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## LONG LIVE THE STUDENT-EDITED LAW REVIEW

*Mary Garvey Algero*\*

### I. INTRODUCTION

Student-edited law reviews have played a vital role in the development and the publishing of legal scholarship, and they should continue to play this role. Historically, student-edited law reviews have served as the primary platform for professors, lawyers, judges, and law students to publish their work.<sup>1</sup> More than 5,000 articles are published a year in student-edited law reviews.<sup>2</sup> Most of these articles will not bring about dramatic changes in our laws or our way of thinking and analyzing the law; some will.<sup>3</sup> Most will serve to provide a platform for commentators and reporters on the law to present their ideas and think through legal issues and problems. The provision of a space for the expression of these ideas itself is valuable because it encourages scholars to take the time to go through the exercises of thinking, researching, and writing deeply on legal subjects. Through the process, scholars often develop new ideas and new ways of thinking of things. Over time, these law review articles will help inform society, lawyers, and judges about the law, will challenge readers to think about the law in new and different ways, and will propose modifications to the law.

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<sup>1</sup> ELIZABETH FAJANS & MARY R. FALK, *SCHOLARLY WRITING FOR LAW STUDENTS* 2 (4th ed. 2011).

<sup>2</sup> Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 *CHI.-KENT L. REV.* 871, 876 n.24 (1996); see also Leo P. Martinez, *Babies, Bathwater, and Law Reviews*, 47 *STAN. L. REV.* 1139, 1144 (1995) (estimating that over 5,000 articles are published in student-edited law reviews per year).

<sup>3</sup> FAJANS & FALK, *supra* note 1, at 4; see also Thomas L. Ambro, *Citing Legal Articles in Judicial Opinions: A Sympathetic Antipathy*, 80 *AM. BANKR. L.J.* 547, 549-51 (2006).

This essay focuses on three reasons student-edited law reviews should and will continue to serve as effective vehicles for legal scholarship: 1) student-edited law reviews are valuable because of their very existence as platforms for the publication of historical and analytical legal writing; 2) law review articles help practitioners, judges, professors, law students, and others studying the law to understand the law and to consider and evaluate arguments about the law as they work on real cases and controversies; and 3) law reviews provide opportunities for law students to develop and practice skills that will be invaluable to them as lawyers.

## II. THE IMPORTANCE OF STUDENT-EDITED LAW REVIEWS

First, law reviews are valuable because of their very existence as platforms for the publication of historical and analytical legal research and writing. They provide the platform on which ideas can be born, develop, grow, and become recognized by others, or changed or modified by others. They provide a platform for many thoughts about the law, both related to real cases and controversies and beyond existing cases and controversies. Courts are limited to addressing real cases and controversies;<sup>4</sup> lawyers address the issues raised by clients' cases. In contrast, scholars writing law review articles are free from these boundaries. Many articles will see a wide audience, while others will draw very little audience.<sup>5</sup> But wide interest is not the main point of this first reason why law reviews are valuable. *Researching and writing requires thinking deeply.* This means that people working on articles are thinking through legal issues and social issues, which may lead to ideas that reform the law for the better and may lead to new and creative laws in emerging fields or areas of law. This thinking and writing about it, once read, may ignite thoughts in others, and so on and so on.

Student-edited law reviews have been at the center of the developments of new doctrine and new legal schools of thought.<sup>6</sup> Some facets of modern tort doctrine were developed through law review articles.<sup>7</sup> Legal schools of thought such as law and

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<sup>4</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>5</sup> FAJANS & FALK, *supra* note 1, at 2.

<sup>6</sup> FAJANS & FALK, *supra* note 1, at 3.

<sup>7</sup> FAJANS & FALK, *supra* note 1, at 4 (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

economics, legal realism, and feminist legal theory were developed in part through articles published in student-edited law reviews.<sup>8</sup> They have helped to gain respect for and inform others about disciplines in the law such as legal writing and storytelling.<sup>9</sup> The nature of a law review article has encouraged these researchers and writers to think deeply and creatively about issues, beyond what can ordinarily be done when a lawyer works on a case or a judge decides a case. They provide the platform for writing about these ideas, and because the platform exists, they encourage legal scholars to even venture to think creatively. As explained by Professors Fajans and Falk:

Like other professionals, lawyers cannot in good conscience concern themselves only with what is, or even with what works: in order to be creative and responsible members of the community, lawyers also need to think about what might, should, and should not be. Legal scholarship allows that free play of intellect and imagination out of which the future of a discipline emerges.<sup>10</sup>

As platforms for this legal research and analysis, student-edited law reviews allow researchers and writers to focus on topics in a deep way. They also provide some agility to the writer who is able to explore new and different topics because student-edited law reviews allow and publish such a wide array of articles on a wide array of topics. A newspaper or magazine allows more agility, but at the expense of depth; a book as a platform lacks the agility, but it certainly provides space for depth. A law review provides a happy medium—that is, agility and depth.

Second, law review articles help practitioners, judges, professors, law students, and others studying the law to understand the law and to consider and evaluate arguments about the law as they work on real cases and controversies.<sup>11</sup> Ironically, articles have been

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<sup>8</sup> Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U. L. REV. 563, 566 (2007); Merritt & Putnam, *supra* note 2, at 886-87.

<sup>9</sup> See Jessica Wherry Clark & Kristen E. Murray, *The Theoretical & Practical Underpinnings of Teaching Scholarly Legal Writing*, 1 TEX. A&M L. REV. 523 (2014) (providing an example of scholarship on legal writing); Jonathan K. Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239 (2012) (providing an example of scholarship on storytelling).

<sup>10</sup> FAJANS & FALK, *supra* note 1, at 3-4.

<sup>11</sup> Natalie C. Cotton, Comment, *The Competence of Students as Editors of Law Reviews: A Response to Judge Posner*, 154 U. PA. L. REV. 951, 954 (2006).

written and published in student-edited law reviews in which the authors dismiss the value of law reviews on the grounds that judges and practitioners do not cite to articles often in their opinions or arguments to the court.<sup>12</sup>

Judges are on record as saying that they ordinarily do not cite to law review articles.<sup>13</sup> Off the record, one sitting judge told the writer that his colleagues discouraged him from citing to law review articles in his opinions. He said this advice was given not because the judges deemed articles of no value, but because they feared that if law review articles were cited in opinions, lawyers, scholars, and other judges might assume that the court agreed with everything in the article, which could turn out to be a problem in the future. He was not discouraged from using articles to assist him in evaluating the law and the arguments; he was only discouraged from citing to them.

Similarly, the articles regarding courts' use of law review articles usually do not assert that law review articles have not provided these researchers and writers with information, explanations, and ideas.<sup>14</sup> In fact, Professors Merritt and Putnam have opined that courts may be influenced by law review articles, but that they may not cite to those articles unless they believe the articles hold some persuasive authority over and above the primary sources to which the court has cited.<sup>15</sup> Most, if not every, lawyer has consulted a law review article to assist in understanding a statute, a case, a constitutional provision, or a regulation.<sup>16</sup> Secondary sources, such as law reviews, are at the top of the list for most researchers who are trying to understand an area of law either for the first time or as a

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<sup>12</sup> See generally Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. 995 (2012); David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by The Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345 (2011); Gregory Scott Crespi, *Judicial and Law Review Citation Frequencies for Articles Published in Different "Tiers" of Law Journals: An Empirical Analysis*, 44 SANTA CLARA L. REV. 897 (2004); see also Merritt & Putnam, *supra* note 2, at 872.

<sup>13</sup> Ambro, *supra* note 3, at 547-49.

<sup>14</sup> But see *A Conversation with Chief Justice Roberts*, C-SPAN (June 25, 2011), <https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts> (discussing law review articles at the Fourth Circuit Appeals Court Annual Conference beginning at 28:45 and ending at 32:05), cited in Petherbridge & Schwartz, *supra* note 12, at 996 (explaining that Chief Justice Roberts opined that law review articles are of no interest to the bench and bar).

<sup>15</sup> Merritt & Putnam, *supra* note 2, at 878.

<sup>16</sup> See, e.g., Ambro, *supra* note 3, at 549-50.

second thought to try to develop arguments or theories involving the area of law.<sup>17</sup> Often these researchers are led to primary sources by law reviews, which do an excellent job of providing attribution to source materials.<sup>18</sup> These researchers then, having been led to the primary sources by the law review article and having now developed an understanding of the topic through the law review article, often choose to cite to the primary source or sources only. Why? Just like the assertion regarding the courts, practitioners prefer to cite to primary sources that will be more persuasive to the court than secondary sources, even when those secondary sources may have contributed greatly to the practitioner's understanding and application of the law. The value of the law review article remains, despite the lack of citation to the article.

Third, law reviews provide opportunities for law students to develop and practice skills that will be invaluable to them as lawyers. The training and discipline involved in working on a law review editorial board or staff, especially as an editor, is second to none. Student editors will be better writers, editors, thinkers, and lawyers because of this work.<sup>19</sup> They will develop a keen attention to detail that will serve them well in the legal profession as they check citations for substance and form and determine whether written statements are accurate. These are skills that are immediately transferrable to practicing law or working as a judicial law clerk or a judge.<sup>20</sup> They will hone their research skills as they tackle articles on a wide variety of legal topics involving a wide variety of legal sources. They will improve their writing as they are exposed to and edit both good writing and bad, sometimes learning more from the bad than the good. When an editor sits to edit a poorly organized article, the editor must break down the article and its ideas into its parts to discern what the writer is trying to say. The editor needs to edit the writing to say what the writer was trying to say, sometimes

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<sup>17</sup> Meg Kribble, *Secondary Sources: ALRs, Encyclopedias, Law Reviews, Restatements, & Treatises: Home*, HARV. L. SCH. LIBR., <http://guides.library.harvard.edu/secondary> (last updated Jan. 9, 2017).

<sup>18</sup> *Id.* at *Law Review Articles*; see also MARY GARVEY ALGERO ET AL., *FEDERAL LEGAL RESEARCH* 54-55 (2d ed. 2015).

<sup>19</sup> See, e.g., Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 *LOY. L. REV.* 1, 24-26 (2013); see also Susan C. Wawrose, *What do Legal Employers Want to See in New Graduates?: Using Focus Groups to Find Out*, 39 *OHIO N.U. L. REV.* 505, 523-32 (2013).

<sup>20</sup> Wise et al., *supra* note 19, at 26.

simply by adding some transitions or paragraphing that help to guide the reader, and sometimes by doing major reconstructive surgery on the writing. All the while, the editor is using skills to try to understand what is meant, which means she is thinking and learning about this area of law and she is using knowledge of style, grammar, and structure to understand and improve the writing. The editor's ability to understand difficult concepts improves as she learns to bring order to what sometimes appears to be chaos. Writing improves as the editor figures out the best ways to edit articles to make them more understandable.

The credential of service on a law review staff or editorial board indicates to others several things: 1) the student was a high achiever in law school, earning high grades, having strong writing skills, or a combination of the two, 2) the student was chosen by his or her peers to serve on an editorial board because of a strong work ethic, dedication, and leadership qualities and abilities, and 3) the student was willing to work extra hard during law school, even when that was not required.<sup>21</sup> These positions mean something to lawyers; they show a level of dedication that will bode well for working hard in a future law practice.<sup>22</sup>

On a related note, experience as an editor or part of the staff helps students to develop *people skills* and the ability to work well with others.<sup>23</sup> These skills, along with integrity, work ethic, common sense, resiliency, and conscientiousness, were recently identified by lawyers across the country as skills they would like new lawyers to have most.<sup>24</sup> An editor may think that an article is not well written, and he may wish to completely rewrite it. The author may disagree. As the editor works through this scenario and other similar scenarios, the editor will learn to show respect even when he disagrees with the

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<sup>21</sup> Menachem Wecker, *Law Review Leads to Legal Jobs, Recruiters Say*, U.S. NEWS (Jan. 19, 2012, 9:00 AM), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/01/19/law-review-leads-to-legal-jobs-recruiters-say>.

<sup>22</sup> Abner J. Mikva, *Law Reviews, Judicial Opinions, and Their Relationship to Writing*, 30 STETSON L. REV. 521, 525 (2000).

<sup>23</sup> Wise, et al., *supra* note 19, at 25-26 (indicating that law review staff members are forced to "learn from and teach their peers" thereby causing them to engage with others on a daily basis).

<sup>24</sup> For results of the Foundations for Practice survey, executive summary, see Alli Gerkman & Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, IAALS 1 (July 2016), [http://iaals.du.edu/sites/default/files/reports/foundations\\_for\\_practice\\_whole\\_lawyer\\_character\\_quotient.pdf](http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf).

author. He will learn that there is more than one way to do things, and he will learn to compromise. He will learn that it is wise to surround himself with good, talented people and to listen to those good, talented people. On a law review editorial board, editors are surrounded by good, talented people, which include the authors submitting the work. Editors learn to respect all of the people playing a part in an article's development and publication, even while suggesting ways to improve their work. Part of how an editor's suggestions are received depends on how the editor comes across and how he delivers his suggestions. If an editor is able to come across as a team player who respects others' views, his suggestions are more likely to be heard and considered.

Today's student law review editors and staffs are also called upon to think innovatively as to ways in which readers want to receive content.<sup>25</sup> Experience adapting law reviews to new methods and habits is a valuable experience for students. Some law reviews have created blogs, in addition to their traditional publications, where students comment on current legal issues and cases almost contemporaneously with the events happening.<sup>26</sup> In this way, the law reviews provide the platform for both an immediate response and commentary on an event, as well as a deeper, more well thought out response in a full-length law review article.<sup>27</sup>

### III. CONCLUSION

In conclusion, long live student-edited law reviews! Student-edited law reviews have a bright future in the field of legal scholarship, which will benefit legal scholars, student editors, legal

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<sup>25</sup> Sarah Kellogg, *Do You Blog?*, WASH. LAW. April 2005, at 24-25 (indicating that blogs are one means that may provide law students, law professors, and lawyers with the chance to enhance the communication of the law to readers in the digital age); Lawrence B. Solum, *Download It While It's Hot: Open Access and Legal Scholarship*, 10 LEWIS & CLARK L. REV. 841, 847-48 (2006) (indicating that there is a recent shift in reader interest in long-form law review articles due to their density).

<sup>26</sup> Some examples of blogs run by law reviews include the Loyola Current, a blog of the Loyola Maritime Law Journal, the 4<sup>th</sup> Circuit blog, maintained by the Wake Forest Law Review, the Pace International Law Review blog, and the Touro Law Review blog. See THE LOY. CURRENT, <http://www.loyolacurrent.com> (last visited Mar. 14, 2017); PACE INT'L L. REV., <https://pilr.blogs.pace.edu> (last visited Mar. 14, 2017); THE WAKE FOREST L. REV., <http://wakeforestlawreview.com/category/fourth-cir-blog/> (last visited Mar. 14, 2017); TOURO L. REV. BLOG, <https://tourolawreviewblog.wordpress.com/> (last visited Mar. 14, 2017).

<sup>27</sup> Kellogg, *supra* note 25, at 25-26; Solum, *supra* note 25, at 856.

researchers, and most of all, the development of the law. These law reviews will continue to play a vital role in legal scholarship as they continue to encourage and provide a space for the presentation of legal research, analysis, and theory; as they assist the bench, the bar, and the academy in understanding and analyzing the law; and as they provide opportunities for law students to develop and hone skills necessary to become successful lawyers and judges.