



# *So let it be written*

*In the last eight years the Chicago-Kent Law Review conducted three faculty productivity surveys* to quantitatively and qualitatively identify the 50 most productive law school faculties in the nation. In the study published this year, *BYU* rose out of obscurity to nab slot number 25.<sup>1</sup> Reasons for the rapid rise on this scale are various. “In the early years, the first order of business for faculty was to master courses taught and get the law school organized and running,” explains Associate Dean Clifton Fleming. “These issues haven’t gone away but are no longer emergency matters. Now faculty can turn to other important things, like publishing.”

*by Louisa Lyman*

ILLUSTRATION BY ROBERT NEUBECKER

Further he says, “The law school as an institution has given enormous encouragement to publishing. Hiring decisions consider potential or proven productivity and this is an issue in promotion and tenure issues as well.”

“The biggest single factor,” offers Kevin Worthen, “is Jim Gordon.” Gordon, now associate academic vice president of the university, publishes frequently in the twenty top journals considered in the survey. He, however, is quick to credit others as well—among them Worthen. “We published in seven of the top 10 journals,” he observes modestly. “A nice recognition.”

It’s not an easy bunch to break into. With few exceptions, the list is limited to general interest law journals edited by students and published by U.S. law schools. Included are names like *Harvard Law Review*, *Yale Law Journal*, *Michigan Law Review*, and *Stanford Law Review*.<sup>2</sup>

“It’s appropriate to direct output to the scholarly academic audience,” Fleming concedes, “but also appropriate to direct output to the judiciary, practicing bar, and law students.” Publications for these constituencies cover a wide range of materials, including casebooks, published symposia, encyclopedias, anthologies, in-house teaching materials, law reviews—consisting of hundreds published by universities and private organizations—and practitioner-oriented loose-leafs, not to mention the myriad publications in other areas of faculty interest. “The survey,” admits Gordon, “shows only one part of the picture, but in that part our faculty performed very well.”

#### *Getting Started*

In fact the BYU law faculty has performed well in all areas of professional writing. How they actually hit on a particular writing topic varies. “It’s different with every

topic. I discuss the topic with colleagues, try it out on students, cultivate it, think about it. “Sometimes the process is quick; sometimes you have to nurture the idea for a long time.” If a topic is truly intriguing to the writer, it will survive over time and generate enough energy “to carry it through the tedium of the midproductivity doldrums when writing becomes long and boring and you’d rather quit,” as Richard Wilkins puts it. Fred Gedicks adds: “Writing is hard enough that you’ve got to do what you’re interested in.”

The freedom to “write on what interests you rather than on what clients are interested in,” according to Wilkins, is “one principal reason to take an academic position.” Worthen agrees, and confides that when he’s writing an article, “I pinch myself and say, ‘Hey, I get paid to do this stuff!’” Practitioners aren’t paid to find out why things are the way they are, asserts

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Though the current survey, unlike those in the past, considered faculty-edited, specialty, and interdisciplinary journals, very few of these figure in the final list. Still excluded are the many privately published law journals rife in the country. “Some law reviews aimed at the practicing bar have much larger circulations than the top 20,” asserts Fleming.

Fleming’s criticism—that the survey is limited to such a small list of journals—was one of those leveled at the study when it was first published. Another was that it didn’t allow for the many other types of faculty publishing. Fleming concurs on this last point as well. “The survey is a very narrow measure of productivity and not a particularly appropriate measure for a professional school. Law reviews are heavily skewed to an audience of law professors and their theoretical concerns, and law school constituencies, such as lawyers and judges, are underserved.” The Chicago-Kent response in both cases was that expanding the list to include more journals or to other types of publishing “would [fall] by its weight.”<sup>3</sup>

project,” purports David Thomas. “Some things I’ve done because I see a need. Others I’ve been assigned by a publisher. For a long time I’d been preoccupied with treatise writing, updating, and new chapters for books. So last summer I got two journal articles out just to see if I could still do it.”

Many publications for Thomas and other faculty members are a side product of their involvement in professional organizations. Dale Whitman currently serves as co-reporter for *Restatement of Mortgage Law*, now in its fifth tentative draft. His last two journal articles grew out of his work on the restatement.

Perhaps the most satisfying reason to write is that a subject “catches your fancy,” as Gordon puts it, and you feel you have something to say. These intriguing topics may relate to his teaching, supreme court cases, discussions with students and faculty, or articles and books he reads. Once he’s interested, Gordon dis-

Jean Burns: “Clients want to get from A to B. In a law review article, you don’t have to get to B. Instead you are free to explore where the law should go—should it go to B or C or D?”

Naturally, writing topics are often closely related to teaching assignments, though, unlike the situation at some universities, that is not a prerequisite. Writing in the areas one teaches has the advantage of improving teaching and assisting the author to become a recognized authority on the subject, however. “It’s easier to get ideas when you know an area well,” observes Gedicks. “Then when you think a new thought, you know it’s new.” Mature scholars, in his view, write the article first and then do research. As a beginning scholar, the opposite is true.

Dale Whitman writes almost exclusively in the areas he teaches. “I’m in a rut,” he confesses. “I’ve been writing on property and real estate for so long it would be an act of temerity to write anything else.”

The imposing bank of filing cabinets in his office is organized by section numbers for the five books he authors and updates for West Publishing. Though this organization facilitates updating his work, he laments, "It is an albatross around my neck." He consults the same files when he prepares an article. Generally 80 percent to 90 percent of the material he needs is in his files, and he has only to decide what position to take before he begins to write.

The supply of topics, says Fleming, is "inexhaustible." His "concern is not what to write about, but how to find time to write on topics out there in abundance." Topics for writing, laments Worthen, are "a two-edged sword. At first you wonder what you'll write about, but the more you write, the more you find to write about. Right now I have 15 ideas. The biggest challenge is to focus." Cheryl Preston, looking at the boxes ranged around her office, agrees. "Papers are just bursting to get out of every one of these. My brother once said he had a paper itching to get out of his head, and I could

incomprehensible titles. These include abortion, same-sex marriage, and feminist issues over more prosaic subjects such as banking, property, and antitrust. Says Burns, "It's easier to get an article on law and religion published now days than one on the ucc." Even if an article deals with a topic commonly treated in a journal, the author must consider that certain points of view are not tolerated. "The most popular journals have a political correctness attitude that makes it hard to get a conservative article on an issue of social morality published," Lynn Wardle believes.

As to why some topics are popular and others not, Burns recalls: "Michael Goldsmith once told me that the student editors favor articles on first-year class subjects, especially constitutional and criminal law. Current hot topics in constitutional law are law and religion and freedom of speech. In criminal law, it's the death penalty."

Though Burns does not advocate picking topics by what is currently popular, authors can't afford to discount the importance of student preference. "Though some articles

interest and pays close attention to the articles similar to those she is working on as well as their footnotes. Footnotes give her names of other journals to consider.

If a faculty member's areas of teaching or writing do not fall precisely into subjects favored by the major journals, writers do better to send their work to special interest journals or link their area of interest to a constitutional or rights issue. "I write Indians and \_\_\_\_ (fill in the blank) articles," Worthen quips. Because Indian law, his main interest, is not at the top of most people's lists, he gives the Indian law a "spin" to more popular areas of law—the federal court jurisdiction in an Indian law context for example, as well as state and local government, international law, equal protection, and same-sex education—meaning all-boy or all-girl schools. "I ask myself, 'How does Indian law inform this issue?'"

Jurisprudential or esoteric topics don't turn Gedicks away from the top journals. With an undergraduate degree in economics and lots of philosophy and literary criticism to his credit, he's armed to take on deconstruction, hermeneutics, postmodernism and a lot of other -tions, -isms and

**We shouldn't be embarrassed to talk about it."**

### **—Frederick Mark Gedicks**

visualize Athena bursting full-grown from Zeus's brow. The metaphor is different for me. I feel like I'm pregnant, and I won't be comfortable until the baby has arrived."

#### *Getting Published in the Top 20*

Naturally, potential publishers influence the choice of topic. Nowhere is this more evident than in the journals considered in the Chicago-Kent survey. The top journals are heavily "oriented to questions of individual rights and not necessarily to getting the work of the world done," criticizes Fleming. "Though their theoretical materials are important, they are not on issues most lawyers deal with." Burns, who Worthen credits with an uncanny ability to psyche out potential law review markets, agrees: "The major journals often concentrate on what I term jurisprudence." Roughly, jurisprudential topics are those related to high profile constitutional issues—many written under the guise of

may be referred to faculty members if the editors have questions," cautions Burns, "students usually have both the first and the last word about what is published."

Gordon concedes that "the students who select the articles for publication in the law reviews tend to be influenced by current fashion, but fashion is only one factor in the process." Other major considerations are well-reasoned development, impressive research, and writing style.

No matter how well an article is written, however, it makes sense to submit it to journals known to publish similar pieces. Says Burns, "You watch which journals are publishing which things. If you run into entire issues or symposia about things you don't understand and you need Fred Gedicks to explain it to you, then you know the journal's not for you." Burns regularly reads the top journals and those in her particular areas of

-ics with aplomb. "I've learned to trust my instincts," he explains. If he has a particular reaction, he knows he should develop it into an article. "Religion is a plus. There aren't many LDS legal scholars and our religion gives us a unique perspective. We shouldn't be embarrassed to talk about it." He doesn't apologize for quoting LDS scripture to make his point, nor for references to LDS history and has placed articles with a Mormon slant in prestigious law reviews. One of his books, *Rhetoric of Church and State*, was published by Duke University.

Like Gedicks, Jack Welch frequently writes on law and religion because he feels that what he says hasn't been said before. For him writing ideas concisely and analytically is an exercise. "I like to try to organize vast amounts of information into coherent patterns or categories. I never feel I've understood a subject until I've written

about it.” And like Worthen, he often links major interests to law—Book of Mormon and law and Biblical law, for example.

Wilkins, Wardle, and Preston all write on constitutional issues that are often in the news. Though Preston’s first published piece after coming to BYU was on a banking issue, feminist issues now vie with her banking interest and place her squarely in the top journals. As she says, “I explore the way gender-specific experiences affect the way we make legal decisions.”

Likewise Wardle’s current writing coincides with the interests of the major journals. He just finished an article on same-sex marriage and has published several pieces on abortion. He feels compelled to write on such subjects, not because they are popular issues and not because he feels his contributions have changed the law, but because the literature is one-sided and he wants to make the community aware of the issues, laws, and contradictions, particularly of the abortion doctrine. Wardle hopes that “someday that doctrine will change. Maybe our students will be instrumental in getting the law corrected.”

Wilkins also addresses the abortion issue, though he is not as optimistic that the law will change. Because of his teaching focus on constitutional law, civil rights, and

simultaneous submissions are being made, and this puts pressure on the staffs to respond quickly if they want a particular piece. “If the article isn’t accepted, by the first 20, I try the next 20 journals on my list,” explains Burns. Whitman prefers to “save the trees” by not sending out an article until he has some assurance that it will be considered. “I call a colleague on the faculty and tell him or her what I have. Usually she or he will offer to hand carry it down to the law review.”

Whichever method is used to get an article into the hands of the law review staffs and accepted for publication, nearly every article produced by the BYU law faculty is eventually accepted and published somewhere, many in the top markets. The difficulties entailed in placing articles in high-profile journals may not seem worth the bother, but Preston feels they are counterbalanced by the sense of community engendered: “I find it much easier to stay involved in research if it relates to broad life experience. You get the sense that you are in a conversation with people.” When she first came to BYU, someone advised her to find a little niche where no one else was writing and fill the need. She has rejected that idea. “It’s much more interesting to work where everyone is building on everyone else.”

addressing client problems, they are serving both the practicing bar and their clients,” says Fleming.

Though Thomas and James Backman have both been published in law reviews, they are currently deeply involved in loose-leaf publishing of particular value to attorneys. “Some years ago, a colleague approached me after a professional meeting to ask if I knew anyone who would update a chapter in a highly regarded property service,” recounts Thomas. “I gave her some names but soon saw that what she wanted was for me to volunteer.” That began a long-term commitment for Thomas and for Backman, who agreed to join him in the effort. What started as one chapter expanded to several over time as well as to other loose-leaves for the same publisher. The key to continued relationships with publishers, observes Backman, “begins with getting a chance” then being “loyal, consistent, and diligent in meeting deadlines.” Most recently Thomas revised an entire property set for a different publisher, with an extremely positive response. Both men comment on the value of collaborating. “It’s nice to work with Dave,” comments Backman. “We encourage each other, share experiences, and often use each other on our projects.”

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federal courts, his writing usually addresses social issues that find their way into the courts. His controversial topics include voting records and the ideological leanings of justices, the role of advocates in courts of appeal, and American law in international relations. Interestingly enough, one of his latest articles deals with Charles Dickens and modern notions of community and responsibility. Of his writing he asserts, “I don’t write to clarify an arcane little area of interest to academics. I’m more interested in debating broad social issues relevant to society.”

Once an article is completed, the submission process begins. Burns and others send their pieces out in waves to 20 or 25 journals at once, opting for the most prestigious first. Most law reviews expect that

### *Getting Published Elsewhere*

Certainly, the Chicago-Kent rating is valuable to the Law School. “It shows that we have a faculty measured by several important constituencies of law schools and judged to be excellent,” sums up Fleming. “It will catch the attention of students and new faculty we want to recruit and should also benefit our fund-raising efforts.” But its value should not be overestimated to the exclusion of other valuable writing, all of which is of service to the Law School’s constituencies and is rewarding in its own way.

*Serving the Bar.* One constituency is the practicing bar. “People will often decide how they feel about the legal system based upon personal experiences. When faculty members produce materials to help thoughtful lawyers be more effective in

Whitman also updates titles of particular interest to the bar. His approach is methodical and ongoing. “I get the releases for all of the reporters. With student help I go through each one, eventually snipping all those cases that impact on the subjects of my publications and file them under section and paragraph.” Anything not in his files, he can usually get from WESTLAW.

Fleming’s publications also benefit the bar. Though distanced from the ivory tower, “good lawyers are looking for creative solutions and need good analysis and theory,” he says.

*Serving Students.* Besides the kinds of materials the BYU law faculty publish in journals, treatises, and loose-leaf services, several also author textbooks and other student-oriented materials. Whitman

authors and updates two case books, two hornbooks, and a black-letter law for West Publishing. Fleming recently published a new text for basic income-tax courses. Wardle is preparing a conflict-of-laws casebook. Even if they don't publish their materials, most faculty members prepare extensive class packets and supplements. These may be collections of rulings and readings, as those Welch does. He prefers to custom make his own materials rather than use others'.

*Serving the Judiciary.* Judges are another of the law school's constituencies. The assumption is often that judges go to the law reviews or privately published treatises for guidance in making difficult decisions. Wilkins insists this is seldom the case: "Academics write to each other, and judges ignore it. When asked if he consulted prestigious law reviews when he reviewed a case, Justice Scalia greeted the suggestion with a loud guffaw." Wilkins recalls sending a particularly well-reasoned article to a Supreme Court justice who was then dealing with that very issue. He received a gracious thank-you letter in return, but the letter was dated so soon after he had mailed his article that he knew the judge couldn't have read it. Wilkins admits his perspective is nontraditional, but rather

jects, may have more impact in the long run."

Likewise, the research and writing to prepare testimony for the United States House and Senate or for teaching constitutional adjudication to state and federal judges in Utah requires large expenditures of time. "Not measured on a scale of productivity, these efforts may do more to promote ordered and reasoned development of law than any single article," Wilkins said.

*Serving the Larger Community.* Naturally all the scholarly writing undertaken by law professors at BYU is not law related. Welch has written on such diverse subjects as scriptural poetry and prominent LDS scholars. "I've always loved to write," he confesses. "I published my first article on chiasmus in the *Book of Mormon* when I was a junior at BYU. Since then there has only been one year, my first year at Duke Law School, when I haven't had something published." His writing takes him into "many different worlds," and he "can't imagine doing without any of these dimensions. They all have a way of complementing each other and compelling me to communicate clearly. Really good writing in one area enhances your ability to write well in another," he said. Editor as well as author, his name figures on many

others it is, as Backman says, "a juggling act." "It helps to make commitments so when they approach, they turn into emergencies," Fleming observes. Welch tries to write daily. He carries a laptop, he dictates, he has a home computer and two offices on campus. "I can write wherever there's a phone's not ringing," Burns has staked out a retreat at the University of Utah medical school library near her husband's office. "It's quiet and air-conditioned; I don't know anyone, and I'm not tempted to read the books." Somewhat computer phobic, she writes her first draft longhand and often calls on the "excellent law school secretaries" in preparing the final drafts.

Usually, scholarly writing requires uninterrupted blocks of time, a rare commodity during the school year. "Books, the computer, things on the desk yell out at me," says Backman. He addresses the problem when classes are in session by having an office in the Lee Library and by retreating, when possible, to his cabin. Most prefer to do their intensive writing during the summer. Not only are generous research grants available to support such writing, but computer systems and librarians are less in demand and more available to the faculty. Whitman, who does summer bar-preparation courses around the country, carries his

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than hope his articles reach the judges and have an influence on them, he prefers to be actively involved in the system. He freely admits that "one of the biggest enemies to academic productivity is getting involved in real-life litigation." Nevertheless he will continue to contribute pro bono time to such causes as prolife, profamily, and prochildren movements because that service has, in his view, "a more significant contribution to make than law review articles." A substantial amount of writing goes into defending such causes, though none if it figures in the publishing indexes. Over the past few years he has written briefs or amicus briefs on issues like school prayer, racial discrimination, voting rights, and abortion. "I believe that work, fully as difficult as writing articles on the same sub-

until I've written about it." —*John W. Welch*

FARMS (Foundation for Ancient Research and Mormon Studies) publications, almost all of which he has had a hand in editing. Currently he edits *BYU Studies*.

Beyond the contributions made by the teaching faculty, the law library faculty publishes widely in law librarianship, librarianship generally, and in nonlibrary publications.

### *Getting the Time*

The time required to produce the materials sent out by the Law School is prodigious, but the faculty accept it as their due rather than an annoyance. For some, like Thomas, output is steady throughout the year. For

laptop with him and hooks into WESTLAW in his hotel room or spends his days writing at a local library. Naturally all writing does not occur during the summer, but as Backman explains, "editing, updating, and reading proofs is something that doesn't require the same level of concentration as the initial research and writing. It can be done when school is in session, in the evenings, or on weekends."

### *Getting Support*

Time to write in the summer is generously supported by the Law School through funds it has raised. "Grants are available to almost everyone who submits a proposal,

explains Worthen, currently on the Faculty Research Committee. "At the end of the summer, faculty report on their progress and submit any new publications to the committee."

Grants received elsewhere are also encouraged by the university. Wardle, for example, received a grant from the National Endowment for the Humanities that allowed him to study outside sources. A Fulbright Grant recently allowed Worthen to live, teach, and research Indian issues in Chile.

All faculty are allowed funds for research assistants. Much of what student assistants do is akin to clerking duties at a firm. They find cases, locate laws and regulations, and do research. Generally they do

not do any of the writing for the final products, but their contribution is immeasurable. Some students make such a contribution that their names figure in the final publications. The annual survey of Supreme Court opinions that Wilkins compiles, most recently published by *Hastings Constitutional Law Quarterly*, bears the names of his student aids as well. Similarly several of Welch's law review articles are coauthored by student research assistants and even classes. "I like collaborating with students and colleagues. Each brings different perspectives to the project." He also appreciates the opportunity this gives to critique each other's work.

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tronic capabilities, available to every faculty office, which allow access to on-line and CD-ROM databases.

The level of university support, in time, money, human and computer assistance, makes writing at BYU less arduous and more rewarding than at many other schools. "We are liberated in this environment," says Wardle. "There's not a negative competitiveness—'If she gets ahead, I look bad.' Rather it's 'If she gets ahead, we all look better.' There's less turf protection and narrow-minded parochialism here." Preston appreciates this as well. "Just the fact that they let me do this stuff," she says, referring to her current research interests, "is a great show of support. But colleagues also edit for me, allow me to

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er that doing scholarship itself is exciting and enjoyable. It sharpens your thinking, helps you learn, and involves you in a larger dialogue about law."

#### NOTES

1. The 1989 survey covered the years from 1982 to 1987 (The Executive Board of the *Chicago-Kent Law Review*, *Chicago-Kent Law Review Faculty Scholarship Survey*, 65 CHI.-KENT L. REV. 195 [1989]), and the 1990 study covered 1983–1988 (Janet M. Gumm, *Chicago-Kent Law Review Faculty Scholarship Survey*, 66 CHI.-KENT L. REV. 509 [1990]). BYU did not place in the top fifty in either one. In the recently published survey (Colleen M. Cullen & S. Randall Kalberg, *Chicago-Kent Law Review Faculty Scholarship Survey*, 70 CHI.-KENT L. REV. 1445

bounce ideas off them, and route me articles of interest."

Despite the high levels of support, Fleming feels more can still be done to foster a writing faculty. Sabbatical leaves, currently not funded, "would help faculty to approach a bigger project presently beyond our capabilities." Likewise an enlarged travel budget, which is currently "somewhat constrained—particularly concerning international travel—would send more faculty out to cross-fertilize by presenting papers at conferences." Additional faculty slots, "particularly in international areas, would broaden subjects in which faculty do research," says Fleming. Additional funding for administrators to assume some nonscholarly chores now done by faculty and additional funds for librarians and secretarial help would all contribute to productivity.

[1995]), covering the period from 1988 to 1992, however, BYU rated 30TH for number of articles and pages per faculty member in the ten leading law reviews, 21ST in articles and pages per faculty member in the 20 top journals (excluding in-house articles), and 24 in articles and pages in the top 20 journals (including in-house articles). They rated 25TH overall.

2. The survey rates faculty publishing in the top 10 and the top 20 journals. The criteria for the top journals have changed in each survey. In the most recent, the list was determined by counting citations to law reviews in *Shepard's Law Review Citations* and the *Social Sciences Citation Index*. The top twenty, as determined by this method, were *Harvard Law Review*, *Yale Law Journal*, *Michigan Law Review*, *Stanford Law Review*, *Columbia Law Review*, *University of Pennsylvania Law Review*, *University of Chicago Law Review*, *California Law Review*, *Texas Law Review*, *Duke Law Journal*, *Southern California Law Review*, *Cornell Law Review*, *Georgetown Law Journal*, *UCLA Law Review*, *Journal of Legal Studies*, *New York University Law Review*, *Harvard Civil Rights-Civil Liberties Law Review*, *Vanderbilt Law Review*, and *Northwestern University Law Review*. For more detail on the selection of these titles, see Cullen & Kalberg, *supra* note 1.

Besides student assistants, faculty may occasionally have reduced teaching loads during the school year to allow more writing time.

Finally, professional research librarians and the extensive library collection make an important contribution. Unlike law schools where faculty researchers are expected to purchase their own sources, a significant portion of the Howard W. Hunter Library collection supports faculty writing. Library reference faculty devote untold hours to aiding faculty by accessing the collection and locating obscure sources. "I joke with Gary Hill," says Worthen, "that I'm going to give him a source he can't find—but so far I haven't succeeded." Fleming also emphasizes the advanced elec-

#### Getting Paid

The BYU Law School profits from the increasing output of its faculty, but most faculty agree that, ultimately, writing is its own reward.

"When I first went into teaching," confesses master teacher Gordon, "I thought doing scholarship was the price one had to pay to be able to teach. But then I discov-

3. Janet M. Gumm, *Chicago-Kent Law Review Faculty Scholarship Survey*, 66 CHI.-KENT L. REV. 514.



—Lynn Wardle