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## Introduction

Jean Stefancic

Fred R. Shapiro

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## INTRODUCTION

JEAN STEFANCIC\* AND FRED R. SHAPIRO\*\*

As readers of this Symposium know, the last few years have seen a veritable ferment over the politics, form, and direction of legal scholarship and publishing. Eminent judges complain that what they find in the law reviews is largely irrelevant to their work. Critics charge that the prevailing mode of scholarship is too normative—empty, self-referential, and full of sonorous banalities. Mainstream writers debate whether a legal canon exists, and where the new forms of narrative and storytelling scholarship fit in. Colloquies debate whether the law reviews are too experimental and prone to accept trendy, cutting-edge articles, and if so, what the cure is: Should there perhaps be more faculty control? One author has even suggested that legal writers eliminate the middle-man, so to speak, and publish their works directly on the Internet as he has done.

None of this ferment should be entirely unexpected. Legal knowledge, like most other kinds of learning, is a social construct; and law reviews are a prime means by which legal ideas and meaning are created, debated, and disseminated. These legal ideas, in turn, come freighted with power, and thus it should not be surprising that the means by which these ideas are framed and distributed should come under continual scrutiny.

One of the premises of this Symposium is that the changing demographics of the legal academy—which today includes many more women, gays, and scholars of color than before—plays a large part in the recent ferment. These “outsider” scholars address new areas of inquiry, such as radical feminism, critical race theory, and gaylegal narratives. They have pioneered new forms of writing, including first-person narratives, storytelling and counter-storytelling. How many such authors are there? Where are they publishing? And what are the effects of this new presence in the legal academy?

The idea for this Symposium germinated when one of us, Fred Shapiro, decided to update his ten-year old ranking of the most-cited

\* Research Associate in Law, University of Colorado School of Law.

\*\* Associate Librarian for Public Services and Lecturer in Legal Research, Yale Law School.

law review articles of the prior forty years.<sup>1</sup> This study contained a compilation of the fifty most-cited law review articles, all written by white male authors, and attracted considerable attention in the legal community and the media. Shapiro wondered whether the list would look different today. In particular, he questioned whether the infusion of women and minorities in the legal academy would significantly alter the make-up of his original list. Many issues of the leading law reviews today contain articles written by members of these groups. Is it possible then that the former outsiders—now filling the pages of the most prestigious reviews and dominating the citation rankings—have become the insiders?

As Shapiro reworked his list, the notion of a symposium devoted to trends in legal scholarship and citations took shape. We obtained a commitment from the *Chicago-Kent Law Review* to publish an issue of comments and articles on the changing form and content of legal writing, using Shapiro's updated study as a springboard. Stefancic obtained commitments from feminists, critical and gay theorists; Shapiro solicited contributions from mainstream scholars, all writing about changes in the legal canon and legal authority. The Symposium you are about to read is the result of this joint endeavor.

A number of themes run through the various contributions: whether law review writing contributes to the formation of legal knowledge, and if so, how; whether the new legal scholars—the outsiders—are indeed well represented in the major reviews; whether top-flight publishing affects the career-paths of legal scholars; and how much the inclusion of new voices is contributing to changes in the way we think about law.

Opening this Symposium is the new study of legal citation practice by Fred Shapiro, which presents two new lists to update his previous study: the first, historical in nature, sets forth the one hundred most-cited legal articles of all time; the second, contemporary in character, presents the ten most-cited articles published in each year during 1982 through 1991. This second list reveals a provocative phenomenon that lays part of the groundwork for this Symposium: a remarkably high percentage of articles on the contemporary list are written by women, feminists, minority scholars, critical race theorists, critical legal studies scholars, and other outsiders, indeed raising the question of whether the outsiders have become insiders in the legal

1. Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540 (1985).

academy, publishing in the top reviews, being read and cited frequently, and influencing the character and direction of legal thought.

Following Shapiro's article, James Lindgren and Daniel Seltzer next present data from their study of the most prolific law professors and faculties during a five-year period (1988-1992) in the twenty most-cited law reviews. The striking results show that a substantial number of the most prolific publishers are professors at non-elite law schools. Indeed, some of these individuals alone have published more in prestigious, most-cited law journals than entire faculties of some law schools that are traditionally ranked within the top twenty in the nation. Furthermore, the study reveals that a substantial majority of the top twenty-five most prolific publishers are lateral appointments. It also indicates that women are underrepresented in the top twenty-five publishers, but are relatively well represented in the remaining pool of prolific authors. The pattern is opposite for minorities, who tend to be underrepresented overall despite being relatively well represented in the top twenty-five most prolific publishers.

Following the two studies are commentaries from three of the four top authors on the historical list of the most-cited articles of all time.<sup>2</sup> R. H. Coase, whose article, *The Problem of Social Cost*,<sup>3</sup> heads the list of the most-cited law review articles, performs his own analysis, showing that his economic approach has been cited by legal academics primarily because the concepts, including the well-known Coase Theorem, were useful in analyzing particular legal situations or problems. He concludes that the number of citations is therefore not a misleading index of the overall influence of his article on the legal academy.

Gerald Gunther comments on the genesis and impact of his article, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*,<sup>4</sup> which ranks third on the all-time list. Gunther notes that the impact of his article should not be overestimated because much of the discussion of equal protection themes in the article provided a convenient reference for other writers, both critical and laudatory. At the same time, Gunther acknowledges that the article has changed the way both judges and academics think about the implications of rationality review.

2. Herbert Wechsler, second on the most-cited list, unfortunately was not able to participate in this Symposium.

3. 3 J.L. & ECON. 1 (1960).

4. 86 HARV. L. REV. 1 (1972).

Charles A. Reich revisits his article, *The New Property*<sup>5</sup>—fourth on the all-time list. Chronicling several major developments, which indicate that his original concerns were not only justified but understated, he concludes that the Supreme Court's failure to protect and guarantee economic security has fundamentally altered the nature of American society for the worse. In sum, Reich implies that his article has not had the type of practical impact he had hoped for, despite receiving so much attention by the legal academy.

Next in the Symposium are general commentaries on trends in legal scholarship and citations. William M. Landes and Richard A. Posner evaluate Shapiro's study and express some concerns with its methodology. Landes and Posner argue that changing the methodological choices in Shapiro's study results in the contrary finding that citations to law and economics scholars are not in decline, but actually grew more rapidly than cites to scholars in other "law and" fields. Looking into their crystal ball of economic analysis, they then predict the total lifetime citation probabilities for the 103 articles on Shapiro's 1982-1991 list. Following this article Shapiro presents a brief response to some of the points raised by Landes and Posner.

J. M. Balkin and Sanford Levinson begin their essay with the premise that the current fascination with citation counts within the legal academy reveals the worrisome implication that our very ideas of merit and influence are infused with, and have been created by, relations of social power. They argue that the feedback-loop of frequent citation serves socially to construct our notions of what constitutes good quality legal scholarship, and that this "economy of citations" serves to normalize certain practices of thought and to marginalize others as deviant. Balkin and Levinson then offer a tongue-in-cheek self-help manual for aspiring legal academics wishing to "win cites and influence people."

Deborah Jones Merritt and Melanie Putnam explore the perceived disjunction between legal scholars and judges, concluding that not only do courts cite law review articles at a relatively low rate compared to the academy, but that judges cite from a more diverse group of law journals and academic backgrounds. They identify ten articles, published in each of three recent years, that have garnered the most judicial citations, and offer comparisons between those articles and those on Shapiro's list during the same period.

5. 73 YALE L.J. 733 (1964).

The second half of the Symposium incorporates some of the outsider perspectives that Shapiro's study highlights as gaining prominence in legal scholarship today. Mark Tushnet examines the assumption that legal scholarship appears to have become broadly interdisciplinary, but questions whether much of this work is truly "*interdisciplinary*." Tushnet demonstrates that while the use of history, for example, in some legal scholarship may be rhetorically effective, legal scholars for the most part do not adhere to the standards of practice accepted by historians working squarely in the discipline. The criteria then for determining good "history-in-law" must be drawn from legal, rather than historical, practice. To this end, Tushnet argues that citation lists such as Shapiro's can identify the legal academy's criteria for good performance in interdisciplinary scholarship.

Frances Olsen raises the question whether increased citation of outsider scholarship will serve to legitimate the new scholarship or, by contrast, to delegitimize citation counts as a source of prestige within the legal academy. Olsen puts forward three alternate visions of what these increased outsider citation counts mean, and warns that the academy may react to this new scholarly presence by changing the current standards and devaluing publication in prestigious law journals. Consequently, as affirmative efforts to hire women and minorities continue to be implemented, outsiders will continue to remain on the outside. Olsen notes that affirmative action may be a necessary but not a sufficient mechanism to fully integrate outsiders: Because of hidden prejudice against anyone who appears to pose a threat to established members of the academy, the ironic result may be that the least threatening, rather than the most promising, outsider will be hired.

Nancy Levit seeks to avoid the pitfalls of conventional criteria of theory-acceptance that, by focusing misguidedly on quantitative measures of popularity, tend to develop a "criteria of meritocracy that may reinforce existing hierarchies." Instead, she proposes that theory-acceptance in law be guided by qualitative "criteria of rationality"—drawn from the scientific method and historically developing notions of sound theory development—which will ensure that "good" scholarship will be theoretically solid regardless of whether or not it is popular. In sum, Levit asks that we explore the foundational, substantive qualities of cutting-edge scholarship, rather than rely on the potentially self-legitimizing "indicia of popularity" which characterize quantitative citation analyses.

Richard Delgado presents a counterpoint study to his previous article<sup>6</sup> that examined the “imperial scholar” phenomenon. In this new article, Delgado inquires whether outsider scholars are guilty of a similar vice (a “colonial scholar” phenomenon): Do minority scholars tend to exhibit a marked preference for works written by scholars from their same minority group by engaging in in-group and self-citation practices? The evidence leads Delgado to conclude that there is no dramatic colonial scholar counterpoint to the imperial scholar dynamic identified in his previous study. Outsider scholars cited scholars of majority and nonmajority race almost equally—actually with a slight edge to authorities who are white. Furthermore, Delgado notes that minority scholars generally do not cite majority scholars in a dismissive or overly negative manner; rather, they accord majority scholars the same type of respect they afford their fellow outsider scholars.

Representing the gay-scholar perspective, William N. Eskridge, Jr., presents the thesis that gay and bisexual scholars (especially white male scholars) have long been academic insiders because their minority sexual orientation is quite literally invisible. So few traditional and critical scholars have come out of the closet, he postulates, because sexual orientation in American culture is an “obsessional discourse” that can distract us from noticing the ideas of the author. Eskridge discusses the “phenomenon of the closet,” which provides gay authors with a “fluid residence” giving them a strategic advantage. Much more than women and somewhat more than authors of color, gay authors are outsider-insiders. They are insiders so long as they remain in the closet, and yet they can establish themselves as outsiders if the gaylegal academic agenda makes such a move strategically attractive. Eskridge argues that gaylegal scholarship should prove to be an increasing presence in the legal academy in the future, attaining some of the same prominence in future citation count studies that feminism and critical race theory currently display.

Building on her previous article<sup>7</sup> on symposium publishing, Jean Stefancic addresses the extent to which outsider scholars have achieved representation in law review colloquies and symposia. She found that outsider scholars did appear less frequently in symposium issues than their numbers and productivity would lead one to expect—and less frequently than in regular issues of the same law reviews.

6. *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

7. Jean Stefancic, *The Law Review Symposium Issue: Community of Meaning or Re-Inscription of Hierarchy?*, 63 COLO. L. REV. 655 (1992).

With one important caveat, Stefancic finds that symposium parties are indeed harder for outsider scholars to crash.

Rounding out the Symposium, Jean Stefancic and Richard Delgado report the results of an empirical survey of early critical and feminist authors. Writers of these persuasions are now registering gains, their ideas received with interest by the legal academy. But was this always so? Were the current advances purchased at the cost of pain, anxiety, and shattered careers?

The findings of Shapiro's *The Most-Cited Law Review Articles Revisited* suggest that legal scholarship today is a far less monolithic field than was true earlier in the century. The other surveys, studies, and commentaries in this Symposium, using both subjective and relatively objective tools, attempt to assess where legal scholarship has been and where it is going. One conclusion that may be drawn is that the outsiders have become insiders; another is that we have all become outsiders, needing to bring whatever diverse perspectives and methodologies we can muster to the task of making sense of an increasingly incoherent discipline.



