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Outsider Scholars: The Early Stories Symposium on Trends in Legal Citations and Scholarship

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OUTSIDER SCHOLARS: THE EARLY STORIES

JEAN STEFANCIC* AND RICHARD DELGADO**

The two signature articles in this Symposium, surveys by Fred Shapiro and James Lindgren, show outsider scholars making significant progress in the world of law review publishing. Lindgren's survey shows minorities, women, and critical scholars distributed throughout his list of most productive scholars, appearing at or near the proportion their numbers in the law professoriate would predict. Likewise, Fred Shapiro's ranking of the most-cited law review articles from a recent ten-year period reveals a substantial number—approaching thirty percent—written by these scholars.

As Shapiro's article mentions, however, this is a relatively recent phenomenon. Hence, the two of us wondered what the early experiences of these outsider scholars (crits, radical feminists, critical race theorists) were like. Ten or fifteen years ago, were they producing the same groundbreaking work that they are writing now, but getting nowhere—being rejected by the top reviews, being told by their colleagues to write more mainstream fare? And what has been the cost, in terms of effort and pain, of their newfound celebrity? Do the outsider scholars reap the benefits, in terms of job offers, invitations to prestigious symposiums, and other measures of professional acceptance, that their stellar writing records would appear to merit?

To explore this human side of law review publishing, we interviewed a sample of old-timers in each of these movements. We sent each author a questionnaire, addressing only writers who had been engaged in outsider scholarship for at least ten years and who are recognized as leaders in their fields today. In some cases, the authors promptly returned their questionnaire with adequate (sometimes copious) answers. Others we followed-up with a telephone interview. In each case, we asked a series of questions about the author's early experiences with editors, publishers, and other scholars. We asked whether their treatment is changing or improving in any respect. The questionnaire we employed, as well as the cover letter we addressed to each author, are reproduced in Appendix A to this article. We re-

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** Charles Inglis Thomson Professor of Law, University of Colorado School of Law. J.D., UC-Berkeley, 1974.

ceived twenty-three responses: Katharine Bartlett, Derrick Bell, Robert Belton, Pat Chew, Martha Fineman, Trina Grillo, Catharine MacKinnon, Michael Olivas, Frances Olsen, Rhonda Rivera, Rennard Strickland, Nadine Taub, Mark Tushnet, Stephanie Wildman, and nine authors who asked to remain anonymous.

I. METHODOLOGY

As was mentioned, we chose authors who had been writing for at least ten years and who we thought most readers would consider path-breakers in their fields. These somewhat personalized selection criteria may well have biased the sample in some respect; casting a broader or narrower net might have changed the results somewhat. Some authors did not reply. Others requested anonymity, arguably reducing the value of the survey for readers who might believe the identity of a respondent is an important aspect of evaluating his or her responses. Nevertheless, we believe the twenty-three responses by thoughtful, high-visibility scholars reported below shed light on the human side of the breakthroughs outsider scholars have been registering in recent years.

II. RESULTS

We asked eleven questions, some pertaining to past experiences, others to the present situation. In response to the first question: *Did a law review editor or book publisher ever ask you to tone things down?* most authors said they had had such an experience. Many suspected that the basis for the editor's request was political. One critical race theory ("CRT") writer reported that he pulled an article when he and the editor simply could not see eye to eye. A well known feminist scholar reported that she had a series of disagreements with the editors of a top review who kept reversing changes made by the previous editor. Some of the best, most pungent material ended up deleted (and used later in a book). Another editor insisted on adding a lengthy section he wrote about Rawls; a third deleted a reference to bath-house sex out of concern that it might offend gay readers. The author reported that the final product, while not unsatisfactory or wrong, was no better than the original version and that the voice was not her own. Another author fought a pitched battle with her Harvard editor, "a real pain" who not only wanted to rewrite the article but ended up leaving it out of the indexes. A leading feminist requested that her editors include the first name of authors she cited

in order to increase recognition of women authors. The editors refused, insisting on bluebook convention, but changed their policy one year later. The author wondered whether the change would have started with her article if her name had been Bruce Ackerman.

Another early feminist recalled that one set of editors objected to her vivid phrase that women were bloodied by domestic violence because it seemed to them disrespectful to a Supreme Court justice writing in the same issue. Yet another writer struggled with an editor who said she should take out all facts about cases and parties, as well as quotes from judges. Just write “the law . . . make it sound like Prosser,” he told her. Winning that battle, she later confronted a challenge over her title—a play on words that could be read as accusing judges of being homophobic or narrow-minded.

Other authors reported that editors asked them not to refer to a person by name when making a negative comment, requested that they not use terms like “empathy” the editors considered nonlegal or soft, or demanded documentation to an absurd extreme, such as requesting a footnote to support the statement that women tend to take care of children in families. One author reported that her editors challenged her at every turn during each of nine edits, essentially attempting to convert her article on the anthropology of marriage law into a statistical piece. They also insisted she disclose her own marital status in the first footnote and generally treated her as though she must have a hidden bias which it was their task to reveal. An American Indian scholar reported that his editor at a major press acted as though he knew better than the author what Indians were like—romantic Hiawathas and sidekick Tontos, not lawyers and businesspersons. A well known CRT figure writing in the first person received a rebuke from an editor that this was not the National Enquirer of law reviews.

One author reported that her main pressure to tone things down comes from colleagues. Another, asked to review a famous author’s treatise on constitutional law, implied toward the end that the author’s scholarship had been corrupted by his ambition for a Supreme Court appointment. A colleague at another school somehow got a copy of a draft and wrote the reviewer urging that he tone down his assertion. Although he “did a bit of tinkering” in response to the letter, he did not retreat from his thesis entirely. The law review editors did not pressure him at all in this respect. Yet another author, anticipating flak, engages in self-censorship to avoid a conflict with his editor or publisher or to avoid the impression he sides unduly with minorities or

emphasizes the minority perspectives (“a Johnny one-note”). One author reported that she has been pressed to tone things down, but also the opposite—to be more contentious, name names, etc., when she was in a bridge-building mode (“as though critical means crazy, Mau-Mauing, titillating”). Another wrote “they all do” (ask me to tone things down), although editors are generally smart enough to put it differently. She says she never gives in—“they knew what they were getting.”

Question two asked if the author had ever been told by a publisher that he or she was too hard on whites or on men. Nine did not answer the question, perhaps believing their answer was implied in their response to question one (about being asked to tone things down). Two said “always, always, always,” another that colleagues say she is too hard on men. Another said he avoided that humiliation by self-censorship. Five said they had not had this problem. Two said their editors told them they could not see how they could write about family law without writing about men and men’s viewpoint at the same time. One said her editor seemed to have a commitment to heterosexuality and was uncomfortable with discussions of other sorts of family arrangements. Another said his editor kept saying he was not “balanced” in his presentation—a criticism that seemed to come out mainly when the author (a Native American) said something negative about whites or their treatment of Indians. A feminist reported that her editor insisted she soften her treatment of Justice Scalia, whom she wanted to compare to a seducer.

An Asian-American writer also reported accusations that she was overly critical of white society and should strive for a more balanced presentation. Yet others told her she was not critical enough. And still others thought her overly critical of other minority groups, or prone to exaggerate discrimination against Asian-Americans.

Question three asked whether the authors ever received an edit that seriously distorted their meaning. Most said they had; one said, “all the time. I’m brutally frank on the Supreme Court’s distortion of (Indian) history. Law review editors revere the Court.” Another reported her article was “completely rewritten—upside down—nonsensical.” A third that it is a constant struggle. A feminist says she is constantly fighting to avoid rephrasing of sentences in a way that changes or dilutes her meaning, making her thoughts less forceful or more accommodating. Another feminist, who teaches at a top school, said this happens to her “constantly.” Yet another responded:

"They all do. Editors are censors. They profess to believe that style is not content."

Authors say this occasionally happens out of ignorance. A leading critical race theorist who is also a feminist said that student editors often do not understand critical race theory and have introduced distortions. One African American scholar said that after he explained to the editor how she distorted his meaning, she agreed to go back to the original version. Others echoed this refrain. But two feminists reported that editors changed words after page proofs without telling them, with the result that they were unable to correct a serious distortion. An Indian law scholar said that he now generally publishes only in journals that solicit him to write; when this happens, the edit is less of a hassle. Only one author said she has not had a work seriously distorted by an edit.

Question four asked whether the individual had ever had trouble getting a really good article or book published. Many authors said yes, especially in the early days; only three authors said no. One said her work always receives some offers, but not at the really big reviews; another reported she does not have problems any more because her work is "pretty well known" now. Three said that they usually wait to be solicited, one because she is discouraged about the whole process. One, a critical race theorist, said CRT articles do get published, but not always in the prestigious journals they deserve. Another race-crit, attempting to reply to a vituperative article in a major law review condemning CRT scholars as anti-Semitic, wrote three drafts but still could not satisfy the editors. The original article still remains unanswered. A feminist said the correlation is inverse: she now sends her best stuff to lower-ranked or specialty reviews. Consequently, "My best stuff is buried." Another feminist said that she published a major article in a relatively low ranked review when others rejected it. It was later cited by a court in an influential decision. Another minority scholar said he seems able to get his material in at the level it deserves; he wonders whether he might have undershot, though, out of fear of rejection or lack of self-confidence. Like the other three authors just mentioned, he generally waits to be invited and does little cold submission. Another author said he gets few rejections now but did earlier in his career. Another, even after publishing a landmark article in a good review, could only get her subsequent work accepted at lower ranked journals.

A leading feminist said she gets few rejections, but only because she is not trying to make a living as a writer. "Real publishing is a

piranha tank. Getting real money for serious critical work is impossible." Another said she had such a pitched battle with her editor that they ended up at an impasse. She gave the article to another journal.

Question five asked whether a colleague had ever suggested that the author refrain from writing about critical theory or feminism but write instead about safe subjects like the tax code. Virtually all of our authors said yes. Reported one highly placed feminist scholar: "Yes, constantly." One woman of color exclaimed: "So many times," and another more ruefully said, "I did it to myself." Yet another, who was then teaching at one of the most interdisciplinary law schools in the country, said she was nevertheless told writing about sexual norms was not as safe as civil procedure. "Don't only do that," one scholar was told early in his career, even though his first article and book were on mainstream subjects. A scholar who wrote about family law reported that a colleague told her, "You'll never get it published." (She published it in *Harvard Law Review*.) Another feminist reported that this form of discouragement "was in the air," but did not let it stop her. Even one scholar who reported generally good experiences with editors and publishers said "a few colleagues said it was safer for tenure purposes" (to write about the tax code). "Hundreds have expressed amazement that I got tenure on my article in [a good review]," said one pathbreaking writer. Another said his dean wrote a generally laudatory recommendation letter about him once, in the course of which he nevertheless felt compelled to add: "But he continues to write about Indians, not law. We hope one day he will. . . ." Another said his colleagues encouraged him not to publish in the *Howard Law Review*.

A leading feminist scholar reported she did receive "steering," but it was a long time ago. "No colleague now would waste their breath. They do let me know that much of my work is a nonsubject, though." Another said she is not so much the object of such counsel, but often has to intervene on behalf of others who are. She tells them: "Be yourself. Write what you care about." A third said this happened to her many times before tenure. "This was standard advice." A scholar of color said that when he first got into teaching, "more than a few said I should write about 'safe' topics." Another scholar of color said he was told meaningfully to "branch out." One scholar of color did not receive this advice because CRT did not exist when she got tenure. However, now she hears that "my students are told that recommendations from me might lose them jobs."

Three questions asked about citation. *Question six asked how this author feels about the way his or her work is cited; question seven whether he or she thinks some of his or her best work is lost, miscited, or misunderstood. Question eight asked whether the author believed that if he or she said a certain thing and a mainstream scholar came along later and said the same thing, the outsider author would thereafter be ignored or relegated to a footnote to "Joe's idea."*

Only two authors had no complaints about the way he or she was cited. Two feminist scholars noted they were relegated to string cites or not cited at all "even when it would be perfect," or when the mainstream scholar later was saying essentially the same thing. A third feminist says she is not cited for work in more mainstream areas because she is regarded as a feminist, something that did not happen when she was writing about traditional legal issues. A fourth feminist said she is often cited simplistically, with a string of fourteen or fifteen assertions, most untrue or unnuanced ("_____ says *this*") so that they can become scholarly accusations used later to dismiss her work. Another has been cited for a polar proposition when her article was in fact qualified and cautious—"probably out of a need for a foil taking that position." One feels her work is mostly misunderstood or cited for points she never made. She recounts going to a conference, after publishing a pathbreaking thesis, and hearing no reference to her work. One of the papers, however, used a highly original heading from her article with no attribution to her. An Indian law scholar said his most denunciatory article is ignored, as is his most theoretical work; another that he was the first to analyze American Indian law in terms of race and racism—today, everyone does this, but generally without citing him.

A feminist of color observed that her substantial work in a non-critical field is ignored, and that her critical work is both caricatured by conservatives and co-opted by liberal white males without citation, even when she and a few others virtually invented that particular approach. "Only gays and lesbians cite my work, generally speaking," says one writer. Other articles about homosexuality and the law "tended to follow my schema and did not cite to my article." Though her articles garner few citations, many recent ones build on her premises and use her terminology. A Chicano scholar said he sends reprints to authors who have not cited him but used an idea or topic associated with him without citation. Another replied that his sharpest critics, who savaged and caricatured his work, have gotten their critiques published in top law reviews: "Crit-bashing is top news."

One feminist whose earlier work was ignored believes that conditions are better today because women not only tend to cite to each other but are more careful in doing so. Another reports adulation, but from outside the field of law. "I don't feel anything but incredulity at how much my work is cited, fought over, as well as praised . . . a lot of my credibility has come from *outside* the legal academy."

Yet one well known feminist scholar wrote:

I am a growth industry. Many others, especially women, make their careers by either . . . stealing my work or lying about it. Because my work treats sexual abuse of women as if it is significant, the approach of choice is lying. Careers are made by sucking up to white men by disavowing my work, often lying about it to do it. No one else corrects it. This includes my work in the world, not only my writing. . . . What happens is, I say things; they and I are maligned. A watered-down version is ripped off and presented surrounded by genuflections, and the author gets a job at places that have turned me down. . . . Virtually all of (my work) is systematically lied about, including with *no* cites or false and decontextualized quotes. There is no "scholarly debate" on this, because nobody publishes to expose it. It's OK to lie about me, but "nasty" and "uncollegial" to expose it, apparently.

Question nine asked whether the author believed he or she is receiving an appropriate number of invitations to contribute to law review symposium issues. Two said they were invited at least as often as their more traditional colleagues (but one said she generally declines invitations to symposiums: "I hate parties!"). Another said that though she has been advised to curb the implications of her work in family law in order to appeal to a wider audience, she presents her work unmoderated. When invited to one symposium as the only feminist, and only one of two women, her work was viciously attacked by one of the conferees, but students loved her paper. At another, five conservative male students who had single mothers asked to be put on her mailing list. ("That's why I continue to go.") Two reported that their invitation rate seemed acceptable; five that symposium invitations seemed ghettoized—they would be invited to subjects dealing with critical theory or feminist issues, but not ones on mainstream subjects where a critical perspective might nevertheless prove illuminating. However, symposium invitations during 1987—the bicentennial year—proliferated, a number with a designated slot for the "critical perspective." Said one writer, "I was expected to represent the entire feminist point of view." One eminent senior labor law scholar, an African American man, said that he receives two or three invitations a year, but mainly

from the lesser known law reviews. Four said the symposium invitations seemed always to go to “the guys”—the mainstream insiders.

Question ten asked whether the well known author is satisfied with his or her options for upward mobility. Five authors said they had little problem in this regard. One of these commented that she had gotten offers from top schools, still: “These are hard times. It is not surprising that many of us are not moving up. I’ve been lucky. Many talented people can’t get jobs.” A second said she has gotten somewhere, but critical race theory (her genre) is not reviewed in the *New York Times* book review section; nor has there been a Supreme Court appointment of a writer in this field. A third was pleased that she now had graduate students from all over the world. One said that arrival at a top school did not insulate her against ordinary failure; she sent an article out this year that was not accepted anywhere. Two authors said either that they had published a lot but gotten few nibbles from other schools, or that the answer to this question was “a close call.” (One went on to add that his *political* activities may have hurt his career chances more than his extensive scholarly portfolio aided them.) One said flatly: “No.” A final author said she “never saw writing as a way to get anywhere. . . . It isn’t why I write. . . . Things have changed because of my writing and that of others—not for me, but for a lot of women. That’s why I do it. It works.”

The final question asked whether the author thought things were getting better, worse, or were about the same as they were when he or she was starting out. The responses were almost equally split. Ten respondents said things were “better,” “much better,” or “somewhat better.” One said today there is safety in numbers; the former outsiders now have a degree of control and influence over publishing and book series; critics and feminists workshop and critique each others’ papers privately and at conferences. One early feminist was told by a legal historian that one of her earlier CLS articles was “just too weird for its time.” Today, however, she thinks law reviews are an “ideal spot for interdisciplinary work,” but admits she is “quite a Pollyanna about this element of the law professor biz.” Another early feminist believes that though white women have gained acceptance, this comes in most cases at the price of adopting male standards.

One author said things were no better. Six said better in some respects, worse in others. One said she is professionally more secure, but that the backlash against feminist writing today is stronger; another said things were better for her but worse for younger scholars; yet another indicated that in scholarship things are better, while per-

sonally, elitism reigns. A second feminist said things today are "different." In her early days there were no movements and little support. The Carrington¹ article immediately made matters worse; good people were denied tenure. This has abated somewhat, but now there is a tendency to categorize and pigeon-hole—a problem critics and feminists did not experience, at least as acutely, in the early days.

Two CRT writers agreed. Said one: "I started out more than fifteen years ago when there was *nothing*. Things are better but much more embattled and therefore precarious." And the other—though a leading writer—occasionally still has his grading monitored by students who think he is too easy, his discipline too soft, ignoring that his course is an advanced writing seminar and does not depend on a final exam.

One said that things are better now than they were ten years ago, but they are likely soon to get much worse. "We are beyond the crest. I expect things to worsen precipitously in the years ahead."

* * *

In closing, we can do no better than reproduce in full a letter we received from one of the respondents about a week after we collected our survey returns. The letter records some afterthoughts the writer had in the days after filling out our form, recounting, in chilling detail, how she sees her life as a scholar:

1. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

February 12, 1996

Dear Jean and Richard:

I had a few more thoughts about the questions you asked on your form. The first is that none of what I described there is over. None of it is past, lost in the bad old days. The attacks and the lies about my work escalate every day, by the pornographers, the mainstream media, and in legitimate scholarly venues. In fact, that is their usual trajectory: from the pornographers, with their bastardized quotes and sexualized hostility; to the mainstream media, looking for facts to report and characterizations it can get away with that aren't libelous but support the pornographers' demonized image; to the academy, where the same false facts are re-reported and the same doctored quotes are re-published and the same lies are repeated and the same fabrications are reiterated, as if they reveal my true motive for saying the sky is blue — this time in the guise of analysis. Other than Andrea Dworkin, and this is done to us together, virtually nobody does anything about any of it. The activity of the other side is a known problem, but the passivity of our side is beyond description.

*But understand that writing and publishing, the focus of your research, has been very much the best part of my so-called career, the brightest spot, what was open to me when all else was closed. When I had no job, I could always get published. Journals sought my writing; I had a forum. I did accept that I wasn't going to be published in law reviews, but I found other ways. Specifically, because I refused to write in law review article goose-step, I created the device of publishing speeches, so there was a text the editors had to be faithful to that couldn't be eviscerated by what is called editing. Also, when I first wrote my legal theory, nobody in law did theory, far less published it in law reviews. So it took it from 1971-2, when I wrote the basic parts of what became *Toward a Feminist Theory of the State*, to the mid-eighties, to find *Signs*, a women's studies publication, where I could publish something like a "theory of the state" and talk law and women at the same time. Now it is common to write theory — or what people think is theory — in law reviews. But the point is, I did get it published. The sexual harassment book was turned down by Pantheon but got accepted immediately at Yale press, although I was just a student. So I can't say that I encountered barriers in publishing, not as I understand barriers from the rest of my life. It means no options. Having a life in which it is possible to write has been something else entirely. But that is not what you asked about. Your research starts later; it seems to suppose an income, a voice, the conditions for creating a text.*

I look forward to what you do with this study.

Warm regards,

Kitty MacKinnon

APPENDIX A

February 15, 1996

Dear _____:

Have you had any graphic experiences or "horror stories" with editors and publishers along the way toward becoming eminent? Were things worse in your early days as a professor and writer, but somewhat better today?

The two of us are critical scholars who have written about the social construction of legal knowledge and authority, and the politics of legal publishing and citation. We invite you to tell us your stories of frustrations and breakthroughs in law review and book publishing over your career, especially the early years.

You may record your answers in the space provided after the brief questions at the end of this letter. You may also choose to be interviewed by phone. You may also remain anonymous, if you prefer.

We will incorporate your answers in a short article we are co-authoring entitled *Outsider Scholars: The Early Stories*. In it, we record and discuss the experiences — including the highs and lows — of early crits, feminists, and critical race theorists who wrote in the early days of their movements — the pathbreakers, in short.

The article will appear in a symposium issue of CHICAGO-KENT LAW REVIEW entitled "Trends in Legal Scholarship and Citation," scheduled for July 1996. The symposium will contain articles by Jack Balkin, Deborah Merritt, Richard Posner, Mark Tushnet, Fran Olsen, Sanford Levinson, William Eskridge, Nancy Levit, and others. It will also feature two surveys by Fred Shapiro and James Lindgren. Both surveys show women and minority scholars making significant breakthroughs in legal publishing, their names and articles appearing in most-cited and most-published lists in a way they did not before.

Our premise is that this was not always so (and may not even be true today). Hence our interest in your stories and experiences. Please take a few minutes to let us know how it was for you. Richard, who bared his soul in *The Imperial Scholar*, reports that it may actually have done some good. We hope you will do so as well. Thank you for your cooperation.

Questions:

1. Did a law review editor or book publisher ever ask you to tone things down? (Please explain.)
2. Did a publisher ever say you were too hard on whites or on men? (Please explain.)
3. Did you ever receive an edit that seriously distorted your meaning? (Please explain.)
4. Did you ever have trouble getting a really good article or book published? (Please explain.)

5. Did a colleague ever urge you to stay away from critical theory or feminism and write about the tax code (or other noncontroversial subject) instead? (Please explain.)

6. How do you feel about the way other scholars cite your work?

7. Do you consider that some of your best stuff is lost, miscited, misunderstood, or unpublished? (Please explain.)

8. If you say a certain thing and a well-respected mainstream scholar later says the same thing, are you ignored or relegated to a string footnote? (Can you give an example?)

9. Are you invited to write for all the good symposium issues, or do the party invitations go mainly to the guys (viz, the insiders)?

10. Are you writing like crazy but getting nowhere?

11. Are things much better? _____ No better? _____

Worse? _____ today than they were when you were starting out?

< Please fax this form back to us with your answers, if possible by Feb. 6 at 5:00 p.m., at (303) 492-1200. Please check one of the two boxes below:

_____ I have no objection to having my name used in the article.

_____ I prefer to remain anonymous.

< Do you prefer to give your answers to one of us by telephone? If so, please check one of the following:

_____ I would like to be called by Richard Delgado.

_____ I would like to be called by Jean Stefancic.

_____ I would like to be called but have no preference.

< Would you like to receive a copy of the article?

_____ Yes, please send me a draft.

_____ I'm willing to wait until the issue comes out.

Thank you for your time and cooperation. If you have any questions, please call us.

Sincerely,

Richard Delgado

Charles Inglis Thomson Professor of Law

Jean Stefancic

Research Associate in Law

STUDENT NOTES AND COMMENTS

