

FROM THE PODIUM

Thomas W. Merrill

The Digital Revolution and the Future of Law Reviews

On April 8, 2016, Thomas W. Merrill, the Charles Evans Hughes Professor at Columbia Law School, delivered these remarks at the University Club of Milwaukee on the occasion of the *Marquette Law Review's* annual banquet.

Let me begin by congratulating the *Marquette Law Review* on reaching the threshold of its 100th anniversary. As you may know, Harvard established the first student-edited law review in 1887. Once the Harvard experiment was seen to be a success, other schools followed suit. Marquette was an early adopter, establishing its law review in 1916. By comparison, the school I attended, the University of Chicago, did not start a law review until 1933.

The title of my remarks could be “Will the *Marquette Law Review* Survive Another Hundred Years?” Or, perhaps, “Will the *Marquette Law Review* Survive Another Hundred Years, or Whenever Dean Kearney Steps Down as Dean, Whichever Comes First?” You will have to wait to the end for the answer.

Let me begin with a brief overview about the state of scholarly journals in the field of law. Based on a recent survey by Washington & Lee University's School of Law, it appears that there are today about 980 active journals in the United States devoted to law. Of these, I estimate that about 800 are student-edited law reviews. Since there are some 200 accredited law schools in the country, this means that the average law school has four student-edited law reviews. Obviously, some have more. Harvard has 18; Columbia and Yale have 11 each. Some have only one. Marquette, which has 4, is right at the mean.

Law reviewing is a growth industry. According to one source, in 1997 there were an estimated 400 student-edited law reviews. This means that the number of student-edited reviews has doubled in fewer than 20 years. The growth appears to be almost entirely in the form of new specialty law reviews at schools that already have a generalist law review and one or more specialty reviews. Lest the numbers astonish you, consider that in the field of biology

there are now 550 academic journals. Knowledge, or at least academic inquiry, is multiplying at an incredible rate. The growth in the number of law reviews in a significant sense simply mirrors a more general proliferation of scholarship, including legal scholarship.

The specific topic I wish to address is how the digital revolution is likely to affect law reviews, especially the 800 student-edited law reviews, in the coming years. About a month ago, the librarian at Columbia Law School sent a remarkable email to the Columbia faculty. He announced that the law school was cancelling its subscriptions to 450 law reviews. I was stunned by this. But, truth be told, I did nothing to protest. As far as I am aware, none of my colleagues did, either.

The explanation for the indifference, certainly in my case, is simple. It has been years since I went to the library to look up a physical copy of a law review. Instead, when I want to peruse a law review article, I look it up on a website called HeinOnline. If it's not there, I use Westlaw or Lexis. As a last resort, I go to the law review's web page. For heavy consumers of law reviews, which I consider myself to be, the world of law reviews has gone digital. Hard copy is obsolete.

How did the librarian pick which 450 subscriptions to cancel? Again, a simple answer. He cancelled every review that immediately uploads its content to HeinOnline. For these reviews, there is a digital facsimile of the hard-copy version available as soon as the hard copy is published. Only those



reviews that delay their migration to HeinOnline (including Marquette, I should note) were spared. But given that these reviews are more-or-less-immediately available on Westlaw and Lexis, or on the law review web page, it is not hard to imagine that their cancellation, too, is not far off.

What are the implications for law reviews? The principal lesson is straightforward: All or nearly all law reviews will eventually cease publishing in hard-copy form and will publish only online. It is a matter of simple economics. Subscribers will continue cancelling print subscriptions. Reviews will find it more and more difficult to justify the cost of hard-copy publication, given the dwindling subscriber base. Indeed, the primary source of revenue for most law reviews today is the license fees and royalty payments they obtain from HeinOnline, Westlaw, and Lexis. If reviews switch to online publication, they can stay afloat, perhaps with a modest subsidy from the law school. Otherwise, the subsidy will have to get larger and larger, to the point where the law schools will force them to go online.

The migration is already underway. Of the 980 active law journals published in the United States today, 89, or almost 10 percent, are already published only online. Most of these are student-edited publications. Columbia, for example, has two student law reviews that are published only online. I would also note that many of the top generalist law reviews have recently started publishing online supplements, featuring shorter essays and commentaries on articles published by the review. Thus, the idea of online publication is already familiar to the top law reviews. Outside law, in fields such as biology and medicine, online journals are even more widespread.

In these fields, only a handful of the oldest and most prestigious journals still publish in hard-copy form. It is reasonable to predict that, soon, all or nearly all law reviews will switch to online publication, in parallel to what is happening in other scholarly fields.

What will be lost? As I have already indicated, for heavy consumers of law reviews, nothing. That consumer is already consuming online. Some faculty and students will lament the passing of the physical reprint of the article or note they have authored. But there is a fairly good near-substitute: a photocopy of a PDF version of the article or note. I already receive many of these from authors. An even better solution is to send an email to colleagues, family, and friends, announcing the publication of an article, with a PDF copy attached. Since most reprints end up in the circular file in any event, online distribution would have environmental benefits as well.

Another way in which the digital revolution has affected law reviews involves the article selection process.

Here it is necessary first to mention an oddity of law review practice. In most scholarly fields, journals follow what is called a single-submission policy. An author submits a manuscript to one journal; if the journal thinks the article may be worth publishing, it sends the piece out to two or three experts for what is called peer review. If the article is turned down, the author then starts with another journal.

Law reviews, for reasons that are lost in the mists of time, follow a multiple-submission policy. An author can send a manuscript to as many journals as he or she wants; at least in theory, all these reviews then consider the article simultaneously. The first journal to make an offer of publication that the author accepts gets the publication rights. This basically establishes

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a race among law reviews to see who is the first to capture the submission. Because this process requires that law reviews make quick publication decisions, law reviews cannot use peer review. The articles editors—third-year law students—make the decisions about which articles are worthy of publication and which should be rejected.

I have long regarded this system as crazy, and I think most of my colleagues do, too. What you end up with is dozens or even hundreds of editors at different schools, swamped by large numbers of submissions, acting under great time pressure to make decisions to accept or reject. This necessarily means that articles are placed—or not—based on dozens or even hundreds of superficial evaluations. The Marquis de Condorcet proved many years ago that large numbers of individuals guessing the number of beans in a jar will produce a more accurate aggregate guess than any individual acting alone. But this depends on aggregating the guesses, whereas the judgments of the articles editors at different law reviews are not aggregated. And, besides, law review articles are not beans in a jar—at least not all of them.

I recently interviewed two articles editors on the *Columbia Law Review* to get a sense of the current reality of the process. There are seven articles editors at Columbia. Each has, at any given point in time, a portfolio of about 200 pending

submissions to evaluate. About 90 percent of these are rejected, they said, after reading about the first 10 pages of the submission. This means, as many law professors have intuited, it is important to write a snazzy introduction. The editors also acknowledged using a variety of proxies to zero in on articles for closer consideration. The academic affiliation of the author is one. Professors at higher-ranked law schools get more attention. The author's past publication record is another. Those with long bibliographies get more attention. A third, which was news to me, is that submissions by post-graduate fellows or visiting assistant professors at top law schools are also given careful consideration. The theory here is that these authors have been carefully vetted as promising scholars by the schools at which they have temporary appointments and that these debut articles will have received great attention in their preparation.

The use of these proxies is obviously distressing from the perspective of an ideal meritocratic system. It means that those who have already achieved success have a built-in advantage in gaining more success. This is a source of bitterness on the part of ambitious young scholars trying to break into the system. The only justification for the process is that, given the reality of multiple submissions, some system of proxies is inevitable. No human being can give careful



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consideration to 200 manuscripts in a short period of time. Proxies are better than what happened when I was an articles editor years ago, which was that manuscripts just got tossed out unread when one editorial board turned over to another.

The system has been modified in recent decades by something called the expedited review. This, too, is maddening, but I think it may be a modest improvement relative to just using proxies such as the school of affiliation of the author. You all know how expedited review works. When an author receives an offer of publication, typically with a short deadline, the author will notify other reviews in which he or she would prefer to publish, and many of them will scramble to consider the submission on an expedited basis. In effect, reviews regard the initial offer of publication as a signal of quality, which justifies their zeroing in on this submission. There are lots of reasons why this is not a perfect system. But one can also see it as another device for dealing with the information overload created by multiple submissions. It also contributes in a small way to the rationality of the ultimate decision about where a submission will be placed, because it generates a modest aggregation of judgment: at least two law reviews are guessing how many beans are in the jar, rather than just one.

What then has been the impact of the digital revolution on the article selection process? Not very much, truth be told. The primary development has been the emergence of two competing web-based services, ExpressO and Scholastica, that authors can use to submit manuscripts for consideration. The author sends the manuscript to the service, indicates the journals to which it is to be submitted, and pays a fee based on the number of journals selected. The

service then distributes the manuscript electronically to the designated journals and keeps a running tab on the status of the manuscript for the benefit of the author and the journals. Within the law review itself, the services can be used to divide manuscripts among articles editors, keep track of the status of each submission, and provide for wider distribution if “reads” by additional editors are deemed appropriate.

In some respects, the advent of these digital services has improved the article selection process. Editors can more easily keep track of the status of articles as they work their way through the evaluation process. Fewer manuscripts get lost or ignored—or just pitched out when the board turns over. The services also make it easier to maintain accountability among multiple articles editors and to provide access for other editors when additional reads are deemed appropriate.

In other respects, the digital services probably exacerbate problems associated with the multiple-submission system. Perhaps most obviously, they greatly reduce the transaction costs to authors of making large numbers of submissions. So the cascade of submissions has risen to a torrent. It is also possible that the digital services encourage even greater use of proxies in selecting articles for publication. Scholastica includes the author’s CV along with the manuscript, so editors do not even have to look it up to figure out where the author teaches and how much he or she has published in the past. And the services do little to enhance aggregation of judgments among different reviews.

Why don’t law reviews give up on the multiple-submission policy and adopt a single-submission policy like journals in other scholarly fields? The answer, I think, is that this would require some kind of collective action on the part of all or nearly all



law reviews acting together. Single submission, certainly if combined with outside peer review, takes time. If one review adopted a single-submission policy, and the other reviews did not, then the other reviews would presumably grab the best articles before the review with a single-submission policy could act. No review wants to lose all the best articles to competing reviews. So no review is in a position to adopt single submission unilaterally. And with editorial boards turning over every year, reviews find it impossible to make long-term commitments to other reviews, such as would be necessary to achieve a comprehensive agreement to move to single submission.

The bottom line is that the digital revolution has regularized and magnified features of the article selection process, but has not fundamentally changed its character. As long as student-edited law reviews adhere to the norm of permitting multiple submissions—as I believe they will—the logic of that system will continue to dictate the way content is allocated among student-edited law reviews.

The most far-reaching question posed by the digital revolution—and here I get to one of my facetious alternative titles—is whether it will lead to the elimination of law reviews altogether. Some of my more tech-savvy colleagues predict that this will happen. They envision a future of open-access publication of scholarship on the Social Science Research Network (SSRN) or its equivalent, in which individuals seek out articles to read based on download counts, citation counts, and references in blogs and other online sources. The traditional function of journal publication will become increasingly irrelevant. SSRN or

something like it will become the dominant source of publication. Law reviews, lacking enough decent content to publish, will wither away and die.

The hypothesis here is based on what is called disintermediation. Something like this has happened to newspapers and booksellers. Newspapers and booksellers used to perform a gatekeeping function, determining what sort of information would be made available to the public, based on their judgment about its accuracy and quality. With the rise of the internet, consumers are increasingly bypassing these gatekeepers and seeking out information from a variety of alternative sources. My skeptical colleagues think something similar will happen in the realm of legal scholarship. No one will care whether an article was published in the *Harvard Law Review* or the *Slippery Rock Law Review*. All that will matter is how many times it has been downloaded or cited, and whether it was mentioned by the *Volokh Conspiracy* or *Prawfsblawg*.

There is no question that law reviews do not perform the strong gatekeeping they once did. When I was a young law professor, a long time ago in a law school far, far away, the library would circulate, once or twice a month, photocopies of the tables of contents of law reviews as they were published. One would peruse these tables of contents to see if articles or student notes had been published germane to one's research, or perhaps simply of general scholarly interest. The library would also route certain law reviews to faculty members for examination before the articles were put on the shelves. These practices reflected the gatekeeping function of the law reviews. If one

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wanted to keep up with cutting-edge scholarship, one looked at recent issues of the law reviews.

These practices have largely stopped. Faculty members rely less on the table of contents of law reviews to tell them what to read, and more on other cues, such as discussions on blogs. I also think that faculty are more focused on seeking out publications that are narrowly relevant to their own specialty than was formerly the case. In this respect, changing habits reflect the explosion in the volume of legal scholarship and the increasing specialization among legal academics.

What has not happened—and what I see no sign of happening—is that legal scholars are forgoing opportunities to publish in law reviews. Many of my colleagues—especially the younger ones—post their manuscripts on SSRN before they submit them to reviews. And some insist that SSRN is more important to them as both a vehicle for dissemination of their scholarship and a source for finding other scholarship. But, oddly enough, they continue to submit their work for publication in law reviews. Indeed, no young scholar interested in getting hired to teach at a law school, or in receiving tenure at a law school, or in securing a lateral offer to teach at another law school, would think of building a résumé consisting solely of

postings on SSRN. This would be a very high-risk strategy—indeed, I would think, the kiss of death.

At least two things of importance are revealed here. First, everyone—by which I mean senior faculty, junior faculty, and aspiring faculty—continues to behave as if getting published in law reviews is a significant measure of quality. The multiple-submission policy may be crazy, and the expedited-review process may be nuts. But getting one’s scholarship accepted for publication in a law review is still regarded as a meaningful signal that the work is serious and should be taken seriously. Second—and here I think we alight on the secret to the enduring success of law reviews—law reviews provide something that SSRN is never going to supply: namely, free editorial service.

Law reviews rest on the following unstated bargain: Students supply free labor. In return, they get the prestige and the educational experience of running a professional journal. Let us look at this unstated bargain from both the faculty side and the student side.

From the faculty side, the faculty get both an outlet for their scholarship and the benefits of a rigorous editing process by the best students, at no out-of-pocket cost. In contrast, in many other scholarly fields, scholars are required to pay for the privilege of having their scholarship published in an academic journal. To be sure, law professors constantly grouse



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about the editing they receive from student-edited law reviews. Everyone has a story about student editors who insist on changing every *which* to a *that*, or every *that* to *which*, or maybe either in a random pattern. And professors love to complain about the excesses of *The Bluebook*. But, in the end, law professors recognize that the careful scrubbing of the manuscript by law review editors makes the work stronger, more reliable, and more professional. Publishing in a law review adds value relative to the posting on SSRN or any other open-access source. Given this reality, professors will continue to publish in student-edited law reviews. There are a handful of faculty-edited law reviews, which have the advantage of using single-submission policies and peer review. But they cannot compete with the unpaid labor available to the student-edited reviews. This helps explain why the student-edited reviews continue to proliferate at a rate far in excess of the growth of faculty-edited reviews, which has been quite slow.

So what about the student side of the bargain? I mentioned unpaid labor. Isn't that the definition of slavery? Why isn't law review membership just a lot of hard work, toiling over articles that no one is going to read, for which the authors hardly ever give the students any thanks? But there is more to it than that.

For one thing, as many of you have noticed, employers like students who have served on law reviews. This is not just because law review membership is a proxy for good grades. Employers can read transcripts to see grades. More importantly, it is because serving on the law review makes you a better lawyer. It instills all sorts of good habits: attention to detail, insistence on accuracy, continual

striving for clarity in expression, intellectual honesty. Serving as an editor makes you a better wordsmith, and all lawyers are ultimately wordsmiths. When I was an articles editor, I edited a piece by Walter Gellhorn, who took the time to explain to me, ever so patiently, when to use *which* and when to use *that*. That was a lesson which I never forgot. (Or should I say, “*Which* was a lesson *that* I never forgot?”)

Serving on law review also teaches students a lot about the law. Half of what I learned about the law in law school I learned through my work on the law review, both in writing a student comment and in selecting and editing articles in a wide variety of fields. Law review work requires a deep level of engagement with a legal topic that is usually missing in classwork and preparing for exams. What you learn in writing and editing tends to stay with you.

Last, but surely not least, serving on the law review—an intense experience that involves working with other editors—is a source of lasting friendships. Nearly all of my law school classmates with whom I stay in touch are people with whom I served on the law review.

So the student end of the bargain is by no means the lesser one. All those long hours and frustrations will eventually be rewarded. You will not regret the investment you have made.

I draw two modest normative suggestions from these ruminations. One is that law reviews should continue to take the article selection process seriously—as seriously as is possible given the avalanche of manuscripts with which they are inundated and the time pressure they operate under in vetting these manuscripts.

The other is that law reviews should continue to strive to provide constructive editorial revisions to the articles they accept, including assuring that citations accord with the edicts of the tyrannical *Bluebook*. Good editing is the key to the success of law reviews, and the key to its continued success in the future. If law reviews pursue their editorial functions with diligence and good faith, they will continue to flourish as the preferred medium for publication of legal scholarship.

To sum up, I would predict that sometime in the next 100 years, or perhaps when Dean Kearney is no longer dean, the *Marquette Law Review* will

become an online publication. I also predict that it will continue to follow a multiple-submission policy, notwithstanding all the imperfections associated with this method of selecting content. But I also predict that the *Marquette Law Review* will be around to celebrate its 200th anniversary, even if Dean Kearney is not available to serve as toastmaster. Certainly, if future generations of students adhere to the standard of excellence that has prevailed over the first 100 years—including in the publication of volume 99, which we celebrate here tonight—it will have a very bright future, matching its proud past. ■

Joseph D. Kearney

The Supreme Court and Religious Liberty

Archbishop Jerome E. ListECKI invited Marquette University Law School Dean Joseph D. Kearney to deliver the Archdiocese of Milwaukee's Pallium Lecture in the fall of 2015.



This is a great privilege. I never would have expected to be on this side of the podium for the Pallium Lecture.

Tonight's topic is the Supreme Court and religious liberty. It is along the lines of what Archbishop ListECKI suggested (and we Chicago White Sox fans have

to support one another). So let's get right into it. After all, we have only a little more than an hour together—or 50 minutes or so on my account, and as much time thereafter as the good judgment of the moderator, John Rothstein, supports.

We must start with the fact that the First Amendment to the United States Constitution provides for religious liberty. It is not the only guarantee of religious liberty, and the Supreme Court of the United States is not the only entity with authority on some questions of

religious liberty. Those are related points. On the first point, almost every state has, in its own constitution, an analogue to the First Amendment, though sometimes speaking in notably different terms. For example, just to give you a local flavor, Article I, Section 18 of the Wisconsin Constitution begins as follows: "The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent. . . ." And it goes on from there. Thus, on my second point of a moment ago, *state* supreme courts have authority to protect against interferences with religious liberty by state and local governments. Additional complications arise because legislative bodies are capable of *granting* rights as well as interfering with rights. This is a point to which we shall have to return before we are finished.

Yet I think it quite justifiable to focus the bulk of our attention on the Supreme Court and the First Amendment. First, the Court has the final authority to interpret, where a case presents the question, the First Amendment. It has that authority because it *announced* as much in 1803 in *Marbury v. Madison*—

