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Journal Wars.

Michael Vitiello

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JOURNAL WARS

MICHAEL VITIELLO*

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I. INTRODUCTION

I recently accepted an invitation to speak to the National Conference of Law Reviews. After I learned that I would be on a panel with Josh Rosenkranz, the “bad boy” author of “Law Review’s Empire,”¹ I realized that the conference organizers wanted me to play a modern day Leibniz, the philosopher best known for his argument that this is the best of all possible worlds.² Their casting decision was no doubt based on the fact that I authored one of few journal articles in support of student run law reviews.³ In the conference organizers’ script, Rosenkranz would get to play Voltaire, whose novel *Candide* roundly satirized Leibniz.

Though I have not read Leibniz and Voltaire since I was an undergraduate, I remember clearly Voltaire’s pompous character Dr. Pan-

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1. Rosenkranz, *Law Review’s Empire*, 39 HASTINGS L.J. 859 (1988).

2. See B. RUSSELL, HISTORY OF WESTERN PHILOSOPHY 604 (1948).

3. Vitiello, *In Defense of Student-Run Law Reviews*, 17 CUMB. L. REV. 859 *passim* (1987). For a short bibliography of articles critical of student run law reviews, see Rosenkranz, *supra* note 1, at 868 n.37. I do not want to portray myself as a lonely Quixotic defender of student run law reviews, but many of the other defenders come from the student ranks. See, e.g., Note, *A Student Defense of Student Edited Journals: In Response to Professor Cramton*, 1987 DUKE L.J. 1122 *passim* (1987). Many in the judiciary support student run journals as well. See, e.g., Richardson, *Law Reviews and the Courts*, 5 WHITTIER L. REV. 385, 389 (1983).

gloss, expounding on true love and pointing to a loving couple, only to learn that the woman was a prostitute whose beauty was only as thick as her makeup and who was suffering from syphilis. At twenty years old, I had no trouble telling who won the argument. Indeed, Bertrand Russell described Leibniz as "orthodox, fantastic and shallow."⁴ I reject the casting decision by the conference organizers. In this article, I want to substitute a different script and different roles. Frankly, I want a more sympathetic role than the shallow Leibniz. Rosenkranz entitled his article "Law Review's Empire," a play on Dworkin's "Law's Empire,"⁵ which in turn has suggested playful allusion to the Star Wars trilogy.⁶ Rather than casting Rosenkranz as Voltaire, for purposes of this article, I have decided to cast him as Luke Skywalker, or at least the Skywalker of Star Wars,⁷ not the Jedi Knight of the later movies. That makes an easy casting decision when I begin my discussion of Roger Cramton's view of student run law reviews. He fits nicely in the role of the Emperor. As head of casting, I had difficulty finding my own role. It was tempting to take the role of the lovable maverick Han Solo. One of my friends suggested curtly that Darth Vader would be more suitable. But I have settled on Obi-Wan Kenobi. It's my script, so a bit of self aggrandizement must be excused.

One ought to remember that Kenobi has seen the dark side of the force and sees its appeal. That is, he does not see the world in the monochromatic way that Skywalker would tend to portray it.

In my role as Kenobi, I recognize a laundry list of valid criticisms of student run law reviews. Initially, I agree that some published articles are poorly written. In addition, one must concede that student editors don't always get it right: top journals have rejected enough of my articles for me to conclude that they miss some fine works!⁸ Fur-

4. B. Russell, *supra* note 2, at 604.

5. R. DWORKIN, *LAW'S EMPIRE* (1986).

6. See, e.g., Addis, *Book Review: The Empire Strikes Back*, 40 U. FLA. L. REV. 585, 585 (1988).

7. The young Skywalker is uncertain about the existence of the force and even during his tutelage under Yoda, the nine hundred year old Jedi master, Skywalker suffers from impatience and doubt.

8. This is intended primarily as a humorous remark. It, in part, addresses the criticism of the grandfather of critics of legal scholarship, Fred Rodell, that law review articles are pompous and humorless. See Rodell, *Goodbye to Law Reviews — Revisited*, 48 VA. L. REV. 279, 280 (1962) ("it seems a cardinal principle of law review writing . . . that nothing may be said forcefully and nothing may be said amusingly").

thermore, footnoting continues to be unnecessarily cumbersome. Finally, because student editors spend summers working in law firms, the pace of the publication process is often faltering causing volumes to be published at irregular intervals. I could lengthen the list if I were so inclined.

We do not live in the best of all possible worlds: law reviews could improve. That is especially true in light of what may ride on the publication decisions made by student editors. For example, some faculties have prescribed lists of acceptable journals in which junior faculty are advised to publish to assure their promotion and tenure. But my theme is simple: much of the criticism of student run law reviews is simply wrong or misleading.

I want to defend student run law reviews from a number of specific charges leveled against them. First of all, law reviews and the selection process have been accused of being elitist.⁹ That alone would not be so surprising or perhaps so reprehensible but for the additional claim that the selection process, most frequently reliance on grade point average, is flawed.¹⁰ The elitist charge is most often voiced by students or by recent graduates,¹¹ still close to the law school experience with all of its frustrations. I do not intend that observation as an *ad hominem* or *ad feminem* attack. I intend to contrast that criticism with a second kind of attack against student run law reviews coming from a very different source, established law professors who see student editors as incompetent to do the important job for which they have been selected.¹² "Super-elitists," as I labelled them in my 1986 article on law reviews,¹³ want to establish faculty edited journals with peer review in place of student article selection. Whatever the motivation for peer journals as the norm,¹⁴ it is a profoundly misguided

9. See Rosenkranz, *supra* note 1, at 860 (instead of fostering comradery, law reviews add to alienating pressures of law school); see also Cane, *The Role of Law Review in Legal Education*, 31 J. LEGAL EDUC. 215, 231-32 (1981).

10. Rosenkranz, *supra* note 1, at 892-93.

11. Rosenkranz, for example, graduated from Georgetown in 1986 and published "Law Review's Empire" in 1988. Cane was a student when she published her article.

12. I focus on the views of Roger Cramton, the most prominent critic of student run law reviews. See Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. LEGAL EDUC. 1 (1986). Cramton is not alone in his criticism of student run journals. See Rosenkranz, *supra* note 1, at 868 n.37.

13. Vitiello, *supra* note 3, at 869.

14. Rosenkranz suggests that the real motivation "has more to do with power than with expertise." Rosenkranz, *supra* note 1, at 868-69.

idea, both from the perspective of law faculties looking for diverse outlets for their scholarship and from the perspective of law reform and the necessary healthy debate among competing voices. Some critics argue that student run journals contribute to doctrinal conformity.¹⁵ That proposition is hard to confirm or deny, but the alternative — reliance on peer review journals — would lead to far more doctrinal conformity.

Further, much of the debate about student run law ignores some of the more interesting recent developments in student run journals. Perhaps influenced by the debate about their continued vitality, student run journals are changing their format. Anecdotal review of student run journals can prove almost anything. A recently published Harvard Law Review essay “demonstrates” the awful writing style of journal articles by citing a number of particularly egregious passages.¹⁶ Anecdotal evidence is often cited to show that student run journals miss truly exceptional scholarship.¹⁷ My anecdotal review of law journals produces a different landscape: I find that there has been positive change in format and content of what many law reviews are publishing.¹⁸

II. JOSH ROSENKRANZ AS LUKE SKYWALKER

Josh Rosenkranz advanced the first position mentioned above, that student run law reviews offer a phoney credential to law review students. I have focused on Rosenkranz's article because it is articulate and was published in a nationally visible journal. Perhaps what makes Rosenkranz' position so interesting is that he was a clear beneficiary of the law review system. His biography demonstrates that his position as a Georgetown Law Journal editor led to an elite judicial clerkship with Justice Brennan.¹⁹

15. See, e.g., Cramton *supra* note 12, at 8.

16. Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 945-47 (1990). The author quotes three examples of badly overwritten material to support his proposition that “[i]t may be hard to say whether good writers are born or made, but it's painfully obvious that few of them are legal scholars.” *Id.* at 942.

17. See Cramton, *supra* note 12, at 7-8 (citing one example to support the argument that “[t]he claim that student editors can recognize whether scholarly articles make an original contribution throughout the domain of the law is now viewed by legal scholars as indefensible”).

18. For a discussion of some of the innovations in legal scholarship, see Note, *supra* note 3, at 1125.

19. See Rosenkranz, *supra* note 1, at 859.

I do not intend to summarize his entire argument and in fact, I am sympathetic to many of the points which he makes about the alienation that students experience in law school. He identifies a problem that concerns many legal educators, the unwillingness of many top law students, often law review students, to seek public service employment. His suggestion that it is essentially conservative law faculties and the law review experience that dulls students' social activism should provide the starting point for a different debate, beyond the scope of this article.²⁰

I want to focus on one specific argument, a cornerstone in his position that law review is a phoney credential. He argues that the primary selection process for law review, reliance on grade point average, does not select the most capable people to serve on law review.²¹ Rosenkranz suggests a heavier reliance on other criteria for selecting law review candidates,²² but also seems sympathetic to opening the job to all comers.²³

His attack on reliance on grades is strident: "For an institution that purports to be dedicated to scholarly writing, th[e] focus on grades is, to say the least, enigmatic The law school grading has come under harsh attack as inaccurate and imprecise, at best, and arbitrary at worst."²⁴ Rosenkranz argues that grades may measure something but that something is meaningless in terms of relevant law review skills. He states that:

20. *Id.* 877-85. Rosenkranz suggests that idealistic and moral students who crave "service through the law" are beaten down, and remolded into conservative conformists ready to serve the corporate master. That may be true of students or some students at Georgetown, although he acknowledges his debt to Mark Tushnet, who undoubtedly opened Rosenkranz's eyes to a very different world than the channel to corporate America. *See id.* at 859 n*. My experience as a law professor suggests a very different view of reality than Rosenkranz's view of conservative law faculty destroying student activism. Common wisdom among many law professors with whom I have spoken is that students are generally motivated by the desire for a lucrative career, have little interest in public service and view us as benighted when we challenge their assumptions about the good (material) life. One of my colleagues who teaches a required two hour course in Poverty Law recounts numerous anecdotes, revolving around the common theme of student hostility to the welfare state, the plight of the homeless and other similar issues.

21. *Id.* at 892-94.

22. *Id.* at 897-99.

23. Rosenkranz concludes that "[n]o main law review . . . would open up its membership to all students." *Id.* at 919. His description of law review work, however, suggests that almost anyone willing to put up with the tedium could do the job. *See id.* at 902-06.

24. *Id.* at 892-93.

grades measure the student's capacity to psychoanalyze professors, to write quickly, and to analyze superficially various aspects of a complex legal problem . . . these attributes . . . have little to do with effective research skills, incisive legal reasoning, persuasive advocacy, and originality that the ideal law review selection process is supposed to detect . . . [c]ertain attributes on which the law exam bases its selection are downright incompatible with good writing. Students need never write a decent English sentence on a law exam.²⁵

That is a grim picture and in fact, if true, we in the law teaching profession have been perpetrating an awfully cruel hoax on our students and the public.

If the process were really so dramatically flawed, one would think that we would be able to notice the gross disparity between the undeserving students who make law review and the deserving students who do not, unless law professors are remarkably unobservant or stupid. But do grades really measure nothing of significance?

Certainly students often believe that. For example, Duncan Kennedy has written that "[s]tudents generally experience . . . grades as almost totally arbitrary — unrelated to how much you worked, how much you liked the subject, how much you thought you understood going into the exam, and what you thought about the class and the teacher."²⁶ In context, apparently Professor Kennedy agrees with much of that assessment.

I have been teaching law since 1977 and in that period of time, I have often heard similar laments. That a position is repeated often hardly makes it correct, especially when we consider the bias of the speaker. In addition, that hypothetical student who challenges the validity of the grading process must ignore some strong evidence that the process is not quite so arbitrary. For example, that hypothetical student probably has received remarkably consistent grades in diverse courses.²⁷

I have no doubt that law faculty members contribute to the mystique about grades. Reviewing exams with students, sometimes hostile and defensive, sometimes in tears, is hardly sport. We are often relieved to be done with the tedious task of grading and find rehashing

25. *Id.* at 893.

26. D. KENNEDY, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW* 50 (D. Kairys ed. 1982).

27. Rosenkranz recognizes this point, but argues that the skills that are measured are not related to relevant law review skills. Rosenkranz, *supra* note 1, at 893.

a student's inadequacies time consuming and unpleasant. But if we do not review exams with students they are free to believe that the process is arbitrary. In fact, the student who truly did not understand the core distinctions in a course is often the most likely to believe that he did well on the exam. Even after reviewing an exam, a student unable to understand reasonably obvious distinctions may still remain befuddled. Given two alternatives, that the faculty member is arbitrary or the student has a limited ability to understand the material, why should we be surprised when the student chooses to blame the system?

I have discussed exams with students and received detailed letters from students in which they contend initially that they have a much more profound understanding of the subject than I gave them credit for. I am not at liberty to quote from specific exams. But let me observe generally that such claims are made by students, for example, in civil procedure who answer a question asking specifically about personal jurisdiction with a discussion about diversity. In a criminal law exam that I recently finished grading, a murder question specifically made reference to a deviate sexual intercourse statute and invited a statutory analysis to determine whether the perpetrator committed a felony at all and then whether the felony might implicate the felony murder doctrine. What would Rosenkranz think of an exam where the student chose not even to mention the felony murder doctrine at all or that if she did, chose not to mention the statute referenced in the exam? These are not quibbles at the margin. Often the misstatements of law and failure to understand fundamental distinctions are unsettling, like the personal jurisdiction-diversity example.

Law faculty must admit that there are close calls at the margin. There is no bright line between a B and B+. But that does not make the entire process flawed and arbitrary. Students who do poorly are seldom well prepared students, who had a poor day but are capable of doing the important job of selecting one article from another as a law review editor must do. Students who do badly are often students who did not get fundamental rules and distinctions.

Thus far, I have relied primarily on my own anecdotal evidence. It might be dismissed as self-interested. Obviously, I am not likely to admit that I am arbitrary and that I consciously engage in a fraud on the hundreds of students whom I have taught. But my views that

grade point average reflects relevant law review skills is supported by objective data.

Rosenkranz argues that students can do well on exams without writing well. As a general proposition, I doubt it. Indeed, I find support in a recently published objective study in the *Loyola Marymount Law Journal*.²⁸ The authors drafted legal memoranda in poorly written legalese and in plain concise English. The documents were designed with the same content. Readers repeatedly found the well written memorandum more persuasive and more professional than the less concise document. That study confirms the intuitive sense that style matters. I suspect that the same experiment with readers of law exams would produce the same result: consciously or unconsciously we grade better written answers higher than answers less well constructed.²⁹

Rosenkranz argues that exam grades may measure something — he must concede that because a given student's grades are often quite consistent from one course to another. But he argues that exam grades measure superficial skills unrelated to the more analytical skills needed for law review editing. Two years ago, some of my colleagues at Loyola urged that Moot Court grades should count only as part of a separate skills grade point average, not as part of the academic grade point average. While our skills curriculum and separate skills grades are an important innovation in legal education, I was concerned that denying academic credit to our very intensive Moot Court class would devalue the course. Hence, a colleague and I who co-taught the course submitted our Moot Court grades for statistical analysis to determine whether we were measuring something separate and apart from what traditional academic courses measure.

I ought to describe briefly our Moot Court program to highlight the significance of the statistical findings. Rosenkranz argues that exams reward the student who shoots from the hip and that a better indication of a student's law review potential is to examine work where the student has had time to do a thorough job of research. Our Moot Court program more than meets that description. A student works

28. Benson & Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 *LOY. L.A.L. REV.* 301 *passim* (1987).

29. Other studies have found a correlation between writing style and the grade given written work. See Marshall & Powells, *Writing, Neatness, Composition Errors and Essay Grades*, 6 *S. EDUC. MEASUREMENT* 97 (1969).

with the same case during the entire course of the semester. First, she is presented with a complaint and must draft a memorandum in support or in opposition to a motion to dismiss. After argument on the motion, the student must write a client letter advising the client as to his options concerning appeal. At that point in the semester, the class is given a full trial transcript and has six weeks to research and write a twenty five page appellate brief. The course concludes with an appellate argument before a three judge panel.

Heavy emphasis is placed on the students' written product. Unlike exams, the course allows the kind of detailed and creative research that Rosenkranz finds missing from the exam situation. The students' written work is explicitly and consciously graded on analysis and on style. Contrary to the expectations of some of my colleagues who believed that we were measuring something different and apart from "academic" courses and Rosenkranz who presumably would have expected no meaningful correlation, we found a .7 correlation between a student's grade point average and her grade in Moot Court.³⁰

My point is straightforward: we need not rely only on anecdotal evidence that grades on exams measure meaningful skills. Most of us in legal teaching believe that we are testing meaningful skills. I might be willing to trust our collective experience and judgment without more evidence. But writers like Rosenkranz have challenged that judgment. Objective evidence exists that supports our intuitive sense that exams measure analytical and writing skills.

Of course there are close cases at the margin. No one is silly enough to suggest that the last student to make law review is somehow truly superior to the first student on the "also ran" list. And also, a lot rides on that cut off. That no doubt explains why there are alternative routes to law review in many schools to accommodate the students who may be left out in the cold if reliance is only on first year grades. It is wrong to suggest that because two students, the last to make law review on grades and the first on the "also ran" list, may look alike, that there are no meaningful differences in skill levels among law students.

III. ROGER CRAMTON AS THE EMPEROR

Some critics argue that the hierarchy imposed by law review is un-

30. Data on file with St. Mary's Law Journal.

fair for a host of reasons. Rosenkranz argues that since grade point average is a poor measure of relevant skills that the credential is false. But he would agree to some relevant selection process.³¹ Others have argued that because law review is primarily an educational experience, it ought to be open to all comers.³²

Except perhaps for the very best student bodies, I believe that abandonment of standards entailed in such a suggestion is profoundly misguided. As I argued above, I am not embarrassed about the validity of the selection process. Further, the continued vitality of student run law reviews will turn on their continued use of some measurement that assures excellence. Excellence matters because what law reviews do matters.³³ But more immediately, excellence matters as a defense against the attack of the Imperial forces.

Roger Cramton has argued most forcefully that students are incompetent to make editorial decisions and that we would be better off without student edited journals.³⁴ At first glance, the argument is powerful: editorial selection is critically important at a minimum to untenured faculty. As one friend has observed, tenured faculty members sometimes use the journal in which an untenured faculty member has published as a proxy for the quality of a piece instead of making an independent assessment of the article's merit. Obviously the latter

31. Rosenkranz, *supra* note 1, at 897-98.

32. Cane, *supra* note 11, at 230. *See also* Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093, 1104 (1986).

33. The debate about whether scholarship matters is largely beyond the scope of this paper. Others, especially judges, have argued that scholarship matters. *See, e.g.*, Richardson, *supra* note 3. There are some dramatic examples where important judicial decisions rest directly on scholarly articles. *See* Vitiello, *supra* note 3, at 865. Those instances are concededly rare. I think that we overlook a more fluid interchange between courts and scholars. Scholars criticize cases or propose new theories; not only may judges read those articles but also students of those professors are exposed to and influenced by their views on the subject matter. When those students become litigators and law clerks, the arguments that may first have been formulated in the ivory tower now become part of the rationale to justify judicial decisions. In an article I am currently working on, I have been reading the debate both within the extensive literature on punishment and within the Supreme Court. It is difficult to identify a single article or text that suddenly changed the court's conceptual framework, but a comparison of the debate in *Powell v. Texas*, 392 U.S. 514 (1968) with that in *Solem v. Helm*, 463 U.S. 277 (1983) demonstrates the close relationship between the Court's thinking on the theory of punishment and the view taken in the scholarly debate. Five justices in *Powell* were ready to adopt a medical model of human behavior, consistent with then prevailing notions of rehabilitation. *Powell*, 792 U.S. at 516-17, 548. Sixteen years later, and consistent with the leading texts written in the 1970's, the Court in *Helm* adopted a just desert model of punishment. *Helm*, 763 U.S. at 280-303.

34. Cramton, *supra* note 12, at 8.

is a lot more time consuming and may even expose that tenured faculty member's own lack of familiarity with the relevant literature. How can students with only two years of training tell whether a piece is worthy? Cramton and others argue that worthy articles go unpublished in student edited journals.³⁵ He argues further that student editors are insecure and, therefore, choose to publish overly footnoted, dull to read, unimaginative articles. Scholars, according to Cramton, know this and, therefore, write such awful stuff to please student editors. Cramton would substitute faculty edited journals with peer review journals.³⁶ Much can be said in response. If there is a serious concern that faculties use the journal in which an article is published as a substitute for independent assessment, a school might easily institute a policy of sending typed copies of articles to outside readers uninformed where the article has appeared. Such a system would protect untenured faculty from peers who fail to use independent judgment to assess the quality of their colleagues' scholarship.

I find frivolous the idea that good articles in today's market go begging for a home. Worthy articles can find a home in some journal, perhaps not a top ten journal. Given the sheer numbers of articles written today and the limited space in the ten or so top journals,³⁷ it is not surprising that some smart and capable people are frustrated in their aspirations. When confronted with this argument, critics of student run law reviews point to Mark Galanter's article written over fifteen years ago, now recognized as innovative and important but which was rejected by all of the student run law reviews to which it was submitted.³⁸ When pressed for additional examples, critics respond that they are personally aware of other similar horror stories. That hardly substitutes for hard data. I contend that few first rate articles cannot find a home in a student run journal. I believe that much of the "evidence" is anecdotal based on highly biased frustration of scholars whose articles are rejected by top ranking journals.

35. *Id.* at 8. During his presentation during the 1990 National Conference of Law Reviews, Professor John Henry Schlegel made the same observation and referred specifically to the Galanter article. See Schlegel, "Revenge, or Moon (Over) Your Law School," at 12 (text of prepared remarks to 1990 National Conference of Law Reviews on file with St. Mary's Law Journal).

36. Cramton, *supra* note 14, at 868 n.37.

37. See Jenson, *The Law Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL EDUC. 383 *passim* (1989).

38. See *supra* note 35. The article in question is Galanter, *Why the 'Haves' Come Out Ahead: Speculations in the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

To admit, as I do, that the top ten journals reject some truly worthy articles is not to agree that good articles go unpublished or that student editors make bad decisions about what to publish. I think that recent scholarship has opened an exciting debate within the profession. Insofar as scholars do overwrite, blaming students for badly written articles is patently unfair.³⁹ One appropriate response to the widely held perception that we sometimes overwrite might be for faculties to work with incoming editors to try to imbue a sense that scholarship should be readable. Further, a review of many journals reveals that the very kind of articles that critics say are not written, less heavily documented, shorter, even occasionally humorous, are beginning to appear in journals.⁴⁰ The debate has not fallen on deaf or stubborn ears.

I have reserved for last, though, my most profound disagreement that we would be better off in the world according to Roger Cramton. His model is similar to that in effect in traditional graduate disciplines where authors must make limited submissions of their work to one journal at a time, wait, often for months, for a decision, and most importantly subject their works to peer review.

I think that the argument is upside down. Fantasize the world of the future in which Cramton has convinced us to abandon student run journals and instead to take on the onerous job of running faculty edited journals. Let me back up to scene one in the Journal Wars. Initially, faculties agreed to continue to support student run journals. But quickly faculties under Professor Cramton's imperial sway decided to count towards promotion only those articles published in prestigious journals, i.e., faculty edited journals. Without the certification of fellow experts through the process of peer review, there was no assurance that the article made a meaningful contribution to the field. Funding was reduced for student run journals; they now seemed quite irrelevant, largely an educational exercise.

The number of journals dropped precipitously because relatively few faculties were interested in doing the demanding editing work entailed by their journal. Some of the professional publishing houses gained a foothold with practice oriented journals, treatises that pro-

39. The late Professor Zenoff certainly was correct when she observed that ". . . the law reviews' flaws may lie not in our students but in ourselves." Zenoff, *I Have Seen the Enemy and They are Us*, 36 J. LEGAL EDUC. 21, 23 (1986).

40. See Note, *supra* note 3, at 1125.

vide reasonably updated summaries of case law. But those journals hardly encouraged intellectually stimulating articles; instead, they continued to produce the oatmeal of blackletter law summaries that appeal to busy lawyers who believe that the bottom line is a fixed rule of law.⁴¹

The new generation of law professors are interested in many of the same values that we cared about: writing and publishing and getting tenure and maybe having an impact on law reform. Their senior colleagues tell them that under the new imperial regime of Professor Cramton, they can write innovative and unusual scholarship, that their peers await such innovation.⁴² When greeted with a skeptical stare, the older professors explain that Cramton's world view was premised on that article of faith and so in the new era, it follows that scholarship is more creative, innovative and better written.

Perhaps by now, Rosenkranz has abandoned public interest service and has joined a law faculty. He is preparing a stunning piece, an article ushering in a new debate about the nature of law, just as CLS did years earlier. Perhaps he is urging that we consider full amnesty for Ewoks or perhaps further that we consider job sharing with Ewoks, now relegated to subservient work for the Emperor.⁴³ But now Rosenkranz asks his greying mentor for advice about where to submit his article. His mentor hesitates, but then responds in substance: you are challenging the established order and we have been told that may be fine in sociology or some other discipline but no less an authority than former Dean Carrington has warned us that there is no room in the academy for your scholarship — it is outside the river.⁴⁴ Daunted but unvanquished, Rosenkranz sends his article off to one of the peer review journals. After six months, he receives a

41. See Schuck, *Why Don't Law Professors Do More Empirical Research?* 39 J. LEGAL EDUC. 323, 336 (1990) ("treatises are now passe").

42. One ought to keep in mind that non-tenured faculty already have significant restraints on their intellectual freedom posed consciously or unconsciously by their tenured senior colleagues. See Getman, *The Internal Scholarly Journal*, 39 J. LEGAL EDUC. 337, 340 (1990); see also Zenoff, *supra* note 39, at 22 (even if we don't write tedious articles, we are responsible if we vote to grant tenure to those who do write "poorly conceived, repetitious, and tedious articles . . .").

43. Cf. D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 123 (1983). Kennedy advocates the equalization of salaries of all members of the law school community including faculty and janitors and for the shift of jobs for at least one month a year.

44. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

rejection. He sends it to another and again receives a rejection in six months. He sends it to a third and so on, only now he starts to get frantic. He includes in his cover letter that he is up for tenure and needs an expeditious decision. This time, the rejection comes back in five months. In each case, he has sent it to a journal where the peers reviewing his article find it interesting but outside the current debate within the discipline. How do they know? They and their colleagues at the other top law schools have yet to discuss the ideas that Rosenkranz has raised. They find his voice too impatient, too critical of the established order.

Discouraged, Rosenkranz slouches into the office of his mentor. In a sentimental moment, his mentor lets down his guard: back in the days before the Cramton empire, the world seemed flawed. Uninformed student editors sometimes missed the boat; and they offended established scholars with their editorial choices.⁴⁵ But now, in retrospect, their minds may have been flawed — well, not flawed but not fully informed after only a couple of years of legal training, but at least those flawed minds were open. Because there were so many worker bees and journals,⁴⁶ we could test out ideas, wild ideas, different voices. In retrospect, part of our dissatisfaction with the state of scholarship was its diversity that made us insecure because it seemed out of control. But what a wonderful memory where you could thumb your nose at the established order. Now the established order furnishes the gate keepers for the profession.

IV. CONCLUSION

I cannot prove that legal scholarship will suffer if we adopt Cramton's suggestion that we move students out of the business of editing law reviews. But my intuitive sense is strong that we are better off with the current world, not the best of all possible worlds, but better than the potentially limiting world of a few faculty edited journals where student run law reviews will shrink in number and prestige. In the mean time, law reviews serve an important function. Student editors obviously share some of the assumptions about the law and status

45. Cramton also cites an incident in which student editors tried to rewrite an article by H.L.A. Hart. They eventually backed down and the article was published as submitted. See Cramton, *supra* note 12, at 8 & n.31.

46. Cramton estimates that there are currently over 250 school centered law reviews. *Id.* at 2.

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within the profession as do established scholars. But they bring a fresh perspective to the discourse between scholars and their readers. For those who aspire to say something new and creative about the law, I urge them that their chances of finding a home for their work product is more improved with student editors than with peers who have more turf to protect in the great turf wars. May the Force be with you, student editors!

