

OPENING REMARKS

LIKE WATER FOR LAW REVIEWS

AN INTRODUCTION TO THE *JOURNAL OF LAW*

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The *Journal of Law* looks a lot like a conventional law review, but it is really a bundle of small, unconventional law journals, all published together in one volume. Each journal is separated from the others by its own black-bordered title page. Look at this volume edge-wise and you will see. This structure saves money over separate publication. It also frees editors of the individual journals to spend more time finding and refining good material, and less time dealing with mundane matters relating to the printing and distribution of their work product. Thus the *Journal of Law*'s generic name: it is no one journal in particular, and it is not tied to any particular institution (like, say, the *Stanford Law Review*), subject (like the *Tax Law Review*), specialty (like the *Journal of Law & Economics*), or method (like the *Journal of Empirical Legal Studies*). The idea is that the *Journal of Law* will be an incubator of sorts, providing for legal intellectuals something akin to what business schools' incubators offer commercial entrepreneurs: friendly, small-scale, in-kind support for promising, unconventional ideas for which (a) there might be a market, but (b) there is not yet backing among established, deep-pocketed powers-that-be.¹

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¹ Compare, e.g., Harvard Business School, *Harvard Launches Innovation Incubator*, www.hbs.edu/news/releases/innovationincubator.html (vis. Mar. 6, 2011), and Darden School of

The conventional law reviews that law schools support are, after all, like snowflakes. Microscopically speaking, each one is unique and beautiful in its own way. Practically speaking, they tend to be pretty much the same – difficult to distinguish absent identifying marks, especially when a large number are packed together, as in a ball or in a database.² But water (the main ingredient in snowflakes, along with air) is blessed with many opportunities to appear in different forms, while legal scholarship (the main ingredient in law reviews) must either crystallize into law review articles or risk eternal academic invisibility.³ The main objective of the *Journal of Law* is to provide legal scholarship with more opportunities to be more like water.

The *Journal of Law* comes, however, not to bury law reviews, but to praise them. The undeniable truth, regardless of where you stand in the wide range of positions on the merits of law reviews,⁴ is that the law review is the dominant life form in the world of legal academia. It is by far the most successful species of legal scholarship –

Business, *Incubator Hosts Record Numbers*, www.darden.virginia.edu/web/Media/Darden-News-Articles/2010/Incubator-Hosts-Record-Numbers/ (vis. Jan. 16, 2011), with Lockheed Martin, *Skunk Works*®, www.skunkworks.com/ (vis. Mar. 11, 2011) (“Skunk Works® Today” link leads to “Page Not Found” at www.lockheedmartin.com/404.html).

² MARIANA GOSNELL, ICE: THE NATURE, THE HISTORY, AND THE USES OF AN ASTONISHING SUBSTANCE 420-24 (2007); Harvard Law School, *Our Publications*, www.law.harvard.edu/about/publications.html (vis. Mar. 6, 2011) (16 journals).

³ Granted, it is a risk, not a certainty, because there are a few alternatives, most importantly books and blogs. But they have limitations. In academic law publishing, a book often is just a big law review article (or bundle of articles) published by professionals at a press instead of (or as well as) by students at law reviews. Compare, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001), with LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (Harvard University Press 2002); see also *Dilatatio ad Absurdum*, 4 GREEN BAG 2D 233 (2001). Acceptance of blogging as genuine legal scholarship (the definition of which is beyond the scope of this essay and probably the capacity of this author) is an open question, although its importance as a force in the legal academy is not. See notes 4-7 below and accompanying text.

⁴ See, e.g., Stephanie L. Plotin, *Legal Scholarship, Electronic Publishing, and Open Access*, 101 LAW LIBR. J. 31 (2009); Lawrence Solum, *The Journal of Legal Analysis & the Future of Peer Review*, LEGAL THEORY BLOG, Isolum.typepad.com/legaltheory/2007/07/the-journal-of.html (July 11, 2007); Richard A. Epstein, *Faculty-Edited Law Journals*, 70 CHI.-KENT L. REV. 87 (1994). Law reviews have been admirably open to explorations of their own warts and beauty marks. See, e.g., 69 U. CHI. L. REV. 1 *et seq.* (Winter 2002); 47 STAN. L. REV. 1117 *et seq.* (Summer 1995).

the flowering pinnacle of legal-academic evolution. And so it is that in the richly blooming field of law reviews, the *Journal of Law* merely aspires to be a useful variety – or, more precisely, varieties. If the *Journal of Law* is to succeed, it will do so not by revolutionizing the development or dissemination of legal scholarship, but, rather, by gradually and constructively broadening the definition of what counts as a law review article and what counts as a law review.

But perhaps there is no need for greater variety in the forms of legal scholarship.

On the one hand, the enthusiasm that sometimes greets opportunities to diversify – blogging being the best recent example – suggests that there is a felt need among law professors and other legal intellectuals for more options in outlets for their scholarly thoughts.⁵

On the other hand, the reluctance that greets calls to include such material in, for example, promotion and tenure decisions suggests that while things other than law review articles (and books) might be interesting and even useful, the legal academy in general is not comfortable with funny-looking scholarship.⁶ After all, the commitment to the traditional form is so strong that almost anything generated in the *form* of a conventional law review article – even if it has little to offer in the way of *content* – will find its way into a law review.⁷ (What is a “conventional law review article”? Perhaps this will do for starters: a monograph dealing with a topic connected in some way to the law and containing (1) between 10,000 and 70,000 words, (2) more than 100 footnotes, (3) at least one theory, and (4) a byline featuring at least one law professor or powerful public official or private practitioner.)

⁵ See, e.g., Steven Keslowitz, *The Transformative Nature of Blogs and Their Effects on Legal Scholarship*, 2009 CARDOZO L. REV. DE NOVO 252.

⁶ Compare, e.g., Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881, 891 (2009), with Ellen S. Podgor, *Blogs and the Promotion and Tenure Letter*, 84 WASH. U.L. REV. 1109, 1110 (2006); see also *Symposium, Bloggership: How Blogs Are Transforming Legal Scholarship*, 84 WASH. U. L. REV. 1025-1261 (2006); Robert S. Boynton, *Attack of the Career-Killing Blogs: When academics post online, do they risk their jobs?*, SLATE, Nov. 16, 2005.

⁷ *Editor's Preface*, 1 CONST. COMMENTARY 1, 1-2 (1984); David P. Currie, *Green Bags*, 1 GREEN BAG 2D 1 (1997); cf. Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 616 & n.114.

Or maybe – and this is, again, the predicate for the *Journal of Law* – there are some other paths along which law reviews might evolve: paths scattered with points at which something might look and quack enough like and yet unlike a conventional law review article to both (a) attract the respect such articles receive and (b) stretch, slightly, their definition. Over time, via the *Journal of Law* and other outlets, the legal academy might gradually inch its way into an environment in which more diverse forms of scholarship are respectable and therefore widely useable.⁸

Of course, if it turns out that all is right in the world of legal academic publishing (with no niches left for the journals of the *Journal of Law* to fill), or that the structure and culture of that world make evolution and diversification impossible, or that there is room and support for change but the *Journal of Law* is too poorly designed or managed to be a part of that change, then this project will flop. The market will speak.

THE INCUBATION

So, what will we be incubating? What novel forms or subjects or methods or whatever of legal scholarship will actually appear in the *Journal of Law*?

There will be four or five or six new journals and perhaps more in the short term (meaning in this, the first issue of the *Journal of Law*, and the next few issues). The initial three journals are listed below and described in greater detail in the introductions to their respective sections of this issue.

Over the long haul, the reader's guess is likely to be as good as ours. This is because the *Journal of Law* will incubate whatever promising ideas coming along. Anyone (or maybe only some people) who can convince the journal's management (see the masthead) that they have an idea that deserves a try will get a chance to put that idea into practice in the form of a dedicated, editorially freestanding journal-within-the-*Journal-of-Law*. Who can foresee what might turn up? Certainly not the proprietors of the *Journal of Law*.

⁸ See, e.g., Lawrence B. Solum, *Download It While It's Hot: Open Access and Legal Scholarship*, 10 LEWIS & CLARK L. REV. 841 (2006).

That is pretty much all the *Journal of Law* is and will be: a bunch of experiments of indefinite character, content, and duration. Some of the experiments will fail, some might succeed. And among the successes some might become permanent parts of the *Journal of Law* while others might spin off into physically as well as editorially free-standing publications.

In this issue of the *Journal of Law* there are three journals:

- *Pub. L. Misc.* is a project of James C. Ho of Gibson, Dunn & Crutcher and Trevor W. Morrison of the Columbia University School of Law. Their plan is to provide a forum for the publication of a relatively neglected body of legal material: constitutional documents, recent and ancient, that originate outside of Article III of the U.S. Constitution.⁹
- *Law & Commentary* is an experiment in non-blind peer review in which signed reviews (by senior, influential scholars) are published side-by-side with the reviewed work.¹⁰ The first issue features an article by Stuart Chinn of the University of Oregon School of Law, with commentary by Bruce Ackerman of the Yale Law School and Sanford Levinson of the University of Texas School of Law.
- *The Congressional Record, FantasyLaw Edition*, is a student-edited journal (formerly an adjunct to the *Green Bag*) focusing on empirical analysis of the activities of federal legislators.¹¹

And we will be introducing at least one additional journal in the next issue of the *Journal of Law*:

- *Chapter One* is a project of Robert C. Berring of Boalt Hall, in which he reintroduces underappreciated classic law books by publishing the first chapter of a book in the company of one or two or a few good essays about it. His hope is that access to a

⁹ James C. Ho & Trevor W. Morrison, *Introducing Pub. L. Misc.*, 1 J.L. (1 PUB. L. MISC.) 13 (2011).

¹⁰ Ross E. Davies, *Three Invitations to Law & Commentary*, 1 J.L. (1 L. & COMMENT. 87 (2011).

¹¹ See *About FantasyLaw*, www.fantasylaw.org/index.php?nav=about (vis. Mar. 10, 2011).

convenient and unintimidating portion of a great book, combined with accessible analyses of it, will lure readers into the whole book, or at least to give them some direct familiarity with slices of that original work and some of the best thinking about it.

By giving scholars the opportunity to try out ideas like and unlike these – and especially the chance to do so without most of the costs, risks, and hassles associated with (a) getting institutional and financial support for developing them as freestanding enterprises and (b) doing the scut work of printing and distribution – the *Journal of Law* ought to increase the likelihood that good ideas (and maybe some bad ones) will get tested, rather than merely talked about.

Another benefit of this co-operative approach may be a reduction in, perhaps even a reversal of, the proliferation of law reviews. Enterprising scholars who work in the *Journal of Law* will not need to build a whole new law review edifice (or perhaps gamble on something more exotic) in order to test drive a new idea. If an idea tested in the *Journal of Law* turns out to be bad it will never become a failed investment in a whole new law review. Instead it will be in large part the *Journal of Law*'s less-costly investment, one that might or might not have a positive academic return.

Furthermore, it is also possible that the *Journal of Law* will end up as the home of good ideas that are currently manifesting unsuccessfully as conventional law reviews but that would do better in a different form. It is an amusingly perverse prospect, given that the *Journal of Law* is itself a new law review – physically speaking, that is – in a world already seen as overpopulated with law reviews.¹²

THE INK ON PAPER

For the time being, the *Journal of Law* will be a print journal, as well as an electronic one (we are at www.journaloflaw.us). At first blush this commitment to old-fashioned print might seem an

¹² See, e.g., Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 928 (1990); cf. NORMAN MACLEAN, *YOUNG MEN AND FIRE* (1992) (describing the use of backfires to fight main fires).

odd choice for a publication so amply supplied with self-congratulatory feeling about its innovative tendencies. A print edition is, however, an essential part of the *Journal of Law*, at least for now, because our objective is to operate and appear as much like a traditional law review as possible in order to leave the editors of our journals as much latitude as possible to push boundaries in other directions that are important to them. And there are still powerful links between scholarly respectability and ink-on-paper publication. The evidence pervades legal academia: Is there a law school at which the flagship law review appears exclusively electronically?

As long as the most prestigious law reviews appear in print, doing without a print edition – an appealing prospect for environmental as well as financial reasons – is not a viable option for a journal that aspires to anything approaching comparable status. When will it be safe to abandon ink and paper? That is difficult to predict, but such a move must await leadership by leaders. This might take any of a number of forms, for example:

- *A movement by leading producers of scholarship.* Perhaps a public commitment by a critical mass of leading scholars that they will not place their scholarly work in print publications – a commitment subsequently honored for a period of time sufficient to convince observers of its durability. For example, if the faculty of the [insert names of prominent law schools of your choice] vowed to boycott print law reviews, and then delivered on that commitment, the [insert names of prominent law reviews of your choice] might abandon print, and they might be followed by many other faculties and journals.
- *Or a movement by leading disseminators of scholarship.* Top publications at leading law schools could go web-only. An impressive group of law librarians has called for something of this sort.¹³

¹³ See Durham Statement on Open Access to Legal Scholarship, cyber.law.harvard.edu/publications/durhamstatement (vis. Sept. 21, 2010):

On 7 November 2008, the directors of the law libraries at the University of Chicago, Columbia University, Cornell University, Duke University, Georgetown University, Harvard University, New York University, Northwestern University, the University of Pennsylvania, Stanford University, the University of Texas, and

For example, if the *Columbia Law Review*, the *Harvard Law Review*, the *University of Pennsylvania Law Review*, and the *Yale Law Journal* all abandoned print (we know they can coordinate because they do so to produce the *Bluebook*), then going web-only might well enhance by association the reputations of lesser journals that followed their lead. And the Ivy League snowball might become an avalanche. Or if student editors lack the vision or courage, faculty could take the lead by ceasing print production of important journals they edit themselves, such as the *Journal of Legal Analysis* (at Harvard), *Law & Contemporary Problems* (at Duke), the *Journal of Empirical Legal Studies* (at Cornell), *Law and History Review* (at the American Society for Legal History), and the *Supreme Court Review* and the *Journal of Legal Studies* (at Chicago).

- *Or a movement by important consumers.* Law schools could cancel their subscriptions to print journals, at least those from leading law schools.¹⁴ Or some other prestigious and influential institutions could do the same – perhaps the federal courts or a few prominent state-court systems or the Am Law 100. To give such an effort real bite – and credibility if it is based on concerns about the environment – the cancellations might also include electronic versions of journals that persist in producing print editions.
- *Or a movement by influential employers.* Judges sensitive to environmental concerns could refuse to hire law clerks who have served on the editorial boards of law reviews that produce print editions. How many successful law students would work

Yale University met in Durham, North Carolina at the Duke Law School. That meeting resulted in the ‘Durham Statement on Open Access to Legal Scholarship,’ which calls for all law schools to stop publishing their journals in print format and to rely instead on electronic publication coupled with a commitment to keep the electronic versions available in stable, open, digital formats.

See also Richard A. Danner, *The Durham Statement on Open Access One Year Later: Preservation and Access to Legal Scholarship*, DUKE LAW FACULTY SCHOLARSHIP, Paper 2145, scholarship.law.duke.edu/faculty_scholarship/2145 (vis. Sept. 21, 2010).

¹⁴ Signers of the Durham Statement on Open Access to Legal Scholarship (see note 13 above) can do this now, if their deans permit it.

on a journal if they knew that doing so would end their chances of landing a clerkship? Law schools could amend their promotion and tenure regulations to forbid consideration of works appearing in print. To be fair, measures of this sort would have to include transition periods: a fairly short one would be plenty for judicial clerkship candidates, given the rapid turnover in law review editorial boards, but a longer one (five years? ten years?) might be needed for those on tenure tracks.

None of these approaches would be certain to succeed, and it is possible that if a few big dogs were to give one a try, they might discover that they are actually tails. That prospect might itself be sufficient to explain why none has yet been tried.

Then again, inaction on all these fronts – which does seem to be the status quo – might quite reasonably be taken to indicate that there is some value to ink on paper that makes the financial and environmental costs worth bearing.¹⁵ (Although “[t]he economics of law reviews is obscure”¹⁶ and good information on the subject is hard to come by, thoughtful observers have argued that print editions are not moneymakers, at least for the law reviews themselves.¹⁷)

In any event, it might be a noble sacrifice by journals (or scholars) of inferior status to take the lead in abandoning print – while journals (and scholars) of superior status preserve their status in part by remaining in print – but such a sacrifice likely would not change the status of print or its importance to scholarly influence and ca-

¹⁵ See, e.g., AAUP Task Force on Economic Models for Scholarly Publishing, *Sustaining Scholarly Publishing: New Business Models for University Presses* (Mar. 2011); WILLIAM POWERS, *HAMLET'S BLACKBERRY: A PRACTICAL PHILOSOPHY FOR BUILDING A GOOD LIFE IN THE DIGITAL AGE* (2010); Jason J. Czarnezki, *What's going on at SSRN?*, czarnezki.com/2010/10/19/whats-going-on-at-ssrn/ (vis. Mar. 19, 2011) (reproducing Gregg Gordon, *SSRN Announces Forthcoming "Purchase Bound Hard Copy" option for Free PDF documents in SSRN eLibrary*, Oct. 19, 2010)).

¹⁶ Dave Hoffman, *The Economics of Law Reviews*, CONCURRING OPINIONS, www.concurringopinions.com/archives/2007/05/the_economics_o_2.html (May 14, 2007; vis. Mar. 27, 2011).

¹⁷ See, e.g., Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 780-81 (2006); Dan Hunter, *Open Access to Infinite Content (or "In Praise of Law Reviews")*, 10 LEWIS & CLARK L. REV. 761, 774-77 (2006).

reers.¹⁸ Indeed, to the extent that print becomes the exclusive province of the established and the prestigious, the occupants of that province will have all the more reason to stand pat. And aspirants to scholarly respectability (and promotion and tenure) will have all the more reason to shape their work and their behavior to appeal to the owners and operators of those printed law reviews.

And so, in conclusion and on behalf of the *Journal of Law*, I ask: Got any good ideas?¹⁹

POSTSCRIPT

This is a resuscitated “Journal of Law.” A journal by that name was published in Philadelphia in 1830-31. It was one of many short-lived legal periodicals to come and go during the rugged early years of American law publishing.²⁰ Its slogan was, “Ignorance of the law excuseth no man.”²¹

¹⁸ See THE BLUEBOOK, Rule 18.2 (19th ed. 2010) (“*The Bluebook* requires the use and citation of traditional printed sources when available, unless there is a digital copy of the source available that is authenticated, official, or an exact copy of the printed source, as described in rule 18.2.1.”); Rita Reusch, *By the Book: Thoughts on the Future of Our Print Collections*, 100 LAW LIBR. J. 555, 558 n.15 (2008). On the other hand, a journal compelled to choose between print and electronic publication might well choose electronics. See Charlotte Brewer, *Only Words*, 32 WILSON Q. 16 (Autumn 2008).

¹⁹ Or a more interesting name for this journal? One thoughtful observer has suggested *The Red Bag*, an idea for which there is some support. Compare JOHN CORDY JEAFFRESON, A BOOK ABOUT LAWYERS 187-90 (1867) (noting ancient English traditions associating success at the bar and the privilege of carrying a red bag), with Donald R. Richberg, *The Rise and Fall of the Green Bag*, 1 GREEN BAG 2D 191 (1998), 18 GREEN BAG 465 (1906).

²⁰ See FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 202-20 (3d rev. ed. 1942; 1959 prtg.); Ross E. Davies, *The Original Law Journals*, 12 GREEN BAG 2D 187 (2009).

²¹ *The Journal of Law*, 12 GREEN BAG 2D 201 (2009).