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Abolish the Law Reviews!

Walter Olson, June 5

In 2008 a federal judge sentenced nine executives of *Newsday*, the Long Island newspaper, to probation, fines, and community service over their role in a circulation scandal that had rocked the publishing world. Prosecutors said that the executives had schemed to overstate the tabloid's reported circulation over several years--by 15-17 percent in the 2002-03 period, for example--thus victimizing advertisers by significantly overstating its reach and influence.

I thought of the *Newsday* scandal when I read one of George Mason University law professor Ross Davies's witty yearly reports on the plight of law reviews, the most visible scholarly monuments of the nation's 200-odd schools of legal education. The circulation of law reviews has been plummeting for a generation; the most famous and widely circulated of them, the *Harvard Law Review* (*HLR*), has seen its subscriber base dwindle from 10,895 in 1963-64 to a mere 1,896 in 2010-11. That downward spiral did not keep the *HLR* from presenting a cheerful face to the world, though: according to Professor Davies, "as late as 2009 its website was claiming 8000." Oops!

Neither I nor, so far as I know, Professor Davies thinks that prosecutors should be marching some of tomorrow's brightest lawyers out of the *HLR* offices in handcuffs. No doubt it was a matter of mere inadvertence, not purposeful fraud. And not to be mean about it, but there's another big difference between a major ad outlet for Long Island car dealers like *Newsday* and the venerable *Harvard Law Review*, which is that when it comes to whether *HLR* distributes 8,000 issues, or 2,000, or 1,000, let's face it: no one really cares.

Besides, quibbling over a circulation difference between 8,000 and 2,000 (how many math majors wind up at *HLS* anyway?) diverts attention from the need to steer toward the right number: 0.

That idea isn't as extreme as it may sound. Every print publication that thinks about its future has wondered whether it should go web-only, and seldom is the argument for doing so stronger than in the case of law reviews, which lack glossy pictures, pass-around interest, or bathroom-stand appeal. No law school wants to give up and go web-only because it seems unprestigious, but the undeniably tony *HLR* could solve that problem by going first. Aside from saving on printers, there might be practical advantages such as not having to hold back an announced issue because one article runs late.

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The wider question is whether the law review model of content--with its long lead time to publication, editing by students, and format that's resistant to after-publication editing--yields enough scholarly gems to deserve surviving in its present form even online.

We have some inkling what John Roberts thinks of the matter. The chief justice told judges last year: "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." Gleeful critics counter that Roberts himself, like all his high court colleagues, continues to cite law review articles as authority to support his opinions.

Most senior law professors seem to harbor mixed emotions about the reviews. Star judge and public intellectual Richard Posner has flayed "the many silly titles, the many opaque passages, the antic proposals, the rude polemics, the myriad pretentious citations." At the same time he's argued (to paraphrase) that while 90 percent of their contents may be valueless, we'll never be sure at the time which 90 percent that is.

What we do know is that the page volume of law reviews has proliferated beyond reason with no corresponding rise in compelling content. Even low-ranked law schools often publish six or eight of them. There's no secret as to why: students crave the credential of having worked on law review, while faculty crave a high likelihood of being published. Legal educator Harold Havighurst nailed it half a century ago: "Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written."

One way or another, some scholarly apparatus will be found to publish meritorious longer articles that advance the mission of serious research into the law. But when it comes to discussion of timely controversies, slash-and-thrust debates, and other forms of writing that people actually go out of their way to read, there's no doubt where talented legal academics are headed: to blogs and other shorter-form online publications.

Much of the intellectual groundwork for the Supreme Court's ObamaCare rulings was laid at blogs like Volokh Conspiracy (for libertarians and conservatives trying to overturn the individual mandate) and Jack Balkin's Balkinization (for liberals defending it). Elizabeth Warren became a national figure in part through her clear and hard-hitting online writing about the problems of consumer debt. Professionally edited web outlets (including *The Atlantic*) allow law professors to get their arguments before an intelligent audience in hours rather than weeks or months. As online law writing has taken off, readers are rewarding qualities like clarity, concision, relevance, and wit, and steering clear of pedantry and mystification.

The doors to the hothouse have been flung open; fresh air is getting in. It's about time.