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Scholarly Legal Monographs: Advantages of the Road Less Taken

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by

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Although many of Professor Bernard J. Hibbitts's criticisms of law reviews in the accompanying article may be excessive, Hibbitts's arguments for the advantages of self publication on the Web are provocative. Although I do not believe that self publication is likely to replace law reviews during the foreseeable future, Hibbitts almost surely is correct in predicting that increasing numbers of law professors will use the Web as an alternative to traditional modes of publication.

Hibbitts, however, has overlooked another alternative to the traditional law review books. This is not surprising, since legal academics traditionally have disseminated their scholarship through law reviews rather than university presses or other publishers of scholarly books. At least until recently, scholarly monographs among law professors have been rare. Since I have published three scholarly books,[1] in addition to various law review articles, the editors of the *Akron Law Review* have asked me to prepare a brief essay on the relative advantages and disadvantages of publishing books as opposed to law review articles.

The law review looms so large in the firmament of legal academia that the very idea of book publication is foreign to many legal academics. Many law professors are so fixated upon the law review genre that they can hardly conceive of a legal book other than a casebook or treatise. While I was completing my first monograph on legal history, one of my own colleagues asked me whether I was going to prepare a teachers' manual.

Since most legal scholarship is published in law reviews rather than books, the association between law reviews and scholarship in legal academia is not surprising. In contrast to the impressive legal scholarship that one finds in law review articles, most books published by legal academics are treatises or casebooks. Such books generally have much greater utility and broader audiences than law review articles because they help teach students and offer practical guidance to the practitioner, something law review articles almost never provide. Many treatises and even some casebooks help make significant intellectual contributions because they help to shape thinking about the law. But they rarely have the originality or intellectual resonance of a good monograph or a cutting-edge law review article.

The traditional primacy of the law review rather than the book as a means of legal scholarship is illustrated by the lack of an index to legal books, until the *Index to Legal Periodicals* began to include them in 1995 and changed its name to the *Index to Legal Periodicals and Books*. The other major indexing service for legal publications, the

Current Law Index, still includes only articles in periodicals. No legal indexing service presently includes chapters in books written by multiple authors.

Publication of books rather than articles offers several rather obvious advantages for law professors. This article will explore the advantages of such publication.

The most obvious advantage of publishing a book is that books are more visible and receive more attention. Similarly, while law review articles are no less durable than books, a book somehow seems more permanent than an article. In contrast to an article, which is published between soft covers and is ultimately bound into a volume that includes the work of numerous other writers, a book is peculiarly the author's own. Also, the publication of a book seems to represent a more significant effort and may carry more prestige. In the world of legal academia, however, this is not always true most law professors would receive more prestige and attention from their peers by publishing with a top-ten law review than with a second-string book publisher. Indeed, publication in a highly ranked law review is likely to carry more prestige in legal academia than would publication with a major university press. Many law professors read law review articles far more avidly than books. At the very least, one is likely to reach a wider audience of law professors through an article in a major journal than with a book, even one published by the best presses.

Another potential advantage of publishing books is that books unlike most articles receive reviews that help to publicize the book. A typical university press book, for example, will receive about a dozen reviews in journals that are relevant to the book's subject matter. A book review, of course, is an obvious advantage to the author only if the review is relatively favorable. Even a fairly negative review, however, can serve a legitimization function a journal ordinarily would not bother to review a book that was garbage. In addition to providing benefits to the author, book reviews also provide advantages to readers. Book reviews enable busy academics to keep abreast of a wide range of scholarly literature that they would not have the time to read. By reading a book review, one can at least get the gist of new scholarship and grasp its significance. Since few legal academics have the time to read or even skim significant numbers of law review articles that are not directly related to their research or teaching, the lack of reviews of law review articles deprives law professors of a basic knowledge of articles that they do not have the time to read.

The benefits of book reviews, however, may not be as great for legal academicians as they are for academics in other
fields. In contrast to journals in other academic disciplines, law reviews publish relatively few book reviews. While a typical journal in most academic disciplines will devote half of its pages to reviews of recent books, book reviews in law reviews generally occupy only a few pages at the end of the journal, if they are found at all. Since large numbers of serious books on legal themes are published, notwithstanding the fact that most legal academics present most of their work in law reviews, the paucity of book reviews in law journals cannot reflect any lack of material. In part it may reflect the way in which legal academia tends to de-emphasize book publication. More likely, however, it reflects the

lack of specialization of most law reviews. In contrast to the typical scholarly review in most disciplines, which covers such a narrow range of subjects that it can provide a review of any significant book in its field, the principal law review at each law school is a journal of only general legal interest and therefore has no specific type of book that it is bound to review and lacks space to review all major books about the law.

Specialized reviews are more competent to publish book reviews in their fields of interest, but few of the hundreds of specialized law reviews seem to devote much attention to book reviews. My random check of recent volumes of specialized law reviews indicated that many contained no book reviews, and many others had nothing more than very brief reviews of books received by the journal. Only a few contained the type of serious and detailed book reviews by professionals rather than students that one would typically find in scholarly journals in other academic disciplines.

The dearth of book reviews in law reviews also may be attributable to their editorship by students, who generally do not know what new literature in the field is significant. Therefore, they review only high-profile books, those written by their own faculty members, or books that happen to strike their fancy. Since there are so many law reviews, book publishers cannot send copies of a book to every review.

The potential advantages of book reviews, however, are much greater when a law professor publishes an interdisciplinary book that is of interest to scholars in other fields. For example, my book on the history of the *Meyer* and *Pierce* cases has been reviewed in such disparate journals as *American Historical Review*, *Church History*, *History of Education Quarterly*, *Journal of Legal Education, Catholic Historical Review, Society of German American Studies Newsletter*, and several regional historical reviews.

Similarly, the publication of interdisciplinary books offers an advantage over interdisciplinary law review articles, since book publishers advertise such books in journals and flyers that reach academics in fields other than law. For non-interdisciplinary work, however, books provide only a limited advantage over articles, because law professors are able to find articles in their field through the *Index to Legal Periodicals and Books* and the *Current Law Index*.

Another major advantage of publishing a book is that most book proposals are subjected to a peer review process university presses and most leading trade presses will not accept a manuscript for publication unless it has received the recommendation of at least one and usually two persons who have special expertise in the subject matter. The review process therefore enables book publishers to make a far more informed judgment about the quality of a submission than student editors typically are able to make.

Most university presses are conscientious about soliciting the opinions of persons who are bona fide specialists in the sub-discipline the book covers. For example, all four scholars who reviewed the proposals for my two books on legal history had published books on closely related topics. In order to further ensure the integrity of the

recommendation, reviewers are assured anonymity, although they may waive this, and generally do, if their report is favorable.

The reviewers provide an abundance of information to book publishers that simply is unavailable to law review editors who select articles for publication. First, the report states whether the book would provide an original contribution to the literature in the field. Although student law review editors presumably do a pre-emption check of every article that they seriously consider for publication, student editors may not have enough expertise to place the significance of an article in its proper perspective. Even when students have the capability of doing a proper pre-emption check, they do not always take the time to do one. For example, one law review editor informed me to my amazement and horror that my thirty-eight page article on the legal career of John Quincy Adams was pre-empted by another article on the very same subject. When I asked for the citation to this supposed pre-emptive piece, the editor directed me to a two-page *ABA Journal* article about the legal career of Adams's father, John Adams. Although I do not doubt that most student editors are far more capable than this one, no one can expect students to have as much expertise as book publishers' peer reviewers in evaluating the scholarly significance of a manuscript that is submitted for publication. Although student editors can and perhaps should seek the advice of faculty members about the importance of manuscripts that they are considering for publication, even the faculty member who is the most knowledgeable about a subject is unlikely to have the depth of expertise of the typical reviewer for a book publisher since such reviewers, as we have seen, have typically published on closely related topics.

In addition to helping the publisher evaluate the merits of the proposal, the reviewer's report usually is helpful to the author because it offers a critique of the book. Although the reviewer does not edit the book and these critiques are typically brief, they provide at least some informed criticism and suggestions that normally would not be available to any student editor. Moreover, the advice of a peer review provides book publishers with the courage to demand revisions that student editors
typically would be loath to require from faculty authors.

Some readers of my books, for example, convinced my publishers that my manuscripts needed to be shortened before publication. Although they did not at first convince me that more brevity was needed, I had no choice but to condense the manuscripts because I recognized that I could not otherwise publish the books. After pruning my manuscripts, I realized that my work greatly benefited from the concision and I was grateful for the readers' advice. In contrast, no law review editor has ever asked me to cut the length of an article. Although I'm not sure whether any of my articles really needed cutting, I do know that I have seen many other law review articles that would have greatly benefited from condensing. But student editors are likely to be more deferential to their authors and may refrain from demanding cuts, even when they sense that they would improve an article.

Aside from the recommendations for greater brevity, peer reviewers have not inspired any major improvements in my books. But they have at least made a few substantive suggestions that I have followed. One reviewer, for example, proposed that I expand my

introduction to provide more of a foundation for the material that followed, a useful suggestion that I followed to the benefit of my book. Another reviewer caught a minor factual error (the misspelling of a small town's name), and others have provided suggestions for additional reading.

Although these contributions were small, no law review editor has ever made any substantive suggestion regarding any article that I have published. Neither, however, has any editor at any of three presses with which I have published books. Although university presses often divide editorial responsibilities into various academic disciplines, these areas are so broad that any individual editor is unlikely to have expertise regarding the academic sub-discipline covered by one's book. At Princeton, for example, my editor was in charge of "History and Classics," a broad area that went far beyond the early twentieth century American legal-political history that was the subject of my book. She did not pretend to have any expertise regarding this subject and did not edit the book for content. Accordingly, the author of a book is just as likely as the author of a law review article to be "on his own" after the readers have issued their reports. Since neither can expect any substantive input from his editors, both must seek out specialists on their own if they want more criticism of their book or article. I found, for example, that my colleague and fellow legal historian David J. Langum offered a far more detailed and useful critique of both of my legal history books than did any of the book's reviewers. One's faculty colleagues, of course, could just as easily critique a law review article or a self-published work.

After the reviewer issues his or her report, the book proposal receives additional peer review from the publisher's board of editors. At university presses, these boards include scholars who are generally well qualified to evaluate the scholarly merit of the proposal. This review, however, involves merely a decision about whether the manuscript merits publication, and does not provide an actual critique of the work.

A third possible advantage of publication by a university press is professional copy editing. In contrast to law review editors, who may or not provide superior copy editing, the copy editors provided by university presses do, by definition, a professional job. Unlike law reviews, however, book publishers do not perform any citation checks. This work is left entirely up to the author or his assistants. The performance of cite checks is by far the major service that law reviews provide for their authors. The advantages of cite checking and therefore of law review publication is considerably diminished, however, insofar as all too many law reviews perform citation checks neglectfully, negligently, or incompetently.

Another advantage of book publication is the greater continuity of editors. One of the most frustrating aspects of publishing a law review article is the frequent multiplicity of editors with whom an author must work. Law review editors frequently graduate while one's article is in the process of publication, forcing the author to become acquainted with a new cast of editors. Moreover, since the editors with whom one has worked have almost certainly graduated by the time that one publishes his next article, the law professor is unable to present his article to any board of editors who is familiar with his

work, and therefore likely to be favorably disposed toward publishing it. Since there are so many journals in which to publish, the lack of continuity among editors who select articles is not necessarily a problem, and law professors probably prefer to publish in a variety of reviews, unless they are able to always publish in the most prestigious, or unless they prefer to publish regularly in a specialized journal.

Another potential advantage of publishing books is that books, unlike articles, can be revised in later editions. As a practical matter, this advantage is limited since only the most successful scholarly books are ever published in a second edition. Publication of books therefore does not afford the advantage of constant updating and revision that Professor Hibbitts identifies as one of the principal advantages of self publication. But while constant revisions may be appropriate for certain technical works, instant revisions seem inappropriate for works of lasting significance because such publications should be self-contained and finite entities a finished picture rather than a kaleidoscope. Moreover, there are reasons to freeze in time even works of more evanescent significance since they provide later generations of scholars with an accurate and lasting view of how a scholar regarded a particular issue at a particular time. By providing the prospect of a second edition, books strike an appropriate balance between a law review, which cannot be revised unless the author wants to publish an essentially redundant article, and a Web publication that may never gel into a finished product.

One possible disadvantage of book publication is the generally longer time that it takes to publish as compared to a law review article. In my experience, the typical length of time from submission to publication has ranged from seven months to more than one year. University press publication will almost certainly take longer. Although most book editors respond to publications within one month, the reader review process can take up to one year, since many reviewers are very slow.

After one's book has received favorable recommendation from the reviewers, one must wait for the board of editors to meet to decide whether to award a contract, and the process of editing and production is often lengthy. Eleven months elapsed between final submission of my manuscript (six months after I received a contract) and Princeton University Press's publication of my first book. I'm told that this was unusually swift. More typical was the University of Nebraska Press, which needed twenty-one months between submission of my final manuscript and publication. Such delays, of course, do not matter if one is publishing a work that will not quickly grow stale. And, as we have seen, works that have a short shelf life probably ought not to be published as law review articles, much less books. Moreover, trade presses generally are able to publish books more rapidly than university presses. My Carolina Academic Press book, for example, was published ten weeks after I submitted the final manuscript.

As the foregoing discussion suggests, the various advantages of publishing books rather than law review articles are significant in some instances, but may not be as significant as one might suppose. Perhaps this explains why most law professors continue to prefer to publish law review articles rather than books, even though many articles are so long, important, and original that they could be published as books with little or no extra effort.

Indeed, many law professors have published articles or collections of their articles in book form. Most articles, however, are too narrow in scope or of too little lasting interest to warrant publication as a book. Indeed, as Professor Hibbitts points out, law review critics have long suggested that many law review articles do not even merit publication as articles. All too many law review articles consist of little more than a prediction of how the U.S. Supreme Court will rule in an upcoming decision, or provide a post-mortem of a recently decided Supreme Court case. Such articles have a limited readership and an even shorter shelf life and seem to be ideal candidates for the type of self-publication that Professor Hibbitts advocates. Likewise, articles that concern developments of only current interest such as recent revisions of the Federal Rules of Civil Procedure or the Internal Revenue Code likewise seem like appropriate candidates for publication on the Internet. Law reviews are probably the appropriate forum for most other work by law professors. A small but not insignificant number of articles, however, have sufficiently significant impact and enduring value that their authors might wish to publish them as books.

Although Hibbitts is correct to urge that many articles that are presently published in law review articles should be published on the Internet, legal scholars in at least some instances should move in the opposite direction and preserve their work in a form that is even more formal than law review articles by publishing books.

* Professor of Law, Cumberland School of Law, Samford University. A.B., Stanford, 1976; J.D., Harvard, 1979. The author is grateful to his colleagues David J. Langum and R. George Wright, themselves the authors of several scholarly books and numerous articles, for their comments concerning this essay.

1. A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937 (1994) (Princeton University Press); Forging New Freedoms: Nativism, Education and the Courts, 1917-1927 (1994) (University of Nebraska Press); The Honest Hour: The Ethics of Time-Based Billing By Attorneys (1996) (Carolina Academic Press).