ASIDE

CHALLENGING LAW REVIEW DOMINANCE

INTRODUCTION

Up until the recent popularization of the internet and independent scholarly webpages, law reviews have dominated legal discourse.[1] This Aside seeks to examine the potentially dangerous shift from paper to server.[2] Part I sets out the historical relationship between student-run law reviews and the academy in order to make certain obvious and noncontroversial claims that are both abstruse and well-cited; it has been omitted for clarity's sake. Part II defends the traditional imperatives of the law review article format, its hyper-prolixical verbosity and its footnote-heavy citation style; it has also been removed for lack of support.[3] Part III argues for a vision of bluebooking as modality encoding via citation uniformity, thus enabling a new hermeneutics of meaning through reader decoding. This part is so dense and yet flaky it has swallowed itself in a Dough-Boy vortex and is now believed to be part of a legal theory pound

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[1] Apparently legal discourse is often dominated. *See, e.g.*, Nathan J. Diament, *Foreign Relations and Our Domestic Constitution*, 30 CONN. L. REV. 911, 926 (1998) ("Kantian liberalism . . . had dominated legal discourse . . . the previous decade."); J. Harvie Wilkinson III, *The Question of Process*, 98 MICH. L. REV. 1387, 1394 (2000) ("The question of discrimination in all its dimensions has dominated legal discourse . . . ."); Claudia A. Lewis, Note, *From This Day Forward*, 97 YALE L.J. 1783, 1790 (1988) ("The masculine voice of rights has dominated legal discourse.").

[2] It is important to begin any law review piece, including this one, with the footnote line high on the page and to that end we are repeating this sentence and expanding its spacing. It is important to begin any law review piece, including this one, with the footnote line high on the page and to that end we are repeating this sentence and expanding its spacing.

[3] For consistency's sake, this particular footnote, likewise, fails to support the proposition but is important for its numerical place in the existential body of footnotes. *See* Aside, *Don't Cry over Filled Milk: The Neglected Footnote Three to* Carolene Products, 136 U. PA. L. REV. 1553 (1988) (arguing for the importance of footnote number three above all other footnotes, even footnote number four, believe it or not).

cake,[4] inferentially observed only by occasional citation from authors attracted to its buttery goodness. Part IV is the only original thought in this whole Aside, but, in the tradition of legal work generally, it is both underdeveloped and fairly insignificant. It more or less amounts to arguing that web pages that seek to replace law reviews by publishing scholarly work on the internet tend to suck.[5]

IV. SUBSTITUTING HTML IN FAVOR OF THE LAW REVIEW: THAT SUCKING SOUND ISN'T JUST FOR NAFTA ANYMORE[6]

The Social Science Research Network ("SSRN"), a webpage that publishes scholarly work, has recently emerged to challenge the law reviews' traditional monopoly in the publication of legal articles.[7] Some applaud this development. In recent years, law reviews have been criticized for letting the patients run the asylum, in other words, letting those law students, recently demoralized as 1Ls, edit and shape professors' work.[8] Law professors, meanwhile, worry about the integrity of their law review submissions because they have seen direct proof that these students—having arrived at law school with excellent recommendations, stellar LSAT scores, and excellent college grades—are largely incompetent.[9] The SSRN allows professors to bypass

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[4] *But see* Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 284 (1962) (insisting that unlike pound cake, "law review articles" are more likely to have a "fluffy filling"). *Cf.* TERESA PREGNALL, TREASURED RECIPES FROM THE CHARLESTON CAKE LADY 26-27 (1996) (providing a recipe for Milk Chocolate Cake that is not fluffy at all). This footnote may not be a footnote number three but it is the next best thing.

[5] Some say "suck ass" but not in this context. *See, e.g.*, N.L.R.B. v. Eldorado Mfg. Corp., 660 F.2d 1207, 1210 (7th Cir. 1981) (not discussing internet sites at all but still saying "suck ass").

[6] Ross Perot warned against NAFTA, but he might have been equally outraged by internet publishers stealing jobs from red-blooded American law review editors. *See* Mike Morton & Sabra Morton, *Galore v. Sore Sport*, N.Y. TIMES, Nov. 9, 1993, at A1 (decrying "that giant sucking sound").

[7] Normally we would be inclined to cite to the subject of the proposition, in this case the SSRN, but we are unable to make any sense of the rule for internet citation and so we will cite to the *Bluebook* instead to create the appearance of authority. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 18.2, at 132 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000) [hereinafter THE BLUEBOOK 17TH ED.].

[8] This reversal of roles has certain Oedipal qualities, but because it is our *Review*'s policy to feminize pronouns we will call them Electra qualities, even though that's not really what we mean. This note may seem like an egregious tangent but it does allow us to mask our weak scholarship with citations to Greek tragedies which provides us with literary street credibility. *E.g.*, SOPHOCLES, ELECTRA (J.H. Kells ed., Cambridge Univ. Press 1973); *see also* WILLIAM SHAKESPEARE, HAMLET (providing a further example that we are well-read).

[9] Some scholars argue that it is, in fact, only the male law students who are

student editing and provides a forum in which no article is declined web-publication for sucking too much. But the advantages of publishing with an ink and paper law review over the SSRN are manifold.[10]

> *[Part A argued within a game-theoretic framework against knowledge asymmetries found in typical Prisoner's Dilemmas and suggested that Coasian/Calabresian promises fared no better than Posnerian postulates in predicting negative externalities or mitigating transaction costs; but this Part was omitted at the last moment when we discovered that gratuitous economic theory was not going to get us tenure. Be advised, however, we were fully prepared to discuss these issues. We're just that bad-assed.*[11] *]*

B. *The Citation Game*

One advantage to a professor publishing in a law review over the SSRN is that of generating reciprocating citation. An article's authority and importance is often judged within the academy according to the number of times that article is cited by subsequent law review articles.[12] But neither citation from nor to web articles

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incompetent. *See* Rodell, *supra* note 4, at 289 (arguing from casual empiricism that "three-fourths or more or the bright boys who beat their way into law school, cannot, even after four years of college, construct a decent English sentence"). This cant be true because everyone says were samart and besides were goonna make alot of money when we graduate so Professor Rodell can stuff it. Word up.

[10] For ease of use, our working definition of "manifold" is, well, "one."

[11] Certain editors substituted "good" for "bad-assed" for grammatical reasons but, despite assurances to the contrary, the change was not picked up in the blackline because, in all honesty, the blackline is a hoax. We are comforted by the fact, however, that we've made more egregious mistakes in the past. *See, e.g.*, Lawrence M. Frankel, Comment, *National Representation for the District of Columbia*, 139 U. PA. L. REV. 1659 (1991) (spelling the first word of the title of an Executive Editor's comment "Naional" on the cover of the issue).

[12] Likewise law reviews are themselves judged according to the frequency of their articles' citation. For example just by citing to all of the articles in this issue, our *Law Review* is thereby advantaged. *See, e.g.*, Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001); Colin S. Diver & Jane Maslow Cohen, *Genophobia: What Is Wrong with Genetic Discrimination?*, 149 U. PA. L. REV. 1439 (2001); Henry T. Greely, *Genotype Discrimination: The Complex Case for Some Legislative Protection*, 149 U. PA. L. REV. 1483 (2001); Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361 (2001). And if we cite to these same pieces again we're even better off. *See, e.g.*, Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001); Colin S. Diver & Jane Maslow Cohen, *Genophobia: What Is Wrong with Genetic Discrimination?*, 149 U. PA. L. REV. 1439 (2001); Henry T. Greely, *Genotype Discrimination: The Complex Case for Some Legislative Protection*, 149 U. PA. L. REV. 1483 (2001); Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361 (2001). Hey, that

counts toward these citation computations.

A second, related, advantage has to do with what has come to be known as ego-citing. Professors publishing in law reviews can and do bump up their citation count by citing to their own previously published articles. Some authors even cite to their own forthcoming works, using the current article like a coming-attraction trailer, and still others go so far as to cite to other legal publications that intend to publish, in substantial part, the very work doing the citing.[13] Not all of this effort to has to do with an unexamined childhood need to feel special; some of these efforts are exercises in good old-fashioned career advancement and narcissism.

C. *Answering Counterarguments: Tyranny of the* Bluebook

One advantage law professors enjoy in publishing on the SSRN instead of with a law review is being able to escape the strictures of the *Bluebook*—a uniform system of citation designed and implemented "with the single minded goal of spanking authors with a paddle, while generating sufficient revenue for the Bluebook schools[14] to support the Executive Editors' ever-expanding drinking habit."[15] In contrast to

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feels pretty good. Brion D. Graber, Comment, *Can the Battle Be Won?* Compaq, *the Sham Transaction Doctrine, and a Critique of Proposals To Combat the Corporate Tax Shelter Dragon*, 149 U. PA. L. REV. 355 (2001); Adam McLain, Comment, *The* Rooker-Feldman *Doctrine: Toward a Workable Role*, 149 U. PA. L. REV. 1555 (2001); B. Douglas Robbins, Comment, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115 (2001).

Some say that there is no magic to publishing anymore but this *Law Review* has discovered how to achieve a feat of near metaphysical impossibility: citing in this issue to articles in a subsequent issue, thereby supporting a proposition with citations that do not even exist yet. *See, e.g.*, Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619 (2001) (making arguments that do not yet exist). Spooky.

[13] *See, e.g.*, Bernard Black, *Does Corporate Governance Matter? A Crude Test Using Russian Data*, 149 U. PA. L. REV. 2131, 2131 n.† (2001) (citing the *Emerging Market Review* as publishing in the future "[a] more technical version of this Article"); *see also id.* at 2148 n.20 (*supra*-ing back to the sword note to remind readers that the same article as the one being read will soon be available elsewhere); *id.* at 2148 n.21 (reminding readers—through the use of an *id.*—in case they were wondering since the last footnote that, indeed, the very article being read will soon be available in another journal).

[14] Bluebook schools are the four ivy league law schools that publish the *Bluebook* and share the spoils. The Bluebook schools are sometimes accused of suffering from a conflict of interests because, on the one hand, a uniform system of citation must maintain consistency over time but, on the other, these schools derive significant income by augmenting the rules and publishing new editions.

[15] Confidential Memorandum from Dan Garodnick, Editor-in-Chief of the

law reviews, the SSRN makes no requirement of their authors to comport with any system of citation, let alone the *Bluebook*.[16] In fact, on SSRN authors are free to make up citation systems and citation sources with impunity and without fear of any editorial meddling. But absolute autonomy turns out, for many authors, to be a Pandora's Box.[17] Moreover, despite the *Bluebook*'s sometimes-mindless rigor, its generations-old internal contradictions, and its periodic need to mutate perfectly good rules and then change them back again in later editions,[18] the *Uniform System of Citation* is still the standard in the legal world for the simple reason that maroon grosses most people out.

University of Pennsylvania Law Review, to the Editors of the Columbia and Harvard Law Reviews and The Yale Law Journal (Feb. 14, 2000).

[16] Many authors also complain that student editors insist on pedantically adding support to the most obvious propositions. Patrick M. McFadden, *Fundamental Principles of American Law*, 85 CAL. L. REV. 1749, 1749-50 & n.2 (1997) ("[A]uthors whine about the . . . editorial obsession to footnote everything."); Ron Coleman, *Citing Cites That Cite Cites: Are There Any New Ideas in Legal Scholarship?*, STUDENT LAW., Feb. 1989, at 13 ("The [law review] author may not assert so much as 'The sun rises in the east' without citing Copernicus."). *But cf., e.g.*, Arnold S. Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y.L. SCH. L. REV. 209, 700 n.4824 (1988). But these authors fail to appreciate the three cardinal principles of law review writing: (1) all propositions must have support, (2) support should try to match the proposition as closely as possible, and (3) support from any source is better than no support at all. Aside, *Challenging Law Review Dominance*, 149 U. PA. L. REV. 1601, 1605 n.16 (2001) (setting out the three cardinal principles of law review prose: "(1) all propositions must have support, (2) support should try to match the proposition as closely as possible, and (3) support from any source is better than no support at all") (citing Aside, *Challenging Law Review Dominance*, 149 U. PA. L. REV. 1601, 1605 n.16 (2001))).

Along similar lines, authors sometimes complain that student editors repeatedly and inexplicably add redundant parenthetical explanations to their citations. McFadden, *supra*, at 1749 (discussing "the tyranny of . . . parentheticals" that fail to really add anything to the discourse, and largely just repeat the proposition). But in our defense it must be said that we do it only from spite.

[17] Although we have no real analysis here we do have another allusion to Greek mythology.

[18] After the 16th Edition changed the rules for the use of the *see* signal, *see* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 16th ed. 1996), the 17th Edition changed the rules for use of the *see* signal back. *See* THE BLUEBOOK 17TH ED., *supra* note 7, R. 1.2(a), at 22; *cf.* Ira P. Robbins, *Semiotics, Analogical Legal Reasoning, and the Cf. Citation*, 48 DUKE L.J. 1043 (1999). *But cf.* Andrew Morton, But Cf.: The Least Understood Signal (May 11, 2000) (unpublished manuscript, on file with the University of Pennsylvania Law Review until we throw it out a month or so prior to your reading this). As of the 17th Edition, even *contra* was restored. THE BLUEBOOK 17TH ED., *supra* note 7, R. 1.2(c), at 23. *Contra* Gil Grantmore, *The Death of Contra*, 52 STAN L. REV. 889, 889 (2000) ("The *Bluebook* no longer lists *contra* as an available introductory signal.").

CONCLUSION

We have examined a number of arguments[19] for why publishing in a traditional law review is superior to web publication alone. We could have made stronger arguments about how law reviews are taken more seriously than webpages by tenure committees, or how it is a pleasure to work with young, fresh student editors, but making stronger arguments is beyond the scope of this Aside. Our argument, instead, has taken the high road, the road less traveled; we have taken the principled stance while our opponents wallow in confusion, self-pity, incontinence, and dry-mouth.[20] And with nearly 150 years of publishing tradition behind us, it is safe to say that we might have learned something over the years if it were not for high turnover and poor institutional memory. But in our short tenure, we have still come to understand that in the battle between form and substance, substance is largely overrated.[21]

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[19] *See supra* note 10 (explaining that the working definition of multiples achieves singularity).

[20] In the interest of full disclosure we must concede that our critics fare no worse than placebo.

[21] Eel sushi, however, is not. *See* Pod.