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Erik M. Jensen

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LAW REVIEWS AND ACADEMIC DEBATE

Erik M. Jensen*

This essay makes a simple point: When a law review publishes an article, the editors should be willing both to publish responses to that article and to give the author a chance to reply to critics. This shouldn't be a controversial principle, but, for far too many reviews today, it's not standard procedure.

Law reviews are different from journals in other academic disciplines, and we professors all make the same, often unfair complaints about student-edited reviews. The students aren't in a position to make informed decisions in selecting articles;¹ they're faddish; they can't write but they insist on redoing even the occasional article that's already well-written; they want citations for everything, including the proposition that "the sun is hot,"² and so on.

Well, we know that students like a good fight, and one might therefore have thought that student-edited reviews, whatever their faults, would be interested in furthering vigorous debate. I had thought that, but now I'm not so sure.

Not long ago, I had an article published in the *Columbia Law Review*.³ I think the article was pretty good, actually, but I was lucky to place it in such a prestigious place, particularly since I don't teach at one of the top twenty law schools. The article dealt with an arcane subject, the meaning of the "direct-tax" clauses in the Constitution, which had been largely ignored for decades. I argued, with more than a little evidence, that the clauses actually meant something originally, and that they might have relevance today.

So far, so good. A nice little (actually not so little) academic article on a subject of almost no general interest. Or so I thought (and still think).

Yale Professor Bruce Ackerman must have been really offended by my article, and he wrote a response, published in *Columbia* a little over a year later.⁴ It was a bombshell. Along the way he used terms like "the legacy of

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1. Actually, I've always thought that helped my chances in placing articles.

2. See *ENCYCLOPEDIA BRITANNICA* 798 (15th ed., 1977) (entry on "sun").

3. Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 *COLUM. LAW REV.* 2334 (1997).

4. Bruce Ackerman, *Taxation and the Constitution*, 99 *COLUM. L. REV.* 1 (1999). The Ackerman article isn't characterized as a response, but mine is the first work cited in note 1, and a chunk of the article deals only with my piece. It's fair to say that Ackerman's piece would have been very different had it not been for my article

racism,” “intemperate,” “hash,” and “enterprising” (not intended as praise) to describe my work.⁵ A colleague characterized the Ackerman article as the definitive statement of my incompetence. And if a Yale professor said it in the *Columbia Law Review*, it must be true.

I was horrified, but, once I’d convinced myself I could write a rebuttal, I calmed down. I felt even better when two colleagues told me that “*Columbia* has to let you reply.” They were sure *Columbia* wouldn’t publish an attack like Ackerman’s without letting the victim respond. If nothing else, the *Review* should want a defense of an article—mine—that it had published.

So I sent the *Columbia* editor-in-chief a note to say a reply would be coming. The marketplace of ideas could operate, with an interchange of ideas published in a visible place. Isn’t that the way things are supposed to work in academic journals?⁶ We might have to negotiate about length and tone, but surely there could be no question about my entitlement to reply in some way.

You can guess what happened. I drafted a reply—one that was probably too long and intemperate, but one that, to my mind, shredded many of Professor Ackerman’s positions.⁷ I sent it to *Columbia* about a month after my—never acknowledged—letter to the EIC. A couple of weeks later, *Columbia* decided to “pass.” I was told the debate should proceed in a different forum because, taking into account another article in the pipeline (more about that later), the *Columbia* editors didn’t want to devote any more space to taxation and the Constitution.

For a professor at a top-ten institution, a rejection like that wouldn’t have mattered. (Of course, none of this would have happened to such a professor. *Columbia* would have published his reply.) The top-ten professor could have gotten his response in another top journal—his home review, if nowhere else. But for someone like me, from a school outside the top ten, the alternatives were fewer. No one’s going to publish an article of mine just

5. *Id.* at 30 n.112 (“legacy of racism”); *id.* at 53 (“intemperate”); *id.* (“hash”); *id.* at 52 (“[G]enerations of academic neglect of the constitutional issues makes [sic] it easy for enterprising scholars to ‘rediscover’ the ‘direct tax’ clauses, and urge their resuscitation without serious consideration of their origins in slavery.”).

6. For six-and-a-half years, I was one of the editors of the *Journal of Legal Education*, the scholarly journal of the Association of American Law Schools. We made a point of publishing every response to articles we published (as long as it was in fact a response and the length was appropriate—we weren’t going to publish a 50-page “response” to a 10-page article). And we always gave the author of the original article the opportunity to reply to his or her critics.

7. You don’t have to agree with my characterization of the relative merits of Ackerman’s and my arguments. It’s enough for present purposes if you accept the proposition that my article might have had some merit and that some of Ackerman’s criticism of me might have been subject to question.

because I wrote it, and other reviews might very well resist publishing a reply to an article that had appeared elsewhere.

Indeed, since my unhappy experience, many people have told me how difficult it is to get a reply to a particular article published if the original journal won't take it. Unless the respondent is prestigious enough, the *Southern North Carolina Law Review* doesn't want to hear about an article published in *Columbia*; that's someone else's problem. And my situation was even worse: the chain of events gave student editors reason to question the quality of my work. I'd been trashed by a prominent person in a prominent journal. The *Columbia* editors had apparently declared the war over, with Ackerman the winner. Why else would Ackerman's attack have gone unchallenged in the *Columbia Law Review*?

In a telephone conversation to discuss why *Columbia* wouldn't publish my reply, I was assured that readers could study both my article and Ackerman's and make their own rational, dispassionate judgments about quality—that I shouldn't be afraid my work would be damaged just because Bruce Ackerman had condemned it in the *Columbia Law Review*. That's a nice sentiment, but it bears no relationship to reality. Not all readers will study two competing conceptions of the universe; many will evaluate relative quality by looking at pedigrees of authors and places of publication. If I'm denied the opportunity to respond to a Yale professor in a top-tier review, it's worse than losing a battle; it's as if I'm not permitted on the same battlefield.⁸

I realize this sounds like a personal grievance, and it is that in part, but there are lessons of more general interest to be learned. One of the problems is that, while law reviews may be institutions with long-term interests and obligations, they're without many of the usual characteristics of institutions. The people minding the store don't necessarily have the long term in mind.

Student editors turn over annually. That's not enough to avoid bedsores, but it's too often to preserve continuity in academic journals. What appeared in any student-edited journal a year or two ago is ancient history to the current editors; the work was someone else's responsibility and the published authors are nothing but names on the page. The new editors are very smart people, but they start with their own agendas. Dealing with leftover problems isn't high on their list of priorities.

8. My reply to Professor Ackerman appeared in a perfectly fine place, see Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct-Tax Clauses*, 15 J.L. & POL. 687 (1999), but it took two years to come out, and it wasn't *Columbia*. I also discuss Ackerman's positions in Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1075 (2001).

That needs to change. Law reviews should provide better fora for discussion of issues raised in their pages. The editors must understand, at more than an abstract level, that the reviews exist to further dialogue, that sometimes the dialogue needs to continue in a single journal, and that the editors have an obligation to publish some articles that don't necessarily coincide with their individual, short-term intellectual interests. And they need to understand the public consequences of rejecting certain pieces once they've permitted a debate to open up. To bring all of this back to my experience: if the Ackerman piece was going to be published in the form that it was, then certain obligations should have arisen from that decision by the *Columbia* editors.

I'm not arguing that law reviews have to publish anything and everything sent them by aggrieved authors. I was open to negotiation about length and tone of reply. If I'd been told I would be limited to five or ten pages, so that I could get my complaint on paper and note that a full reply would appear elsewhere, I would have understood. (I wouldn't have been happy, but I would have understood.) Nothing like that happened.

And you know what? The mysterious "article in the pipeline," the purported reason for not publishing any more articles on taxation and the Constitution in *Columbia*, turned out to be a direct response to my article.⁹ I wasn't being given a chance to reply because *Columbia* was publishing yet another article criticizing my work! When I read this second essay, even though it was respectful in tone, I started feeling as if I were being used for target practice in the *Columbia Law Review*. I contacted the editors once again, graciously offering to limit myself to five pages in responding to both of my critics. No dice.

* * * * *

If authors can't respond to their critics in the same law review, and if other journals are unlikely to publish pieces that are primarily responses to articles published elsewhere, what happens? Either the responses don't get published at all, or the authors have to hide the responses in the endless prose of longer, more general works. In either case, it's hard to see how scholarship benefits.

Except for the occasional, really path breaking article—the piece that redefines or creates a field of study—scholarship is incremental. Academic articles build on other academic articles. Author *A* uses author *B*'s study as

9. See Lawrence Zelenak, Essay: *Radical Tax Reform, the Constitution, and the Conscientious Legislator*, 99 COLUM. L. REV. 833 (1999).

the basis for a new examination of the duty of care owed in geriatrics. Or author *C* challenges *B*'s characterization of the Ohio jurisprudence on products liability. In turn, *B* almost certainly has interesting things to say about *A*'s work, and *B* can perhaps point to holes in *C*'s criticism. When many minds are engaged in the study of similar or related issues, everyone's work should benefit.¹⁰ And, yes, although it may sound pretentious to say so, the refinement of ideas through the academic process of point/counterpoint improves the state of knowledge.¹¹ Any law review policies that frustrate the process of intellectual engagement should be treated as suspect. (That's a polite way of saying they should be discarded.) At a minimum, legal journals shouldn't be cutting off debate that begins in their pages, something that, as I've been arguing, happens much too often.

Happily, and despite the grumpy tone of this essay, help may be on the way. Many academic journals, and now a few law reviews, have a "correspondence," "communications," or "letters" section to deal with controversies about work that appears in their volumes (and sometimes in other journals as well). Critics write; original author responds. That exchange might end the debate, or it might then continue in another forum.

Correspondence sections are a wonderful development that ought to become universal in law reviews, at least until someone comes up with a better solution to a very real problem. So if you don't like this essay, fire away. I'm ready to return the fire.

10. Which isn't to say that the process is painless for those engaged in it. Criticism hurts, even (especially?) when deserved.

11. The totally new article—one that depends not at all on work that has come before—is the exception, not the rule, in legal scholarship. And that's generally a good thing; incrementalism has much to recommend it. Totally new thoughts on legal matters are generally new because they're bizarre, not because they're worth serious attention. Cf. Daniel A. Farber, Commentary: *The Case Against Brilliance*, 70 MINN. L. REV. 917, 917 (1986) ("The same traits of novelty, surprise, and unconventionality that are considered marks of distinction in other fields should be considered suspect in economics and law, in which thoughtfulness may be a more important virtue.") (footnote omitted). The law is at some level tied to human nature, which (the last time I looked) doesn't change on a daily basis.