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# Legal Scholarship: Insiders, Outsiders, Editors Symposium on Legal Scholarship

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# LEGAL SCHOLARSHIP: INSIDERS, OUTSIDERS, EDITORS

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*A. The Stefancic Article*

I find an intriguing connection between this very fine piece by Ms. Stefancic and the Law in Action school of legal scholarship that sprang up at Wisconsin in the middle years of the century and continues today. Law in Action, an early Critical movement in American law, focuses on how legal institutions and rules operate in practice in the real world.[1] Law in Action is more interested in law's impact than in its coherence, beauty, or whatever virtues it may have "on the books."[2] Scholars working in this vein have examined jury behavior,[3] the capture of federal agencies by the industries they supposedly regulate, and the subversion of small claims court into a collection device for creditors, installment sellers and property owners.[4]

In a sense, Ms. Stefancic's article might be considered an example of *scholarship in action*—the sort of empirical research David Bryden calls for; the kind that is hard, time-consuming, and labor intensive—but that can help you actually learn something about yourself or your craft.

The piece has real "Critical bite," particularly, I think, in the author's observation that community—something we all purport to want and need (especially in difficult times)—and exclusion (or if you like community and hierarchy) are balanced on a razor's edge.[5] One can easily shade over into the other and, apparently, often does. I believe the community of legal scholars will also be grateful to Ms. Stefancic for her teasing out answers to many of the questions most of us had been harboring about symposium publishing. For example, Who does

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1. A leading proponent is David Trubek. *See* David M. Trubek, *Where The Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

2. *Id. See also* Marc S. Galanter, *Why The Haves Come Out Ahead*, 9 LAW & SOC'Y REV. 95 (1974); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (questioning received wisdom about the existence of a "litigation explosion").

3. HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY (1966).

4. Beatrice A. Moulton, Note, *The Persecution and Intimidation of the Low Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969).

5. Jean Stefancic, *The Law Review Symposium Issue: Community of Meaning or Re-inscription of Hierarchy?*, 63 U. COLO. L. REV. 651 (1992).

it?[6] Why is this phenomenon increasing?[7] Do symposium issues have as great an impact as nonsymposium issues?[8] Are symposium articles of higher or lower quality than nonsymposium articles by the same author?[9] Is there an insider network of "imperial communitarians" whose names magically appear in all the best symposiums?[10] Are student editors, confined to a one year tour of duty, uncomfortable exploring the untried and untested?

I have only two comments, each ending in a question.

1. If as the author suggests, symposia are unconscious or conscious quests for community, searches for kindred souls in difficult times,[11] then one might expect to see a similar increase in symposium-type publishing in other disciplines that are undergoing rapid change and tumult. For example, over the past ten years theology has been in such a state, as psychiatry was in the 1970's. Is there a flourishing of group publishing in other fields during difficult times—and does the communitarian impulse weaken when harmony is restored and no paradigm shifts are on the horizon? Or is law special in some way, perhaps because our current fractured condition is worse than that which other fields experience?[12]

2. The second question and observation concerns the role of computers. The development that permitted Ms. Stefancic, a single researcher, to carry out this elaborate, many part study, and reveal the many fascinating patterns is computerization.[13] Computers enabled Ms. Stefancic to look for the "schlock" effect;[14] to develop a "sociogram" of who publishes where;[15] and, to show a shift from past- and present-oriented symposia to those focusing on the future.[16] All of this could not have been done—at least not without an enormous investment of time and energy—without computers, something that Ms. Stefancic concedes.[17]

In a recent piece I called attention to the way in which the advent

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6. *Id.* at 661.

7. *Id.* at 665.

8. *Id.* at 667.

9. *Id.* at 674.

10. *Id.* at 669.

11. *Id.* at 656.

12. Ms. Stefancic's answer to this question was that she suspected this relationship between social fragmentation and symposium-type publishing could be shown in other disciplines, but that she had not searched for it directly.

13. Stefancic, *supra* note 5, at 656.

14. *Id.* at 674.

15. *Id.* at 671.

16. *Id.* at 677.

17. *Id.*

of computers caused a change in the behavior studied[18]—a sort of perverse "observer effect."[19] I showed that civil rights attorneys have been employing computers to demonstrate inequality, suspicious-looking patterns or results in employment discrimination, death penalty, and a host of other types of cases.[20] But often the legal system responded by simply changing the rules of the game. As proof of facts became easier, the law merely redefined redressable discrimination to make it more difficult to prove, adding intent and causation requirements. The net result was little or no gain.[21]

After Ms. Stefancic's article appears, the world of legal scholarship will know that she—or another researcher—may be watching, and that patterns may appear to the sharp eye of a computer. Will there prove to be an "observer effect," in which writers structure their articles, or their manner of publishing them, to avoid leaving the "tracks" that might look curious when laid out on a computer printout—leading to a sort of infinite chase or regress?[22]

### *B. The Bryden Article*

I like Professor Bryden's article—it is nice and irreverent. And, it is valuable to learn what editors are thinking; too often authors have to guess. There should be more exchanges of information of this kind. (For those of you who are unaware of it, David Bryden is a past co-editor of *Constitutional Quarterly*, a major journal published at the University of Minnesota Law School.)[23]

Professor Bryden points out that legal authors are driven by many ordinary forces—fame, glory, conformism, preference for the familiar, and a wish to avoid hard work—for example, writing an empirically-based article.[24] We pander to other academics—especially ones on our tenure and promotions committees,[25] timidly avoid risks,[26] write poorly and in an incomprehensible jargon,[27] and take a lot of

18. Richard Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 WIS. L. REV. 579.

19. In empirical science, the observer effect means a change in the behavior studied that results from the subject's awareness that the researcher is observing him or her.

20. Delgado, *supra* note 18, at 583.

21. *Id.* at 583-84.

22. Ms. Stefancic's answer to this question was: Probably not, the famous authors' egos, at least in the short run, will result in their proceeding much as they always have.

23. *Constitutional Commentary* publishes four issues a year, and is currently edited by Daniel A. Farber, Philip P. Frickey & Suzanna Sherry.

24. David P. Bryden, *Scholarship About Scholarship*, 63 U. COLO. L. REV. 641 (1992).

25. *Id.* at 645.

26. *Id.* at 648.

27. *Id.* at 647.

words to say little that is new.[28]

Many of these things are true. And it is useful to hear an editor say them. I often have wished that editors would simply stop publishing articles that had nothing new to say, that just rehashed old ideas or doctrine. Yet, I wonder whether on some level Professor Bryden is being just a little unfair, a little harsh on legal academics. Some of us do set out, sometimes at least, to say new things.[29] As for hard, empirical articles—well, one is being presented on this very panel.[30]

So, one might concede that legal scholars are flawed—are sometimes timid or interested more in padding their resumes than in contributing to the selfless pursuit of knowledge. But one might still want to ask "Compared to whom?" For example, lawyers in the real world seek money and fame, and often unhesitatingly take cases that present absolutely no novel legal issues at all, *e.g.*, the typical airplane crash. Madison Avenue writers have little respect for truth. Many architects and contractors never do things the hard way but crank out cookie-cutter houses with little originality to them.

So I wonder if the ills Professor Bryden identifies in the world of legal writers are exclusive to that world, or rather are, lamentably, broadly shared faults and propensities.

One particular type of timidity that Professor Bryden charges his colleagues with—falling under the heading of "political correctness"—is worth comment. His paper mentions a number of professors who declined invitations to write or speak on sensitive subjects out of fear of left-wing or feminist criticism.

Are conservatives really that timid, that beleaguered? Is the campus atmosphere in danger of declining into a modish liberal orthodoxy with free speech and inquiry the victims? Am I, perhaps, insensitive in framing the question this way? One should hesitate to dictate to others (such as conservatives) how reality should seem to them. (I will note, however, that none of my left-leaning friends received a two year grant from the Olin Foundation as Dinesh D'Souza did to write his recent book lamenting a left wing takeover on campus.)[31] I offer the following interpretation; if I'm wrong I'll be glad to take the criticism. American campuses have always been bastions of majoritarian power. White men, and a few women, ran things. This is largely true even

28. *Id.* at 648.

29. Critical Race Theory, for example, has pioneered the "legal storytelling" movement, see *Symposium, Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). Deconstructionist thought recently developed the critique of normativity. *See Symposium, The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991).

30. Stefancic, *supra* note 5.

31. DINESH D'SOUZA, ILLIBERAL EDUCATION (1991).

today. Go stand on any of our nation's campuses as classes change and notice the sea of white faces. Visit an office of any large business, and you will see the same thing.

The majority race then, is firmly in control. Yet, some white male conservatives feel themselves under attack. How can this be? I think the explanation is as follows: Today for the first time, there is a smattering of people of color on campuses, in professors' offices, and in corporate board rooms. In relative numbers, the proportion is quite small—most law schools have one or zero black professors and perhaps ten to fifteen percent students of color. But occasionally the newcomers raise their voices, challenging orthodoxy, questioning the status quo. Why is contracts taught this way, rather than that? What about the history of slavery in American constitutional law? Why did you use this example, professor? It made me feel uncomfortable. In former days, professors did not face challenges of this sort. Until recently, there was silence; the professor's authority reigned. By contrast, today's occasional diversity-speaking voices seem loud, almost deafening. But it is not because the newcomers' voices drown out everyone else's—far from it. Rather, the change is noticeable only because it is in relation to the silence that prevailed before.

### *C. The Coombs Paper: Should Critique Turn Inward?*

"A radically different form of writing has been appearing in law reviews of late," Professor Coombs writes, namely Feminist Jurisprudence and Critical Race Theory.[32]

I can attest to that, at least. Like her second epigram's author,[33] I was present at the birth of one of the movements. I saw the infant Critical Race Theory born outside of Madison, Wisconsin in the summer of 1989,[34] receive its name,[35] and have watched it grow. Since I am currently preparing an annotated bibliography of its body of work,[36] I know how much it weighs. So, I know a little about it.

Professor Coombs, who has reviewed some of our writing and received survey responses from a few of us, has drawn two conclusions about what the movement needs: 1) Race-Crits, like all "outsider"

32. Mary Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992).

33. *Id.* (citing author's description of her own child's birth).

34. The first annual Conference on Critical Race Theory was held in June 1989 in a small seminary outside Madison. Precursor writings appeared before this time, of course, mainly in the work of Derrick Bell.

35. The thirty participants settled on Critical (or "the New") Race Theory after weighing a number of alternatives.

36. Richard Delgado, Annotated Bibliography of Critical Race Theory Writing (unpublished paper on file with author).

authors, are deeply torn by conflicting loyalties to their communities and to their academic peer group, and need to focus on the question of "audience."[37] 2) We need criteria for evaluating the new writing, the sooner the better.[38] In these comments I shall be concerned mainly with her second proposal—the call for criteria.

Coombs is not the first to discuss standards for judging the new scholarship. Randall Kennedy[39] and Stephen Carter[40] argue that standards are needed because the new scholarship is nonrigorous and sometimes grandiose; Edward Rubin calls for the same because the work is important and in danger of being misunderstood.[41] But Coombs' call is based on different reasons. We should develop criteria for judging the new *genres*, she says, because they can (a) help the new communities define themselves;[42] and (b) guard against harsh, unsympathetic judgments by mainstream writers.[43]

Does she have a point? I cannot speak for feminism. Perhaps her suggestions make sense for this other, more established movement. But as regards Critical Race Theory, I believe Professor Coombs is seriously wrong. I have read much of the group's literature and attended most of its meetings and simply cannot recall one occasion in which a CRT scholar echoed Coombs' call for standards. Many of us do, indeed, debate sharply with each other over various tenets of the Critical faith—Is anti-essentialism a helpful Critical tool or not? Is storytelling a useful adjunct to classical argument? Is there a distinct voice of color?

But no one, to my knowledge, has urged that we solve these disagreements definitionally, by first getting a fix on who we are. Coombs's call reminds me of those people who as soon as a group forms (*e.g.* to oppose a war), demand that everyone sit down, draft and

37. Coombs, *supra* note 32 at 692 (setting out author's thesis that outsider writers "[m]ore than traditional scholars . . . face a range of possible, sometimes overlapping, but distinct audiences. It is thus even more important . . . that we begin focusing concretely, both individually and collectively, upon the question of audience.").

38. *Id.* at 697 ("problem of the unfriendly eavesdropper"); ("defined by a commitment to the interests of people of color"); (necessary also to meet standards of the scholarly community at large.).

39. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

40. Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons From the Patent Law*, 100 YALE L.J. 2065 (1991).

41. Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. (forthcoming 1992).

42. Coombs, *supra* note 32, at 715 ("Such criteria are an inherent part of the definition of a community; they are a means by which we can understand our goals and improve our work.").

43. *Id.* ("They are also politically necessary to insulate the practitioner of outsider scholarship from the imposition of criteria developed by and for traditional legal scholars . . . [T]he task should be undertaken, despite the danger some outsider scholars have perceived in the very concept of criteria of judgment.").

sign a mission statement, agree on articles of incorporation, or adopt Robert's Rules of Order. "How can you know how to act," the question goes, "unless you know who you are?"[44]

How useful is it to spend time deciding whether Derrick Bell's *Civil Rights Chronicles*[45] is better than Mari Matsuda's *Voices of America*.[46] I think not very useful at all. And I am similarly skeptical about her second, instrumental, argument that the new rules will protect us against harsh judgments by unsympathetic others, *e.g.*, members of the tenure committee. I argue elsewhere that this hope is vain.[47] At the same time I fear Coombs's task will distract us and will focus on critiquing not things that need it (racism, social institutions, hierarchy), but other Crits.

Coombs calls for the wrong critical judgment. She would have us turn inward, start evaluating each other, and aim for internal purity and ideological correctness. In my view this is not a helpful proposal, particularly given the newness of the CRT movement. Only three years old, it is barely an infant. There are many things one can do with an infant: Observe it. Interact with it. Nurture it. Weigh it. Help it along. Learn to understand it. Ask if it needs anything.

But rush in with evaluative standards? Judge it, rank its eyes, limbs, teeth, hair, brain? Calling for evaluative standards in the case of a young movement, when legal scholarship generally is in a state of flux, is misguided. It comes too early, is an odd thing to be concerned about, and could stunt the movement's growth. There is also the serious risk that readers less sympathetic than Coombs will read her call and say: "See? Even one of them is calling for standards. I've thought all along that the Crits were getting away with something, writing sloppy, impressionistic work. Finally, here is one that agrees. Now on this tenure matter we have before us. . . ."

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44. For the view that this hope is always vain, see Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991).

45. Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); DERRICK BELL, AND WE ARE NOT SAVED (1990) (expanded form of the *Chronicles*).

46. Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L.J. 1329 (1992).

47. *Compare* Richard Delgado et al, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (formal rules sometimes constrain prejudice), *with* Richard Delgado, Judging Outsiders: A Task in Search of a Rationale, (unpublished manuscript on file with author) (arguing evaluation of scholarship is not such a setting).