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# On Letters & Law Reviews: A Jaded Rejoinder

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## ON LETTERS & LAW REVIEWS: A JADED REJOINER

*Kenneth Lasson\**

I'VE been asked to comment upon Professor Jensen's essay,<sup>1</sup> and I'm left with wearily wondering why's. Why did Jensen write this piece in the first place? Why was I asked to address it? Why did I so quickly say yes?

Let me respond.

### WHY DID JENSEN WRITE THIS PIECE?

It could well be that he was perfectly serious about seeking to improve the readability of law reviews; after all, his suggestion to validate correspondence sections makes eminent sense.

And it's possible that the chagrin he registered was genuine, having been so thoroughly chastised by the editors at *Michigan* and *Chicago*. However, it strains credulity that my colleague could honestly believe any self-respecting law review editors would take his essay seriously. They're much too busy taking *themselves* seriously.<sup>2</sup> For their part, the editors might well have asked: "Doesn't Jensen realize we're on *law review*? What'll he want next—*advertising*? *Color centerfolds*?"

Then again, maybe the editors' reactions are only proper—they have to deal with the thousands of professors preening their way through the teeming (800-plus) law reviews, most of them themselves dead serious about their work. It's they who puff their pieces shame-

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1. Erik M. Jensen, *Law Review Correspondence: Better Read Than Dead?*, 24 CONN. L. REV. 159 (1991). Is this an essay, comment, article, or opinion? That may be a seminal question to editors and academics (see *infra* text accompanying note 4); to others, perhaps, it's about as important as the number of pickle-pushers in Podunk.

2. Like the editors at the *Idaho Law Review*, who were not amused when asked about the status of their potato-law symposium issue. Whether toiling in the jurisprudential trenches of law journals is any higher a calling than digging dirt for the gossip papers is open to increasing debate. See Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 931 & n.28, 943 & n.94 (1990).

lessly,<sup>3</sup> and who promulgate a pecking order of publication: for purposes of promotion and tenure, at least, articles are better than comments, comments are better than book reviews, book reviews are better than letters. (This hierarchy is subject to obvious vagaries. For example, a short letter in the *Harvard Law Review* is likely to earn louder huzzahs than a lead article in the *Frizzelburg State Journal of Korean Boat Law*.<sup>4</sup>)

Although Professor Jensen misses the best way to improve law reviews—get rid of half of them—he's right on point with another important plea: for shorter articles, better written. I share his dismay at the ivory-tower perception that brief and succinct comments are little more than "extended op-ed pieces."<sup>5</sup> We both regard such denigration as little more than the half-witted grousing of intellectual snobs. In truth, op-eds are generally much better crafted—and subjected to more rigorous competition and editorial scrutiny—than most law review articles.<sup>6</sup> They also have greater interest and impact.

But most law review editors and contributors would perish the thought that legal scholarship should be written in jargonless prose that anybody could understand. Nor do they fathom why Mark Twain once apologized for a lengthy letter by saying that he didn't have enough time to write a short one; it's often more difficult to be concise.

We may never know the real reason behind the birth of Professor Jensen's *Law Review Correspondence: Better Read Than Dead?* But even in the unlikely event that it was penned less out of altruistic concern for academic discourse than as a means of professional aggrandizement, I say *more power to the professor!* I hope *Dead?* makes a nice addition to his curriculum vitae. I hope it augurs a promising future for him as well, and generates a bit more response than he's had so far to his other career publications.<sup>7</sup> I hope it secures him safe passage

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3. For example, on a public listing of faculty accomplishments, a professor I know carefully concealed the fact that his "recent publication" in the *Harvard Law Review* was nothing more than a book review.

4. See Lasson, *supra* note 2, at 948-49.

5. Jensen, *supra* note 1, at 166.

6. Major newspapers pick and choose only a handful of free-lance submissions from the hundreds submitted every week. Conversation with Hal Piper, Op-Ed Editor, *Baltimore Morning Sun*. On the other hand, with so many law reviews out there, practically anything that's in English can get published in one of them. See Lasson, *supra* note 2, at 928-31.

7. Actually, Professor Jensen is widely published and (I trust) admired. According to one data base, he has some 18 articles to his credit, the most important of which is undoubtedly his groundbreaking opus, *A Call for a New Buffalo Law Scholarship*, 38 KAN. L. REV. 433 (1990). In turn, however, like most of us, he's seldom been cited elsewhere (according to my own small-minded

through whatever post-tenure review process he might now be facing.<sup>8</sup> And to the extent that he's made a "contribution to the literature,"<sup>9</sup> another cheer and kudos.

### WHY WAS I ASKED TO RESPOND?

I suppose the editors of this journal approached me because of the notoriety received by my recent article in the *Harvard Law Review* (*Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*),<sup>10</sup> seeking (perhaps they thought) to bask in its reflected glory. If that was their purpose, their judgment was impeccable. The glory has been in the form of a widespread and sympathetic response to my irreverent and disaffected diatribe against traditional legal scholarship.<sup>11</sup> Besides those letters published in the *Harvard Law Review's* own spanking new correspondence section,<sup>12</sup> there were many others from practitioners, law professors, and judges. Here's a modest (ha!) sampling:

*From a big-firm, New York lawyer:*

"I am one of the few practicing attorneys who reads law reviews 'out of non-billable interest.' I especially enjoy hap-

study in which I searched *Shepard's Law Review Citations* for references to Jensen's articles).

8. The more that law schools feel budget crunches and face retrenchment, the more that lip service is paid to post-tenure review as a means of pressuring "deadwood" senior faculty to publish. The nexus between a law professor's writing of obscure articles and his "productivity" is unclear. Also remaining to be seen is the degree to which having a letter published in a law review will keep the wolves at bay.

9. See Lasson, *supra* note 2, at 936. But has he met the standard guidelines for "scholarship"? That is, has he "disprove[d] an accepted understanding of what the law is or how it works"? Has he "provide[d] a fresh conceptual framework"? Has he "[broken] new ground"? Judging the quality of one's work is exceedingly subjective, and can be used to support or demean a candidate's scholarly competence. *Id.* at 941.

10. 103 HARV. L. REV. 926 (1990). Critics of this commentary will observe that I've shamelessly cited the same piece in notes 2, 4, and 6 *supra*, not to mention making indirect references to it in notes 11-15 *infra*. When it comes to an opportunity for obscure self-aggrandizement and note-oriety, I know one when I see one.

11. The *Connecticut Law Review* editors' desire for my two-cents' worth may actually be further evidence of problems in publication hierarchy. Journals are just as anxious to get "big names" as authors are to get into "big journals." The attention generated by *Scholarship Amok* included feature stories on the author in the *Washington Post* and *New York Times*—both of which his mother saw.

The sole negative response was a dyspeptic burp by Mark Tushnet (referring to my article as an example of "anti- intellectualism, notable only for its venue," *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1522 n.33 (1990)). I'd love to hear from Tushnet as to why he felt that way, but hesitate to contact him any more directly than via this footnote (which he's unlikely ever to see)—because, after all, he's a lot better known and perhaps more respected than I am, even with his spiritlessly plodding prose style.

12. See 103 HARV. L. REV. 2085 (1990).

pening across articles such as the one you wrote in the February 1990 *Harvard Law Review*. It offered me an escape from the howling horrors of corporate paper pushing . . . . Maybe law review writing is a way for professors and law review geeks to cope, a therapy akin to shooting hoops, zen meditation, playing video games, basket weaving . . . .”

*From a well-known and widely published professor:*

“Reducing the number of law reviews (or review pages) by, say, 60-90% would surely stiffen the competition, reduce the amount of tripe that is published, and encourage a truer community of scholarship because we would all be reading a higher proportion of published work. All good objectives.”

*From an appellate court judge:*

“I have subscribed to Harvard Law Review since 1949 but I rarely read it except for research. I read most of your article . . . and enjoyed it enough to tell you so.”<sup>13</sup>

Even those who praised the article may have missed one of my points—that the scholarship game has its darker side as well. Seldom mentioned in polite circles are three black holes of academic quicksand: the deep sense of funk visited upon many young professors forced to produce tenure pieces while carrying substantial teaching loads; the abyss faced by legal writing instructors who themselves can’t match a subject with a predicate; and the Kafkaesque entanglements brought about by a Sisyphean publication process.<sup>14</sup>

The evidence is largely anecdotal, but there are many cases of untenured teachers moping through the myopia of “my article”—that is, having “to get started on my article,” or having “to finish my article,” or having “to find a law review for my article”—all in the midst of an equal (and more justifiable) pressure to be effective in the classroom. Too often the preoccupation with “my article” is debilitating. Likewise, this single-piece-mindedness runs counter to the current promotion-and-tenure imperative that a candidate must “establish a pattern of publication.”

Meanwhile, law faculties and deans—in rightly recognizing that

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13. Letters on file with author.

14. Both “Kafkaesque” and “Sisyphean” might reflect the author’s own quietly-suffered despair (if not his literary pretentiousness). Sisyphus is a mythical figure condemned to Hades, where he must endlessly push a boulder up a hill, never quite reaching the top before the rock rolls back down. The ignorant reader is invited to educate himself as to Hades and Kafka.

law students can't write—wrongly arrogate to themselves the task of teaching them how. The plain truth is that many law professors can't write much better. Just take a look at the average law review article—or for that matter the average internal faculty memorandum. All too frequently they are long on wind and embarrassingly short on grammar, punctuation, spelling, and syntax—not to mention substance.

And then there are the publication and post-publication blues: the multiple submissions of manuscripts, delayed responses from student editorial boards, and protracted negotiations with student editors over word choices and citation sources; the nagging (and usually needless) concern that the long wait before an already-irrelevant article actually appears in print will render it moot; and, finally, the (usually justified) fretting that the piece won't be read or cited by anyone of stature or in anyplace of substance. It is fascinating though mind-numbing to glance at the periodic studies that seek to demonstrate statistically who are the "most productive" legal scholars—a measurement achieved by counting the number of times they have been cited in the "leading" law reviews.

All of which underscores my support for Professor Jensen's campaign to minimize dross.

#### WHY DID I SO QUICKLY SAY YES?

For three reasons that I can identify:

First, ego gratification.<sup>15</sup>

Second, I can't say no to a promise of publication, even though I'm fully aware of the long odds against anybody reading this little flagon of well-aged whine.<sup>16</sup>

Third, like Professor Jensen, I am unwittingly caught in the quicksand of the publication process, churning its bottomless pit, spurred on by the expectations of "scholarship"—trapped, spellbound, in the tantalizing webs spun by promotion-and-tenure committees—eternally

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15. It's still a poor man's high to hand out reprints, although I'll admit that this particular pleasure is wearing thin as I address mass mailings to "Current Occupants." I'm starting to get a bigger kick from reading West's *Feminist Law in a Nutshell* or watching re-runs of Baltimore Colt highlight films. But if you've yet to receive your free copy of *Scholarship Amok*, send me a self-addressed stamped envelope and whatever handling costs you can afford.

16. The *Connecticut Law Review* is way down on the list of most-cited publications. (Author's own mildly empirical study, comparing selected columns of references in *Shepard's Law Review Citations*.) Sorry, guys.

stuck in the primeval muck that itself forms the spawning ground for thousands of sticky law review articles.<sup>17</sup>

Can somebody out there help us?<sup>18</sup>

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17. Please pardon the purple patch. I can't help myself. You owe it to yourself to look up "purple passage" in Webster's *New Collegiate Dictionary*; see also *infra* note 18 and accompanying text.

18. I can be contacted via the commentary section of the *Connecticut Law Review*. The editors would appreciate that, I think.