

# Texas Law Review Online

Volume 100

Essay

## Words, Words, Words: Some Reflections on the *Texas Law Review*

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Toward the end of Alan Lerner and Frederick Loewe's famous musical play, *My Fair Lady*, Eliza Doolittle explodes in frustration when her admirer, Freddy Eynsford-Hill, wants to read her some love poems he has written. "Words, words, words, I'm so sick of words," she laments. "I get words all day through, first from him, now from you – is that all you blighters can do?" The "him" in that sentence is Henry Higgins, the famed linguist who boasted that he could turn Eliza, a common flower girl, into a lady solely by teaching her "proper" English.

The problem is that for a long time, Higgins treated Eliza no better than Pygmalion treated the marble statue of a woman in the Greek myth. In Ovid's recounting of this story (in book 10 of the *Metamorphoses*<sup>1</sup>), the eponymous king and sculptor is a misogynist who thinks that all women are hopelessly flawed. This inspires him to create a statue of the perfect woman. In time, Pygmalion falls in love with his statue and is devastated by unrequited love. But Aphrodite takes pity on him, and she brings his statue to life. Pygmalion and the woman marry and live happily ever after. This story inspired George Bernard Shaw in 1913 to write the play on which *My Fair Lady* is based.<sup>2</sup>

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1. See *Metamorphoses, poem by Ovid*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Metamorphoses-poem-by-Ovid> [<https://perma.cc/TDZ3-JRMJ>].

2. See *Pygmalion, play by Shaw*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Pygmalion-play-by-Shaw> [<https://perma.cc/2FR2-58RM>].

We learn by the end of the musical that Higgins has indeed created a lady, working largely through the power of words. And, just as Pygmalion did, Higgins comes to appreciate her as a human being.

Like Higgins, lawyers are in the business of words. And sometimes the mountain of words found in everything from judicial opinions, to statutes, to regulations, to briefs and memoranda, to oral presentations, can seem just as overwhelming as the barrage of words to which Eliza was subjected. Both the sheer volume of material and the need to pay close attention to the exact meaning of each word compel most first-year law students to toil well into the evening in order to read, absorb, and understand a strange new language. From the first day of classes, students can test their progress in mastering this new language through classroom discussions—Socratic or otherwise—and through structured opportunities such as seminars and courses in legal research and writing.

All of that is well and good, but it is rarely enough to assure excellence in legal writing. Practice makes perfect, not just for sports and music, but also for writing. And that is where the *Texas Law Review* comes in. Or, more accurately, I should say the Texas “law reviews,” plural. Because, important though the now-hundred-year-old *Texas Law Review* is—and I will have more to say about that in a minute—the Law School actually houses *thirteen* law journals, ranging from the *American Journal of Criminal Law*, to the *Texas International Law Journal*, to the *Texas Journal of Women, Gender, and the Law*, to the *Review of Litigation*, to name just a few. All of these journals provide the student contributors and student editors invaluable experience in identifying worthy topics for study, expressing themselves clearly, editing ruthlessly, and enjoying the camaraderie that comes only from a collective effort. For me, as for so many others, the opportunity not only to be a member of the *Law Review*’s staff, but also to be on its editorial board, immeasurably enriched my law school experience and preparation for life as a lawyer.

Sometimes people don’t realize the value of an experience until years later. For me, moving from New Jersey to Texas days before my sixteenth birthday was one of those events. Like most teenagers, I did not welcome the prospect of leaving my friends and going to a new school. But that proved to be shortsighted: aside from making many new friends and learning to adapt to new situations, my decision to attend the University of Texas at Austin first as an undergraduate and then for law school was a direct result of that move. And I would not trade my time at UT for anything.

Law review, however, was not one of those experiences that one appreciates only from a distance: the opportunities for learning and the doors that opened for law review members were immediately apparent. Law firms that came to campus looking for summer associates made that as clear as they

could. By the time I showed up at Covington & Burling in Washington, D.C., during the summer after my second year at UT, I was able to put to use the skills that I had learned in my first year on the *Law Review*. Indeed, I'm sure that I would not have had that job if it had not been for the *Law Review*. And it is equally clear that Judge Irving L. Goldberg of the U.S. Court of Appeals for the Fifth Circuit would not have responded enthusiastically to my application for a clerkship had I not by that time been selected to be a Note and Comment Editor for Volume 53. That experience in turn played a large role, there can be no doubt, in Associate Justice Harry A. Blackmun's decision to offer me a clerkship. Not only did both the judge and the justice understand the skills that law review nurtured, but the law review experience also brought all of the students involved in the law review's work into closer contact with the UT Law faculty, whose recommendations were essential for the clerkships.

I can say that with confidence because I have now participated in the clerkship process from the judge's side of the table for more than a quarter of a century. One of the things I look for first in an applicant is the kind of writing and analytic experience that law review affords. I have hired only from the finest law schools in the country, including the University of Texas, and so I have kept up with the *Texas Law Review* more closely than I might have if I had been a practicing lawyer. Indeed, I was privileged to serve for several years on the Board of the *Texas Law Review* Association, which publishes the *Law Review*. That experience, as well as my exposure to the Notes that my UT applicants have written for the *Law Review*, has allowed me to watch it evolve over the years.

Although the *Law Review* has changed since I was a student—the idea of an online presence, for instance, was not even a gleam in anyone's eye then—it has remained the same in its essence. It is still a place where an aspiring young law student can be exposed to the nearly infinite breadth of the law. That student can and must learn not to be daunted by the fact that a note she is reading, or an article she is assessing, deals with a topic she has never heard of, let alone taken a course in. Law review is one of the first places (aside from summer jobs) where a student can put to work the research and writing skills she learned during her first year.

And that is just the beginning. Learning the Bluebook is a rite of passage for new law review staff members (even though, I must confess, I never did learn it very well, and now that I am a circuit judge I use my own style rules, which are loosely based on the ones used by the U.S. Supreme Court's Reporter of Decisions). Nevertheless, whatever else the Bluebook is good for, it is superb at cultivating habits of precision, scrupulous attention to detail, and accuracy. And those are traits that every good lawyer must have, no matter whether the lawyer uses large and small caps or italics for book titles.

Substantive cite-checking is another skill that the new staff member must master. The most formally perfect citation will be useless, if not misleading, if the source does not support the proposition in the text. The law review experience teaches that there are no shortcuts when it comes to substance. If a case is cited—whether in an article, a note, or a brief—the author (and the citechecker) better read the entire opinion, to make sure that the catchy phrase that a Westlaw or Lexis search turned up does not appear in a paragraph that concludes “this, in any event, is appellant’s argument, but we are not persuaded.”

Law review also provides a window into the sometimes murky world of attribution. Everyone knows, or should know, that plagiarism is wrong. What people do not have an instinctive feel for, however, is how thoroughly and how often sources must be cited. Does every proposition need a footnote? Must an author include a citation to 28 U.S.C. § 1 for the proposition that the Supreme Court is composed of one Chief Justice and eight associate justices? What about an assertion that it takes six justices to make up a quorum? The former statement is one that is so well known, and so incontestable, that the citation should be unnecessary. The latter one, however, is probably not so ingrained in the public mind, and so the citation to section 1 is proper. Student-edited law reviews tend to err on the side of over-citation, probably because the students do not have the background to know what is beyond dispute in a particular area and what needs substantiation. But that is normally a problem that can be worked out amicably between an author and a student editor.

Another challenge faced by the students on the *Law Review* is to decide which topics are worthy of coverage and which are not. This involves much more than a so-called preemption check, done to ensure that the proposed article is novel enough to warrant publication. Something might be novel but a poor choice for the review. This can be a difficult task for students—especially the Articles editors who must review tenure pieces from aspiring academics around the country who are desperate to show their erudition. At their worst, law reviews cover topics that are so abstruse that they are likely to appeal to an audience limited to five people. This is the point that Chief Justice John Roberts amusingly made when he startled the legal academy in 2011 by describing the typical law review article as something concerned with “the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria or something,”<sup>3</sup> (Never mind the fact that during the

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3. Chief Justice John G. Roberts, Jr., *A Conversation with John Roberts*, C-SPAN (June 25, 2011), <http://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts> [https://perma.cc/PL96-DZYG].

eighteenth century the area covered by modern Bulgaria did not bear that name because it was part of the Ottoman Empire—the Chief’s point is clear.)

I became concerned enough about this phenomenon that (what else?) I wrote a law review article about the influence, or more accurately lack of influence, of law review articles on busy judges. I called it “Legal Scholarship for Judges.”<sup>4</sup> The centerpiece of the article was an empirical study of citations to legal scholarship in the Seventh Circuit during the year from August 2013 to August 2014. Over that time, I found, the court issued 1,123 opinions, of which 669 were precedential and appeared in the Federal Reporter (3d), while another 454 were nonprecedential orders.<sup>5</sup> Only seventy-six precedential opinions (11.4%) included one or more references to legal scholarship.<sup>6</sup> Looking more closely at the type of legal scholarship involved, I found that only a handful of opinions cited the type of scholarly article that one would expect to find in the *Texas Law Review*. I identified seven types of publication for this purpose:

(1) doctrinal works that focus on a narrow issue (forty-two cases, with eighty citations); (2) doctrinal works that survey an area (twenty-four cases, with forty-two citations); (3) theoretical or interdisciplinary works (eighteen cases, with twenty-six citations); (4) articles discussing legislative history or those that include a critique of the law or a proposal for change (seven cases, with nine citations); (5) articles presenting empirical research (six cases, six citations); (6) articles discussing recent decisions of the U.S. Supreme Court (five cases, six citations); and (7) articles offering a comparative legal perspective (three cases, four citations).<sup>7</sup>

To be clear, when I referred to “doctrinal works,” I meant the sort of article that a lawyer would expect to read for a continuing legal education program or to find in a bar publication designed to report on new developments in an area of law—not, in other words, the type of article that the *Texas Law Review* and its scholarly peers around the country tend to feature.

Interesting though the more theoretical articles may be, a judge is constrained in important ways in how she can use them. As I said in the Yale article, theory and innovative ideas “must be used with caution, within the boundaries that the Constitution, legislation, and higher courts have delineated. Law does matter, and it imposes constraints that genuinely bind judges.”<sup>8</sup> And lawyers are just as busy. Even if they find an article to be

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4. Diane P. Wood, *Legal Scholarship for Judges*, 124 YALE L.J. 2592 (2015).

5. *Id.* at 2604.

6. *Id.*

7. *Id.*

8. *Id.* at 2605.

enlightening, they perforce must take a practical approach to the amount of time they can devote to this type of reading and what the cost/benefit ratio of that kind of reading is. That presents an enormous challenge for the student editors who must decide which submissions to take, whether as an article or as a student note. No one wants to be pedestrian, but on the other hand, no one wants to slave over an article or a note that slips into obscurity the minute it is published.

A look at the most recent year or so of issues published by the *Texas Law Review* shows that it has, for the most part, done an excellent job steering between that Scylla and Charybdis. It has run articles that broadly examine a question—from 10,000 feet up, so to speak—and thus has contributed to the ability of all interested persons to see how the law is evolving. Recent examples of this type of valuable contribution include articles such as Kenneth S. Abraham and G. Edward White’s piece on “First Amendment Imperialism and the Constitutionalization of Tort Liability,”<sup>9</sup> or Barry Friedman and Elizabeth G. Jánosky’s article on “Policing’s Information Problem,”<sup>10</sup> and Orin S. Kerr’s examination of “The Questionable Objectivity of Fourth Amendment Law.”<sup>11</sup> And there are many more. The Symposium issues of the *Law Review* are especially helpful in this respect. Procedure buffs such as myself thoroughly enjoyed the Symposium on Remedies in Complex Litigation, which appeared in June 2020.<sup>12</sup> Corporate law fans undoubtedly had the same reaction to the 2021 Symposium, which was entitled “Governance Wars: Contesting Power and Purpose in the 21st Century Corporation.”<sup>13</sup>

The student notes selected for publication show comparable quality. And it is entirely appropriate to focus some notes on potential legislative change, some on judicial interpretations, and some on broader philosophy. Not every article or note has to command as broad an audience as your favorite social media platform or even the *New Yorker* or Disney Plus. If someone wants to discuss a matter of pure theory, the *Law Review* should, and does, have room for such an article. (I won’t say that it will be the first one that a busy judge reads, but that should not be the standard.) The overarching goal is quality. The student members of the *Law Review* enjoy a unique opportunity to practice separating the wheat from the chaff. In so doing, they

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9. Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 TEXAS L. REV. 813 (2020).

10. Barry Friedman & Elizabeth G. Jánosky, *Policing’s Information Problem*, 99 TEXAS L. REV. 1 (2020).

11. Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEXAS L. REV. 447 (2021).

12. Symposium, *Remedies in Complex Litigation*, 98 TEXAS L. REV. 1165 (2020).

13. Symposium, *Governance Wars: Contesting Power and Purpose in the 21st Century Corporation*, 99 TEXAS L. REV. 1247 (2021).

discover which topics are on the cutting edge of the law, who wants or needs to learn about these points, and how well the author expresses him- or herself. No classroom can replicate that experience, and it influences the rest of one's career.

Other disciplines do not trust students with this much of a role in the publication process. Peer-reviewed, faculty-edited journals are the norm in practically every other field. There are a few such journals in the law, too, such as the *Journal of Legal Studies* and the *Supreme Court Review*, both published by the University of Chicago Press. And the legal profession does have its specialty outlets, such as the *Antitrust Law Journal*, which is edited and published by the American Bar Association's Section of Antitrust Law. Nonetheless, the overwhelming majority of scholarly publications in the legal profession are student edited.

Perhaps that would be a problem if there were a scarcity of law journals: students will commit both Type I and Type II errors. That is, they will mistakenly reject a submission that is in fact an excellent article (Type I), and they will publish an article that should have been rejected (Type II). But the cost of the Type I error in the legal field is quite low. That is true because virtually every one of the approximately 200 ABA-accredited law schools in the United States<sup>14</sup> has at least one law review, and many of them have several. The aspiring author whose article was turned down by the *Texas Law Review* thus has many other opportunities for publication, and she is likely to succeed with another one. The ideas will be disseminated, the author will receive whatever credit is due, and perhaps the next time the author will succeed in publishing in a more prestigious journal.

Long ago, when I was on the *Texas Law Review*'s editorial board, those Type I errors were more serious. Law libraries, both in law firms and in academic institutions, did not necessarily subscribe to every journal, and so the consequence of publishing in a less well-known place was that the audience was much smaller. That has changed with the advent of computer legal services, online journals, and sophisticated search algorithms. To my knowledge, someone searching for the latest article on the Foreign Intelligence Surveillance Court will be directed to articles from any journal included within the database in question—Westlaw, Lexis, HeinOnline, or another.

This is in many ways a good thing, but it raises a new set of problems. Not every journal is put together with the care that the *Texas Law Review* or its elite peers lavish on every article, note, or essay. But how does one build a reputation in the Wild West of the Internet? (This problem, incidentally, is

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14. See *ABA-Accredited Law Schools*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/) [<https://perma.cc/L4QP-GRMS>].

by no means unique to law reviews; it is also very difficult for the traditional press, such as the *New York Times* or the *Wall Street Journal*, to distinguish itself from someone who sets up shop as a random blogger or podcaster who does not work so scrupulously to verify stories.) Perhaps the best one can do is to work hard to protect the “brand” and ensure that the journal’s reputation for quality is both earned and protected. Just as a person seeking medical information on the Internet is likely to have greater confidence in an entry on websites maintained by such institutions as the Mayo Clinic, the Texas Medical Center, or Harvard Health, a person looking for quality legal scholarship will recognize the consistency and quality of the journals published by the best law schools.

As an observer from almost 1200 miles away, I can confirm that the *Texas Law Review* has not only maintained its reputation but continues with each group of student editors to enhance it. That in itself is a fine accomplishment. But the *Law Review* does far more for the students lucky enough to participate in its work. Friendships are forged that last a lifetime. I spent most of my third year in law school practically living out of my office in the suite then occupied by the *Texas Law Review* in Townes Hall. I started every day with a cup of coffee and pleasant conversation with my officemate, Dan Witschey. Others on the Volume 53 Board would wander in and out of the suite throughout the day, and we would chat about matters large and small.

The sheer enjoyment of working hard together, all in the interest of producing as good a set of issues as we could, is something none of us will ever forget. *Law Review* launched us, and *Law Review* left a permanent mark on us. It is gratifying to be able to participate in the celebration of the *Law Review*’s 100th anniversary and to see how well the many boards that followed ours have carried on this fine tradition. I look forward to much more to come.