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=H1Counter-Manifesto: A Qualified Defense of Student-Edited Law Reviews

Possible alternative title: *Student Run Law Reviews: A Counter-Manifesto on Quality, Meritocracy and Intellectual Property*

(I thought it was a good idea to have something highlighting the intellectual property stuff in the title)

=B1Wendy J. Gordon†

In the great scheme of things, how important are the problems with law reviews? Jim Lindgren's essay is a bit overheated, even for someone playfully enamored of polemic as a literary form.[1] But he does have a point: if law reviews are going to be published, the task should be done better than it is. That does not mean getting rid of student law reviews-- not even for Jim--[2] but ~~much remains to be said about law reviews as an institution and about~~ it does require patience and further inquiry into the nature of legal scholarship.

I join in several of Jim Lindgren's suggestions. Most important, authors' names and affiliations should be physically removed from articles before selection begins, as at least a partial prophylactic against good articles being ignored.[3] **[WG-We talked about this a little, and our brief essay will touch on it as well. I tend to favor it in theory, though I doubt whether the limited step toward anonymity would justify the considerable administrative costs. And you might wish to consider other costs as well. For example, if we are truly concerned about getting the best material published, and believe students are poorly qualified, and accept some correlation between the authors' affiliations and the quality of the pieces they produce, perhaps blind reads would lead to a substantial decrease in review quality. After all, letterheads may actually help ignorant editors avoid selecting truly wretched articles. Of course, if professors control the final decisions, as Prof. Lindgren appears to advocate, they probably could stop this from happening. But then it is not an issue of whether blind reads are themselves**

good or bad, but of whether professorial control is good or bad.-TJS] In addition, student editors should read several style books[4] and be otherwise better trained **[WG-I am not sure what this would entail. Although JL makes the suggestion, he also (somewhat inconsistently) notes that the root of the problem may be that many otherwise talented students have little ear for language. My view is that accomplished stylists' "feel" for language almost invariably comes from a lifetime of reading well-written (i.e., non-legal) prose. I doubt whether a swift education in the textbook intricacies of the English language would significantly improve students' editing.-TJS]** before daring to correct others' prose. Further, faculty input into the publishing process should be increased,[5] and more faculty-edited journals should enter the field. **[WG-We spoke about increased faculty involvement, as well. I remain convinced that few, if any, professors here at Chicago would welcome the first change. And I am not sure how outside referees would work in practice. Would articles be mailed around, from the board to the ref? Who**

would have the ultimate "say"? If the ref ostensibly did, do you think the board would always capitulate? Suppose they would; do you think that such a structure would decrease the pleasure and pride that articles staffs take in their work? Would their work product suffer? Regarding the second change, do you think the economic problems might be prohibitive? I do. Economic theory suggests that professors would need to be compensated both for the income loss resulting from time spent on the review that previously went to their own work, and the notional income that they received from doing work that they enjoy as opposed to work that they do not like. Though the second may sound trivial, I believe it is the more important, particularly when one considers that most professors believe their notional income to be high enough to compensate them for the hundreds of thousands of

Leibman & White address this - should I recap their arguments? WG

dollars they lose because they choose not to work for firms.-TJS]

Also, more empirical research into the review process should be undertaken.[6] But it seems to me that from what we know now, the virtues of the student-edited review outweigh its vices, from the

perspective of all those it affects.

My essay will have two parts. The first will be a response to James Lindgren. The second will be a defense of one much-maligned aspect of student-run law reviews, their obsession with having authors provide background information and footnotes.

[WG: I moved this paragraph from the beginning of the intro to the end because I think it helps, especially given the nature of Jim's piece, to jump into the fray a bit before mapping out specific arguments. Also, you originally had two unnumbered sections, with roman numeral subparts, etc. Given our presentation on the page, and the way the other essays will look, I think it better each part be a roman numeral, then letters, etc., as shown here.--TAD Good idea --WJG]

=S1I. A Response to Lindgren

=S2A. Beneficiaries or Victims?

A wide range of persons and institutions are potentially affected by law reviews. These include: students; individual professors; the professoriat's pretensions to (or achievement of)

meritocracy; the bar and practicing judges; and society as a whole. Are they beneficiaries or victims?

=S31. Students.

Opinion is divided as to how much students gain from the current system. At many schools, students who do not "make" the review feel alienated, while students who achieve editorships often fail to attend classes. And after the first couple of spading assignments, the time spent on checking footnotes yields precious little marginal benefit to the student laborer. Further, some observers feel strongly that the students' learning/time ratio could be drastically improved if students turned the time spent on editing the articles of others toward writing additional papers of their own.

On the other hand, most student editors consider the experience valuable for learning.[7] Admittedly, cognitive dissonance may be partially responsible for their view. (Those who feel themselves required to jump through resume-enhancing hoops are more likely than outsiders to assign a transcendent

value to hoop-hopping.) Nevertheless, general student perception that being on law review provides valuable learning experience strikes me as accurate.

Membership on a law review is one of the few forms of apprenticeship left in our profession. (Clinic participation is another.) These activities put students into unusually close contact with expert professionals, and in a context where the outcome really matters. Such benefits should not lightly be foregone. **[WG-I think "lightly be foregone" falls more trippingly from the tongue, but I do not have strong feelings-TJS]** Working with author/lawyers, students often learn not only subtleties of legal thinking that might not be available outside such one-on-one contact,[8] but they may also learn what they should have known earlier--that details count and that sloppiness is intolerable.

If the outcome is sometimes an excessive concern with form and detail--how does the footnote look--surely the alternative is worse. And over time, as these students on reviews go out into

practice, the obsessions will moderate and leave behind a healthy respect for precision.

At least that is my current guess. My discussion rests on many assumptions for which evidence is scarce. I **[WG-Avoids repetition.-TJS]** therefore echo one of Jim's recommendations, that more empirical research ~~needs to~~ be done and made accessible, on a variety of law-review related pedagogic questions.

For example: How would overall student morale, class attendance, and productivity alter if students ceased editing the law reviews? **[WG-A good question. You might find interesting that I think I am significantly more interested and active in my classes than I would be if I were not on the board, since through the Review I have gotten to know many more people who enjoy arguing about issues out of class than I would otherwise have known.--TJS] [Perhaps we're an exception though (though I'm not sure why), I've had more than one professor comment on how it seems the law review editors, moot court finalists, etc. all come**

to class regularly, which was not the case where and when they went to school (Harvard).--TAD] How many student editors do indeed feel the process valuable, and for what purposes? If student note-writing and editing were eliminated, how many additional opportunities to write papers (in close consultation with professors) would be available to the released students? Do the law reviews enroll only an elite who already know the value of precision? How many students on the law reviews deal in depth with author/lawyers, and what percentage of students in law school join reviews?

Some of this data is available in scattered form at individual law schools; some is collected;[9] much is not; and, so far as I know, no overall compendium of the existing data exists. **[We didn't run across anything helpful here either. There is a National Association of Law Reviews that does an annual survey, but its more geared to surveying operations rather than experiences. As such, I think you point here stands, even if it does exist, it's not well-known or accessible.--TAD]** Until I have

better answers to these and similar questions, my best estimate is that, from the perspective of furthering student learning, student-run reviews provide a net benefit to students.

=S32. Individual professors, as authors and consumers.

In our capacity as authors, student editors drive us crazy. The stress caused by their overshort deadlines ("respond to our edit in three days or we'll print it OUR way") has actually caused health problems. The line-editing of prose is, as Jim indicates, usually maddening, time-consuming and more destructive than helpful.

But as Jim fails to indicate, the student editors sometimes recommend tremendously helpful structural changes. On one occasion I had reworked a lengthy article through more than five drafts over eight years: the first time I presented it to a faculty colloquium was in 1985, and by 1993 the article was a verbal thicket. Only the constant admonition of my student editor--to simplify, simplify, simplify--finally made the article's argument linear and satisfactory.[10] Indeed, nearly

every one of my articles was stronger coming out of the editorial process than it was going in.

In our capacity as consumers of scholarly articles, **[WG-In context, the meaning of consumers is clear. I do not think you need two words to say it.-TJS]** it is customary to complain that law reviews contain nothing but deadening prose and overstuffed style.[11] Admittedly, the literature contains many rambling pieces that could do with a top-notch edit & shrink treatment, and its funny articles (like those by Pierre Schlag or--gasp--Jim Lindgren) are all too few. But in reading many law review articles, I actually enjoy myself. I even like footnotes. **[WG-Dumb question, maybe, but what do you mean by "multiple"? "Frequent"? "Lots of"?-TJS OK, deleted -WJG]** Because they provide an author the opportunity to conduct a sort of running dialogue with herself, footnotes can make me feel like I am getting a view into someone's head as she composes. **[WG-I did not think the combination of plurals and singular read well.-TJS OK-WJG]** It's fun.[12]

=S33. The meritocracy.

Jim is obviously concerned that a scholar's affiliation with an elite school might prejudice the process by which articles are selected. **[WG-As noted above, if students are ignorant enough, maybe this, if true, is a good thing.-TJS Tim-- I have a response to this in fn 3. Maybe all that should be moved down here, or otherwise consolidated? Organizational assistance wd be appreciated. -WJG]** However, neither his publishing record nor mine suggests that teachers at non-Ivy schools are prevented from placing articles well. Still, ~~I have heard a large number of stories suggesting~~ many researchers have reported reflecting some that bias exists, particularly ~~given~~ student temptation to favor their own (in-house) professors.(*) Therefore blind reviewing (deleting the name and other **[WG-"Other" eliminates the moment of am ambiguity I suffered in interpreting "identifying data . . . ." Without it, the presence of the verb "deleting" encourages the reader to first interpret "identifying" as a parallel verb, and not an adjective.-TJS]** identifying data from each article submitted), which is common in other

(*) Add NOTE: See, e.g., Leibman & White at 405. ~~Authors are resident faculty members...~~

disciplines, should become the rule in law reviews as well, at least at the initial stages of article selection.[13] **[WG-Again, I am not so sure. Able editors would not rely on these fallible indicia of quality, and ignorant editors might do better by relying on them.-TJS TIm- Again, see fn 3 and the Leibman & White article cited there. -WG]**

There is an aristocracy in the law school world which ~~not only~~ ~~tend~~s to undervalu~~e~~ing the work of outsiders ~~but tends to influence the value scale of everyone else~~; this should be resisted to the extent possible. In addition to blind review, another mode of resisting the aristocratic tendency is to insist on full recognition of prior art. As discussed below, the law reviews already engage in this practice.

/=S34. Judges and the bar.

Fred Rodell argued that lazy lawyers used law review articles to collect cases and arguments. He saw something wrong with that.[14] I am at a loss to figure out what he had against the process, other than his disapproval of lazy lawyers whose self-interest might lead them to support modes of legal

scholarship which Rodell disdained. But if law reviews can make even lazy lawyers better lawyers, two cheers. And if as a result judges are better informed, three cheers.

It has also been argued that taking the law reviews away from students would make the reviews so theoretical that lawyers and judges would stop reading them. **[WG-Perhaps this is more a question for JL than you, since he seems to base part of his argument on the view that law reviews are lamentably out-of-step with the practicing bar, but do you really think lawyers read law reviews, anyway? In my limited experience (3 months with a nuts-and-bolts, "blue-collar" firm in Maine, and 3 in a prestigious D.C. litigation firm), I have only once known a lawyer to read a law review article, and it was in the Maine Law Review, treating a narrow issue of Maine Constitutional Law. If it is an infrequent event, how much should elite law reviews cater to practitioners?-TJS]** I think that is a possibility.

=S35. Society at large.

As Rodell saw, perhaps the most important problem with law

review articles is the ~~insularity~~ ivory-towerism of professors--the likelihood that the professoriat will ~~continue to~~ talk ~~only to each other~~ primarily to itself, caught in legalisms and ignoring the real world.[15] But we have made progress. The Legal Realist movement and its progeny--movements such as Law and Economics, Critical Legal Studies, and Law and Society --have forced us to expand our frame of reference beyond the four corners of cases (even if they introduce their own islands of discourse).

Insularity is of course something we still need to fight. ~~X~~ CLS writing tends to be in a language best understood by CLS initiates; Law & Economics ~~folk~~ articles tend to talk most clearly to Law & Economics folk; and so on. Removing students from their editorships, so that we talk only to each other prior to publication, is hardly likely to ameliorate this problem.

omit this reference

=S2B. Specific Responses

My primary disagreement with Jim Lindgren's article is one of emphasis. On the whole I like rather than dislike the institution. As mentioned above, however, the ~~institution~~ system of

student-run law reviews could be improved, and many of Jim's suggestions are good ones. One suggestion, however, is not. Jim calls for more specialization in journals.[17] To the contrary, I think that what the professoriat has to offer is the ability to cross subject-matter and doctrinal lines, and to utilize the interrelationships that exist in the real world. A drastic increase in the number of specialized journals might work against this possibility.

As for the empirical details of Jim's article, most are unexceptionable. Some are otherwise. The data he cites on student interviewers have no necessary relevance to the topic at hand.[18] Some of his statistics appear internally inconsistent.[19] And some of his statements do not seem to be supported by the sources he cites.[20] But ~~as is usual with Jim, he has applied good research and thoughtful analysis to an important topic~~. these are minor cavils. It is good that Jim is working, as are others, to put our scholarly institutions on the professional agenda. **[WG-I understand that the point here is to avoid "harshing" needlessly on JL's piece, consistent with the friendship that you discuss in your acknowledgments. But I object to the foregoing sentence on two grounds: first, it seems odd coming directly on the heels of**

substantial criticisms; second, in combination with the kudo above for his humorous articles and the use of the familiar "Jim," to those of us on the "outside," the article starts to sound like you go to the same club or something. Could you instead say something about how the embryonic nature of scholarly research in this area may explain or excuse these discrepancies?-TJS] [I'm still thinking — I agree w/ you on time but don't yet have a good substitute. -WG]

=S1II. On Praising Predecessors

=S2A. Footnotes and Literature Reviews

Perhaps the most common criticism of law reviews (other than those Lindgren makes) is the complaint that the students are too obsessed with "prior art." This obsession shows itself in two ways. First, most articles are expected to contain a lengthy introductory section where the author summarizes the relevant case law and literature from which her topic has arisen. **[WG-I prefer alternating between "his" or "her" to using both; do you feel strongly?-TJS]** (-ok WG) Second, most articles are expected to contain a great many footnotes.

As for the inclusion of introductory background sections, many professors feel these sections do little more than cater to law review editors' ignorance, at fairly high cost. These costs include: increasing the time needed to write an article and thus decreasing the number of contributions to the literature one can make; increasing the time ~~and patience~~ needed to read an article and thus decreasing readership; increasing the articles' length and thus reducing the number and diversity of articles that can be published; increasing the boredom level of the law review literature **[WG-Is this distinct from "patience"?-TJS]**; and increasing the chance that the author's central ideas will be buried in detritus. The complaints about footnote costs are parallel.

First, placing the article in context helps the student editors select more widely. (Hopefully they will also do a pre-emption check before accepting a piece, which should also assist them in making an educated choice.) Second,

It is clear that both literature reviews and footnotes can be overdone. But on balance, I think it a good thing that most of our journals require both.[21] ~~In part~~, placing the article in context (even though the students may not fully recognize when this is well or poorly done) means that our articles are

accessible to a fairly wide audience. If I want to learn about a new area, I can do so by picking up virtually any article.*

This is far different in fields whose journals are solely edited by faculty. In philosophy, for example, it is not uncommon for a lawyer-reader like myself to be somewhat mystified when reading an article. The author typically assumes his or her readership knows precisely with whom the article is arguing and over what topic. The writer may not even bother to identify either, never mind explaining the literature as a whole.

Of course, the faculty-edited journals do publish ~~some~~ occasional articles whose sole purpose is to review the literature on a given topic. ~~While most articles in these journals~~ omit discussion of background. ~~Therefore, these journals avoid the repetition of background material to which ours are prone.~~

Nevertheless, the high number of interrelated fields within law makes the current format ~~useful for us~~. "[S]cholarship directed at narrow interests will often generate interest and value in unexpected places."[22] Also, as de Tocqueville argued, lawyers

Add Note * The same may not be true of non-lawyers.

problem to discuss here: layperson readers - WG

in our country possess a special kind of influence;[23] as such we have a special responsibility to make ourselves understood.[24] ~~I do not know if the educated layperson can read our pieces, given the oddly high lawyer-to-person ratio in this country.~~ Further, we all know that pygmies see further when "standing on the shoulders of giants", yet it is all too easy to spend our time reinvented the wheel. An insistence on knowing where we have come from will make it more likely that we and our readers will know when we are saying something <u>new</u>.

Admittedly, some scholars and some schools **[WG-Why schools?- TJS Are you kidding? -WJG Which reminds me: you should know that I had a disagreement with Richard Epstein over the importance of such matters.-WJG]** have profited by ignoring this: they trust that if they occasionally ~~bomb~~ err by unknowingly repeating ~~the obvious~~ prior art, this will be more than outweighed by the increase in the number of articles they can write and ideas they can advance. This viewpoint might prevail with me, except for the role that acknowledging the past plays in safeguarding the meritocratic elements of our profession.

I should clarify this to you - remind me WG

=S2B. The Intellectual Property Regime of Scholarship: The Role

problem to discuss here: how to label the "lowest denominator" problem — it's a kind of incentive difficulty (I'm afraid of expanding too much - cuz of space) — WC

Played by Background Exposition and Footnotes

The intellectual property regime that governs scholarship is probably the best-functioning regime that we currently have for governing intellectual products. For purposes of contrast, note the problems ~~of~~ inherent in the most salient alternative regimes: a property regime, a liability-rule regime,[25] a regime of public subsidy, or a regime of advertiser support. Every regime ~~but~~ except that of Scholarship poses intractable trade-offs between incentives, censorship, and administrative cost:

A property regime like copyright poses the dangers that culture will be subordinated to popularity and that copyright owners will use their exclusive rights to engage in private censorship.[26] A liability-rule regime avoids the danger of private censorship, but may involve insuperable administrative costs that could overwhelm incentive effects. Governmental subsidies can restore some positive incentive for production, but it poses the danger of *public* censorship. Advertiser-sponsored dissemination (as on TV or in magazines) provides incentives and conceivably might be structured to avoid censorship difficulties, but poses the danger of a lowest-common-denominator cultural

product.

What governs scholarship is a set of informal rules that avoids the censorship problem without incurring great administrative costs or sacrificing incentives. All of us can use others' ideas, and sometimes even language, without the author's advance permission: all we need "pay" is a citation or other recitation of our debt.[27] This system works for scholarship due to the fortunate confluence of several factors. In particular: first, we each "pay" by registering our debts; second, the schools in turn "pay" those who are most commonly cited by awarding tenure, increasing salaries, and giving offers at prestigious places to oft-cited folk. Censorship is avoided both because tenure protects the proponents of unpopular views, and because the people who pay the money are not the people who decide which scholars are best. Instead, those writers who give citations and provide background reviews of the literature have primary input on the decision regarding quality.

=S1Conclusion

In response to Jim Lindgren's review essay, this brief article has presented a qualified defense of student-run journals. It has also suggested that certain practices of those journals are crucial to the success of the relevant intellectual property regime in promoting both substantive progress and meritocracy. The article was inspired by appreciation of the student editors who have made significant contributions to my published work, primarily Pat Cippilone,[28] Claire Finkelstein, Susan Pilcher, Adam Pritchard, Myron Rumeld, and Gene Scalia.[29] I have not had the opportunity to thank any of them in public before.[30] Thanks, guys.

† Professor of Law, Boston University School of Law. Copyright 1994 Wendy J. Gordon. I began preparing **[WG-I would prefer to avoid the nominalization.-TJS]** this essay while I was a Lecturer in Law at Yale Law School. I am indebted for discussion of this topic to many colleagues at both BU and Yale, (particularly Bruce Ackerman, Bob Bone, Joe Brodley, Jane Cohen, Jules Coleman, Rusty Alan Feld,

Park, and David Seipp) [Any thoughts on whether I should include this long list?], as well as to Sam Postbrief, the editors of this Review, and the participants in the January, 1994 AALS meeting convened to consider forming a new section on law reviews and legal scholarship. I should also note that I have a longstanding friendship with my antagonist here, Jim Lindgren, who has on occasion made excellent suggestions about my writing--for example, it was he who put me on to Joseph Williams's powerful book Style: Ten Lessons in Clarity and Grace (Chicago, 3d ed 1989)--and he has provided both a willing ear and advice when law review editors were really getting me down.

[1] See James Lindgren, Return to Sender, 78 Calif L Rev 1719, 1719 (1990) ("Polemics have a long and honorable history: Cicero, Swift, Paine, Carlyle, Twain, and Orwell.").

[2] Jim's suggestions for improvement do not include elimination of the student-run law review. See James Lindgren, An Author's Manifesto, 61 U Chi L Rev XXX, XXX (1994) ("Manifesto").

You may be wondering, why "Jim" rather than the expected "Professor Lindgren"? Law review criticism may be one of the few places where law review editors are willing to bend their usual rules, and here it's the customs of formality and distance that are giving way a little.

[3]Conceivably a professor's school affiliation and prior scholarly output can provide a useful aid to student editors buried under piles of manuscripts. This is conceded by Jordan H. Leibman and James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEG. EDUC. 387 (1989), who nonetheless favor initial blind reads to counter in-school favoritism and other undue influences. (This article is one of the best addressing the question of law review restructuring.) As Liebman and White note, such procedures should be combined with methods to reduce the flood of manuscripts, See id. at 418-20, & also see Erik M. Jwensen, *Thew Law Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL ED. 383 (1989). They should also be supplemented and with methods to

better select, educate, and coordinate the law review members who make article selections. See Leibman & White at 420-22.

[4] I recommend Joseph Williams, Style: Ten Lessons in Clarity and Grace (Chicago, 3d ed 1989); Graves & Hodges (~~First names~~), The Reader Over Your Shoulder (~~Publisher, Date~~). The Texas Law Review Manual on Style is not suitable for providing such a general education, as two editors of the Texas Law Review themselves implicitly admit. See Charles D. Moody and Arthur S. Feldman, Greetings from Hell, 78 Calif L Rev 1703, 1704-08, 1716 (1990).

[5]For one interesting suggestion on how this might be done, see Jordan H. Leibman and James P. White, *How the Student-Edited Law Jounrals Make Their Publication Decisions*, 39 J. LEG. EDUC. 387 (1989) at 423-24. They suggest that the AALS organize willing faculty into a number of national panels, each with substantive expertise in a particular area and willing to review a certain number of manuscripts per year. Authors who wished to use the panels' services would be free to append the panels' evaluations

and recommendations to their manuscripts when sending them to student reviews. "Ultimately, those reviews should prove to be influential, but probably not dispositive... Like judges, the student-editors would still have the final say, but now they would have the help of expert witnesses." Id. at 424.

Leibman and White defer discussion of the details. How such a program would be administered, what kind of incentives would draw expert faculty to serve as reviewers, and similar questions, are issues that need to be hammered out. But the Leibman and White article, like my instant essay, aimed more at putting the issue on the professorial agenda rather than to answer all questions. [NOTE that the latter is why I haven't responded to all the questions about details posed in your comments to me.]

[6] But note that my emphasis on which questions most need investigation is somewhat different from his. See text accompanying notes XX.

[7]Max Stier, Kelly M. Klaus, Dan L. Bagatell, Jeffrey J. Rachlinski, *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN L REV 1467 at 1491-92 (1992). By no means are all students happy with the experience, however. See, e.g., E. Joshua Rosenkranz, *Law Review's Empire*, 39 HASTINGS L J 859 (1988).

[8] Such contact is also available in seminar papers.

[9] See e.g. Leibman & White, supra note __, Stier et al., supra note __, and sources collected in Manifesto at XX.

[10] Note, however, that it was I who rewrote the argument to simplify it. I do not know if I would have been as pleased if the editor had made the changes herself.

[11] The classic here is Fred Rodell's exuberantly curmudgeony piece in the Virginia Law Review, reprinted and supplemented in his Goodbye to Law Reviews--Revisited, 48 Va L Rev 279 (1962).

[12] Honest.

[13]See Leibman & White, supra note __.

[14] Rodell, 48 Va L Rev at 285-86, 287 (cited in note 8).

[15] Id at 283-84.

[16] A vivid example of insularity in another field: a hairdresser is ordinarily required to attend cosmetology school for many months in order to qualify for a job, but in some states the schools teach only spit-curls and roller techniques--techniques that no leading hairdressers use any more. The de facto tenured faculty never bothered learning what needs to be learned in a changing industry.

omit

[17] Manifesto at XX. Leibman and White make a similar suggestion, with additional reasons cited, at __.

[18] See id at XX.

[19] For example, constitutional law gets 22% at one point, and 19% in another; difference in populations isn't cleanly stated. **[Need pinpoints]**

(discrepancy between journals' subject matter coverage and ~~[illegible]~~ subject matters most frequently taught). pattern

[20] Id at XX. It is unclear how this disserves faculty interests, even if most ~~articles~~ journals do not publish many articles in often-taught subjects, ~~given that~~ faculty writing and teaching interests are frequently not the same. **[WG-I do not understand this footnote.-TJS]**

[21] It is also a good thing that not all do.

[22]Leibman & White, supra note __, at 422.

[23]See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 245 (J. P. Mayer & Max Leerner eds & Goerge Lawrence trans., 1966). For being reminded of lawyers' special role in this connection, I am indebted to Richard Ford ~~XX~~.

[24]Cf., Linda Hirschman's suggestion that "As virtuous rulers of the law schools, law teachers have a responsibility to enable the ruled to participate in the regime." Linda R. Hirshman, *Nobody in Here But Us Chickens: Legal Education and the Virtues of the Ruler*, 45 Stan.L.Rev. 1905, 1929 (1993). ~~(presenting a general~~ (developing and applying a virtue-based ethic) (I am also indebted to her for bringing to mind the de Tocqueville material.)

[25]The term "liability rule" is of course derived from the classic article, Guido Calbresi & Douglas Melamed, *Property Rules,*

Liability Rules, and Inalienability: One View of the Cathedral, Harv.L.Rev. In a liability-rule regime, intellectual property owners would lack a full property-rule veto over the uses that might be made of their property, but they would be able to obtain governmentally-set compensation for uses to which they did not consent. Allowing a damage-only remedy is a form of liability rule, as is a compulsory license.

[26]Note that even from an economic perspective, using property for purposes of censorship is less justifiable than are most other uses of property. See, e.g., Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problems of Private Censorship*, 57 U Chi L Rev 1009 (1990) (review essay) at 1042-43 (arguing that in situtations involving highly personalized and emotional investment, there is often no "highest valued use" that can be determined independently of the legal allocation of entitlement starting points.) For consideration of specific attempts to use intellectual property for purposes of censorship,

see Wendy S. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L J 1533 at 1535-46 and 1583-1606 (1993).

[27] Which reminds me to thank Patricia Diak, a student of mine (Yale class of 1994) whose enthusiastic research for a paper on plagiarism spurred me into ~~recognizing~~ focusing on the value of footnotes as a method of intellectual property payment.

[28] Is this spelled correctly? Pat was on your review in approx 1990.

[29] Note to Review: do you think I should add the schools & graduation years for each student? or the name of the article each worked on? **[WG-I would not. They know who they are, and adding the schools would seem either to imply that they are "cool" for going to "good" ones (assuming they did), or that you are for publishing there.)** OK

[30] Though on a couple of occasions I've tried to sneak the name

of my editor into the thank-you footnote, the reviews have refused. So I would like to take this opportunity also to thank the two wonderful non-student editors I've worked with: Richard Epstein and Theresa Glover.