The Law Review Follies

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"Would you want the New England Journal of Medicine to be edited by medical students?"[1]

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INTRODUCTION

The world of law review scholarship is a bizarre one and has been for a long time. Traditional forty-plus page law review articles with hundreds of footnotes are barely read, except by law school hiring and tenure committees and maybe a few other law professors writing on the same subject. Many professors are frustrated by the unduly lengthy time, often a year or more, that it takes for an article to go from submission to print, usually with much wrangling between student editors and faculty over the smallest of editing decisions. The need to footnote every idea, even universally accepted statements of obvious fact, disturbs and frustrates many law review authors.[2] And the competition to the traditional law review article, in the form of shorter and less-footnoted online law review essays, op-eds, blog posts, and online journals such as *Slate*, *National Review*, and *The Atlantic*, among many others, has never been fiercer. In short, the traditional law review article is in great jeopardy, and that is

* Kathy & Lawrence Ashe Professor of Law, Georgia State University College of Law. Thanks to the excellent students of the *Loyola University Chicago Law Journal* for hosting this wonderful symposium on legal scholarship and to all the faculty who attended the conference and provided many insights that helped shape this essay. Warning: the footnotes to this essay will be unconventional and may be dangerous to read for those who take The Bluebook seriously.

1. Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. Times (Oct. 21, 2013), https://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?_r=0 (quoting Professor Richard Wise).

2. *See* this is just true.

exactly as it should be.

I am far from the first person to point this out. Here is Professor Barry Friedman:

> There are too many law reviews. So many reviews that just about anything any author writes can get published. Much of what gets published is of dubious value. Student editors are incapable of separating the wheat from the chaff. Faculty should select the articles for publication in law journals, or there should be peer review, or both. The process of selecting articles for publication, and the process of editing them, are seriously broken. Maybe we could do without most law reviews altogether. The thing is, this is all old news. Very old news.[3]

Supreme Court reporter Adam Liptak once wrote that, "[l]aw reviews are not really meant to be read. They mostly exist as a way for law schools to evaluate law professors for promotion and tenure, based partly on what they have to say and partly on their success in placing articles in prestigious law reviews."[4] And Professor James Lindgren did not mince words when he observed, "[o]ur scholarly journals are in the hands of incompetents."[5] No offense to the hard-working *Loyola University Chicago Law Journal*, or any other law review students, but their talents simply do not match their job descriptions.

This short essay outlines the major problems with law reviews and suggests a few fixes. Part I will—no, wait, I am not doing that. Just read on.

I. Too Long, Too Many Footnotes, Too Bland

In the most recent issue (well, it will not be close to the most recent when this essay is finally published) of the *Harvard Law Review*, Professor Daphne Renan wrote what should have been an important and timely article on presidential norms.[6] Unfortunately, the article is ninety-six pages long with 510 footnotes. This length is beyond all reason. The commitment it takes to reading, *really* reading, the entire article, is almost the same commitment it takes to read a book, though the footnotes make it possibly harder. I do not know how many people will read this piece from first word to last, but I am quite sure it will be much less than a

3. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3936&context=dlj at 1299–1300. This is the only cite you get, sorry, which I know will make it harder for you to re-cite in law reviews that require serious bluebooking. That is the way it goes sometimes. I do not believe anyone will walk to a library to get this article. If you the reader want to read it, click on it, and you will have a box seat.

4. Liptak, note 1.

5. *Id.* (quoting Professor James Lindgren).

6. Daphna Renan, *Presidential Norms and Article II*, 131 Harv. L. Rev. 2187 (2018), https://harvardlawreview.org/wp-content/uploads/2018/06/2187-2282_Online.pdf.

typical essay in *Slate* or *National Review*. The length of law review articles is quite a deterrent to their being read, and will prove even more so as time goes on.[7]

One of the reasons law review articles are too long is that most break one of the cardinal rules of good writing. Footnotes should only point the reader to the source of the statement in the text or maybe to other helpful information for the interested reader. Placing substantive information in footnotes is quite confusing.

For example—and this is common across law review articles—the author of the aforementioned opus on presidential norms says the following in the text about the president's duty to defend federal laws: "The norm requires the President to defend a statute against constitutional challenge in court, even if the President concludes the statute is unconstitutional, unless the statute interferes with the President's own constitutional authority."[8] After this sentence, there is a long footnote only *some* of which I am reproducing here:

> Pursuant to norm-based practice, the general duty to defend the constitutionality of a statute is limited to those circumstances when a reasonable argument can be made in the statute's defense and does not apply (i) when the President concludes that the law misinterprets the President's constitutional authority, or (ii) when defending the statute would require the Department of Justice to urge the Supreme Court to overrule or alter a constitutional precedent.[9]

Why is this article broken up into text and footnotes in this manner? If the latter sentences are important, they should be in the article's text. If they are not, they should not be there at all. I do not mean to pick on this author, as this problem runs rampant throughout traditional law review articles and makes most articles difficult to read and understand.

It has been true for a long time that most law review articles are written Sahara Desert dry. Professors rarely care whether the reader is entertained or even informed in a manner that will entice rather than drive away. I cannot say it better than Professor Fred Rodell said it in 1936:

> Suppose a law review writer wants to criticize a court decision. Does he say "Justice Fussbudget, in a long-winded and vacuous opinion, managed to twist his logic and mangle his history so as to reach a result which is not only reactionary but ridiculous"? He may think exactly that but he does not say it. He does not even say "It was a thoroughly stupid decision." What he says is—"It would seem that a contrary conclusion might perhaps have been better justified." "It would seem—," the

7. I have no cite for this, but I think it is obvious that the attention spans of younger generations are getting shorter as more visual multi-tasking options are becoming prevalent.

8. Renan, note 6 at 2198.

9. *Id.* at 2198 n.41. By the way, why *Id.*? It really should be *Ibid* like the rest of the world.

> matriarch of mollycoddle phrases, still revered by the law reviews in the dull name of dignity.[10]

Law reviews are full of "mollycoddle phrases" and that is one reason almost no one reads them.

II. Too Long Between Acceptance and Publication

I could not find any data on the average length of time between an article's acceptance and when it is finally, *finally*, published, but that length of time is definitely way too long.[11] It is way too long partially because of the obsessive need of student editors to want to footnote every sentence. The reason the length of time matters so much is that these days there are so many avenues of scholarship for law professors to take other than walking through the tortuously slow law review process that, on most issues with contemporary importance, the one-year delay between acceptance and publication will mean the article is no longer timely because it is not wrestling with the most recent scholarship and, in some cases, current events.

There was a time when publishing shorter essays in online law reviews could mitigate this issue (and the footnote problem as well). These online sections of traditional law reviews were supposed to provide a place for shorter, timelier pieces that could go from acceptance to print much faster than traditional law review articles. Again, I could find no data, but my personal experience suggests the time lag is becoming just as long. In the last few years, and not to brag (right), I have been published by the online law reviews of Harvard, Cornell, Fordham, Northwestern, Wake Forest, Penn, and Washington University, among others.[12] It generally has taken six months to almost a year for these pieces to be published. In contrast, I have published 2000-word essays in *Vox* and *The Atlantic* (I am not bragging, I swear) that took less than three weeks from start to finish.[13]

The other problem is that most hiring and tenure committees do not value these shorter 2000- to 5000-word online law review essays. This failure is a mistake, because these pieces are often timely, substantive, and easier to read and understand. If they reflect serious thought and consideration, there is no reason they should be ignored in evaluating a professor's scholarship for promotion, tenure, or hire.

10. Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38, 39 (1936), *available at* http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3794&context=fss_papers.

11. *See* everyone knows this.

12. No links because that ***would*** be bragging.

13. Nope, no links, sorry.

III. THE AVALANCHE OF SCHOLARSHIP[14]

In 1997, I published a law review article in the peer-reviewed (yea!) journal, *Constitutional Commentary*, on originalism. This article summarized the first article I could find that employed the phrase the "living Constitution."[15] That essay, written in the 1900 *Harvard Law Review*, asked how judges should apply a fixed Constitution to changing circumstances. I argued that this author discussed that question as well as anyone since, and that there really was not much more to say about the originalism debate (okay, so I was wildly wrong). I found that piece by physically looking through all the paper law reviews that were in existence from the late nineteenth century to 1905. There was no computer database in 1994 up to that task.

My research for that article included reading law review articles, political science scholarship, and a few books. I spent almost a year researching and writing. The relevant sources did not change much during that year. Although there was an abundance of literature on the topic, it was not hard to identify the most influential and important sources and scholars. The task was daunting but realistically containable.

I recently finished my book, *Originalism as Faith*. To research this project, I slogged through law review articles, books, essays, op-eds, and nonlegal publications like *Slate*, *The Atlantic*, *Vox*, and *National Review*. I read important posts in the *Volokh Conspiracy*, *Law Fare*, *Balkanization*, *SCOTUSblog*, *Dorf on Law* (where I blog), and a number of other online legal fora before even starting the writing process, and I had to keep up with those sources throughout the process.

Additionally, unlike in 1997, academics now routinely submit amicus briefs on high-profile issues that contain substantive arguments that need to be addressed if one is writing in that area. For example, if you plan on writing about the intersection of First Amendment law and nondiscrimination statutes (the topic of the October 2017 term's *Masterpiece Cakeshop*[16] case), you would best set aside substantial time to read the many amicus briefs submitted by, among others, constitutional law Hall of Famers Doug Laycock, Eugene Volokh, Ira Lupu, Steve Shiffrin (with Seana Shiffrin and Mike Dorf), and Michael McConnell, advocating numerous different perspectives on the appropriate law they

14. This section is taken in part from my blog post here: http://www.dorfonlaw.org/2017/11/writing-about-law-in-avalanche-what-is.html.

15. *See* Arthur W. Machen, Jr., *The Elasticity of the Constitution*, 14 Harv. L. Rev. 200, 205 (1900). My piece discussing Machen's article can be found here: https://conservancy.umn.edu/bitstream/handle/11299/167780/15_03_Segall.pdf?sequence=1&isAllowed=y.

16. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018), https://www.supremecourt.gov/opinions/17pdf/16-111diff2_e1pf.pdf.

thought should govern the case.[17]

The literature changes every day. While I was researching and writing my book, the second most cited legal scholar of this generation (Cass Sunstein) posted a draft essay on SSRN called, humbly, *Originalism*, in which he discussed at length a draft essay by leading originalists Randy Barnett and Evan Bernick that was also posted on SSRN.[18] Neither piece had been accepted for publication at the time.

I read Barnett's and Bernick's article months before I read Sunstein's essay and wrote a response to it in my draft book. A few months later, however, they put a new version on SSRN, and my guess is they will update it again to respond to Sunstein's analysis, which may cause Sunstein to post a new draft of his version after that. Back in the old days, there were only completed books, published articles, and maybe a handful (at most) of relevant non-law review treatments. The ability of scholars to post draft pieces on SSRN for worldwide view has dramatically altered the legal research landscape. To the extent that faculty often respond to scholarship before it is in print, it is fair to ask "what purposes are served by the byzantine selection and editing processes of student-run journals."[19]

The other major change for legal scholars is the all-too-real and pressure laden news cycle problem, which is a consideration that barely existed twenty years ago. To be heard over all the din, not only does one need to be smart at marketing her work, but one needs to be very fast. That skill is quite different than being comprehensive, careful, and thoughtful. It used to be that one had at least a year from the date of a major Supreme Court case to contribute to the scholarly discussion of that case. The only real places to put the case in perspective were the law reviews. Very few professors wrote op-eds or magazine pieces. Today, a week is probably much too long.

Is this good or bad, and what is a scholar to do? I have no strong opinion on the first question. On one hand, I am pretty sure that with all the increased avenues of scholarship comes a greater democratization of the legal field. Folks like me at non-elite law schools can get our voices heard and scholarship read without relying on students at the elite law reviews to take a chance on us.[20] On the other hand, with the news cycle pressure taking up significant time, it is quite possible the overall quality

17. Go to the *Masterpiece* page on SCOTUSblog to find these briefs. I would do it for you, but I am making a point about the avalanche of scholarship.

18. Cass R. Sunstein, *Originalism* (Oct. 17, 2017) (unpublished manuscript), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3055093.

19. Friedman, note 3, at 1302. For those wondering, I insisted that the words *supra* and *infra* not appear in these footnotes.

20. *See* the next section on the completely insane selection process.

of legal scholarship has substantially deteriorated.

As to the second question, my experience over the last few years writing in the areas of originalism, standing, constitutional interpretation, free exercise of religion, Second Amendment, and free speech, tells me that trying to comprehensively address the existing literature on those subjects in advance of writing traditional law review articles and books is a fool's errand. I think the best one can do is try to identify a subset set of sources that represent thoughtful and diverse components of the larger debates and hope that does the trick. There really is no other way.

IV. The Completely Insane Selection Process

"No one . . . is happy with the norms governing the submission, selection, and placement of articles in law reviews."[21]

Academics from other disciplines are always astonished to learn that second- and third-year law students decide whether to publish articles from law professors. Professor Anthony Michael Kreis devoted his entry in this symposium to this problem.[22] As he persuasively details, these students do not have the knowledge to distinguish good articles from bad, often make decisions based on resumes and not quality (a rational decision given the first point), and have instituted a system where, after the first acceptance, a professor tries to play the "trade up" game, often resulting in the first journal's offer being declined. There may be a few upsides to having students make these all-important decisions that affect the careers of most law professors. Perhaps, personal connections play less of a role than in disciplines where blind review is allegedly the norm but in practice is often breached by the people involved. Overall, however, the submission process is wildly irrational. I cannot do better than Professor Kreis on this issue, but I do have a revealing story to tell.

In 1994, I began work on what would end up being my tenure article. In this rather audacious piece for a young law professor, I argued that the views of far left, progressive law professor Mark Tushnet and far right, reactionary Supreme Court Justice Antonin Scalia regarding the rule of law were more similar than either man would be willing to admit. I sent the piece to Professor Tushnet, who I had never met at the time. He graciously sent me back a three-page letter with much criticism, but he also suggested that he found the piece interesting. I sent the article out to law reviews, and it was accepted by the *George Washington University Law Review*.

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21. Dennis J. Callahan & Neal Devins, *Law Review Article Placement: Benefit or Beauty Prize?*, 56 J. Legal Educ. 374, 374 (2006) (I insisted that we not use the ridiculous large and small caps in these footnotes).

22. Anthony Michael Kreis, *Picking Spinach*, 50 Loy. U. Chi. L.J. 395 (2018).

Back then, after you received a law review acceptance, you would call law reviews higher up in the pecking order and leave a voice message asking them for expedited review. Then you waited. And waited. I left such a message for the *University of Michigan Law Review*. The articles editor eventually called me back and asked me where my offer was from. When I responded George Washington University, there was a brief sigh on the other end of the telephone. I asked what "was the matter," and he said, "oh nothing." I pushed for an answer, as is my way, and he reluctantly said that it would have been better had my offer been from a slightly higher ranked journal such as the *Georgetown University Law Review*. I thanked him for his honesty and mentioned to him that the article was critical of a Georgetown University law professor whom I had never met (Tushnet is now at Harvard). I disclosed that he had read the article, had a number of criticisms, but overall thought it was interesting. I suggested that the law review editor contact Professor Tushnet. He responded that the law review's policy was never to contact professors from other schools. In disbelief, I pointed out that what that meant was that his law review cared more about what the *students* on the *Georgetown University Law Review* thought about my work than what the *professor* who taught those students thought about my work. He paused, thought for a few seconds, and said I guess that is right, but that is our policy. I withdrew the article from consideration.

There is no perfect way to select law review articles. But whatever the infirmities of a refereed system, they cannot be as bad as having second- and third-year law students trying to gauge the quality of legal scholarship they cannot possibly appreciate or understand. A better system would be blind review by law professors, not students, with the students helping with the editing and proofreading of the articles. Until that change is made, it is complete folly that hiring and tenure committees care deeply about where law review articles are placed. As Professor Kreis so eloquently wrote about the resume bias:

> If my fears are true that an author's curriculum vitae colors the evaluation of an article's worth, then whether a person can successfully break into the legal academy may be baked in the cake years before they consider teaching. The results of one admission exam or the decision to attend a particular school for family or financial reasons are then dispositive of what legal scholarship looks like. That result is at odds with some of the noblest themes in our profession, which focus on remedying economic inequality, eradicating the ill effects of bias, and opening up avenues for second chances.[23]

23. *See id.* at 396.

V. THE FUTURE OF LEGAL SCHOLARSHIP

The unduly long length of law review articles, the long delay between acceptance by a law review and publication, the absurdly detailed non-substantive footnote practices of most journals, and the inability of students to distinguish great articles from good articles from mediocre articles, all suggest that major reform is needed to keep legal scholarship timely, important, and relevant. Professor Friedman suggested the following:

1) Law reviews should not accept for publication work that is not nearly ready to be published
2) They should publish less
3) They should move to blind review
4) They should put an end to in-school nepotism
5) They should limit submissions; require acceptance of offers
6) Eliminate shopping altogether[24]

All these suggestions are designed to make law reviews more streamlined, timely, relevant, and egalitarian (in terms of publication opportunity). I would add to this list strict page limitations, restrictions on footnotes, and clearly identifiable time deadlines that students and faculty both adhere to.

In addition to material changes to law reviews, the world of legal scholarship would greatly benefit if hiring and tenure committees placed more value on nontraditional publications such as blog posts, op-eds, and legal essays in national journals. As is the case with traditional law review articles, some blog posts, op-eds, and journal articles are highly substantive, timely, and chock full of important legal information, while others are less substantive, less timely, and less chock full of important legal information. But a series of blog posts on originalism, for example,[25] over a period of months, adding up to 10,000 to 15,000 words, should count just as much for hiring and tenure as one 15,000-word essay, if they are of the same quality. Sadly, few law schools agree with that proposal.

Finally, most law schools underestimate the link between well-placed and excellent blog posts, editorials, and non-law review journal articles and invitations to non-elite law professors to participate in symposia and conferences at law schools elite and non-elite. Because most elite law reviews publish a disproportionate number of articles from their own professors,[26] as well as scholars at other elite schools, and because

24. Friedman, note 3 at 1342–59.

25. I could cite ten or so posts by yours truly to make this point, but again, that would be bragging.

26. Albert H. Yoon, *Editorial Bias in Legal Academia*, J. Legal Analysis 1, 13 (Oct. 1, 2013),

publishing articles in second- and third-tier journals, no matter how well done, rarely leads to further professional engagements, faculty at non-elite schools need to build their reputations either through books or through well-placed op-eds and essays in highly visible publications. If lower tier schools want their faculties to develop national reputations, those schools would do well to incentivize their faculty to pursue avenues of scholarship in addition to the rarely read, too long, absurdly footnoted, and often irrelevant articles that fill our nation's far too many law reviews.

CONCLUSION

In the words of Professor Friedman, "I hate the conclusions on law review articles, and now I finally get to say so. They usually are regurgitations of what came before, and cryptic ones at that."[27] That is all folks.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336775.

27. Friedman, note 3 at 1366.