PEER-REVIEWED JOURNAL ON THE INTERNET

LAST WRITES? The Law Review in the Age of Cyberspace

By [BERNARD J. HIBBITTS](#)

Abstract

This article reassesses the history and future of the law review in light of changing technological and academic conditions. It analyzes why law reviews developed in the late nineteenth and early twentieth centuries, and describes how three different waves of criticism have reflected shifting professorial, professional and pedagogical concerns about the genre. Recent editorial reforms and the inauguration of on-line services and electronic law journals appear to solve some of the law review's traditional problems, but the author suggests that these procedural and technological modifications leave the basic criticisms of the law review system unmet. In this context, the author proposes that legal writers self-publish on the World Wide Web, as he has done in an [extended version](#) of the present piece. This strategy would give legal writers more control over the substance and form of their scholarship, would create more opportunities for spontaneity and creativity, and would promote more direct dialogue between legal thinkers.

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Introduction

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

At first, this contention might seem implausible - after all, the law review is the supreme institution of the 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 (in particular, growing professorial dissatisfaction with the custom of student editing) and new computer-mediated communications technologies (in particular, the Internet and the World Wide Web) 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.

In this article [[1](#)] I reassess the law review from the perspective of the present age of cyberspace. Such a re-assessment is best begun by investigating the academic and technological conditions that joined to generate the form in the first place.

The Rise of Law Reviews

The standard story of the rise of the American law review is short and sweet. In 1887, supported by visionary faculty and alumni, a group of innovative students at the Harvard law school began the first successful student-edited legal journal. Their publication proved so pedagogically and professionally useful that the genre soon spread to other law schools across the United States.^[2]

This story is factually accurate, but conceptually inadequate. In focusing on Harvard, it downplays the extent to which the law review served the general interests of late nineteenth century university-based law schools as academically-marginal establishments seeking to enhance the quality of their programs and the marketability of their students. 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 journal-publishing projects of medicine, chemistry, history and other disciplines animated the law professors who supported the student initiatives at Harvard and elsewhere. Most important for present purposes, the story 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 conditions, rather than as an instance of institutions across the country copying Harvard for its own sake.

Three Waves of Criticism

Insofar as the law review emerged in response to perceived institutional, professorial and pedagogical goals, it was vulnerable to sometimes-scathing 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 Wave

The first, weakest and most diffuse wave of criticism lasted roughly from 1905-1940. The early critics claimed that there were already too many law reviews (in 1900 there were 7, in 1937 there were 50); they pointed out that students writing case notes in different journals often noted the same cases. The early critics also doubted law students' basic competence to select and edit law professors' articles or even to write serious legal commentary of their own. In 1911, United States Supreme Court Justice Oliver Wendell Holmes dismissed the reviews as the "work of boys", unworthy for citation before the bench ^[3]. Especially creative legal thinkers, like the University of Virginia's Fred Rodell, expressed concern that law reviews were forcing legal scholarship into a dull, narrow and unimaginative mold: writing in 1936, he concluded that the law review had two basic problems: "One is its style. The other is its content."^[4] Somewhat ironically, perhaps, these early critiques prompted the creation of several new law reviews: a few were designed to cater to specific state audiences, a couple were edited by law faculty, and one overtly promised its readers a greater interdisciplinarity reach. Ultimately, however, these publications enjoyed only limited success.

The Second Wave

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 a variety of other factors. Law reviews were continuing to multiply at an alarming rate (by 1952, there were 76), law students were increasingly refusing to seek the guidance of law faculty members on editorial matters, and in the midst of post-war egalitarianism, traditional grade-based methods of selecting law review editors seemed suspect. Renewed complaints indirectly encouraged the founding of a number of now-prominent faculty-edited law journals - among them, the Supreme Court Review and the American Journal of Legal History - but, again, fundamental change did not occur.

The Third Wave

In the mid-1980s, still-simmering discontent with the law review system exploded into a third wave (perhaps more accurately, a "tsunami", or tidal wave) of very intense, even vitriolic criticism which continues to this day. ^[5] The number of school-sponsored reviews (in 1981, 180; in 1995, 382) has once again prompted comment, but contemporary complaints have been more about matters of quality than quantity. Their minds wonderfully concentrated by the contemporary imperative to "publish or perish," many legal scholars have publicly alleged that more than a few law review editors select articles arbitrarily and edit them incompetently. 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 the faculty or certain elite law schools. 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 expressed concern about the increasing number of delays encountered in the editing and publishing process and have even voiced 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 by instituting "blind" reads of submissions (Yale) [6] or formally proclaiming their "deference" to the wishes of academic authors (Chicago). [7] It has also encouraged the inauguration of even more faculty-run law journals.

By and large, however, the old regime survives. This may be the fault of the reformers as much as the fault of those they would reform: having lost sight of how technology contributed to the creation and development of law reviews in the first place, the critics have failed to consider how new technologies - in particular, computer-mediated communication technologies - might be deployed to break the impasses of the present system.

Law Reviews On-Line

Of course, the computer-mediated communications technologies embodied in today's legal online services (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 American experiments in computer-assisted legal research were performed at the University of Pittsburgh in the late 1950s and early 1960s. LEXIS - an indirect descendent of those early experiments - was ultimately introduced in 1973; WESTLAW was introduced in 1975. [8]

Originally, these services carried cases and statutes, not law review articles, but by 1982 both had decided to expand their coverage. LEXIS and WESTLAW now 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.

The Conservatism of LEXIS/WESTLAW

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 (now over 400) 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 which do not fundamentally challenge or improve the present scheme of scholarly communication.

Electronic Law Journals

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 - including the [Federal Communications Law Journal](#) and the [Cornell Law Review](#) - appeared in 1994 as electronic versions of printed law reviews. In 1995 a number of second-generation electronic legal journals that had no print equivalents appeared in the United States: the [National Journal of Sexual Orientation Law](#), the [Journal of Online Law](#), the [Richmond Journal of Law and Technology](#), and the [Michigan Telecommunications and Technology Law Review](#). 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.

Shortcomings

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 purely electronic 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 press the advantages of their electronic medium or pass those advantages on to authors, 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, distributing and using 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.

Web Self-Publishing: The Case In Favor

In brief, legal scholars can escape the traditional straitjacket of the law reviews by publishing their scholarship directly on the World Wide Web.

Do-It-Yourself

The case for Web self-publishing is clear and strong. As their own electronic publishers

- legal scholars 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;

- legal scholars need not defer to the (usually mundane) layout and design conventions of a given legal publication; they can physically present their work in whatever manner they deem best suited to its substance.
- legal scholars 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 production schedule permits.
- legal scholars need not tolerate the inaccuracies and indignities of line-editing done by amateurs who may not always be competent for the task.
- legal scholars need not turn their backs on their work once formally issued. For the benefit of both their readers and themselves they can update and improve their articles days, months or even years after initial publication without going through a middleman. Instead of being dead-on-arrival, every article a law professor or lawyer publishes for themselves on the Web can be a living creature, capable of growing and changing with the fast-paced world around it. In this fashion, legal scholars can radically extend the "shelf-life" of their scholarship.

The Advantages of the Web

Self-publishing on the Web also brings with it all the advantages of Web publication per se:

- on the Web, legal 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. An article on the Magna Carta, for instance, might provide readers not only with the [text](#) of the famous thirteenth-century English charter, but also with a full color [image](#) of the manuscript in the British Museum. An article on *Roe v. Wade* might analogously link to both a copy of the [judgment](#) and to the [oral arguments](#) of the attorneys before the United States Supreme Court.
- 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. Scholars can use these comments as the basis for revision and improvement; new readers can use them as guides to an article's strengths and weaknesses, or as a general barometer of reaction to a particular piece.

Web Self-Publishing: The Case Against

Of course, several arguments can be made against the self-publishing of legal scholarship on the Web.

Quality Control

For instance, it might be said that edited law reviews provide quality control, without which the legal community would be flooded with sub-standard scholarship. The premise of this assertion, however, is at least somewhat dubious. Do the second- and third-year law students who edit most of the reviews today really make consistent and accurate judgments about the quality of the articles submitted as opposed to the schools of their authors, their previous publishing records, or the recognizability of the topics discussed? What about a faculty-edited journal's stable of editorially-appointed peer-reviewers? Do they always do the right thing, resisting the temptations of bias, overwork and even, on occasion, ignorance - problems which have lately led to soul-searching discussions in other disciplines about the legitimacy of traditional peer review?

But even setting these troubling questions aside, Web self-publication and significant, professionally-undertaken quality control are in fact highly compatible. Given that faculty authors would be electronically exposing their work to the world rather than handing it over to law review editors, they arguably would have more rather than less incentive to check their on-line works for technical and substantive errors (placing greater reliance on research assistants and computerized spelling, grammar and citation checkers as appropriate). To supplement this self-policing, legal scholars publishing on-line could continue and even extend their present practice of having colleagues pre-vet their work informally.

More generalized peer review could take place after publication: as I indicated earlier, e-mail would give scholarly readers of an article the ability to electronically post comments that could then be attached to the original electronic document. The very threat of negative, publicly-accessible peer reaction (or worse still, no reaction) would likely make authors think twice before posting poor-quality material. The posted comments could moreover tell a new reader of an article whether it was considered good or bad, who liked it and who didn't, and why (which is notably much more than we can get from the present peer

review system). Peer comments might also prompt an article's author to publicly respond, encouraging dialogue and debate which some would say is the very essence of scholarship.

Notification and Location

A second major argument that might be advanced against Web 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 finding print scholarship in a poorly-indexed sea of print is often difficult, time-consuming and sometimes impossible, this problem could be avoided if a legal academic institution such as the Association of American Law Schools created or maintained a searchable central Web site - an electronic archive or bank of sorts - to which all law professors could send or link their scholarly work. Users could be electronically notified of all new submissions on a periodic basis, or alternatively notified of submissions pertaining to particular subject-areas, or even by particular authors.

Technological Limitations

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 processors, screen resolution and legibility are continually increasing, and a Web-published article can always be downloaded to print for easy-chair enjoyment (presuming, of course, that anyone really reads law review articles in an easy chair...).

Pedagogical Costs

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. Recently-published comments by some law professors and even by some law students would suggest, however, that these educational benefits have been vastly overstated. Even presuming that such benefits are substantial and could not be gained in some other way - say, by instituting special upper-level writing seminars for advanced legal research and writing classes - they might be preserved by allowing students to continue operating law reviews for themselves. While law professors, practitioners and judges would publish directly on-line, students could go on producing and editing their own notes and comments in the old format, filing them, perhaps, in an electronic archive of their own.

Prestige at Risk

A fifth point of disagreement might focus on the prestige or "halo effect" that legal scholars would theoretically 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 "premiere placement" per se is somewhat dubious given the shortcomings of the current editorial structure. A few untenured legal scholars have learned this to their detriment when their articles in high-prestige journals have been savaged by external faculty reviewers at promotion time. Moreover, 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 (or even a few favored "peer reviewers") think of them?

In a self-publishing system associated with post-hoc peer review, however, prestige itself would hardly disappear; it would merely be gained in a new, more legitimate and democratic fashion. Did a piece prompt extensive electronic dialogue and debate? Did readers report that they liked or it found it useful? Affirmative answers to such questions would certainly confer status on scholarly work.

Science Fiction

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 (high energy physics, which currently depends on an [electronic archive](#) of so-called "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 issued an [Interim Report](#) speculating that the practice might spread to the legal academy.

The Verdict

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 Agenda

The question therefore becomes: what can members of the American legal community - professors, administrators and even law students - do to make this proposal a reality?

Individual law professors might put [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 articles could post their products whenever they 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 printed law reviews; several prominent law reviews have already accepted articles that their authors had previously posted on-line. One review, the [University of Chicago Legal Forum](#), has itself posted electronic pre-prints of articles scheduled to appear in its pages. 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 self-published legal scholarship, or at least recognizing its scholarly value for tenure purposes. As suggested earlier, 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 an automated but supervised site that would archive and link the new corpus of self-published legal scholarship. The editors of contemporary law reviews might also help, if they chose, 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 (giving self-publishers materials with which to link).

Last Writes

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.^[9] 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 vinyl in the entertainment industry. Even in the ostensibly more conservative academic context, the experience of high energy physics demonstrates that new technologies which address 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.

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Notes

1. This article is abridged from Bernard J. Hibbitts, "Last Writes?: Reassessing the Law Review in the Age of Cyberspace", electronically available at <http://www.law.pitt.edu/hibbitts/lastrev.htm>, and shortly to be "reprinted" in 71 New York University Law Review (forthcoming, 1996). A variant of this abridgment is to be included in 29 Akron Law Review (Special Issue, forthcoming, 1996), a Symposium Issue of that journal containing commentaries on "Last Writes?" with my response to same.
2. See generally Swygert & Bruce [1985].
3. Hughes [1941], p. 737, quoting Holmes.
4. Rodell [1936], p. 38.
5. See, e.g., Cramton [1986], Lindgren [1994], Posner [1995].
6. Lindgren [1995], p.1129.
7. The Articles Editors [1994], p. 558.
8. Harrington [1984-85].
9. This is not to say that the law review might not survive in some radically altered form with which we are not now familiar. It could, for instance, continue as a high-status archival or ceremonial form of

publication (a "deluxe edition" of the "Web's greatest hits"). Alternatively, it might continue as a collection of student-written reviews or listings of recommended self-published articles. In either of these scenarios, however, the law review would lose its currently-central role in legal scholarship.

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