



The day of the controversialist is happily coming to an end, and of the writer who twists the facts of science to suit a world of his own making, or of that of a group with which he is associated. Theory can now be labelled theory, and fact, fact.

Winston Churchill

*An Essay on the American Contribution  
and the Democratic Idea (1918)*

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# MICRO-SYMPOSIUM

ON ORIN KERR'S  
"A THEORY OF LAW"

PART 2

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INTRODUCTION TO  
PART 2  
OF THE MICRO-SYMPOSIUM ON

ORIN KERR'S  
“A THEORY OF LAW”

The Winter 2013 issue of the *Green Bag* includes that journal's first micro-symposium, the subject of which is Professor Orin Kerr's article, "A Theory of Law."<sup>1</sup> Unfortunately, the *Green Bag* is a small magazine. It lacks the space to publish more than a small (but representative) fraction of the excellent papers it received in response to the call for papers for the micro-symposium.

The *Journal of Law* has a bit (but only a bit) more flexibility when it comes to page counts and word counts. And so the next few pages of this issue are filled with several more excellent comments on "A Theory of Law" (although still nowhere near all the comments that deserve to be in print).

For more information about the micro-symposium, please read the "Micro-Symposium" section that begins on page 213 of the Winter 2013 *Green Bag*.

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<sup>1</sup> Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

# A THEORY OF LAW, AMENDED & MENDED

*Laura I Appleman*<sup>†</sup>

**G**ood theories of punishment and crime  
Rely on views mortal and divine.  
This schema of Kerr's  
Dramatically errs  
By forgetting to cite all of mine.<sup>1</sup>

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<sup>†</sup> Associate Professor, Willamette University College of Law. Copyright Laura I Appleman 2012.

<sup>1</sup> See, e.g., Laura I Appleman, *The Great Writ*, 9 GREEN BAG 2D 93 (2005); *The Appellate Lawyer's Lament*, 8 GREEN BAG 2D 210 (2005).

# THE UNEASY CASE FOR A THEORY OF LAW

Shawn Bayern & Jeffrey Kahn<sup>†</sup>

It is often said, though we don't know precisely where, that there is very little new legal scholarship. This applies even to Professor Kerr's apparently novel enterprise.<sup>1</sup>

Still, two pieces do not make a crowded field. We are somewhat concerned that Kerr may overstate his case by referring to "extensive scholarship on the point."<sup>2</sup>

Accordingly, recognizing the dialectic nature of scholarship, it seems only fair that where Kerr's article is cited, this article be cited as contrary authority. This article is quite contrary indeed; some of it is false, and it disagrees even with itself.<sup>3</sup>

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<sup>†</sup> Assistant Professor and Larson Professor, Florida State University College of Law. Copyright © 2012 Shawn Bayern and Jeffrey Kahn.

<sup>1</sup> See Patrick M. McFadden, *Fundamental Principles of American Law*, 85 CALIF. L. REV. 1749 (1997).

<sup>2</sup> Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

<sup>3</sup> But see Shawn Bayern & Jeffrey Kahn, *The Uneasy Case for a Theory of Law*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 490 (2012).

SUPPORTING THE  
INSUPPORTABLE  
AN INTELLECTUAL HISTORY

*Adam D. Chandler*<sup>†</sup>

Professor Kerr's theory of law, both elegant and audacious, is not written on a blank slate. An earlier citation-fraud scheme debuted in April 1934, when the *Harvard Law Review* ran a back-page ad headlined "Have You Ever Had To Support an Insupportable Proposition?" For "a small sum," the editors would "arrange for the filing in the Harvard Law School library of an 'unpublished thesis' supporting your proposition." Dubious papers on federal jurisdiction were their specialty, as they are for most law students. The price for attaching Professor Frankfurter's name? Available upon request.

And that's precisely how Professor Kerr's theory breaks new ground. It, too, carries the imprimatur of an esteemed scholar – in published form, no less – but it does so at no cost to those who would cite it. Professor Kerr is not in this for the money (only the citations).

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<sup>†</sup> Attorney, U.S. Department of Justice.

## AN ALTERNATIVE CITATION POLICY

*Robert D. Cheren*<sup>†</sup>

Professor Kerr lamented the “common practice among law review editors to demand that authors support every claim with a citation.”<sup>1</sup> But the editors of the *Case Western Reserve Law Review* had already reformulated the journal’s policies to better identify when a citation is required. Rather than demanding authors “support every claim,” we require a citation for every reference.<sup>2</sup> A reference is an assertion of the contents of a document or a statistic. The citation guides the reader to the document or the statistic. Authors may make whatever claims they desire with however so much support as they choose. The rule is simple to administer and – better yet – omitted citations to references can be produced by 2Ls without taxing authors.<sup>3</sup>

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<sup>†</sup> Publisher, Volume 63, *Case Western Reserve Law Review*.

<sup>1</sup> Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> This and every sentence except for the text accompanying notes 1 and 2 have no references and therefore require no citations.

A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

## THE INFINITE CITATION

*Miriam A. Cherry & Anders Walker*<sup>†</sup>

**A**s rain turns to sun  
*Supra*<sup>1</sup> transforms to *infra*<sup>2</sup>  
Editors approve

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<sup>†</sup> Professors of law, Saint Louis University School of Law.

<sup>1</sup> See note 2, *infra*.

<sup>2</sup> See note 1, *supra*.

## THE SERIOUS POINT

*Paul Gowder*<sup>†</sup>

In other disciplines, editors don't demand a footnote for every single factual assertion.

Articles in peer-reviewed journals still have citations because their authors want to be believed, and being believed means substantiating controversial claims. Authors and their intended readers, being experts, know which claims are controversial.

Law reviews are (theoretically) written for a non-specialist audience. But not every article is written for judges and lawyers: when I write a jurisprudence article, only handful of professors in law and philosophy might care. They can tell if I just make things up.

Moreover, there is no *authority* in philosophy, social science, and other non-law disciplines: nobody's words can be cited to definitively establish a claim as true. By contrast, doctrinal areas have authority in that sense (statutes, supreme court rulings, etc.).

Law review editors should demand citations for every claim in doctrinal articles. They should let the author decide in theory articles.

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<sup>†</sup> Associate Professor, University of Iowa College of Law. Copyright © 2012 Paul Gowder.



## A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

# A CONTRARY VIEW

*Robert A. James*<sup>†</sup>

Professor Kerr's *A Theory of Law* might be criticized as filling a much-needed gap. But the "obsession of the legal community with documenting even the most obvious fact"<sup>1</sup> amply justifies a highfalutin title that can backstop a proposition for which no more specific citation has been found.

Sometimes the converse is true. Authors are frequently compelled to cite a famous and indispensable authority that they vaguely believe is wrong or obnoxious. The busy or lazy writer may wish to cast pale doubt on the authority without bothering to develop the full-blown scholarly apparatus of critique. This article is offered to that end, full in expectation that its citations will forever follow the signal *But see*.

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<sup>†</sup> Partner, Pillsbury Winthrop Shaw Pittman LLP.

<sup>1</sup> Davison M. Douglas, *Attenuated Subtleties Revisited*, 1 GREEN BAG 2D 375, 375 (1998). *But see* Robert A. James, *A Contrary View*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 495 (2012).

# A NON-IDEAL THEORY OF LAW

*Jacob T. Levy*<sup>†</sup>

**T**he Folk Theorem shows that essentially any outcome of a repeated game can be shown to be an equilibrium. The theorem of the second-best shows that, if one variable in an optimization is held at the non-optimal level, the overall optimum is not necessarily approached as the other variable approaches its optimal level. It follows that essentially anything, no matter how counterintuitive, can be justified as a "second-best" outcome.

Orin Kerr's important article supports claims such that, as he puts it, "it is plainly true that the author's claim is correct."<sup>1</sup> Some claims are too counterintuitive for "plainly true" to suffice. If you have been directed to this page by a citation elsewhere, it is *surprisingly* true that the author's conclusion is correct as a matter of the best-attainable second-best.

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<sup>†</sup> Tomlinson Professor of Political Theory, McGill University.

<sup>1</sup> Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

# THE COGNITIVE-CITATION APP™

*Orly Lobel*<sup>†</sup>

**K**err's innovative proposal to establish a one-stop citation for all references is groundbreaking but incomplete. Kerr overlooks a little-known yet invaluable goal of law review citations: the detection of unsupported theories. To this end, I offer a far more advanced mechanism than the Kerr One-Cite System. Bringing legal citation to the 21st century and applying the latest in neuro-tech,<sup>1</sup> the Cognitive-Citation App™ (CCA) will allow legal scholars to place a mobile device near the frontal lobe and to thereby digitally confirm (CCA code automatically generates) that the scholar has direct knowledge that the claims made in their article are supported. Claims may be obvious, obscure, or false, but they cannot be unsupported.

The app will also include the Headache Function™ allowing legal scholars to provide law review editors support for "major headaches" which Kerr, unsupportedly, claims to occur when demands for citations are made.

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<sup>†</sup> University Professor and Professor of Law, University of San Diego.

<sup>1</sup> See CCA-OL-1.

A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

PRACTICAL LEGAL THEORY

*Theodore P. "Jack" Metzler*

In his ground-breaking article, "A Theory of Law," Professor Kerr demonstrates that law review editors often require support in the form of a citation for every claim made in an article.<sup>1</sup> Kerr's contribution in this regard cannot be overstated,<sup>2</sup> but it is also true that repeated citations to a single work of legal scholarship, no matter how important, might make an author's own work appear to be needlessly derivative.<sup>3</sup> Moreover, some claims may appear weaker when supported by a single source.<sup>4</sup> Accordingly, like Kerr, "I offer this page, with the following conclusion: If you have been directed to this page by a citation elsewhere, it is plainly true that the author's claim is correct. For further support, consult the extensive scholarship on the point."<sup>5</sup>

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<sup>1</sup> Orin S. Kerr, A Theory of Law, 16 GREEN BAG 2D 111 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; Theodore P. "Jack" Metzler, *Practical Legal Theory*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 498 (2012).

## ENDING THE WAR

### WHY EDITORS CANNOT QUESTION CITATIONS TO "A THEORY OF LAW"

*Ronak Patel*

Reflecting a war as old as legal scholarship, *A Theory of Law* assumes that unnecessary citation demands derive from editors.<sup>1</sup> But it is tradition that requires this rule; personally, we editors loathe it.<sup>2</sup> Thus, we support Kerr, but need an article justifying its use from our perspective.

But a professor cannot write it, as editors may not trust them on this topic. Instead, a current editor loyal to our community should author it.<sup>3</sup> Scholars can use it to bolster a Kerr citation, and defuse editors' concerns.<sup>4</sup>

Let's end this war.

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<sup>1</sup> Orin Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012); see also Ronak Patel, *Ending The War: Why Editors Cannot Question Citations to "A Theory of Law"*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 499 (2012) (validating Kerr's assertions).

<sup>2</sup> *Id.*

<sup>3</sup> Patel is the *McGeorge Law Review's* Chief Articles Editor.

<sup>4</sup> For an example, see Patel, *supra* note 1, at n.1.

## A PLAUSIBLE BUT NOT DECISIVE OBJECTION

*Jeffrey A. Pojanowski*<sup>†</sup>

**A** *Theory of Law* is an invaluable – one might say preemptive – contribution that will play a crucial role in a wide array of scholarly inquiry. Prof. Kerr's project nevertheless neglects an important gap in the legal literature, namely the citational completist's impulse to denote disagreement with a proffered proposition, even though discussion of said dissent will be limited to parenthetical summation.

The ideal candidate for this "but see" citation is an article by a scholar who is (a) not so formidable in stature so as to cast doubt on the citing author's claim, while (b) not being an obviously fringe figure. A junior professor at a respectable institution fits such a bill;<sup>1</sup> he is even likely to value the marginal appreciation in his citation count.<sup>2</sup>

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<sup>†</sup> Associate Professor of Law, Notre Dame Law School. Copyright © 2012 Jeffrey Pojanowski.

<sup>1</sup> See, e.g., author note, *supra*.

<sup>2</sup> See Jeffrey A. Pojanowski, *A Plausible But Not Decisive Objection*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 500 (2012).

A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

ON NARCISSISM

Alexandra J. Roberts<sup>†</sup>

With his recent opus, "A Theory of Law," Orin Kerr endeavors to provide a comprehensive reference for legal scholars. Yet his celebration of self-citation forges a dangerous precedent. While every important thinker cites his own work, his friends' work, and the work of those whose friendship he feigns, Kerr's *see generally* sets legal scholarship afloat on a flume of solipsism.<sup>1</sup> Given the exacting demands of law review editors, such self-citation will soon flank every period and semicolon. From there, a citational maelstrom comprising intra-sentential,<sup>2</sup> fix<sup>3</sup>ational, and p<sup>4</sup>ost-allophonic self-citation will ensue, drowning the professoriate in a sea of *ids*.

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<sup>1</sup> See DAVID FOSTER WALLACE, *CONSIDER THE LOBSTER AND OTHER ESSAYS* (2006) 87 n.32 (defining "cannabic solipsism," the adolescent, marijuana-induced "terror that [one's] own inner experience is both private and unverifiable").

<sup>2</sup> See generally Alexandra J. Roberts, *On Narcissism*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 501 (2012).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

## CURSING RECURSION

*Kent Scheidegger*<sup>†</sup>

**R**ecursive subroutine calls are a powerful but dangerous technique in computer programming. Routines regularly call other routines to do various tasks, but a routine can also call itself. If the programmer is not careful, such a recursive call can result in an infinite loop, with the routine calling itself without limit and locking up the computer. Infinite recursion is generally followed by cursing – by the user at the programmer.

After 50 years, more or less, the legal profession has caught up. Professor Orin Kerr has introduced the recursive law review citation.<sup>1</sup> This is a powerful but dangerous technique.<sup>2</sup> Damn him.

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<sup>†</sup> Legal Director, Criminal Justice Legal Foundation. Copyright © 2012 Kent Scheidegger.

<sup>1</sup> See Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

<sup>2</sup> Cf. Kent Scheidegger, *Cursing Recursion*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 502 (2012).