Virtual Liquid Networks and Other Guiding Principles for Optimizing Future Student-Edited Law Review Platforms

Donald J. Kochan

VIRTUAL LIQUID NETWORKS
AND OTHER GUIDING PRINCIPLES FOR OPTIMIZING
FUTURE STUDENT-EDITED LAW REVIEW PLATFORMS

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One goal of an Associate Dean for Research should be to help create an overall engaged scholarly culture at every level of the law school, incorporating roles not just for faculty, but also students and other community members.[1] If the Associate Dean for Research has a responsibility to shape and develop the intellectual life of the law school, then part of that charge should be to aid the student-edited law reviews in their contribution to that enterprise and to help them evolve. These reviews play a part in sending signals to the outside world of the scholarly commitment of a law school, while serving the higher value of distributing knowledge and disseminating legal thought that addresses doctrinal clarity, unpacks theoretical uncertainties, creates foundations for reform, or otherwise presents solutions through law to critical social issues. It is with these service goals in mind that I offer here a few thoughts on this symposium's topic, "Student-Edited Law Reviews: Future Publication Platforms."

I.   FACILITATING LEGAL SCHOLARSHIP RESPONSIBILITIES

The three primary strands of professional activity for law faculty are teaching, service, and scholarship — all with an eye toward enhancing the learning environment for our students and bettering the overall understanding of the law. All three strands are interconnected and interdependent. As legal scholars, we hope—borrowing some

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[1] *See, e.g.*, Sonia K. Katyal, *Encouraging Engaged Scholarship: Perspectives from an Associate Dean for Research*, 31 TOURO L. REV. 53, 65 69 (2014) (articulating the need for an Associate Dean for Research to "enlarge the size of that scholarly community by considering ways to actively bring in other parts of the law school community—students, clinicians, alums, the surrounding community, and others.").

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words from John Locke—that with "[e]very step the mind takes in its progress towards knowledge"[2] in our research, we "make some discovery, which is not only new, but the best too, for the time at least,"[3] and that we are able to memorialize our original discoveries on paper for the benefit of law's development. Student-edited law reviews help legal scholars accomplish these aims.

There are, of course, other justifications that can be offered for student-edited law reviews—including the pedagogical value from students developing editing, reasoning, research, and writing skills. But there should be no doubt that there is this separate, independent value in the contribution student-edited law reviews make to the scholarly environment at a law school. These reviews provide a critical forum for the publication of the scholarship that law professors and others produce to advance and develop our knowledge and understanding of the law and to thereby improve the operation of the legal system.

Indeed, law reviews help law faculty fulfill a fundamental obligation to produce legal scholarship valuable to broad constituencies of learning. The "Responsibilities of Scholars" articulated by the Association of American Law Schools (AALS) states it well: "A basic responsibility of the community of higher education in the United States is to refine, extend, and transmit knowledge,"[4] and as part of that task, "law professors have a responsibility to engage in their own research and publish their conclusions. In this way, law professors participate in an intellectual exchange that tests and improves their knowledge of the field, to the ultimate benefit of their students, the profession and society."[5] So, when we ask about future publication platforms for student-edited law reviews, the most immediate conclusion is that—if we are to adequately meet the goals of each institution to inculcate a scholarly culture, and if we are to meet the legal scholar responsibilities to engage in intellectual exchange that the academy

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[2] JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 11 (Alexander Campbell Fraser ed., Oxford: Oxford University Press 1844) (1690).

[3] LOCKE, *supra* note 2, at 11.

[4] *AALS Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities*, WASHBURN U. SCH. OF L., http://washburnlaw.edu/facultystaff/otherpolicies/aalsgoodpractices.html (last visited Feb. 15, 2016) (also available at *Law Professors in the Discharge of Ethical and Professional Responsibilities*, ASSOC. OF AMERICAN LAW SCHOOLS, https://www.aals.org/members/other-member-services/aals-statements/ethics/ (last visited Mar. 22, 2016)).

[5] AALS, *supra* note 4, at 1.

has identified for law professors from all law schools—the continued existence of at least some platform provided by student-edited law reviews for the publication of legal scholarship seems vital.

II.   GUIDANCE ON CONTENT CONSTRAINTS

While the platforms for, or modes of delivery of, legal scholarship may be changing, the irreducible minimum requirements judging what constitutes quality "legal scholarship" should not. So, the first guiding principle that should control student-edited law reviews as they adopt new platforms is simple: *maintain the distinctive function of publishing content that has the rigor and other qualities to count as legal scholarship*.

It's not about the box; it's the contents that count. The ideal direction for student-edited journals is toward multiple platforms that deliver law review-quality content. The content quality filters must remain lest the reviews stop providing the service of separating the wheat from the chaff and performing the filtration function demanded by the consumer market for law review-style products. As such, a fundamental metric for the content that populates any new student-edited law review platform should be its quality as measured by its originality and unique contribution to the literature.[6]

This issue of quality control is about maintaining a distinctive function for the law review. Cass Sunstein's characterization of the unique services performed by law reviews should help give students focus. Sunstein posits that, "whatever [law reviews] do, they often display great care and rigor, in a way that makes op-eds, blog posts, and essays in general interest magazines look like pretty thin gruel – mere bumper stickers, a kind of wind, even when written by law professors."[7] A high level of careful and rigorous selection and review of content is an attribute that will allow student-edited law reviews to maintain their integrity as content-providers no matter the platform.

And, as for the type of content, Erwin Chemerinsky offers what I believe is a valuable guide worth adopting by student-edited law reviews for distinguishing legal scholarship from other written

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[6] *See, e.g.*, Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881, 887, 891 (2009) (discussing the necessity of "quality determinations" for what should be written and published and stating that "quality certainly should be assessed based on the amount of original analysis").

[7] Cass R. Sunstein, *In Praise of Law Reviews (and Jargon-Filled, Academic Writing)*, MICH. L. REV. at 13 (forthcoming 2016).

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products, focusing on whether the writings "make an original contribution to the analysis and understanding of those engaged in the field of law."[8]   The test for quality should examine whether a writing "adds to the knowledge of those in the field. Will those reading the piece learn something that is not available in any other source?"[9] Student editors can also glean insight regarding the universality of legal scholarship norms regardless of platform when Chemerinsky explains that, "If a writing makes a significant, original contribution to knowledge about the law, then it should be regarded as scholarship regardless of the audience for whom it is written and regardless of whether it is doctrinal or theoretical writing."[10]   The student-edited law reviews' focus should be on maintaining standards of quality, utility, uniqueness, originality and the capacity of the work—no matter on what platform delivered—to advance knowledge.

III.   GUIDANCE ON PLATFORM POSSIBILITIES

The influence and services provided by law reviews can be expanded and enhanced, including by harnessing technology to (1) achieve faster and easier distribution through more accessible outlets; (2) reach wider and more diverse audiences; (3) operate more efficiently and generate a lower cost product; and (4) and break down barriers to entry, thus fostering more competition for content publication. And, perhaps the most innovative ways that law reviews can embrace the future include using new platforms and technologies to increase dialogue, exchange, and distributive reasoning through virtual liquid networks.

In his book *Where Good Ideas Come From: The Natural History of Innovation*,[11] Steven Johnson explains the concept of "liquid networks" (from which this essay draws its title). After discussing evolution and innovation in nature, including formations and creations of life within liquid water, Johnson identifies the "two essential properties" in this "original innovation engine on earth" as including "[f]irst, a capacity to make new connections with as many other ele-

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[8] Chemerinsky, *supra* note 6, at 891. As Chemerinsky notes, some valuable metrics are also provided in Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992).

[9] Chemerinsky, *supra* note 6, at 891.

[10] Chemerinsky, *supra* note 6, at 891.

[11] STEVEN JOHNSON, WHERE GOOD IDEAS COME FROM: THE NATURAL HISTORY OF INNOVATION (2010).

ments as possible. And, second, a 'randomizing' environment that encourages collisions between all the elements in the system."[12] He concludes that, "On earth, at least, the story of life's creativity begins with a liquid, high-density network: connection-hungry carbon atoms colliding with other elements in the primordial soup."[13] These same forces that work on the natural world and its evolutionary processes operate in the generation and refinement of ideas.

Thus, Johnson explains that we should aim to create "intellectual space[s]" that resemble liquid networks so that "true sparks fly."[14] Bringing thinkers together and allowing their ideas to collide with each other is the key to advancing knowledge and truly spurring innovative thought and setting the necessary conditions for discovery—all goals that should be embraced in academic scholarship. These aims of collection, conversation, and collision should serve as guideposts for evaluating platforms that a law review might adopt for its role in creating the ideal conditions for innovative and useful content publication. In other words, we should be—through law reviews and other academic outlets—trying to create "unusually fertile"[15] and "shared environments"[16] that make possible "serendipitous connections"[17] and allow for the improvement and completion of ideas.[18]

Johnson's work is heavily influenced by the observations of Kevin Dunbar who studied scientists in the laboratory environment to isolate the source of the best and most innovative scientific ideas and discoveries.[19] Dunbar identified the utility of "distributed reasoning"

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[12] JOHNSON, *supra* note 11, at 51.

[13] JOHNSON, *supra* note 11, at 51.

[14] JOHNSON, *supra* note 11, at 163.

[15] JOHNSON, *supra* note 11, at 17.

[16] JOHNSON, *supra* note 11, at 162.

[17] JOHNSON, *supra* note 11, at 109.

[18] JOHNSON, *supra* note 11, at 75. As Johnson explains:

> [M]ost great ideas first take shape in a partial, incomplete form . . . . Liquid networks create an environment where those partial ideas can connect; they provide a kind of dating service for promising hunches. They make it easier to disseminate good ideas, of course, but they also do something more sublime: they help *complete* ideas.

[19] JOHNSON, *supra* note 11, at 60-62; *see also, e.g.*, Kevin Dunbar, *How Scientists Think: On-line Creativity and Conceptual Change in Science*, *in* CREATIVE THOUGHT: AN INVESTIGATION OF CONCEPTUAL STRUCTURES AND PROCESSES 461 (Thomas B. Ward et al. eds., 1997) [hereinafter Dunbar, *How Scientists Think*]; Kevin Dunbar, *How Scientists Build Models: InVivo Science as a Window on the Scientific Mind*, *in* MODEL-BASED REASONING IN SCIENTIFIC DISCOVERY 85 (Lorenzo Magnani et al. eds., 1999) [hereinafter Dunbar, *How Scientists Build Models*].

where "scientists performing cognitive operations on information (e.g., induction)" pass "the results of the operation on to other scientists in the group" and the "other scientists then use the results of the first operation as the input to further cognitive operations."[20] The result is that "different members of a group reason about topics such as hypothesis, experiment, methodology, or interpretation of a result while adding new elements to the topic under discussion."[21] As Johnson described the findings, "If you looked at the map of idea formation that Dunbar created, the ground zero of innovation was not the microscope. It was the conference table."[22]

There are valuable lessons to learn from these revelations about liquid network-like effects when constructing the best platforms for the discussion and publication of scholarly ideas. Physical academic workshops,[23] roundtables,[24] and like-gatherings have been traditional ways to bring scholars together to converse and collide, discussing their work in both draft and final form. These forums have liquid network-like attributes. Student-edited law reviews can offer a similar type of service—including by leveraging virtual platforms—for the benefit of improving the scholarship and expanding the dialogue on particular scholarly projects. It is the scientific laboratory Dunbar observed and like congregations of thinkers that should be incorporated as a design element—at least to the extent possible within the limitations of the written form—when constructing future law review publication platforms.

So, let us consider a few platform possibilities that can try to take advantage of the liquid network idea. To start, articles and essays on more discrete, limited scope subjects can be covered in shorter-form content platforms that can be quickly edited and quickly released for distribution online. Many online law review companions that electronically publish original or responsive works are already utilizing this type of platform. There is nothing wrong with shorter

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[20] Dunbar, *How Scientists Think*, *supra* note 19, at 13; Dunbar, *How Scientists Build Models*, *supra* note 19, at 96.

[21] Dunbar, *How Scientists Think*, *supra* note 19, at 482.

[22] JOHNSON, *supra* note 11, at 60-61.

[23] *See, e.g.*, Gary Lawson, *Making Workshops Work*, 54 J. LEGAL EDUC. 302 (2004) (describing the traditional law school workshop model and variations).

[24] *See, e.g.*, A. Benjamin Spencer, *Supporting and Promoting Scholarly Life in Turbulent Times*, 31 TOURO L. REV. 25, 27 (2014) (discussing the concept and utility of scholarship "roundtables" (at least of the physically-congregated kind) where guests are invited to review and comment on drafts).

works if they survive the filters that distinguish legal scholarship from other forms of writing.[25] In fact, many valuable advancements in knowledge can occur in shorter works and might even be lost by an over-emphasis (sometimes lurking in the views of academic traditionalists) on the need to publish masterpieces or nothing at all. I am quite fond of a passage from John Locke's "Epistle to the Reader" ("Epistle") opening his noted work, *An Essay Concerning Human Understanding*, where he explains that, "[t]he commonwealth of learning is" filled with "master-builders, whose mighty designs . . . will leave lasting monuments to the admiration of posterity."[26] Masterpieces are good and valuable. Yet, Locke counsels that we need not all strive to pen a masterpiece to add value – "every one must not hope to be"[27] a legend of the field, but instead "it is ambition enough to be employed as an under-labourer in clearing the ground a little, and removing some of the rubbish that lies in the way to knowledge."[28] Student-edited law reviews can assist that rubbish-removing labor by providing a venue for shorter, more concentrated, yet knowledge-advancing work. Furthermore, little bites are often more susceptible to post-publication liquid-networking effects because they are easier to chew on. Readers can consume and comment rather quickly, and ideas presented in the short form may often be those even more likely to be just enough "spark" to ignite a fruitful academic conversation.

Nonetheless, if it is a shorter work that does not meet the irreducible minimum standards discussed earlier for what constitutes legal scholarship, then it is not legal scholarship and should not be the business of student-edited law reviews. Such other non-scholarly writings might have their own type of value, but their production and publication should be left to other groups to distribute. So, the caution when adding a shorter-form content platform into the student-edited law review's portfolio is twofold: (1) the standards for such content must be maintained. This type of format could quickly become bastardized into something that stops resembling a law review. The risk is high that shorter content platforms could morph over time, devolving into polemic, political, opinion-based, or otherwise non-disciplined and non-scholarly critique. Law review editors will need

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[25] Chemerinsky, *supra* note 6, at 892 (standards for what counts as scholarship cannot be based on length because "longer is not inherently better").

[26] LOCKE, *supra* note 2, at 13.

[27] LOCKE, *supra* note 2, at 13.

[28] LOCKE, *supra* note 2, at 13.

to act as vigilant gatekeepers against such possible degeneration. (2) There must remain a place for the long form substantial research articles that require substantially more editing and that should probably be separated out in some segregated place (no matter whether they are in print, digital, or both).[29]

Beyond shorter-form content, other mechanisms too can facilitate scholar-matchmaking and dialogue functions to move closer to facilitating "collisions" of ideas that create mutually beneficial improvements to authors' scholarship. Student-edited law reviews should harness technology to provide previously unavailable avenues for such conversations. For example, law reviews can offer the concurrent posting of response pieces at the same time as posting or printing main selected articles. This again is being adopted by some journals, oftentimes with the main article appearing in print and a response appearing online.[30] Similarly, reviews could offer their online platform as a place for consecutive posting of a main article and a later response.[31] Both of the previous options could involve solicited responses or an open invitation for responses (perhaps with, for example, submitters competing to be selected as the respondent that receives an online slot from the law journal).

Most of what I have discussed so far is occurring in some form at some student-edited law reviews across the country. Further spread of such platforms to more law reviews should be welcomed.

My final suggestion lies closer to the edge of innovation. Student-edited law reviews should harness technology to innovate with virtual workshops and virtual roundtables that facilitate strong liquid networks that leave open room to improve scholarly works before publication of a "final" product. The idea here is to truly replicate, in virtual form, the roundtable or workshop concept to achieve even higher-order liquid networking effects than some of the previously discussed platforms.[32]

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[29] LOCKE, *supra* note 2, at 22-27. The reasons for preserving this traditional mainstay of legal scholarship are deep, but too lengthy to attempt to include in this shorter-form essay.

[30] *See* Raymond A. Bair, *Impact of Advances in Computing and Communications Technologies on Chemical Science and Technology: Report of a Workshop*, NCBI, http://www.ncbi.nlm.nih.gov/books/NBK44990/ (last visited Feb. 12, 2016). In this sense, the law reviews are indeed encouraging dialogue, but it is a bit scripted and does not maximize the opportunities to improve the main work from the insights offered by the corresponding response. In that sense, the true virtual workshop model discussed at the end of this section better optimizes the liquid networking idea.

[31] This option has the same comparative infirmities discussed in note 29, above.

[32] Bair, *supra* note 30, at 1. Mini-symposia on some law blogs resemble this concept, alt-

The idea proceeds as follows. The student-edited law review would (1) choose an author's draft through a submission process; (2) post the accepted draft on its website;[33] (3) act as a host of a virtual (non-physical) roundtable-like discussion, questioning, or commenting period on the work, organized under a variety of possible input formats; and (4) through the virtual platform, empower the author to engage with the virtual roundtable, responding to comments and modifying the draft as she goes along to improve the work in light of comments. Through virtual workshops, law reviews can generate a platform that replicates "a circle of humans at a table, talking shop" which Johnson reports remains "the most productive tool for generating good ideas" and "where information can spill over from one project to another" and "[t]he social flow of the group conversation turns that private solid state [of solitary thought] into a liquid network."[34]

The commenting period in the virtual workshop would have some designated closing period, after which the author improves the work prior to a step (5) where the student-edited law review publishes the final, improved article in print form, digital form, or both. Certain comments or responses might also lead to invitations extended to certain virtual workshop participants offering such parties a place to publish a more polished essay in response to the amended and final main author product. The initial commenting space or "virtual conference table" could be open to the public and/or to a selected group of solicited virtual workshop participants. The virtual workshop might also be followed up with a conference call or skype-based meeting among the commenters facilitated by the law review that extends the interaction even further.

These platforms designed around the idea of liquid networks could be said to energize what Erez Reuveni has described as "fertile cognitive architecture."[35] That term seems apt for new structures that

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hough those are often organized around an already-published article or book. Think of how much more useful it might be if the conversation was capable of improving the book or article that is the topic of the dialogue.

[33] *See Stanford Law Review's Peer Review Process*, PRAWFSBLAWG (Aug. 16, 2011), http://prawfsblawg.blogs.com/prawfsblawg/2011/08/stanford-law-reviews-peer-review-process.html. A few journals have started to post accepted submission drafts on their websites and some also send accepted drafts to peer "reviewers" who offer the author some suggestions. These are good innovations. But I am not familiar with any law journal that has gone further to create a formalized commenting process designed to replicate a workshop-like environment within a virtual platform.

[34] JOHNSON, *supra* note 11, at 61.

[35] Erez Reuveni, *Copyright, Neuroscience, and Creativity*, 64 ALA. L. REV. 735, 752

law reviews might build. Reuveni explains that "All the brilliant neural connections in the world are of marginal utility if they exist in isolation, particularly because so few great ideas emerge fully formed from the internal architecture of the brain."[36] The brain's optimal "fertility" is instead dependent on "exchanging information with others—in person, in school, in offices, on the Internet" where "half-finished fragments of ideas interplay with similar fragments in other people's minds."[37] These proposed virtual liquid network platforms hold the possibility of helping authors produce works of legal scholarship substantially improved from the forms such works might take in the traditional, more sterile and inert publication platforms.[38]

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To be successful, content will need to be supplied for these proposed or other platforms committed to publishing material with the minimum characteristics necessary to be deemed distinctively legal scholarship. So, we must incentivize content providers of legal scholarship. For our part in developing an administrative and tenure and promotion system, faculties should strive to develop standards recognizing that contributions to these new platforms "count" in tenure and promotion decisions and other evaluative moments so long as the content fits the standards as scholarly.[39] If the student-edited law reviews maintain the quality controls discussed above, that should not be difficult so long as faculties are willing to recognize that such scholarly content can be packaged and delivered in a variety of boxes.

Associate Deans for Research, law review advisers, and law faculty as a whole have a great opportunity and responsibility to help guide student-edited law reviews through evolutionary times. If we

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(2013) ("A fertile cognitive architecture thus requires a similarly fertile external environment in which to interact, almost as if each individual were himself a node in a larger informational network.").

[36] Reuveni, *supra* note 35, at 752.

[37] Reuveni, *supra* note 35, at 752.

[38] Reuveni, *supra* note 35, at 752. A number of other valuable outcomes are accomplished with each of these types of platforms that—to one degree or another—borrow from the virtual liquid network idea. For example, participants in the dialogue-like opportunities can build networks and forge professional relationships. More scholars can learn of each other's work at critical stages during development of articles rather than after the fact. And, these platforms can create mentoring opportunities for authors, especially more junior scholars, by matching them up with others engaged in their field. This can be especially valuable to those scholars who may not have experts in their field inside their own law school walls.

[39] *See, e.g.*, Chemerinsky, *supra* note 6, at 891 (discussing the problem of determining "what counts" as scholarship for purposes of promotion and tenure evaluation).

set the right guideposts and continue to help generate innovative platform ideas, student-edited law reviews can thrive and continue to play their part in the intellectual life of the law school and the advancement of legal knowledge.