



# DUMPING

## ON LAW REVIEWS

*James Boyle*

**T**HIS IS A LIGHTHEARTED ATTEMPT to explain why law reviews are so bad for both authors and editors, written from the perspective of various prominent schools of legal theory. It will have no footnotes, but this is where the footnote to Fred Rodell *would have been*.

Before I go on let me agree with you that this is a mere caricature, that your personal experience both as law review editor and as author has been nothing like what I describe here, that these problems were always imaginary, and have been fixed recently by a bold series of reforms, that the issues I bring up only affect the schools at the top, bottom or middle of the perceived hierarchy, that you never publish in law reviews anyway, preferring peer-reviewed journals, and that there is certainly not a substantial literature suggesting that peer-reviewed journals have their own pathologies or, when empirically assessed, might flunk peer review. All of those things are either true, false, mythical, historical or motivated by malice – just as you would wish.

The basic puzzle is obvious, if complex. Why does law, alone out of all the disciplines, turn over a vital function of the academy – the production, curation and distribution of scholarly content – to a group of second and third year students? It is not merely the literal Saturnalian inversion of the hierarchy, or the fact that careers, tenure decisions and the progress of

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*A typically saturnalian law review office.*

*J.R. Weguelin, The Roman saturnalia (Dec. 1884), in The Miriam and Ira D. Wallach Division of Art, Prints and Photographs, N.Y. Public Library.*

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science and the useful arts may depend on the whims of a group of students who in other contexts we might be grading, or whose own work might make us wonder over mistakes of logic or doctrine. That is but a first taste of the problem, an *amuse bouche* of absurdity prepared by the enigmatic surrealist chef in back.

What are these students *doing* apart from making up or down decisions on the basis of 52 weeks of law school experience, frequently in doctrinal areas or methodologies with which they themselves are not familiar? Well, there's the citation-stuff; an elaborate and apparently almost entirely functionless hieratic set of rituals designed to achieve consistency with an enormous Blue (or Maroon) Sacred Text. In terms of Reform or Orthodox, we are definitely on the Orthodox side of the ledger.

Then there is the obsessive search for "Authority" for every point. In my very first article, I mentioned that the fight with relativism ran, like a fault line, through the humanities and sometimes even the sciences. Authority was, appropriately, demanded. My weak joke that the demand itself seemed to offer proof of the point was, rightly, ignored. I provided some citation to Hume and Wittgenstein, I think. That was also rejected. I was told that

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I needed to start at Anthropology and go through to Zoology, sustaining the proposition for each. My response, if memory serves, was “*See Widener Library generally.*”

One is left with a scholarly discipline, picking as its gatekeepers those perhaps least suited for the job, while those gatekeepers immerse themselves in labyrinthine and pointless devotion to a task that could literally be performed by a computer, all wrapped in a fetishistic worship of citations for (and parentheticals about) the blindingly obvious. Unsurprisingly, the result is that no one – other than the people I addressed in the second paragraph – think the process of being edited, on average, reliably improves the articles. Here I am talking about *net* improvement – measured against the opportunity-costs of the silly demands, meaningless formalisms and errors of fact, grammar and style helpfully introduced in multiple rounds of editing by people who do not communicate with each other into an erratically redlined article that was actually pretty good when it first hit SSRN. To put it another way, how many more articles could you have written over the course of a career if journals merely made up/down decisions? Net/net, this makes no sense, does it?

The world-weary cynic will weigh in at this point and say, “well it’s really just a credentialing function, you know. You are making too much of it.” I am all for world-weary cynicism, or at least Stoicism, but if you were “credentialing” for a profession, why on earth would *this* set of rituals and skills be the one you chose, rather than say skill at euchre or tiddlywinks, or crosswords? Why would the students, or their employers, want them to be tortured into learning *these* skills? Also, whatever your answer, that may be what is in it for the students. What is in it for *us*?

Some possible answers are provided below, each in the style of a different take on legal theory. These are, to repeat, tongue-in-cheek. The ones you find mildly amusing, or even thought-provoking, probably say more about your scholarly predilections than about law reviews.

### LAW & LITERATURE (AND SOME CRITICAL LEGAL STUDIES)

**I**t’s always about authorship, isn’t it? As a discipline, law has a uniquely tortured relationship to authorship and particularly to the romantic author, dazzling in her originality. While other disciplines encourage their

members to assert originality in everything they produce, in our *doctrinal* mode we are author-deniers. Look at our Canon; the judges whose names appear again and again in our casebooks. The high-point, the cynosure of the art, is the judge who can bring up a dramatically original argument, can transform the doctrine utterly, all while claiming that there is nothing to look at here, that this is merely the mechanical application of the rule, routine and boring.

Cardozo is a classic case-in-point. Remember how, in *McPherson v. Buick*, he overturns decades of precedent on privity, while making an exception about foreseeably dangerous articles consume a well-understood rule? It is a *tour de force* and it actually contains a morally compelling and legally novel argument. But Cardozo must deny it. We have always been at war with Eastasia. Privity has always been nullified for everything more dangerous than toilet paper, and possibly even there. We invite our students to marvel over the “craftsmanship” of the opinion. We put him in the Canon.

How does this shape law reviews, though? Take that fascinating genre “the Student Note,” one that I have actually found to contain many fine and informative pieces of work. The Student Note is constituted by two fundamental rules: the Preemption Rule and the Subcite Rule. The Preemption Rule says that “thou shalt not sayeth anything that has been said before.” The Subcite Rule says that “thou shalt not sayeth anything that *hasn’t*, for that would Lack Authority.” It is in the asymptotically vanishing “deadly space between” those two rules (and here would be the cite to Melville) that the Student Note must live and move and find its being. The fact that our students nevertheless produce some pretty good work is a testament to their talents.

When student author becomes student editor, the Preemption Rule governs the article’s acceptance process, while the Subcite Rule governs the *Bildungsroman* of the article’s editing, both its oral stage (endless hunger for citations) and its anal stage (endless fussiness about how they are formatted.) Our obsessive denial of authority helps produce the irrational semantic spaces in which our own authorship is produced! Add Baudrillard to taste, and serve. To quote a memorable line from a student in my Law and Literature class, “It’s like a metaphor.”

[Warning: do not think too long about this comment. A chuckle or a sigh is fine. But if you start really to *think* about it? To repeat it over and over?

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*Herman Melville, patron saint of the Student Note.*

*L.F. Grant, in Raymond M. Weaver,*

*Herman Melville: Mariner and Mystic (1921).*

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To wonder if that makes it a *simile*? To say it to yourself like a mantra until the words lose all meaning, and you, all sense of self? That could be Very Bad. They will find you in the morning, like the bride in Sartre's *The Words*, crouched naked and mad on top of the wardrobe, repeating "It's, like, a *metaphor*?" in the bright, quizzical uptones of a Southern California Valley accent.]

If a critical legal studies version of the law and literature account is desired, these two rules would form the “fundamental contradiction,” the mediation of which produces the institution above it in a fractal pattern of compulsively repeated, but futile, denial on ever-finer levels of particularity. (Probably Claude Levi-Strauss and Duncan Kennedy.)

## INTERNATIONAL POWER POLITICS

The realist – and here I am thinking more of international realists, Myres McDougal rather than Felix Cohen – sees that we are living in a vicious struggle for national preeminence, in which we must be endlessly vigilant for possible attacks coming from our enemies. If you stay awake worrying about cyberattacks on our electric grid, this may be you. Seen in the harsh spotlight of this realism, the true insidiousness of the law review scheme becomes clear.

Churchill, perhaps apocryphally, is said to have claimed that *The Times* crossword was more destructive to British productivity than a German bombing raid. Every day it took hundreds of thousands of hours from the brightest minds of Britain and wasted it in meaningless, unproductive activity. “But how does this relate to law reviews?” Do I have to draw you a *map*, sheeple!? Perhaps, I do.

Think of all that our students accomplish while going to law school full-time. They work in Innocence Projects, freeing the wrongly incarcerated. They defend asylum-seekers, act as guardians, help local businesses incorporate, give volunteer tax assistance and represent victims of domestic violence. They educate themselves beyond law school classes, or create guided readings seminars in the intellectual topics of the day. Now imagine what they might accomplish if we freed them from the job of learning how to Bluebook, or collectively writing thousands of entries for casenote competitions, entries generated in haste, read as cursorily as college essays, and then discarded. Imagine them free from the job of demanding citations for the correlation of poverty with the absence of wealth, or the fortunate happenstance of beaches being so close to the sea, if sea-bathing is desired. Imagine the joy of the fourth layer of the editing process, whose job it is to undo the changes introduced by the third layer, while scattering unflagged and sometimes ungrammatical edits throughout the text, when they can finally shed that burden!

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This, like Churchill's crossword, is obviously the result of a long-running attack by a hostile power, an attack that every year takes hundreds of thousands of hours of labor from some of the brightest students we have and burns it, a Bonfire of the Analities, if you will. What could we have accomplished as a society, from small acts of kindness and mercy to grand projects of the young and idealistic, if it were not for this pernicious drain on our energies?

Obviously, some parts of the theory still need development. The *duration* of the attack makes the identity of the perpetrator particularly mysterious. My working hypothesis is that it is British revenge for that whole independence unpleasantness, one last rude gesture in the grand tradition of John Cleese and the Ministry of Silly Walks. Notice which profession they are targeting. The very group that wrote the Declaration of Independence and the Constitution; the architects of a rebellious Republic. Coincidence!? I admit, however, that the Illuminati may also be involved. Further study is needed.

### TWO FLAVORS OF FUNCTIONALISM

**T**he world-weary cynic has a smarter, more thoughtful cousin: functionalism. There are two functionalisms, actually, the Chicago School, efficiently adaptive, public choice variety and the hegemonic, Gramsci, Horkheimer and Adorno, variety.

Let us start with a public choice perspective. Contrary to all that has been written in this essay so far, and certainly to the Churchillian conspiracy theory above, law reviews are in fact brilliantly designed for a particular purpose; it just isn't the purpose you thought it was. Law review customs are like the rules of the common law, endlessly threshed in a Priestian-mill of repeat encounters until only the efficient survive, or even the Hayekian private ordering of Shasta ranchers, layering private informal norms on a backbone of hard law in a quest for better organization. "Is that purpose the production of a rational mechanism for the assessment, editing and publication of legal scholarship?" you ask. Clearly not. Don't make me laugh.

The public choice theorist delights in showing you how the apparent ludicrous inefficiencies of some bureaucracy are in fact highly functional in terms of the incumbents and beneficiaries of that organization. The Chicago school always loved what Bob Gordon called the "*épater les sissies*" style of

argument: “*Sell the babies!*” “Optimal dishonesty!” (This was trolling the libs, before it was cool.) If you put both together, you get the explanation of law reviews.

Law reviews, and in particular the utterly meaningless, pointless formalisms of law review work, are brilliantly designed for a single purpose: separating the merely very smart from the very smart who can, for hundreds of hours, perform tedious, repetitive tasks of questionable social worth. It is the latter that Big Law requires and law reviews are literally built around the functional requirements of that goal. Far from being irrational, this is a superb sorting mechanism for the needs of industrial-scale legal practice. (In reality, I associate this actual insight not with public choice theorists but with Dave Trubek. Score one for the law and society movement.)

The hegemonic variant takes the basic functionalist tune and, to paraphrase Bob Gordon *again*, replaces its triumphant trumpet salutations to efficiency with the dark minor chords of domination. Law reviews are indeed well-suited to the warped vision of quality and standards functional for the hegemonic ideology of alienated legal labor in Late Capitalism. (For those not familiar with the lingo, that is the Frankfurt school way of saying that Big Law sucks, that it *needs* to suck, that it needs both parties to pretend it *doesn't* suck and then to repress the fact you are both pretending.) The student learns in a law review to boast of the extremity of her pointless labors, fitting her well for later boasts about how many billable hours she has clocked this month and how seldom she has even seen her apartment. Arduousness provides its own meaning — just as painful rituals prepare an initiate to enter a cult, while simultaneously making the game seem worth the candle. In this vision, migraine-inducing subcite sessions are the ritual scars of our tribe. “If it hurts so much, it must be good, right?”

## THE STUDENT REVOLUTIONARY

Let us close, though, on a happier note. Scholars from other disciplines mock us for having the lowest and most irrational publication standards in academia. What they don't understand is the brilliant, even subversive nature of the enterprise. Peer review provides a powerful form of entrenchment to dominant paradigms of academic thought. An iconoclastic



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*A ranch in Shasta County, California, fertile ground for legal theorizing.*

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idea that challenges the orthodoxy, rather than saying original things within it, is likely to meet with rejection after rejection. Thomas Kuhn believed the real method for paradigm-revolution is to have all the old guys die. Nothing else worked that well.

Law reviews upend this tendency! The second and third year students may not even know what the dominant paradigm *is*. “This Einstein guy seems to be doing physics kind of stuff. Let’s publish!” The Crazy 8 Ball of the law review submission process is not a bug but a feature. Law reviews

embed a radical, and again I will say, Saturnalian process – a hierarchy inversion – at the heart of a conservative discipline. “Law and literature! Critical race theory! Feminist Legal theory! Sure, why not?” They arrived decades before they might have in a more hierarchical journal structure. All of the meaningless formalistic editing jobs? Well, we have to cloak our student-led insurrection in the robes of formality. What’s more, now *we* get to torture the *professors*. We will even call the primary instrument of their torture a “Bluebook.” Poetic justice! *Aux armes, étudiants!* You have nothing to lose but your chain-citations.

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