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Last Writes? Re-assesing the Law Review in the Age of Cyberspace

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by

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The next decade could witness the end of the law review as we know it.

At first glance, this contention might seem implausible after all, the law review is the supreme institution of the contemporary American legal academy. Virtually all accredited law schools have one; quite a few have several. Law schools depend upon law reviews for publicity and prestige. Law professors depend upon law reviews for publication and promotion. Law students depend upon law reviews for education and eventual employment.

The law review, however, is hardly an inevitable institution. It emerged in the late nineteenth and early twentieth centuries as the product of a fortuitous interaction of academic circumstances and improvements in publishing technology. Today, new academic circumstances not least among which is increased professorial dissatisfaction with law reviews themselves and new computer-mediated communications technologies (e.g. on-line services and the Internet) are coming together in a way that may soon lead to the demise of the familiar law review in favor of a more promising system of scholarly communication.

The full-text version of this article[1] offers a comprehensive re-assessment of the law review from the perspective of the present age of cyberspace. Such a re-assessment is best begun with an investigation of the academic and technological conditions that initially joined to generate the genre. The standard story setting out the origin of the American law review runs as follows: in 1887, a group of enterprising Harvard law students, backed by visionary faculty and supportive Harvard alumni, commenced publication of a student-edited legal periodical (the *Harvard Law Review*) which soon became the model for many others. The story is factually accurate, but conceptually inadequate. It downplays the extent to which the law review served the general interests of the university-based law school as a formerly-marginal institution seeking greater distinction for its programs and its students in late nineteenth and early twentieth century America. It presents the law review as the creature of narrow legal considerations where there is at least circumstantial evidence to suggest that a desire to match the new journal-publishing projects of numerous other disciplines (e.g. medicine, chemistry, history) might have animated the professors who supported the student initiatives at Harvard and elsewhere. Most important for present purposes, the traditional story totally disregards technological developments in the printing and publishing industries in particular, the development of high-speed rotary presses and improved paper-making processes that in the late nineteenth century radically lowered printing costs and made law school sponsorship of legal periodicals financially and conceptually plausible for the first time. In light of these factors, the initial spread of law reviews to a variety of law schools can

be seen as a logical outgrowth of contemporary circumstances, rather than as an instance of institutions across the United States simply "following the leader."

Insofar as the law review emerged in response to perceived institutional, professorial and pedagogical goals, it was potentially vulnerable to criticism. Almost from the outset, dissident law professors, practitioners, judges and occasionally even law students themselves complained about the law review's content, form and operation. The criticisms came in waves, each larger and more powerful than the last. The first, weakest and most diffuse wave of criticism lasted roughly from 1905-1940. The earliest critics of the law review complained about the redundancy caused by the relatively-rapid proliferation of general-purpose, school-sponsored legal journals. They also expressed dissatisfaction with the standardization of the law review format which had come with the growing popularity and power of the genre. Concern about student editing and aversion to the dominant doctrinalism of the law reviews (especially on the part of legal "realists") precipitated other objections. These critiques prompted the creation of a few new-style law reviews which were designed for specific state audiences, which featured single-subject symposia, or which aspired to greater interdisciplinarity. Ultimately, however, those publications enjoyed only limited success.

The lack of change contributed to the build up of a second wave of criticism which struck the law reviews in the 1950s and early 1960s. In addition to sheer frustration, this second wave was induced by the rapid rate at which law reviews were continuing to multiply, by the growing independence of most student-edited journals from even indirect supervision by law faculty, and by a rising post-war egalitarianism which threw into question traditional grade-based methods of selecting law review editors. The renewed complaints indirectly encouraged the founding of a number of prominent faculty-edited law journals, but, again, fundamental change did not occur.

In the mid-1980s, still-simmering discontent with the law review system exploded into a third wave of very intense, even vitriolic criticism which continues to this day. Largely animated by the contemporary imperative to "publish or perish," many legal scholars have complained about how law review editors select and edit articles. They have accused student editors in particular of lacking the experience and expertise necessary to judge good scholarship, and of being biased in favor of certain subjects, certain styles and certain institutions. Under the influence of the recent "interdisciplinary turn" in the legal academy, they have noted that no other discipline permits its trainees to control the flow of scholarly information. Legal scholars have also expressed concern about delays encountered in the editing and publishing process and have even expressed doubts about the long-presumed educational validity of the law review experience for students themselves. The number and force of these and other criticisms has lately caused some law reviews to change their selection and editorial policies and has encouraged the inauguration of even more faculty-run law journals, but by and large the old regime survives. This may be the fault of the reformers as much as of those they would reform: having lost sight of how technology contributed to the creation and development of law reviews in the first place, all but a few critics have failed to consider how new

technologies in particular, computer-mediated communications technologies might be deployed to break the impasses of the present system.

Of course, the computer-mediated communications technologies embodied in LEXIS, WESTLAW and the Internet's so-called "electronic journals" have already begun to change and to some extent improve the prevailing law review structure. The first successful experiments in computer-assisted legal research were conducted at the University of Pittsburgh in the late 1950s and early 1960s. The online service LEXIS, an indirect descendant of the Pittsburgh initiative, was introduced in 1973; WESTLAW was introduced in 1975. Originally, neither LEXIS or WESTLAW carried law review articles, but by 1982 both had decided to do so. LEXIS and WESTLAW allow virtually-immediate access to law reviews upon publication; they offer unprecedentedly convenient access to published law review material; they allow for specific keyword searches of law review material, and they make it easier for law professors to reach an audience that cannot afford to subscribe to all the print law journals. Some of the changes in law review distribution and usage prompted by LEXIS and WESTLAW address some of the complaints that have historically been made about printed law reviews; in particular, the electronic databases relieve the physical burden of researching the hundreds of printed journals in the current law review system. In leaving intact the institutional and editorial structures of the law reviews, however, LEXIS and WESTLAW have revealed themselves to be conservative information technologies that do not fundamentally challenge or improve the present scheme of scholarly communication.

The inherent conservatism of LEXIS and WESTLAW has indirectly contributed to the development of electronic law journals distributed via the Internet. The first American incarnations of these journals appeared in 1994 as electronic versions of printed law reviews. In 1995 a number of second-generation electronic legal journals appeared that had no print equivalents. Journals of this latter sort have relatively greater potential to change and improve the way that legal scholarship is distributed, accessed and even done. They are cheaper to produce than print journals and their electronic extensions. Being easier to edit, they may eventually attract more faculty interest. In theory, they can take advantage of multimedia and hypertext.

One might conclude from these observations that purely electronic law journals provide the ultimate publishing alternative for legal scholars dissatisfied with the existing law review structure. But these journals suffer from serious limitations, especially as presently constructed. There are far too few of them to absorb existing scholarly output, they show little willingness to take full advantage of multimedia and hypertext, and (being at present mostly student-edited) they replicate existing editorial structures with all their limitations. The legal community can do better. Modern computer-mediated communications technology, in particular the World Wide Web, offers legal scholars not only a new platform for legal scholarship, but a radically-new method for producing and distributing it which at a stroke could remove most of the editorial frustrations and administrative bottlenecks of the old print-based (and even the new electronically-based) law review system.

In brief, legal scholars can escape the traditional straitjacket of the law reviews by publishing their scholarship directly on the World Wide Web. The case for Web self-publishing is clear and strong. Law professors writing at terminals with an Internet connection need not worry anymore about whether the subjects or styles of their work conform to the preferences and prejudices of student (or even faculty) law review editors. They need not endure months of frustrating or embarrassing delay while their articles are judged or printed. Their work can appear when they want it to, as opposed to when someone else's printing and publication schedule allows. They need not tolerate the inaccuracies or indignities of line-editing done by individuals who may not always be competent for the task. They need not turn their backs on their work once it is printed; for the benefit of both their readers and themselves they can conveniently improve their articles days, months or even years after initial publication.

Self-publishing on the Web also brings with it all the advantages of Web publication per se. On the Web, scholarship need no longer be circumscribed by the national or intra-disciplinary circulation of the law reviews; rather, it can be presented to an international and interdisciplinary public. On the Web, legal scholars are no longer limited by the linear nature or physical form of the print medium; free to use hypertext and multimedia to full advantage, they can link ideas and sources in new ways while exploring sensory dimensions of the legal process that to this point have been largely ignored. On the Web, legal scholars may moreover benefit from almost instant feedback; the Web's built-in electronic mail capacities allow and encourage readers to offer comments at the touch of a button comments which scholars can use as the basis for revision and improvement. Instead of being dead-on-arrival, every article a law professor or lawyer publishes on the Web can be a living creature, capable of interactivity, growth and evolution.

Of course, several arguments can be made against the self-publishing of legal scholarship on the Web. None of them, however, withstands under analysis. For instance, it might be said that edited law reviews provide important quality control, without which the legal community would be flooded with sub-standard scholarship. Even disregarding the dubious presumption that student-editing affords any kind of reliable and consistent quality control under the present system, Web self-publication and significant, professionally-undertaken quality control are in fact highly compatible. Given that legal writers would be electronically exposing their work to the world rather than handing it over to law review editors, they would have increased incentive to check their own works for technical and substantive errors. To supplement this, legal scholars publishing on-line could continue and even extend their practice of having their work pre-vetted by colleagues. Formal peer review in a system of self-published Web scholarship could take place after publication: scholarly readers could electronically attach comments to a piece that would then be available to other scholarly readers. If a new reader were interested, looking at these comments could quickly indicate whether an article were good or bad, and why.

A second major argument that might be advanced against Web self-publishing might suggest that only law reviews are capable of efficiently bringing legal scholarship to the attention of legal readers; self-published scholarship would be lost in a sea of electronic

information. Again, even disregarding the fact that much print scholarship is already lost in a poorly-indexed sea of print, this problem could be avoided if a legal academic institution such as the Association of American Law Schools (AALS) created or maintained a searchable central Web site an electronic archive of sorts to which all law professors could send and/or link their scholarly work.

A third foreseeable argument against Web self-publishing might be technological in nature, asserting that not enough law professors are on the Internet for the proposal to work, that encoding articles for Web delivery is too difficult, or that Web self-publishing would condemn legal scholars to the uncomfortable fate of having to read from screens. Here, however, critics would take aim at a moving target: more law professors are going on-line all the time, creating Web documents using Hypertext Markup Language (HTML) is easy and is becoming much easier with the development of so-called "editors" which mimic word processing programs, and screen legibility is continually increasing.

A fourth criticism of Web self-publishing of legal scholarship might focus on how it would supposedly deprive law students of the educational benefits of editing a law review. Recent comments by some law professors and even by some law students would suggest, however, that these educational benefits have been overstated, or at least might be conferred by other and better means. Even presuming that the benefits of law review editing are substantial and could not be gained in another way, they might be preserved by allowing students to operate law reviews for themselves. While law professors, practitioners and judges would self-publish on-line, students could continue to edit and produce their own Notes and Comments in the old institutional format.

A fifth point of disagreement might focus on the prestige or "halo effect" that legal scholars would have to forego as a result of not having some of their work placed in "elite" print law reviews. There might indeed be a short-term loss here, but surely the prestige value of a "premier placement" is (at best) intellectually dubious given the current editorial structure. Shouldn't articles be evaluated by one's colleagues on their own academic merit, rather than according to what a few inexperienced, non-expert students think of them? Moreover, in a self-publishing system associated with post-hoc peer review, prestige itself would hardly disappear; it would merely be gained (largely by posted reader comments) in a new, more legitimate and more democratic fashion.

Finally, one might simply react with disbelief to the prospect of legal scholars publishing their work directly on the Web. But the general idea has already been implemented by individual scholars (including a few law professors) all over the world. It has become standard practice in at least one discipline (physics, which currently depends on an electronic archive of "pre-prints") and is making practical headway in several others (including philosophy, economics and the health sciences). In 1993, a joint committee established by the University of Dayton School of Law and LEXIS-provider Mead Data Central even speculated that the practice might spread to the legal academy.

The self-publishing of legal scholarship on the Web might not be altogether without its own difficulties and challenges (especially in the short term, while the relevant

technology is still evolving), but the theoretical and practical analysis offered here suggests that in the context of the multiple problems plaguing the contemporary law review system, the professional and intellectual benefits of such a scheme would be well worth the risks. The question therefore becomes: what can members of the American legal community administrators, professors and even law students do to make this proposal a reality?

Individual law professors might help by putting their own papers on-line as soon as possible. Professors retaining copyright to their print pieces could put those up immediately; professors in the process of writing could put their pieces up whenever those are completed to their satisfaction. In the short-term, at least, such self-publishing need not pre-empt law professors from publishing articles in traditional law reviews; indeed, with law reviews' co-operation, law professors could use the comments generated by Web publication to improve their formally-published offerings. In the long run, however, legal scholars will likely find a two-track publication system to be unstable. Writers used to the flexibility of the Web will chafe at the finality of traditional publication, and will want to continue updating and revising the on-line versions of their works in the interests of both their readers and themselves. Readers will in turn want to see the most recent version of an article and will stop using or citing formally printed or otherwise "set" law review versions once those have been superseded by on-line revision.

Law deans and faculties might analogously promote change by encouraging or at least recognizing the scholarly value of self-published legal scholarship. The AALS or some other institution, even a "non-elite" law school seeking to enhance its visibility and reputation might provide critical assistance by creating the research facility I mentioned earlier: an automated but supervised Web site that would archive and link the new corpus of self-published legal scholarship. The editors of contemporary law reviews might help, if they choose, by agreeing to publish material which had originally been released on-line, and by continuing their incipient efforts to develop on-line editions with complete back-runs of their printed issues, thereby giving self-publishers materials with which to link.

In the long run, however, the practice of self-publishing legal scholarship on the World Wide Web will almost certainly bring about the end of the law review as we know it, in both its print and electronic forms. When will that end come? Providing they are attractive, convenient and not too expensive, new technologies can disrupt traditional media very quickly just consider how rapidly CDs replaced LPs in the entertainment industry. Even in the ostensibly more conservative academic context, the experience of physics demonstrates that new technologies which solve fundamental problems and create new opportunities for professors and their institutions can change scholarly norms in a stunningly-short snippet of time. In actuality, it is still too early to say exactly when the law review in its present form will pass from the American academic scene, but in light of its critical condition and the availability of an alternative and arguably superior form of scholarly communication, it may not be too early for the last writes.

* This is an extended abstract of Bernard J. Hibbitts, *Last Writes? Re-assessing the Law Review in the Age of Cyberspace*, <http://www.law.pitt.edu/hibbitts/last.htm> (version 1.0, Feb. 5, 1996), a slightly-revised version of which is printed in 71 N.Y.U. L. Rev. 615 (1996). A variant of this abstract previously appeared in *First Monday: Peer-Reviewed Journal on the Internet* <http://www.firstmonday.dk/> (September 3, 1996).

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1. Bernard J. Hibbitts, *Last Writes? Re-assessing the Law Review in the Age of Cyberspace* <http://www.law.pitt.edu/hibbitts/last.htm> (version 1.0, Feb. 5, 1996); <http://www.
law.pitt.edu/hibbitts/lastrev.htm> (version 1.1, June 4, 1996); reprinted with further revisions in 71 N.Y.U. L. Rev. 615 (1996).