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How to Write a Law Review Article

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How to Write a Law Review Article *

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Introduction

I HAVE BEEN ASKED TO SPEAK on how to write a law review article. Like many, I find it much easier to write something than to talk about my thought processes during that writing. Nevertheless, I have tried to distill out a series of observations, tips, short cuts, and so on that I, personally, would have found helpful had someone passed them on to me when I was starting out. Good law reviews convey many of them to their new members at orientation time. For many of you, these observations will be old hat; for this, I apologize. Also, I should state at the outset that I have included little in the way of political or critical analysis of law review writing. I have written elsewhere about that.[1]

Some of the matters I expect to touch on in this talk are

I. Why write a law review article at all, in preference to something else, a book or political satire, for example?
II. What varieties of law review article are there? Presumably more than just the classic "case cruncher." What are some of the other kinds?
III. Topics—where to get them? How to know a good one when you see it?
IV. Research strategies.
V. Footnotes and theory of authority.

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* This article is a slightly edited version of an address given during the Minority Law Professors' Conference which was held at the University of San Francisco School of Law on October 26, 1985.

1. Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

VI. The actual writing of the article.
VII. Submitting the article and working with your editor.
VIII. After publication, what next?

I. WHY WRITE A LAW REVIEW ARTICLE?

Why write? There are several reasons: because your colleagues are writing, because you have something to say, because you want to change the law, because it's enjoyable (at least sometimes), or because you want professional advancement and recognition. Personally, I prefer the intrinsic reasons—writing as self-expression, writing because it is satisfying. But, I also enjoy the result when something I have written has an impact—stirs people up, helps a court make the right decision. Everyone's motivation is, I think, mixed, and the mix varies from person to person and article to article.

II. VARIETIES OF LAW REVIEW ARTICLES

Just as there are different reasons for writing law review articles, there are different types of articles. I can think of at least ten. First, there is the "case cruncher"—the "typical" article. This type of article analyzes case law in an area that is confused, in conflict, or in transition. Doctrine is antiquated or incoherent and needs to be reshaped. Often the author resolves the conflict or problem by reference to policy, offering a solution that best advances goals of equity, efficiency, and so forth.

Next, there is the law reform article. Pieces in this vein argue that a legal rule or institution is not just incoherent, but bad—has evil consequences, is inequitable or unfair. The writer shows how to change the rule to avoid these problems.

There is also the legislative note, in which the author analyzes proposed or recently enacted legislation, often section by section, offering comments, criticisms, and sometimes suggestions for improvement.

Another type of article is the interdisciplinary article. The author of an interdisciplinary article shows how insights from another field, such as psychology, economics, or sociology, can enable the law to deal better with some recurring problem. Professor Charles Lawrence's upcoming article on theories of unconscious

motivation and their relation to race relations law[2] falls within this category.

There is the theory-fitting article. The author examines developments in an area of law and finds in them the seeds of a new legal theory or tort. Warren and Brandeis's famous article on privacy is a well-known example of this type of writing.[3]

Discussions of the legal profession, legal language, legal argument, or legal education form yet another category of law review writing.[4] Lawyers are like most people—they enjoy reading about themselves. There is a brisk market in such pieces.

There are the bookish, learned dialogues that continue a preexisting debate.[5] These pieces take the following form: "In an influential article in the *W Law Review*, Professor *X* argued *Z*. Critics, including Professor *Y*, attacked her view, arguing *A*, *B*, and *C*. This Article offers *D*, a new approach to the problem of *Z* (a new criticism, a new way of defending *X*'s position in the face of her critics, a way of accommodating *X* and her critics, or something of the sort)."

Another category consists of pieces on legal history. The origins and development of a legal rule or institution may shed light on its current operation or shortcomings. Similarly, comparative law articles are often valuable and engrossing for many of the same reasons: it will sometimes happen that other legal systems treat a problem more effectively or more humanely than does ours. Friedrich Kessler's famous article on contracts of adhesion is a well-known example of a piece that draws on the experience of foreign systems to improve the quality of American justice.[6]

The final categories are the casenote, which examines a recent decision, together with its antecedents, argument, deficiencies, and likely consequences, and the empirical research article. The latter

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2. C. Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Discrimination, (to be published in Volume 38 of the Stanford Law Review).

3. Warren & Brandeis, *The Right To Privacy*, 5 HARV. L. REV. 193 (1890).

4. *E.g.*, Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971). See also any issue of the *Journal of Legal Education* for articles on legal education, law schools, bar exams, legal language and writing, and related topics.

5. *E.g.*, Dolinko, *Comment: Intolerable Conditions As a Defense to Prison Escapes?* 26 UCLA L. REV. 1126 (1979); Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape*, 26 UCLA L. REV. 1355 (1979).

6. Kessler, *Contracts of Adhesion . . . Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

is, in some ways, the most useful of all, if one can manage the logistical problems it presents, because it enables the writer to expand knowledge beyond the armchair confines limiting most legal writing. An example of this type of article is Bea Moulton's article on the development of small claims courts as vehicles for oppression of the poor by the petty bourgeoisie.[7] My point is that there are many accepted law review formats and objectives, not just one—different strokes for different folks.

III. TOPICS

Lurking somewhere in the array of genres and formats there is, optimistically, a topic that is right for you. What makes a topic good? A good topic is interesting, manageable, and significant. Most law review articles take the writer at least 150 hours from start to finish. It is critical, therefore, that your topic hold your interest. Otherwise, you are going to find reasons, at 4:15 in the afternoon, not to get to it. The topic should also be broad enough to be socially or legally significant, yet not so broad that you are swimming in abstraction or drowning in cases. Antidiscrimination law in relation to university faculty hiring may be a little too broad. Findings in perception research and the psychology of the token and their connection with antidiscrimination principles in the university setting—a topic one of the participants in this conference is currently working on—is about right.

A piece of advice that a leading law review dispensed to its members in connection with finding comment topics proved helpful and therapeutic to me: find one new point, one new insight, one new way of looking at a piece of law, and organize your entire article around that. One insight from another discipline, one application of simple logic to a problem where it has never been made before is all you need. The article states in the introduction what that new thing is, and the rest of the article argues, illustrates, defends it in the face of possible objections, showing how it would work in practice.

Where do topics come from? You find them in advance sheets, legal and popular newspapers, conversations with colleagues, and in class. One often overlooked source is casebooks, particularly the

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7. Comment, *The Persecution and Intimidation of the Low Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969).

sections of questions and comments that follow major cases or that serve as transitions to the next section. The notes and questions are placed there, often, because they have no answer as yet and because the author considers them important enough to warrant attention. Many of the questions are about the right "size" for a law review article.

A final source is practitioners in the field, especially lawyers in public interest law firms and specialized litigation centers. Often these attorneys are looking and thinking ahead. They know what areas are ripe for law reform cases and are on the lookout for them. If your interests and their agenda match, they may be able to suggest a topic that will lay the groundwork for a major case they hope to litigate in five or ten years. There is much to be said, it seems to me, for writing a casenote before the big case comes down rather than afterwards—especially if in doing so you assist the court and shape the analysis.

Preemption checking is an important aspect of finding and settling on a topic. Most law reviews will refuse to publish anything lacking novelty, that is, anything that does not contain some suggestion, slant, idea, or analysis that has not appeared before. What preempts? Certainly law review articles and cases do. Legal books probably preempt. For other publications, the question gets closer. An article in a social science or popular journal probably does not mean that your idea is out, unless the coverage overlaps with your article so much that there is little left for you to say. In most cases, your analysis will include case discussion, law-oriented policy discussion, and so forth, and is therefore likely to go beyond the scope of the piece by the nonlegal author.

It is tragic, though, to spend long hours on an article and then find out that you are preempted and cannot have your article published. So, it is essential not to cut corners with the preemption check. Most good law reviews will conduct their own check; if you slip up, they will tell you about it. As part of my own check, here are some places I usually look: indexes of legal periodicals (going back at least fifteen years for most topics), under as many headings as I can think of that might contain a relevant article; casebooks and hornbooks in the appropriate section, with the thought that the author may have included a reference or footnote to the article I need to know about; and treatises and encyclopedias. Finally, I make a point of asking colleagues from the field in

which I want to write ("I am thinking of writing an article about *X*; are you aware of any writing addressing that question?").

Late-developing preemption is a special problem in areas of law that are highly visible or that have received a great deal of recent publicity. Seniority rules and affirmative action is currently such an area.[8] I would not be surprised if several articles or comments were being written right now on various aspects of these rules. Anyone who writes in an area such as this runs obvious risks of preemption, unless their approach is so novel that no one else is likely to have thought of it. There is no central registry of topics, no one place you can phone up and ask whether anyone is writing on your topic. Sometimes, you may be able to think of an individual or institution that a person planning to write on your topic would consult. You can then ask that person if he or she knows of anyone writing on the question. For example, anyone writing about the Patty Hearst case and the legal defense of brainwashing, or "coercive persuasion,"[9] would be likely to have communicated with Patty Hearst's lawyer, F. Lee Bailey. A check with Bailey might reveal whether you had competition or not.

IV. RESEARCH STRATEGIES AND AUTHORITIES

Research strategies and uses of authority can be discussed together, because a grasp of the conventions and uses of footnoting shapes your approach when you are researching issues and taking notes. It goes without saying that you must read everything that bears on your subject. Your footnotes and argument should reflect that you have taken into account every significant idea, book, or article that is out there. The last few things that you read may radically change your idea of the way your analysis should go. So, resist the temptation to start writing until you have read everything. I find it helpful to start with very general authorities—casebooks, hornbooks, and encyclopedias—to get an overview. Often, the authors of these books will cite leading cases and

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8. Memphis Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576 (1984).

9. *See* Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1 (1978); Lunde & Wilson, *Brainwashing as a Defense to Criminal Liability: Patty Hearst Revisited*, 13 CRIM. L. BULL. 341 (1977).

articles, so when I turn to these other sources, I already have a partial list of things to read. At first, each item you read will lead you to another, and so on. Eventually, the circle will start to close, and you will know you have read everything and are ready to write.

V. FOOTNOTES AND AUTHORITY

Essentially, each assertion of law or fact that you make in the body of your article will require a footnote. The main exceptions are topic sentences, conclusions of paragraphs and sections, and passages of pure argument. There are many different types of footnotes. Textual footnotes carry on the argument from the text. You put there material that would clutter up the text and detract from the narrative flow. The authority footnote is used to substantiate propositions in the text. This type of footnote may begin with any of a number of "signals," those little words and abbreviations, like "*see*," "*e.g.*," "*see also*," and "*cf.*" that you find at the beginning of footnotes. Each signal has a technical meaning, which must be used correctly. Each signal corresponds to the strength and type of authority invoked—direct authority, indirect authority, inferential authority, authority going the other way, compare-and-contrast authority, and so on. Until you have these down pat, it is a good idea to have a copy of the *Bluebook* handy while you are doing research. The reason for this is that it saves much time and effort if you get the strength-of-authority right the first time, when the reporter, treatise, or article is in front of you and you are taking notes. You can always go back a second time and figure out whether the note you took five months ago ought to be a "*see*" or a "*cf.*" cite. But why do things twice? And what if the book isn't there the second time?

Flipping through the footnotes to see if the author uses footnotes sensitively, with a variety of strengths and signals and an appropriate mixture of textual and authority notes is, I suspect, one of the first things an articles editor does when he or she receives a manuscript. If your footnotes are sporadic and devoid of signals, two thoughts are likely to go through the editor's mind: first, the author is inexperienced, and second, the law review (and possibly the editor) is going to have to put in the signals and textual footnotes. Would you enjoy sitting in front of a stack of books and making 100 or 200 judgment calls, for someone else, on whether the textual passage and the cited authority are related by

a "*see*," "*cf.*," or "*compare*" signal?

VI. WRITING THE ARTICLE

For the actual writing, I prefer, as many do, to write an entire section or subsection at a sitting. I like to have the section I plan to write that day outlined fairly completely before I start, so I know where I am going when I sit down at the typewriter. My own preference is to write fast and edit slowly. I find that writing fast overcomes inhibitions and forces me to write simply. Moreover, if I have something down on paper, even if it is rough, I can edit it, refine it, and improve it later at my leisure. Law review prose should aim to be spare and clean, without any conscious style or affectation. Editors want your organization to be clear as well, with an easily discernible "story line." Resist the temptation to put an idea down on paper, or discuss a case, simply because it exists. Everything should contribute to the development of your central theme; otherwise put it in a footnote. Say a thing only once.

VII. SUBMITTING THE ARTICLE

When you are finished and the footnotes are in place, submit the article—but to your friends first, law reviews later. Ask your friends to critique the article and get back to you soon. Try to find readers who know the subject; do not use people on your tenure committee. Your readers do not have to be at your law school, and there are good arguments for using outside readers.[10] When you receive their comments and suggestions, incorporate those that you agree with.

When the article is as good as you can make it, send it to several law reviews, with a cover letter to the articles editor, saying what the article is about and conveying, inferentially, why it is novel and important. Authors these days almost invariably submit to more than one law review at a time. Many of my colleagues and I send our articles to eight to ten reviews at once, starting at the

10. Members of your own faculty may remember the first draft of your article, with bumps and warts, rather than the final, polished version. That may hurt you at tenure or merit review time. On the other hand, there may be "estoppel" value in showing the article to members of your faculty and allowing them to criticize the article before the presses roll. If you then make all the changes they suggest, later criticisms from the same readers should be stilled—or so one might argue.

top and working down. There are various purported rankings of the law reviews.[11] It generally takes a review several weeks to complete an evaluation of an article and get back to you. In the meantime you may get progress calls: "Professor Jones, one of us has read your article and liked it a lot. Before we complete our review, we thought we would ask if the article is still available."

VIII. WORKING WITH YOUR EDITOR

Sooner or later, a review will offer to publish the article. Get the details from the editor—when it will appear; what editing changes are contemplated; whether you will have the right to review and accept or reject final changes; whether your piece will be the lead article—and then tell them you want to think about it. In the meantime, you can consider their offer, consult with your colleagues and check with the other reviews to see whether they are close to a decision.

When I have committed an article to a review and been assigned to an editor, I like to tell the editor my preference in the way of editing. I personally like "maximalist" editing, and so I tell the editor to work on the article fearlessly, making changes and additions without the need to discuss each one with me first. That way, I think I get the editor's best work, and I also avoid the type of guessing games that ensue when the editor attempts to be deferential.[12]

IX. AFTER PUBLICATION, WHAT NEXT?

When the article is published, get a stack of reprints and send them to your parents, your high school guidance counselor who told you to major in auto shop or home economics, and the principal legal authorities in the area in which you have written. Make sure to send copies to writers of hornbooks and casebooks. Having

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11. *E.g.*, Maru, *Measuring the Impact of Legal Periodicals*, 1 AM. B. FOUND. RESEARCH J. 227, 243 (1976).

12. I am thinking of editors who return the manuscript with politely worded questions in the margin. "Had you thought about *X*?" "What about *Y*?" or "Query—is this necessarily so?" Or, the editor may state even more obliquely: "I am not convinced," "This seems weak," or "We need more here." I find it much more helpful if the editor indicates what he or she thinks about *X* and *Y*, tells me why he or she thinks *Z* does not follow or seem convincing, and what "more" would satisfy him or her. Most editors, I have found, will be glad to provide such directive editing, if asked.

the reprint in front of them helps them keep track of the field, and if they like the article they may mention it in their next edition, which won't hurt your reputation. Occasionally, you can use an article as a basis for a spin-off piece, such as an op-ed column in a newspaper or a practice note in a handbook or newsletter for practitioners.

Conclusion

Give some thought to what your next article will be on. It helps to coordinate your writing so as to lay a claim on some more or less defined field, rather than aiming at targets of opportunity. You get to be known as an authority in the area, your writing reinforces your teaching (assuming you also teach in this area), and the background and expertise you acquire make subsequent articles that much easier to write.