895 in 1963–1964. By the 2010–2011 academic year, that figure had plummeted to 1,896.”)

<sup>72</sup> Walter Olson, Abolish the Law Reviews!, *Atlantic* (July 5, 2012, 12:40 PM), <http://www.theatlantic.com/national/archive/2012/07/abolish-the-law-reviews/259389/>.

<sup>73</sup> 397 U.S. 254 (1970).

<sup>74</sup> Charles Reich, *The New Property*, 73 *Yale L.J.* 733 (1964) (cited by the Court in *Goldberg*, 397 U.S. at 262 n.8).

<sup>75</sup> *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>76</sup> In the first case of the trilogy, the Court favorably cited a passage from Archibald Cox, *Current Problems in the Law of Grievance Arbitration*, 30 *Rocky Mtn. L. Rev.* 247, 261 (1958). See *Am. Mfg. Co.*, 363 U.S. at 568 n.6. In the second case of the trilogy, the Court relied extensively on Archibald Cox, *Reflections upon Labor Arbitration*, 72 *Harv. L. Rev.* 1482 (1959), and Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 *Harv. L. Rev.* 999 (1955). See *Warrior & Gulf Navigation Co.*, 363 U.S. at 579. Cox, a member of the Harvard Law School faculty, was one of the great labor law scholars of his generation; Shulman, who was the dean of the Yale Law School, was one of the great labor arbitrators of his generation.

arship; nor do I blame the law reviews for the academy's seeming disdain for scholarship that focuses on issues related to professional practice, procedure, doctrine, regulation, and legislation that would be of more interest and greater use to wider audiences. The reviews really do not have the leverage to change how law schools operate. Nonetheless, because the law reviews serve as the principal vehicles for the publication of legal scholarship, they are now complicit in reinforcing an unfortunate trend in the legal academy.

It is possible that recent economic problems, which have spurred reforms to make legal education more practical, will lead to law reviews publishing more scholarship that appeals to the practicing community. Law schools are now under fire, with a number of commentators questioning the value of legal education<sup>77</sup> and suggesting that reforms are necessary.<sup>78</sup> And law school applications are down, in part due to the economic crisis in the legal profession.<sup>79</sup> These realities have caused

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<sup>77</sup> Tamanaha, *supra* note 63; Jim Chen, A Degree of Practical Wisdom: The Ratio of Educational Debt to Income as a Basic Measurement of Law School Graduates' Economic Viability, 38 Wm. Mitchell L. Rev. 1185, 1187 (2012); William D. Henderson & Rachel M. Zahorsky, The Law School Bubble: Federal Loans Inflate College Budgets, But How Long Will It Last if Grads Can't Pay Bills?, 98 A.B.A. J. 30, 35 (2012); Richard A. Matasar, The Viability of the Law Degree: Cost, Value, and Intrinsic Worth, 96 Iowa L. Rev. 1579, 1580–81 (2011); Daniel Thies, Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market, 59 J. Legal Educ. 598, 599 (2010).

<sup>78</sup> Am. Bar Ass'n Task Force on the Future of Legal Educ., Report and Recommendations 2–3 (2014), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf); James E. Moliterno, The American Legal Profession in Crisis: Resistance and Responses to Change 225–29 (2013); David Segal, What They Don't Teach Law Students: Lawyering, N.Y. Times, Nov. 20, 2011, at A1; Judith Welch Wegner, The Carnegie Foundation's *Educating Lawyers*: Four Questions for Bar Examiners, The Bar Exam'r, June 2011, at 12; Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Road Map 7–9 (2007); William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 162–84 (2007); Susan Sturm & Lani Guinier, The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity, 60 Vand. L. Rev. 515, 550–51 (2007).

<sup>79</sup> Karen Sloan, ABA Releases Details of Law Schools [sic] Enrollment Declines, Nat'l L.J. (Mar. 3, 2014), <http://www.nationallawjournal.com/id=1202645247048/ABA-Releases-Details-of-Law-Schools-Enrollment-Declines> (“The ABA had reported in December [2013] that new student enrollment had declined significantly last fall, and the latest figures put the decline at 8 percent.”); Jennifer Smith, Law 2014: Paring Back at U.S. Law Schools Continues, Wall St. J. L. Blog (Jan. 2, 2014, 5:57 PM), <http://blogs.wsj.com/law/2014/01/02/law-2014-paring-back-at-u-s-law-schools-continues/>.



some law schools to overhaul their curriculums or take innovative steps to make course offerings more relevant to the needs of the profession.<sup>80</sup>

The American Bar Association's ("ABA") recent "A Survey of Law School Curricula: 2002-2010" found that:

[T]he objective data combined with the narrative responses . . . reveal that law school faculties are engaged in efforts to review and revise their curriculum to produce practice ready professionals. Survey respondents frequently cited the changing job market and the three publications (*The MacCrate Report*, *Educating Lawyers*, and *Best Practices*) as influential in their decisionmaking processes.

In the 2002 Survey, we observed that law schools had begun to re-tool aspects of their programs with two commitments guiding them: an increased commitment to clinical legal education and an increased commitment to professionalism. The 2010 data suggests that these goals remain firmly in place as law schools attempt to respond to the critiques and external influences of recent years. But there is more. Engaging in wholesale curricular review has produced experimentation and change at all levels of the curriculum, resulting in new programs and courses, new and enhanced experiential learning, and greater emphasis on various kinds of writing across the curriculum.<sup>81</sup>

In support of such experimentation, the ABA recently endorsed a package of reforms that would require six hours of clinical or "experiential" credit per student, raise the limit on distance courses from twelve to fifteen credits per student, eliminate the twenty-hour weekly limit on outside work by students, encourage more pro bono service, and require

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<sup>80</sup> See, e.g., Stephen Daniels, Martin Katz & William Sullivan, *Analyzing Carnegie's Reach: The Contingent Nature of Innovation*, 63 J. Legal Educ. 585, 589–90 (2014); Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, *A Survey of Law School Curricula: 2002–2010*, at 13–16 (2012) [hereinafter *A Survey of Law School Curricula*], available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2012\\_survey\\_of\\_law\\_school\\_curricula\\_2002\\_2010\\_executive\\_summary.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_survey_of_law_school_curricula_2002_2010_executive_summary.authcheckdam.pdf) (executive summary); Peter Lattman, N.Y.U. Law Plans Overhaul of Students' Third Year, N.Y. Times, Oct. 17, 2012, at B1; Taylor Murphy, UW Law School Looks to Change Curriculum to Better Prepare Grads for New Economy, *Badger Herald* (Dec. 2, 2013, 11:00 AM), <http://badgerherald.com/news/2013/12/02/uw-law-school-looks-change-curriculum-better-prepare-grads-new-economy-ai-aj-ajs-sphk/>; J.D. Program, Harvard L. Sch., <http://www.law.harvard.edu/academics/degrees/jd/> (last visited Sept. 14, 2014); Who We Are, U.C. Irvine Sch. of L., <http://www.law.uci.edu/about/> (last visited Sept. 14, 2014).

<sup>81</sup> *A Survey of Law School Curricula*, supra note 80, at 14.

that law schools assess student outcomes, such as bar exam results and employment, as part of their accreditation standards.<sup>82</sup>

At least it appears that some members of the legal academy are now willing to consider ideas for curricular reform. These reforms suggest that legal educators recognize that in order to remain valuable as a form of professional training, law schools must tailor their curriculum to prepare students to meet the demands of the legal profession. Legal scholarship should likewise aim to maximize its appeal and relevance to those who employ the law to serve society.

If *balance* is to be achieved in legal scholarship, it will not come at the initiative of the law reviews. Student editors of law journals cannot control law school preferences regarding faculty hiring and scholarship. If law schools prefer hiring young scholars who mostly pursue abstract scholarship and have little interest in procedure, practice, doctrine, rules, or legislation, then the articles produced by these scholars will tilt in the same direction. But there is no good reason for the academy to pursue such a narrow course.

I think that law schools have responsibilities to society that exceed current practices in the legal academy:

In constructing a vision of legal education, I agree with Professor J.B. White, who has written that, in order for legal academic work “to be of value to the law it is essential that the work in question express interest in, and respect for, the possibilities of what lawyers . . . do.” Unfortunately, in my view, too many legal academics do not produce such work. Why? Because they seem to forget that law schools are professional schools, not graduate schools, so they have little interest in the work of practitioners. Indeed, there are still a number of law professors who express outright disdain for the practice of law.<sup>83</sup>

This is not to say that there is no place for theory. I have consistently argued it should be incorporated in writing that appeals to broader audiences of practitioners:

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<sup>82</sup> Am. Bar Ass’n, Report to the House of Delegates, Resolution 103A, at 25–26, 30–31, 35, 39–40 (2014), available at [http://www.americanbar.org/content/dam/aba/images/abanews/2014am\\_hodres/103a.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/2014am_hodres/103a.pdf) (adopting Am. Bar Ass’n Section of Legal Educ. & Admissions to the Bar, Revised Standards for Approval of Law Schools (2014)).

<sup>83</sup> Edwards, *Renewing Our Commitment*, supra note 66, at 1430 (quoting James Boyd White, *Law Teachers’ Writing*, 91 Mich. L. Rev. 1970, 1976 (1993)).

2014] *Another Look at Goodbye to Law Reviews* 1509

In pressing the point that law schools are professional schools, not graduate schools, I do not mean to suggest that law schools are or should be “trade schools.” Our law schools must nurture thoughtful lawyers who have first-rate legal minds *and* an understanding of and commitment to the broader public responsibilities that are at the heart of the profession. This requires law professors who are able to address large questions of theory and policy, using modes of research and analysis that extend beyond the lines of inquiry common to the study of legal doctrine. Legal education must therefore include significant elements of interdisciplinary study. Many law schools now attract faculty members who are well-versed in disciplines such as economics, political science, and sociology. We still face the problem, however, that too many legal scholars address material from other disciplines without situating it in a legal context.<sup>84</sup>

My guess is that we will see no significant change in the content of what is published in the law reviews unless the law schools change their ways.

Meanwhile, there are a few small things that law review editors might do to achieve a better balance in the scholarship that is published in their journals. To improve the selection of scholarship, faculty should play a greater role in screening articles that are submitted for publication, especially in specialized areas such as tax, employment law, civil procedure, securities law, corporations, administrative law, bankruptcy, intellectual property, and environmental law, to name a few. It might also make sense for law review editors to seek the advice of top practitioners, both for suggestions regarding important subjects of interest to the practice community and to screen some of the articles that are submitted for publication. If practitioners are taken seriously in these ways, this might engender greater respect in the practice community for the work product of law journals.

Judge Posner has suggested that “[l]aw reviews should focus on doctrinal scholarship in both the faculty-written and the student-written sections of the review, leaving to the growing number of faculty-edited journals the principal responsibility for screening, nurturing, improving, and editing non-doctrinal scholarship.”<sup>85</sup> This is an interesting idea if one

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<sup>84</sup> Id. at 1431.

<sup>85</sup> Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 *Stan. L. Rev.* 1131, 1136 (1995).

believes that law faculty members should focus on “nondoctrinal scholarship.” I do not. I have heard some commentators suggest that law reviews should adopt peer-review processes in the selection of articles for publication. This is a bad idea. Peer review is much too cumbersome and time-consuming to be of great service to law journals. Furthermore, a number of thoughtful commentators have shown that there are many flaws in peer review and that it is not necessarily the best process for promoting the highest quality publications.<sup>86</sup>

Law reviews might also institute selection processes that require editors to articulate how the thesis of an article is relevant and useful in the regular work of practitioners, legislators, judges, or regulators, and then ensure that a number of such articles are published each year. Space in law journals could also be allotted for occasional essays or commentaries written by lawyers, judges, or regulators.<sup>87</sup> Law review editors might additionally aim consciously to publish articles that address important public interest problems, such as issues facing under-served communities or remedying specific ongoing injustices in law enforcement. And reviews should strive to publish articles discussing the actual practice of lawyering. Articles of this sort could be dedicated to professional craft, rather than the substance of law, and might address ethical questions, issues that arise in the changing nature of the profession, or discourse about best practices for lawyers and judges.

I do not mean to be Pollyannaish in offering these modest suggestions, some of which have already been implemented by some law reviews. I understand that change does not come easily, especially in higher education. But I believe that law review editors have some viable options that they can pursue to promote diversity of content and viewpoint, encourage scholarship that is relevant to the legal profession and the public interest, and blunt some of the incentives that now lead law journals to publish articles “[r]iding one intellectual fad after another.”<sup>88</sup>

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<sup>86</sup> See, e.g., Rethinking Peer Review: How the Internet Is Changing Science Journals, *New Atlantis*, Summer 2006, at 106–10; David Shatz, *Peer Review: A Critical Inquiry* 2–4 (2004).

<sup>87</sup> As Seth Waxman observes, “What we really need are far more venues in which practitioners, scholars, and judges can talk to one another. . . . [L]aw schools can provide print forums—either in the law reviews themselves or in other publications—in which professors, practitioners, jurists, and students can write about the law in a way that is more inviting and accessible to the profession as a whole than most current legal scholarship.” Waxman, *supra* note 20, at 1911.

<sup>88</sup> Tamanaha, *supra* note 63, at 56.

## CONCLUSION

I am not advocating a return to the narrow-minded, provincial doctrinal scholarship that Professor Rodell singled out for criticism. My hope is that law schools will lead the way in valuing the work of *all* good scholars, those who write articles focused on professional practice, procedure, doctrine, legislation, and regulation, as well those who focus on theory, philosophy, and empirical studies. The law schools and law reviews should consider seriously Professor Rodell's view that "law is supposed to be a device to serve society, a civilized way of helping the wheels go round without too much friction."<sup>89</sup> If the status quo remains, our profession may find itself criticized for merely "diddling while Rome burned."<sup>90</sup> Professor Rodell's memorable phrase is as apt today as it was when he wrote it in 1936.

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<sup>89</sup> Rodell, *Goodbye*, supra note 1, at 42.

<sup>90</sup> *Id.* at 43.

