

# THE DEATH OF LAW REVIEWS HAS BEEN PREDICTED: WHAT MIGHT BE LOST WHEN THE LAST LAW REVIEW SHUTS DOWN?

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## INTRODUCTION

On February 5, 1996, there appeared a scholarly legal article unlike any other. "Last Writes? Re-Assessing the Law Review in the Age of Cyberspace," chronicled the many complaints made against

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student-edited law reviews from 1905 to present and predicted that the venerable institution of law reviews will cease to exist in a few years. Like a biblical prophet predicting the downfall of some great city,<sup>1</sup> the author, Professor Bernard Hibbitts of the University of Pittsburgh School of Law, is proclaiming that the vast intellectual citadel of law reviews, the hundreds of them,<sup>2</sup> will soon stop their presses, close their doors, and be silent forevermore. The article was unique because it proposed a new mechanism for the dismemberment of law reviews. Henceforth, according to the author, legal scholars can and should publish their articles by posting them to a home page on the World Wide Web, allowing anyone interested to read via modem and computer.

The second thing that made this article unique is that Professor Hibbitts actually did what he proposed all authors do. For months this article has appeared nowhere on paper, except for the copies readers might have printed for their own personal convenience. It was, in its entirety, a creature of the Internet, beckoning would-be legal authors to forsake the world of print and join in a brave, new electronic venture.<sup>3</sup> Now, a version of the article has joined the mainstream of legal scholarship by being printed in a law review.<sup>4</sup>

This Article explores how some of the complaints articulated by Professor Hibbitts regarding law reviews might be addressed by self-publication on the Internet rather than traditional publication. It will focus on two main implications of Professor Hibbitts' proposal: 1) it examines the impermanence inherent in allowing authors to update "completed" work,<sup>5</sup> and 2) the Article evaluates the role law review editors play in improving legal scholarship, both by

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<sup>1</sup> See e.g., *Jonah* 1:1-2; 3:1-3; 4:10 (noting that Jonah predicted the destruction of the metropolis of Ninveh, a then-thriving city with a population of 120,000).

<sup>2</sup> See AL JOYNER, *JOYNER'S DICTIONARY FOR SUCCESSFUL PUBLISHING IN LEGAL PERIODICALS* v-xxiii, (1987) (listing 619 legal periodicals).

<sup>3</sup> See Bernard J. Hibbitts, *Last Writes? Re-assessing Law Review in the Age of Cyberspace*, (visited Feb. 5, 1995) <<http://www.law.pitt.edu/hibbitts/last.htm>>; <<http://www.law.pitt.edu/hibbitts/lwp1.htm>>. There are currently two versions of the "Last Writes?" article posted on Professor Hibbitts' home page, designated "version 1.0" and "version 1.1." See *id.* A difficulty arises in providing page citations to versions 1.0 and 1.1, since "version 1.1" does not have consecutive page numbers, and "version 1.0" has no page numbers at all. See *id.* Accordingly, citations to "version 1.0" will be made to footnotes, while citations to "version 1.1" will be to paragraph numbers. See *id.* Only "version 1.1" provided numbered paragraphs. See *id.*

<sup>4</sup> See 71 N.Y.U. L. REV. 615 (1996).

<sup>5</sup> See *infra* notes 63-82 and accompanying text. Professor Hibbitts has suggested that this feature is a significant advantage of Internet self-publication over traditional printed journals. Hibbitts, *supra* note 3, at notes 228-30, ¶¶ 4.1-5. See *infra* notes 63-131 and accompanying text for an analysis of this feature of the proposal.

keeping the focus of scholars' writings from becoming too narrow and by enforcing standards of technical accuracy on would-be authors. The Article does not seek to agree or disagree with the prediction that printed, student-edited law reviews with contributions by non-student writers might soon join paddle wheel ships and steam locomotives as the quaint technology of a bygone era. Rather, it explores what might be lost if the predicted demise of law reviews becomes a reality.

## I. THE CONTEXT FOR THE ELECTRONIC JOURNAL DEBATE

Various branches of academia have debated electronic "publishing"<sup>6</sup> for a number of years.<sup>7</sup> Publishers, librarians, and other academics have held annual conferences since 1990 to discuss changes resulting from electronic dissemination.<sup>8</sup> On-line academic journals already exist in law and other disciplines.<sup>9</sup>

Scholarly publishing is changing because of computer technology. At least one author has predicted the demise of print journals because print is more expensive than electronic distribution:<sup>10</sup>

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<sup>6</sup> This Article uses the word "publish" to mean any broad dissemination of information. This includes traditional printed publications as well as publications on the Internet. Legal and general dictionary definitions support this usage. See BLACK'S LAW DICTIONARY 1227 (6th ed. 1990) ("Publication. To make public . . . to exhibit, display, disclose or reveal."); THE OXFORD ENGLISH DICTIONARY 782 (2d ed. 1989) ("2. a. the issuing, or offering to the public").

<sup>7</sup> See generally SCHOLARLY JOURNALS AT THE CROSSROADS: A SUBVERSIVE PROPOSAL FOR ELECTRONIC PUBLISHING (Ann Shumelda Okerson & James J. O'Donnell eds., 1995) (reproducing an extended treatment on electronic mail during 1994 and 1995 of a proposal to bypass print media in favor of electronic publication of scholarly writing) [hereinafter SCHOLARLY JOURNALS]; SCHOLARLY COMMUNICATION IN AN ELECTRONIC ENVIRONMENT (Robert Sidney Martin ed., 1993) (essays on the coming era of electronic scholarship by eight authors). Professor Hibbitts recognizes that other disciplines have taken steps toward implementing electronic publishing. See Hibbitts, *supra* note 3, at notes 245-53, ¶¶ 4.19-20.

<sup>8</sup> See JINNIE DAVIS, *A Synopsis of the Conference in Scholarly Publishing on the Electronic Networks: The Fourth Symposium 1* (Ann Okerson ed., 1994).

<sup>9</sup> Some journals exist only in the electronic realm. For example, The Boston University School of Law has an exclusive electronic journal, the "Journal of Science & Technology Law." (announcement on file with author). The Journal of World Systems Research is an on-line political science journal. See *infra* note 18 for a list of 10 more journals with no paper counterpart. See generally Diane Kovacs, *Electronic Journals, Magazines, and Zines*, DIRECTORY OF ELECTRONIC JOURNALS, NEWLETTERS AND ACADEMIC DISCUSSION LISTS, (pt. 2), (Ann Okerson, ed. 1995) 105-346 (providing an incomplete list of electronic journals).

A somewhat different phenomenon is a paper journal also available on-line. For example, the Akron Law Review is a paper journal with its full text available on the Internet. See generally <http://www.uakron.edu/law/alr/alr.html>.

<sup>10</sup> JEAN-CLAUDE GUEDON, *Electronic Journals, Libraries, and University Presses*, in SCHOLARLY PUBLISHING ON THE ELECTRONIC NETWORKS: FILLING THE PIPELINE AND PAY-

We have one certainty: the economic model of print journals is well known and the trends that go with it are eminently clear. They all point to the impending collapse of the whole system so that we have no other choice but to look for alternatives, presumably based on electronic and digitized documents.<sup>11</sup>

Others have disagreed, predicting that traditional printed journals will continue to fulfill the needs that electronic media cannot.<sup>12</sup> Cost considerations seem to be a crucial argument to the advocates of electronic dissemination of scholarship.<sup>13</sup> Publishing cost increases have forced journal prices upward. In the meantime, academic budgets are being reduced, causing libraries to abandon subscriptions to journals that scholars may wish to read.<sup>14</sup> Electronic dissemination offers the twin benefits of reducing costs and increasing access to scholarship.<sup>15</sup> Another factor cited by supporters of electronic journals is the alleviation of managing the tremendous volume of paper involved with printed publications.<sup>16</sup>

A recent survey of scholars to whom electronic journals are addressed sought to answer the formidable question: "Is the electronic journal a viable channel for formal scholarly communica-

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ING THE PIPER 67, 67 (Ann Okerson ed., 1995) [hereinafter FILLING THE PIPELINE]. But see Carol Tenopir & Donald W. King, *Setting the Record Straight on Journal Publishing: Myth vs. Reality*, L. LIBR. J., Mar. 15, 1996, at 32, 34 ("Sometimes arguments are stated in black-and-white terms—Publications must be either all electronic or all paper. . . . In fact, a combination of technologies are likely to coexist, each fulfilling a niche that satisfies specific information needs and requirements."); Christopher L. Tomlins, *Print and Electronic Book Reviewing Can Peacefully Co-Exist*, CHRON. HIGHER EDUC., Aug. 9, 1996, at A40.

<sup>11</sup> See generally GUEDON, *supra* note 10.

<sup>12</sup> See Tenopir & King, *supra* note 10, at 35.

<sup>13</sup> See generally SCHOLARLY JOURNALS, *supra* note 7, at 23-29, 118-39 (discussing extensively the cost savings projected in electronic publication); GUEDON, *supra* note 10; ANDREA KEYHANI, *Innovations in Cost Recovery*, in FILLING THE PIPELINE, *supra* note 10, at 57 (same); Tenopir & King, *supra* note 10, at 35.

<sup>14</sup> See Paul McCarthy, *Serial Killers: Academic Libraries Respond to Soaring Costs*, L. LIBR. J., June 15, 1994, at 41-44. See also Tenopir & King, *supra* note 10, at 33-34 (noting that the reductions in library collections are mostly modest, but some dramatic reductions have taken place).

<sup>15</sup> See *id.*

<sup>16</sup> For example, the field of physics, which has played a leading role in the development of electronic dissemination of journal information, can boast some impressive numbers. The American Physical Society reports that its *Physical Review* published 80,000 pages in 1993. The society, which began publishing in 1893, has published two-thirds of its pages in the last 20 years. BOB KELLY, *Publishing E-prints, Preprints, and Journals in the Sciences*, in FILLING THE PIPELINE, *supra* note 10, at 113. By contrast, the 1993 Harvard Law Review totalled 2044 pages.

tion?"<sup>17</sup> The academic communities served by ten on-line journals<sup>18</sup> were questioned whether potential authors within the journals' target disciplines were willing to publish solely in electronic media.<sup>19</sup>

The academics' most frequently expressed concern was the status of electronic publications.<sup>20</sup> They questioned whether their colleagues would consider electronic publications to be "real" publications, worthy of prestige.<sup>21</sup> The survey also identified concerns regarding the adequacy of indexing for electronic journals and whether articles read on-line today will still be available in the future.<sup>22</sup> Only a few respondents expressed concern about the potential for altering electronic texts.<sup>23</sup>

When asked about the advantages of electronic publishing,<sup>24</sup> over seventy percent of those responding agreed that the speed of publication in an electronic medium was a major advantage.<sup>25</sup> A significant number of those surveyed also expressed as advantages the ability of electronic journals to reach a targeted audience, enhance scholarly dialogue, and provide information to readers at low cost and in remote geographic locations.<sup>26</sup> A small group found advantages in the ability to publish materials not capable of being reproduced on paper<sup>27</sup> and to make use of "hypertext."<sup>28</sup>

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<sup>17</sup> See H. JULENE BUTLER, *Research into the Reward System of Scholarship; Where Does Scholarly Electronic Publishing Get You?* in OKERSON 167, 167 (1995).

<sup>18</sup> See *id.* at 168, tbl. 1. To be included in the study the journals had to publish original, scholarly research, be reviewed by at least two readers in addition to the editor, and be disseminated primarily via an electronic format. Journals regularly distributed on paper as well as electronically were not studied. See *id.* at 167. The 10 journals were: Education Policy Analysis Archives, Electronic Journal of Communication, Electronic Journal of Virtual Culture, Flora Online, Interpersonal Computing and Technology, Journal of the International Academy of Hospitality Research, MC Journal, Online Journal of Current Clinical Trials, Psychology, and Public Access Computer Systems Review. See *id.* at 168.

<sup>19</sup> See *id.* at 167.

<sup>20</sup> See *id.* at 173, fig. 7.

<sup>21</sup> See *id.* This is more than a question of authors' pride, since publication is rewarded in academia. See generally, John W. Creswell, *Editor's Notes*, in MEASURING FACULTY RESEARCH PERFORMANCE I (John W. Creswell, ed.) (1986); HOWARD P. TUCKMAN, PUBLICATION, TEACHING, AND ACADEMIC STRUCTURE (1976).

<sup>22</sup> See generally BUTLER, *supra* note 17.

<sup>23</sup> See *id.* Approximately eight percent of those surveyed shared this concern. Less than eight percent of those responding expressed concerns regarding the copyright protection available for electronic articles. See *id.*

<sup>24</sup> See *id.* at 173, fig. 8.

<sup>25</sup> See *id.* Professor Hibbitts recognized this advantage. See Hibbitts, *supra* note 3, at notes 140-42, 228-30, ¶¶ 2-20, 4.1-5.

<sup>26</sup> See generally BUTLER, *supra* note 17.

<sup>27</sup> 17.65 % of respondents noted an advantage on this issue. See *id.* at 173. Profes-

Regardless of the advantages or disadvantages of electronic publishing, it appears this innovation will have a profound effect on the world of scholarly writing.<sup>29</sup> The electronic tools are available and their use in disseminating scholarship is a reality today,<sup>30</sup> but the contours of that use have yet to be determined. This is as true in law as it is in other branches of the academy.<sup>31</sup>

## II. PROFESSOR HIBBITTS' PROPOSAL<sup>32</sup>

### A. *The Nature of Professor Hibbitts' Proposal*

Against the backdrop of this discussion in the academic world, Professor Bernard Hibbitts has proposed that legal scholarship embrace electronic dissemination.<sup>33</sup> This proposal, however, contains revolutionary elements largely absent from the discussion in other fields. The central feature of the proposal is to rid legal scholarship of organized journals and their editorial controls.<sup>34</sup> The radical nature of this position cannot be understated. The majority of academic literature is peer-reviewed.<sup>35</sup> That is, journals decide

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sor Hibbitts pointed out this advantage of the electronic environment. See Hibbitts, *supra* note 3, at notes 231-34, ¶ 4.6.

<sup>28</sup> Hypertext is defined as the ability of a computer user to jump from an article directly into other related document and then return to the original article. Less than four percent of respondents noted an advantage here. See generally BUTLER, *supra* note 17.

<sup>29</sup> See generally *supra* notes 10, 13, 18. See also M. ETHAN KATSH, LAW IN A DIGITAL WORLD 8 (1995); David A. Rier, *The Future of Legal Scholarship and Scholarly Communication in the Age of Cyberspace*, 30 AKRON L. REV. 183 (forthcoming 1996).

<sup>30</sup> See *id.*; *supra* note 8.

<sup>31</sup> See generally *supra* note 9.

<sup>32</sup> If possible, the reader should access "Last Writes" on-line and read it rather than rely on the following brief summary. In addition to the problems that attend even the most minute and faithful summary, the reader who does not read Professor Hibbitts' article in its original format loses the part of its impact that flows from finding it on the World Wide Web, reading it on a computer screen or printout, and considering the implications of those acts.

<sup>33</sup> See generally Hibbitts, *supra* note 3.

<sup>34</sup> See *id.* at notes 228-30, ¶¶ 4.1-5. A faint echo of Professor Hibbitts' desire to eliminate pre-publication edits can be found in SCHOLARLY JOURNALS AT THE CROSSROADS: AN INTERNET DISCUSSION ABOUT SCIENTIFIC AND SCHOLARLY JOURNALS AND THEIR FUTURE 201 (Anne S. Okerson & James J. O'Donnell, eds. 1995) (reprinting a suggestion by Professor Steven Harnad that peer review might be dispensable because it does not block publication of bad articles in "vanity presses"). But see HAROLD KLAWANS, TRIALS OF AN EXPERT WITNESS: TALES OF CLINICAL NEUROLOGY AND THE LAW 122-23 (1991) (comparing medical and scientific articles not subjected to peer review to *Batman* comic books as authoritative sources of information).

<sup>35</sup> See Howard A. Denemark, *Improving Litigation Against Drug Manufacturers for Failure to Warn Against Possible Side Effects: Keeping Dubious Lawsuits from Driving Good Drugs Off the Market*, 40 CASE W. RES. L. REV. 413, 433 (1989-90) (describing the prevalence and role of peer review in scientific publishing); Irene D. Feurer et al., *Evaluating Peer*

whether to publish manuscripts by asking "readers" in the relevant field of expertise to review the submitted work. These peer-reviewers report to the journal, whose editors decide whether to publish the submission.<sup>36</sup> There are some peer-reviewed legal publications,<sup>37</sup> but the bulk of law reviews are edited by students.<sup>38</sup> While peer-review has been criticized in academic literature<sup>39</sup> and by the popular press,<sup>40</sup> few arguments are made for electronic publication in disciplines with peer-reviewed literature based on the possibility of publication without editorial controls.<sup>41</sup>

While student editors have also been criticized,<sup>42</sup> prior criticism focused on either the need to find editors more worthy than law students or on training law students to become better guardians of the literature.<sup>43</sup> A forthcoming article calls for the law to

*Reviews: Pilot Testing of a Grading Instrument*, 272 JAMA 98, 98 (July 13, 1994) ("Peer review of scholarly manuscripts by qualified outside referees is the cornerstone of the editorial review process.").

<sup>36</sup> See *id.*

<sup>37</sup> See 1995 DIRECTORY OF LAW REVIEWS AND SCHOLARLY LEGAL PERIODICALS 28-39 (Anderson Publ'g Co. 1994) (listing faculty and professionally-edited legal periodicals).

<sup>38</sup> See Joyner, *supra* note 2, at v-xxiii, 637 (listing 619 legal periodicals, indicating 88 are refereed).

<sup>39</sup> See, e.g., STEPHEN LOCK, A DIFFERENT BALANCE: EDITORIAL PEER REVIEW IN MEDICINE 23-55 (1986). See generally Mary Frank Fox, *Scientific Misconduct and Editorial and Peer Review Processes*, 65 J. HIGHER ED. 298 (1994) (noting the limits of peer review in stopping scientific fraud and misrepresentation).

<sup>40</sup> See WILLIAM BROAD & NICHOLAS WADE, BETRAYERS OF THE TRUTH 100-04 (1982); ALEXANDER KOHN, FALSE PROPHETS: FRAUD AND ERROR IN SCIENCE AND MEDICINE 146-60 (1986). Recently the field of "science studies," a branch of sociology, suffered an embarrassment when the peer-reviewed journal, *Social Text*, unknowingly published a spoof containing ludicrous misstatements. See Sharon Begley & Adam Rogers, "Morphogenic Field" Day: A P.C. Academic Journal Falls for a Physicist's Parody of Trendy-Left Social Theory, NEWSWEEK, June 3, 1996, at 37; Edward Rothstein, *When Wry Hits Your Pi From a Real Sneaky Guy*, N.Y. TIMES, May 26, 1996, at E6.

<sup>41</sup> The 1994 academic conference on electronic publishing included a session to address the question of whether academics would publish in electronic media. One basic assumption of that session was that "[a]n acceptable scholarly communication channel must convey knowledge certified through the peer review process." BUTLER, *supra* note 17, at 167-68; Tenopir & King, *supra* note 10, at 34-35 (dismissing as too simplistic arguments that academic publishers will be entirely replaced by self-publication because of the value of the review function); KELLY, *supra* note 16, at 117 (proposing a system of electronic pre-publications review that includes peer review). *But see supra* note 33.

<sup>42</sup> See Hibbitts, *supra* note 3, at notes 54-178, ¶¶ 2.1-27, for a thorough catalog of criticisms of student-editors through the years.

<sup>43</sup> See, e.g., *id.*; Roger C. Cramton, *The Most Remarkable Institution: The American Law Review*, 36 J. LEGAL EDUC. 1, 8 (1986) (calling for fewer reviews and faculty editing); James Lindgren, *Reforming the American Law Review*, 47 STAN. L. REV. 1123 (1995) (concluding that faculty must teach law review editors to do their jobs better); Richard A.

join the rest of academia in adopting peer-review.<sup>44</sup> Until Professor Hibbitts, no one had suggested a way by which legal scholars could entirely escape the process of pre-publication edits.

The proposed mechanism for distribution of scholarship is electronic self-publication on one's own home page or a home page maintained by a group of legal scholars.<sup>45</sup> Articles posted in such a manner are to remain under the control of the author, who may update them at will.<sup>46</sup>

Professor Hibbitts' proposal can be divided into two separable elements: electronic dissemination of legal scholarship<sup>47</sup> and the end of editorial controls.<sup>48</sup> It is, however, perfectly possible to have editors publish an electronic journal, complete with the usual editorial process of reviewing manuscripts.<sup>49</sup> It is equally possible to have electronic self-publication on a home page without editorial controls.<sup>50</sup> Thus, electronic distribution may, but does not have to, facilitate an end to all editorial controls.<sup>51</sup>

### B. *Advantages of Electronic Dissemination of Scholarship*

Professor Hibbitts' article is the beginning of what may be a long argument among legal scholars about the proper role of electronic scholarship. Certain legal articles are currently available on the Internet.<sup>52</sup> Some reasons for favoring electronic availability of scholarship seem well-founded. Electronic dissemination may ease library costs for the acquisition of information<sup>53</sup> will certainly

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Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131 (1995) (suggesting peer review for non-doctrinal submissions).

<sup>44</sup> See generally Rier, *supra* note 29 (arguing that the advantages of peer review over student review justify changing to peer review of legal scholarship). Professor Rier is not alone in his assessment. See Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 423-24 (1989) (calling for faculty advisory panels to help students judge articles); James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 535 (1994) (calling for "a maximum role for faculty in article selection"). See, e.g., Posner, *supra* note 43, at 1136 (calling for faculty review of non-doctrinal manuscripts).

<sup>45</sup> See Hibbitts, *supra* note 3, at notes 228-230, ¶¶ 4.1-5.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.* at notes 228-34, ¶¶ 4.1-6.

<sup>48</sup> See *id.*

<sup>49</sup> See *supra* note 18, for examples of electronic journals that are subject to editorial control.

<sup>50</sup> This was the exact status of Professor Hibbitts' "Last Writes" article from its Internet debut to its scheduled appearance in the New York University Law Review. See *supra* note 3.

<sup>51</sup> See *supra* notes 47-50 and accompanying text.

<sup>52</sup> See *supra* note 8.

<sup>53</sup> Not all information available in an electronic form is free. The Boston Univer-



lessen storage costs as the number of pages a library must shelve will decrease. Electronic availability may provide a number of users access to the same documents at the same time.<sup>54</sup> Moreover, information on the Internet moves faster than traditional mail.<sup>55</sup> These features are part of today's electronic journals, independent of whether they employ student editorial controls.

### C. *Advantages of Home Page Self-Publication*

Home page self-publication would circumvent editorial controls.<sup>56</sup> It would allow authors to change and update their work at will.<sup>57</sup> Even if a group of scholars sponsored a home page for articles, as proposed by Professor Hibbitts,<sup>58</sup> the system could preserve the ability of authors to update their work.

The predicted end of editorial control on legal scholarship would unquestionably resolve the complaints leveled at student editors. Obviously, with the ability to circumvent editorial controls, delays due to the editorial process would cease.<sup>59</sup> Similarly, no complaints alleging unfair publication decisions would persist because authors would have the ability to decide what to publish.<sup>60</sup> The arrogance of student-editors must cease to be a factor,<sup>61</sup> and any shortcomings students may have in their understanding of the law or effective writing in English will be irrelevant to non-student legal writers.<sup>62</sup>

Balanced against these likely gains are some serious considerations about the permanence of articles in an electronic environment and the loss of the benefits of student-editorial control. The next two sections examine what might be lost if legal scholarship

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sity Journal of Science & Technology Law, available on-line, costs fifty dollars for an institutional one-year subscription. Some information is free, such as Professor Hibbitts' article and the Akron Law Review. *See supra* note 8.

<sup>54</sup> This is a familiar fact to users of on-line legal data bases. One person's access to a given document on Lexis or Westlaw does not interfere with other users' access to that same document.

<sup>55</sup> *See* BUTLER, *supra* note 17, at 173; Hibbitts, *supra* note 3, at note 214, ¶ 3.8.

<sup>56</sup> *See* Hibbitts, *supra* note 3, at notes 228-30, ¶¶ 4.1-5. In an article soon to be released, Professor Hibbitts states that he does not wish to eliminate all editors. Editorial boards or students or faculty, however, are to be eliminated. The remaining editors are colleagues one solicits as readers and one's own research assistants. Editorial controls would thus be entirely voluntary. *See* Bernard J. Hibbitts, *Yesterday Once More: Skeptics Scribes and the Death of Law Reviews*, 30 AKRON L. REV. 267 (forthcoming 1996).

<sup>57</sup> *See id.*

<sup>58</sup> *See id.* at notes 238, 255, ¶ 4.9, v.5.

<sup>59</sup> *See id.* at note 230, ¶ 4.5. *See generally* BUTLER, *supra* note 17.

<sup>60</sup> *See id.*

<sup>61</sup> *See* Hibbitts, *supra* note 3, at note 230, ¶ 4.5.

<sup>62</sup> *See id.*

moves into the brave new world of unedited electronic self-publication.

### III. ELECTRONIC DISSEMINATION AND THE PERMANENCE OF LEGAL WRITING

#### A. *The Instability of Electronic Information*

One cornerstone of Professor Hibbitts' proposal to self-publish legal articles is the ability to change the text after publication.<sup>63</sup> Professor Hibbitts foresees scholars updating their articles because:

On the Web, we need not turn our backs on our own work once it is printed, without the benefit of revision, correction or change; we can conveniently and immediately improve our own articles days, months, or even years after initial publication, without going through an editorial middleman.<sup>64</sup>

Authors would also maintain the liberty to update their articles in response to readers' comments, later-decided cases, articles, or reports of new events.<sup>65</sup>

This ability holds serious dangers for the history of ideas and the usefulness of legal articles. Articles published on a home page are infinitely malleable. They can be updated with the speed of hands on a keyboard and provided someone had not downloaded the article or kept a private copy, the words can be made to vanish altogether. While material erased from one's own home page may exist somewhere, there is little question that printed words are easier to find on library shelves than an Internet article placed on a home page and later erased.<sup>66</sup>

In the world of electronic self-publication, author control jeopardizes the permanence of records.<sup>67</sup> If legal scholarship

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<sup>63</sup> See *id.*

<sup>64</sup> *Id.*

<sup>65</sup> See *id.*

<sup>66</sup> It must be noted that Professor Hibbitts does not see publication on one's own home page as a permanent solution, but rather suggests that the Association of American Law Schools sponsor a "supervised Web site." See Hibbitts, *supra* note 3, at notes 238, 255, ¶ 4.9, v.5. To the extent that "supervision" allows changes initiated by authors, a "supervised" home page is no different for purposes of this discussion than one's own home page. See *id.* To the extent it blocks such changes, a claim cannot be made that one may update one's work whenever it appears desirable. See *id.* at note 230, ¶ 4.5. Perhaps this Web site would preserve earlier drafts together with the dates of changes, in which case it would provide a good record of the history of thought, but might discourage its use as a "sounding board" for controversial ideas, since comments would be recorded and made public rather than remaining among colleagues. Also, if multiple versions are made available, the drudgery of reading multiple drafts might effectively hide earlier versions from scrutiny.

<sup>67</sup> See KATSH, *supra* note 29, at 97-98.

abandons the printed medium, legal discussions will no longer be "safeguarded by the fixed and protective cover of the printed book. . . ."68 Without the permanence of paper copies, legal scholarship will become fragile knowledge, dependent on the willingness of authors to be associated with their previously held opinions.

Today, words are on the shelf. Tomorrow, scholars may have to ask authors to provide copies of their work, or ask if anyone has downloaded or printed copy of the document. If the work underwent multiple revisions, authors might not get the version containing the crucial part that formed the basis of scholarly interest.<sup>69</sup> This could be due to dishonesty or uncooperativeness on the part of the author,<sup>70</sup> but might also be a common side effect of working on a word processor. Writers may not keep paper drafts of their work and, therefore, might "update" each prior draft out of existence as new changes are entered.<sup>71</sup>

This issue was identified in the 1980s by University of Alabama Professor Gordon B. Neavill who noted that "[t]he survival of information in an electronic environment becomes an intellectual and technological problem in its own right."<sup>72</sup> Libraries exist to acquire and safeguard information, collecting current information and holding it to make an intellectual record for the future.<sup>73</sup> He later noted, however, that "[t]he whole concept of preservation seems to be antithetical to the electronic ethos."<sup>74</sup> The very technology of electronic media "favor[s] revision, updating, and continual currency, not retrospective documentation. Magnetic media are easily erased and reused."<sup>75</sup>

Particularly in light of the claim that linking one's articles to

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<sup>68</sup> *Id.*

<sup>69</sup> Articles are not always cited for their main thrust. For example, in this Article I cite two articles and one comment as examples to show that law reviews may show arithmetic calculations to support numerical assertions. See *infra* note 174. The topics of those articles were not germane to my use of them, so what might seem an unimportant or stylistic change to the author might be of vital importance to another scholar.

<sup>70</sup> Researchers in the sciences are known to be reluctant to give other researchers access to their data, even after articles based upon it have been published. Outrageous lies about supposed destruction of records have been told to those requesting raw data. BROAD & WADE, *supra* note 40, at 78-82.

<sup>71</sup> See Gordon B. Neavill, *Libraries and Texts in the Electronic Environment*, in SCHOLARLY COMMUNICATION IN AN ELECTRONIC ENVIRONMENT: ISSUES FOR RESEARCH LIBRARIES 53, 56-57, 67 (Robert S. Martin ed., 1993).

<sup>72</sup> Gordon B. Neavill, *Electronic Publishing, Libraries, and the Survival of Information*, 28 LIBR. RESOURCES & TECHNICAL SERVS. 78 (1984).

<sup>73</sup> See Neavill, *supra* note 71 at 56-57, 67.

<sup>74</sup> *Id.* at 58.

<sup>75</sup> *Id.* at 56.

other information available on-line should replace footnotes,<sup>76</sup> it is important to note that depending on others' sites is a questionable proposition. Today, the problem of information or web sites disappearing is even recognized in the tongue-in-cheek jargon of modern computer users.<sup>77</sup> A new term, "link rot," has been coined to describe the problem of links that lead the reader to defunct sites.<sup>78</sup> The development of this term shows a problem that does not generally threaten the paper-based library. A written source can probably be found on some library shelf, and footnotes reproduce the portion of the material the authors and editors thought essential. However, if one depends upon others to maintain cites or information, articles that are adequately supported today may be without support in the future.

If permanence of legal thought is important to legal scholarship then it must be preserved consciously.<sup>79</sup> It had been noted in 1993 that the necessary technological mechanisms did not then exist to safeguard the intellectual history of electronic publications.<sup>80</sup>

Law reviews are criticized for being of little use to courts.<sup>81</sup> Making articles infinitely malleable can decrease judges' ability to rely on them. Law relies on fixed written records.<sup>82</sup> Allowing authors the unrestrained power to update their work means that every article will forever be a mere draft and never a final product.

<sup>76</sup> Hibbitts, *supra* note 3, at notes 225-26, 231-34, ¶¶ 3.15, 4.6.

<sup>77</sup> One federal court recognized computer jargon as a separate and impenetrable dialect as early as 1970, when it wrote:

After hearing the evidence in this case the first finding the court is constrained to make is that, in the computer age, lawyers and courts need no longer feel ashamed or even sensitive about the charge, often made, that they confuse the issue by resort to legal "jargon," law Latin or Norman French. By comparison, the misnomers and industrial shorthand of the computer world make the most esoteric legal writing seem as clear and lucid as the Ten Commandments or the Gettysburg Address . . . ."

Honeywell, Inc. v. Lithonia Lighting, Inc., 317 F. Supp. 406, 408 (N.D. Ga. 1970).

<sup>78</sup> See *CGI Joe's Guestbook* (visited November 8, 1996) <<http://heron.tc.clarkson.edu/odonnell/cgi-bin/guestbook.pl.cgi>>.

<sup>79</sup> See generally Peter S. Graham, *Intellectual Preservation and the Electronic Environment*, in *SCHOLARLY COMMUNICATION IN AN ELECTRONIC ENVIRONMENT: ISSUES FOR RESEARCH LIBRARIES* 72 (Robert S. Martin ed., 1993) (quoting and paraphrasing Professor Neavill).

<sup>80</sup> See generally *id.*

<sup>81</sup> See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Hibbitts, *supra* note 3, at notes 162-65, ¶ 2.25. But see Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 45 (1937) (stating that lawyers like law reviews because "they are tickled pink to have somebody else look up cases and think up new arguments for them to use. . .").

<sup>82</sup> See KATSH, *supra* note 29, at 96-97.

This is not the stuff on which courts will gladly rest precedents.<sup>83</sup>

### B. Which Articles Will Disappear?

Some authors might never update their writing, leaving them to be discussed or ignored as the interests and needs of legal scholarship dictate. It is, however, worth asking what might motivate authors to change their prior works. Perhaps ongoing interest in the subject matter or a desire to provide current information will motivate authors to update.<sup>84</sup> Another desire might be to avoid being associated with unpopular opinions or failed predictions.

#### 1. The Loss of Unpopular Opinions

Law discusses very sensitive topics. Questions may change from hotly debated issues to matters of great consensus. One example is enforced racial segregation in public education. This was a widespread practice before the United States Supreme Court made it illegal in 1954.<sup>85</sup> Those studying this era, the nature of the dispute, or the nature of the predictions then being made, may find in an electronic era of self-publication that losing opinions are erased.<sup>86</sup>

For example, a 1957 state bar journal reprinted a judge's newspaper editorial asserting that:

Truly a massive campaign of super-brainwashing propaganda is

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<sup>83</sup> See *id.* The latest edition of *The Bluebook* acknowledges this difficulty, stating: "[b]ecause of the transient nature of many Internet sources, citation to Internet sources is discouraged unless the materials are unavailable in printed form or are difficult to obtain in their original form." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, R. 17.3.3 (16th ed. 1996).

<sup>84</sup> Professor Hibbitts noted that articles can be important to professors because promotion and tenure committees consider one's scholarly productivity. Hibbitts, *supra* note 3, at note 85, ¶ 2.10; see also John W. Creswell, *Editors' Notes* in MEASURING FACULTY RESEARCH PERFORMANCE 1 (1986) (stating that publications are increasingly important in professors' career advancement). See generally TUCKMAN, *supra* note 21. It is unclear how updating an article will be evaluated in the future when writing another article seems a clearer way of documenting one's productivity.

<sup>85</sup> See ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, JR., DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL DESEGREGATION CASES 5, 6 (1957) ("In 1951, when the first of the recent public school segregation cases began its tortuous climb up the judicial ladder toward Supreme Court decision, 21 states and the District of Columbia had laws either compelling or permitting the separation of white and colored in educational institutions."). Indeed, the *Brown v. Board of Education* case itself dealt with four states' school systems: Kansas, South Carolina, Virginia, and Delaware. See *Brown v. Board of Educ.*, 347 U.S. 483, 486 (1954). It was decided on the same day as *Bolling v. Sharpe*, 347 U.S. 497 (1954), which invalidated racial segregation in the public schools in Washington, D.C. See 347 U.S. at 500.

<sup>86</sup> See *infra* notes 87-111 and accompanying text.

now being directed against the white race, particularly by those who envy its glory and greatness. Because our people have pride of race we are denounced as bigoted, prejudiced, racial propagandists and hate-mongers by those who wish an impure, mixed breed that would destroy the white race by mongrelization. The integrationists and mongrelizers do not deceive any person of common sense with their pious talk of wanting only equal rights and opportunities for other races. Their real and final goal is intermarriage and mongrelization of the American people.<sup>87</sup>

Few authors would want to be associated with those words today.<sup>88</sup> What was once publishable can now be punishable. Today, these inflammatory words come close to exposing a judge to discipline.<sup>89</sup> These words are, however, preserved in law libraries nationwide. Scholars may ponder their meaning without fear that an author may change or retract them undetected at some later time.

A few minutes spent with the hard-bound Index to Legal Periodicals<sup>90</sup> allows a researcher to find in the 1947-48 Mississippi Law Journal an address by the past president of the Mississippi State Bar to those attending its annual meeting. Its clarion call favoring poll taxes,<sup>91</sup> opposing federal anti-lynching laws and bans on employ-

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<sup>87</sup> Walter B. Jones, *I Speak for the White Race*, 18 ALA. LAW. 201 (App. 1957). This article, written by an Alabama state judge, was originally published in the Montgomery Alabama newspaper, "The Advertiser." *Id.*

<sup>88</sup> There may be less willingness to voice unpopular opinions about issues of race, sex, age, ethnicity, and other demographic factors on college campuses in the 1990's than had been true in earlier eras. See generally DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES (Paul Berman ed., 1992). This trend may influence legal scholarship. See David P. Bryden, *Scholarship About Scholarship*, 63 U. COLO. L. REV. 641 648-50 (1992); Richard Delgado, *Legal Scholarship: Insiders, Outsiders, Editors*, 63 U. COLO. L. REV. 717, 720-21 (1992).

<sup>89</sup> See ABA Model Code of Judicial Conduct, Canon 3 (5) (1990), which states:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by word or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race . . . .

ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3 (5) (1990). While it is doubtful that writing for a newspaper constitutes a judicial duty, the author nonetheless held himself out as a judge and permitted the article to be published in a bar journal. If spoken or written in the course of judicial duties, the quoted statement would have violated this ethical canon.

<sup>90</sup> I found all of the law review and bar journal articles quoted in this section in less than three hours using only the Index to Legal Periodicals and the printed volumes and microfiches available in my law school's library. That time included reading the Index annotations, finding the articles on the shelf, and determining their thrust. Guessing what issues might produce illustrative articles and knowing what years to search made the process manageable in a short period of time.

<sup>91</sup> W. Calvin Wells, *Is the South to be Called upon to Endure a Second Tragic Era?*, 19 MISS. L. J. 413, 419-20 (1948).

ment discrimination<sup>92</sup> are an eerie reminder of a closed chapter in American political discourse. In the 1990's the words of this speech clearly would not be published by a state bar, nor by a law review.<sup>93</sup> It is easy to imagine the proponents of such positions living long enough to regret them and if it were possible, erasing them from the historical record.<sup>94</sup>

Law reviews may reflect the times and so form an important means of studying them. Reviews published both approving and disapproving sentiments about the internment of Japanese-Americans during the Second World War.<sup>95</sup> Today the internment seems a shameful part of our history for which the Congress of the United States has issued an apology.<sup>96</sup> Those who favored the internment at the time very well might wish to obliterate any record or their prior views.<sup>97</sup>

In the 1920s, when eugenics was a powerful social idea, it expressed itself in legislation allowing the sterilization of those deemed "defective." The most famous case on the subject was *Buck v. Bell*, in which the United States Supreme Court upheld a statute allowing the sterilization of "mental defectives."<sup>98</sup> Mr. Justice Holmes's ringing pronouncement that "[t]hree generations of imbeciles are enough,"<sup>99</sup> was an anthem for those who saw the breeding of humans like the breeding of cattle and whose goal was to help those with "desirable traits" reproduce while stopping the transmission of weakness.<sup>100</sup>

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<sup>92</sup> *Id.* at 421-29.

<sup>93</sup> See *supra* note 86.

<sup>94</sup> See *id.*

<sup>95</sup> See generally James E. Cotter, Note, 33 GEO. L.J. 224 (1945) (favoring the internment); Nanette Dembitz, *Racial Discrimination and the Military Judgment: the Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945) (criticizing the internment); Eugene V. Restow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945) (same).

<sup>96</sup> "The Congress recognizes that . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. . . . For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation." 50 U.S.C. app. § 1989a (1988).

<sup>97</sup> See *supra* note 83.

<sup>98</sup> See *Buck v. Bell*, 274 U.S. 200, 205 (1927).

<sup>99</sup> *Id.* at 207.

<sup>100</sup> "My attention had been called to an interesting piece of Ohio legislation that requires the owner of any male animal offered to the public for breeding purposes to advertise with the description of such animal any blemishes or defects it may have. The object, of course, is to prevent the transmission of such defects and to improve the stock.

I thought if it is important to improve the brute animal in order that it may serve man better, how much more important to improve man. . . ." J. W. JONES, THE GREAT-

*Buck v. Bell* is one historical document that illuminates the era of eugenics; law reviews are another. The paper-based law library contains paeans to the idea of stopping hereditary undesirables from entering the United States or from reproducing.<sup>101</sup> The undesirable "hereditary" traits that marked one for sterilization included "epilepsy,"<sup>102</sup> drug addiction, and being "morally degenerate."<sup>103</sup> The bold prediction that, "if sterilization laws could be enforced in the whole United States, less than four generations would eliminate nine-tenths of the feeble-mindedness, insanity and crime of the country,"<sup>104</sup> is chilling today.<sup>105</sup> No less frightening is the statement that "science reasonably knows what diseases are hereditary"<sup>106</sup> when "epilepsy" was one of the conditions that could result in sterilization.<sup>107</sup> "Epilepsy" is not a single disease, but a description of symptoms the underlying causes of which may be hereditary or non-hereditary.<sup>108</sup> Here, again, one

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EST PROBLEM OF THE RACE—ITS OWN CONSERVATION 23 (1917). See generally ALBERT EDWARD WIGGAM, *THE NEW DECALOGUE OF SCIENCE* (1923) (a popular book of the era that called for eugenic policies); PAUL POPENOE & ROSWELL HILL JOHNSON, *APPLIED EUGENICS* (1923) (same); H. S. JENNINGS, *THE BIOLOGICAL BASIS OF HUMAN BEHAVIOR* (1930) (same).

<sup>101</sup> See e.g., W.D. Funkhouser, *Eugenical Sterilization*, 23 Ky. L.J. 511 (1935) (the author, the Dean of the Graduate School of the University of Kentucky, argued for the sterilization of certain categories of "undesirables" as a way of protecting society from their offspring); Robert Edwin Hatton, Jr., *Is Compulsory Human Sterilization the Long Sought Solution for the Problem of our Mental Incompetents?* 23 Ky. L.J. 517 (1934-35) (calling for eugenic policies in immigration law).

<sup>102</sup> Sterilization laws that included epilepsy as an enabling criterion are summarized in Elyce Zenoff Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 626-27 (app. A) (1966).

<sup>103</sup> Funkhouser, *supra* note 101, at 511.

<sup>104</sup> *Id.* at 516.

<sup>105</sup> See *infra* notes 105-08 and accompanying text. Particularly frightening is the fact that the Nazi extermination program conducted in the 1930s and 1940s gained support by citing United States' laws regarding sterilization. ROBERT JAY LIFTON, *THE NAZI DOCTORS* 22-23 (1986) ("No wonder that Fritz Lenz, a German physician geneticist advocate of sterilization [later a leading ideologue in Nazi program of 'racial hygiene'] could, in 1923, berate his countrymen for their backwardness in the domain of sterilization as compared with the United States.").

<sup>106</sup> George T. Skinner, Note, 23 Ky. L.J. 168, 174 (1934).

<sup>107</sup> Indeed, the "Bell" of *Buck v. Bell* was listed by the Court as "Superintendent of the Virginia State Colony for Epileptics and Feeble Minded." 274 U.S. 200, 201 (1927). Sterilization laws that included epilepsy as an enabling criterion are summarized in Ferster, *supra* note 102, at 591, 626-27 app. A.

<sup>108</sup> See, e.g., Maria Salam-Adams & Raymond D. Adams, *The Convulsive State and Idiopathic Epilepsy*, in HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 131, 135 (9th ed. 1980). Tuberosus sclerosis is an example of an inheritable disease that can cause seizures diagnosable as "epilepsy." *Id.* Non-hereditary causes might include prenatal injuries, which might happen without detection and be presumed hereditary by the enthusiasts who embraced eugenic sterilization as a panacea. *Id.* at 137; RAYMOND D. ADAMS & MAURICE VICTOR, *PRINCIPLES OF NEUROLOGY* 211-12 (1981).



can imagine authors wishing to disassociate themselves from those words.<sup>109</sup> Self-publication on an electronic database may afford the means to do so.

This brief discussion of opinions that were once debatable but are no longer viewed as legitimate, demonstrates the dangers of impermanent scholarship. Today's hotly debated controversies may be subjects of great consensus for future generations. Those on the losing side of current policy debates may be viewed as ignorant, evil, or naive just as the racists and eugenicists of earlier eras seem today.<sup>110</sup> But unlike those who committed their views to writing in the past, today's scholars may be able to erase their words forever, to the permanent detriment of scholarship, history, and even court decisions.<sup>111</sup>

## 2. The Loss of Author Accountability (Or: "I'll Never be Proved Wrong Again")

Not only might authors' pride or timidity motivate removing words from the scholarly record, but personal self-interest also may do so. An illustrative case is that of Robert H. Bork, whom President Ronald Reagan nominated in 1987 for a position on the United States Supreme Court.<sup>112</sup> Judge Bork had written articles involving legal issues both in scholarly and general publications.<sup>113</sup> Controversy about what his writings revealed of his writings regarding his judicial philosophy was a key element in the Senate's refusal

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<sup>109</sup> See *supra* note 86.

<sup>110</sup> By 1970, a book published by the Yale University Press began with the assertion that:

The eugenic movement of the late nineteenth and early twentieth century was based in the main upon biological and socioscientific misinformation or lack of information, and—what is worse—upon parochial if not indeed elitist and racial views of the ideal type of man.

PAUL RAMSEY, *FABRICATED MAN* 1 (1970).

<sup>111</sup> See *supra* notes 63-108 and accompanying text. Recently, the United States Supreme Court decided a case regarding single-sex education in publicly funded universities, citing discredited medical opinions that underlay the original decision to separate men and women in education. See *United States v. Virginia*, 116 S. Ct. 2264, 2277 n.9 (1996). Thus, the history of ideas, even ones now rejected, can help decide court cases.

<sup>112</sup> See *News in Brief: Judicial Nominations*, 56 U.S.L.W. 2028 (July 14, 1987); Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L. J. 559, 561 (1988).

<sup>113</sup> Two of his most controversial articles at the confirmation hearings were Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), and "a rather thoughtless little essay that he tossed off in *The New Republic* while a relatively young scholar. . . ." See Stephen L. Carter, *The Confirmation Mess, Continued*, 62 U. CIN. L. REV. 75, 83 (1993).

to confirm his nomination.<sup>114</sup> Judge Bork claimed that his words were misread and that he was portrayed unfairly in a campaign of political mudslinging.<sup>115</sup>

When considering this scenario in the world of home page self-publication, three possibilities present themselves. First, Judge Bork could have deleted the publications before his name was mentioned for office. Given the fact that one controversial article had been published sixteen years before his nomination, the debate surrounding what he wrote—or even whether he wrote—would not be easily resolved.<sup>116</sup>

The second possibility flows from the fact that Judge Bork could have changed his opinions from those expressed in the article.<sup>117</sup> Following adoption of Professor Hibbitts' proposal, future nominees might change their articles to reflect their current beliefs, or possibly a position more acceptable to the electorate. If nominees could have changed their articles without detection, the world would not only have been deprived of the intellectual history of prior thinking, but might have been deluded into the belief that the nominee held certain pleasing beliefs from the earliest date the article had appeared on the home page. Similarly, an unscrupulous opponent could claim to have a former version of a nominee's article with some damaging statements. Authenticity would be difficult to disprove.<sup>118</sup>

A third possibility is that even if the nominee had left prior

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<sup>114</sup> See Rotunda, *supra* note 112, at 580-82 (noting that the media campaign based in part on his writings was more damaging to the nomination than the facts underlying it).

<sup>115</sup> See generally, ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990). See also *Justice Dept. Report Says Critics Mislead the Public on Bork*, N.Y. TIMES, Sept. 13, 1987, § 1, at 35.

<sup>116</sup> See Rotunda, *supra* note 112, at 574-77. Good political advice might have been to delete the file and hope no copies could be located. Judge Bork himself predicted that the preferred nomination tactic of the future would be to nominate only those without a provable record of having written on the law. See BORK, *supra* note 113, at 347-48. He was not alone in his assessment. See Terri Jennings Peretti, *Restoring the Balance of Power: The Struggle for Control of the Supreme Court*, 20 HASTINGS CONST. L. Q. 69, 85 (1992); see also Sen. Dennis DeConcini, *Examining the Judicial Nomination Process: The Politics of Advice and Consent*, 34 ARIZ. L. REV. 1, 14 (1992) (responding to "many critics who speculated that, after Bork, individuals with controversial written backgrounds would no longer be nominated"). But see Lawrence C. Marshall, *Intellectual Feasts and Intellectual Responsibility*, 84 NW. U. L. REV. 832, 834 (1990) (disagreeing with the idea that future nominations would exclude those who had published articles).

<sup>117</sup> See Rotunda, *supra* note 112, at 575-76.

<sup>118</sup> See KATSH, *supra* note 29, at 100 (discussing problems of electronic document authentication); DAVID M. LEVY, *Naming the Namable: Names, Versions, and Document Identity in a Networked Environment* in FILLING THE PIPELINE, *supra* note 10, at 153, 157 (1995) (noting the ease with which copies and different versions of documents can be produced).

writings unaltered there would be no reliable historical record upon which to make a defense. Authors of integrity would suffer by the fact that the *absence* of changes might be as unprovable. Judge Bork wrote a book about his nomination, detailing his mistreatment both at the hands of the press and political process.<sup>119</sup> He recounted allegations made against him and summarized his own view of his writings.<sup>120</sup> Significantly, he provided citations, enabling his readers to refer to his actual texts.<sup>121</sup> Thus, any reader with access to a law library may evaluate the fairness of the opposition to Judge Bork's nomination.

Regarding one of his hotly criticized judicial opinions, Judge Bork confidently asserted that "anyone who wishes to learn the truth of the matter may read it."<sup>122</sup> That same challenge could be made regarding his law review articles, pointing to an unalterable record for a more favorable judgment from history than he received from the confirmation hearings and the press.

Some legal scholars have used that record to assert that Judge Bork's positions were misrepresented.<sup>123</sup> The paper record, however, was not enough to win the popular debate or confirmation hearing.<sup>124</sup> Perhaps that feat is beyond the power of legal scholarship when faced with a multi-million dollar advertising campaign on television, radio, and direct mail.<sup>125</sup> Nonetheless, it was undoubtedly a comfort to Judge Bork and future historians to be able to make a case upon fixed facts.<sup>126</sup>

Experience with Supreme Court nominees immediately following Judge Bork's rejection by the Senate caused some scholars to conclude that those who have written articles are at a disadvantage when seeking confirmation.<sup>127</sup> Some even suggested that future presidents will nominate only those who never published their views.<sup>128</sup> If this is true then perhaps allowing scholars to eradicate

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<sup>119</sup> See BORK, *supra* note 113.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.* at 323-36, 403-06.

<sup>122</sup> *Id.* at 328.

<sup>123</sup> See, e.g., Carter, *supra* note 113, at 82-85; Rotunda, *supra* note 112.

<sup>124</sup> Judge Bork's nomination failed in the Senate by a vote of 58-42. See 133 CONG. REC. S15,011 (daily ed. Oct. 23, 1987).

<sup>125</sup> Suzanne Garment, *The War Against Robert H. Bork*, 85 COMMENTARY, Jan. 1988, at 17 (estimating the anti-Bork media campaign cost between 10 and 15 million dollars).

<sup>126</sup> See George Kannar, Book Review Essay, *Citizenship and Scholarship*, 90 COLUM. L. REV. 2017, 2068 (1990) (calling Judge Bork a "winner," in that he "achieved full political martyrdom—as well as a national best-seller"); *supra* notes 119-21 and accompanying text.

<sup>127</sup> See *supra* note 115.

<sup>128</sup> See *id.*

their works would help bring better qualified judges to the nation's highest bench. This prediction, however, has not been borne out.<sup>129</sup> Justice Ginsburg authored or co-authored five books and thirty-two articles before her appointment,<sup>130</sup> while Justice Breyer wrote or co-wrote four books and twenty-five articles.<sup>131</sup>

#### IV. CIRCUMVENTING STUDENT EDITORS: BABY, BATHWATER, AND ALL

Allegations of irrational decision making over whether to accept certain articles, of high-handed edits that stultify style and change substance, appear in the literature regarding law reviews.<sup>132</sup> When scholars place their work on the Internet themselves, they can say what they wish to say the way they choose to say it.<sup>133</sup>

This predicted freedom may have a serious cost as legal scholarship will lose the benefit of having gatekeepers at all. Today's authors write knowing that any article submitted to a general interest law journal must be written so that bright, motivated, third-year law students—the best of their schools<sup>134</sup>—can understand the points being made.<sup>135</sup> Those students have distinguished themselves at law school either by superior class performance or superior writing.<sup>136</sup> By definition they show an interest in legal scholarship and publication. But most important, collectively they are an influential set of gatekeepers of legal scholarship.<sup>137</sup>

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<sup>129</sup> Perhaps those whose predictions had failed, cited in *supra* note 115, would have erased or altered their statements by now if they had the chance, making proof of my point all but impossible.

<sup>130</sup> See *Supreme Court: Ruth Bader Ginsburg*, 2 ALMANAC OF THE FEDERAL JUDICIARY, SUPREME COURT 7-8 (Prentice Hall Law & Bus.) (1996).

<sup>131</sup> See *Supreme Court: Stephen G. Breyer*, 2 ALMANAC OF THE FEDERAL JUDICIARY, SUPREME COURT 3-4 (Prentice Hall Law & Bus.) (1996).

<sup>132</sup> For a summary of articles criticizing law reviews for these reasons, see Hibbitts, *supra* note 3, at notes 135-39, ¶ 2.19.

<sup>133</sup> See *id.* at notes 228-30, ¶¶ 4.1-5.

<sup>134</sup> See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 693 (2d ed. 1985) (“[L]aw review editors were the student elite of their schools. They had the best grades, the best, or only, rapport with the faculty, and went to the best firms when they got their degrees.”). See also JOHN F. DOBBYN, SO YOU WANT TO GO TO LAW SCHOOL 139 (1976) (calling review members an “elite corps of students that are the pride of the school”).

<sup>135</sup> A number of law journals seek faculty input into their publication decisions, usually at the final decision phase. The practice is more common when students find the topic “technical or obscure.” Nonetheless, the main decisions appear to rest with student editors. See Leibman & White, *supra* note 44, at 408.

<sup>136</sup> See *id.* at 400 (noting that grades and writing competitions are the most common methods of admitting students to law reviews); LAW SCHOOL ADMISSIONS COUNCIL, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS, 4, 19 (1997 ed. 1996) (same).

<sup>137</sup> It should be noted, however, that some law reviews are faculty and professionally

A. *The Benefits of Justifying Ourselves to Students*

1. Writing For the Ultimate Generalists—Law Students

Law review students are a good surrogate for the legal profession because they are the epitome of legal generalists. The editorial board as a whole has probably taken many of the elective courses available to them, and the individual students are likely to know all they will ever know about substantive law of areas they will not pursue.<sup>138</sup>

Lawyers have traditionally seen themselves as generalists.<sup>139</sup> Law schools purport to train generalist lawyers.<sup>140</sup> Lawyers pride themselves on being able to learn any body of information quickly when it is necessary for a legal matter. Recently, a committee studying mandatory *pro bono* service for lawyers in the State of New York noted:

Even in an age of pervasive specialization, lawyers are known for their versatility as generalists, for their capacity to master the unfamiliar complexities of cases in areas of the law in which they may have had little or no prior training or exposure. Litigation practice readily bears out this point, as does the daily experience of many sole practitioners who often do not know what unfamiliar areas of the law their next client's matter will entail. . . . Common experience tells us that in few of these instances, which are fairly typical of the way the legal profession works, do lawyers refuse the work on the ground that they lack familiarity with the relevant law; rather they gain the required familiarity as

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reviewed. See *supra* note 38. Thus, while student-editors are important gatekeepers, they are not the only editors who determine the content of the legal literature.

<sup>138</sup> For example, those lawyers who pursue civil practice probably last concerned themselves with search and seizure in law school, while those who become prosecutors may learn nothing more about conflict of laws or probate than they did in law school. A recent law school graduate made a similar observation recently. See David Lewellen, *From Manager to Barrister*, WOOSTER (OHIO) DAILY RECORD, May 16, 1996, at C1 ("You'll never know as much law as you do right before the bar exam' because once admitted to the bar, lawyers usually specialize to some extent.").

<sup>139</sup> See, e.g., William H. Clune III, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 IOWA L. REV. 47, 118 (1983) ("The generalist role is both grandiose and surprisingly feasible."); Jeffrey O'Connell & Thomas E. O'Connell, *The Diverse Doctor Johnson: Among Other Things, A Lawyer's Lawyer*, 65 NOTRE DAME L. REV. 617, 617 (1990) ("Perhaps more than any other professional, the lawyer is a generalist who draws upon learning from any and all sources, humanistic and scientific, in plying his or her trade."); Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Theory and Practice*, 43 HASTINGS CONST. L. Q. 749, 758 (1992) ("It is, perhaps, by now truistic that all good lawyers are generalists.").

<sup>140</sup> See, e.g., Leonard Biernat, *Why Not Model Rules of Conduct for Law Students?* 12 FLA. ST. U. L. REV. 781, 786 (1985) (noting that law schools seek to train students as generalists and thereby help maintain homogeneity in the profession of law).

quickly and as thoroughly as they can.<sup>141</sup>

While some authors have assailed the notion that lawyers can indeed be generalists,<sup>142</sup> the concept of lawyer-as-generalist remains a powerful self-conception in the legal profession.<sup>143</sup>

Writing for the third-year editors regulates the assumptions authors may make regarding how much background information their readers need. They are free to assume that their readers will possess the basic knowledge gained in a legal education, but not the specialized knowledge of working in the particular topic area of the article.<sup>144</sup> Writing for this level of knowledge meshes well with the profession's conception of itself as one of generalists.<sup>145</sup> If the editors have only accepted articles they understood, the civil lawyer concerned with a search and seizure case should be able to understand relevant law review articles.<sup>146</sup> These articles may then form part of the process of preparing to analyze the unfamiliar legal issue.<sup>147</sup>

Much of academic writing outside the law, however, is not ac-

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<sup>141</sup> See Committee to Improve the Availability of Legal Services, *Final Report to the Chief Judge of the State of New York* (Apr. 1990), in 19 HOFSTRA L. REV. 755, 812 (1991).

<sup>142</sup> See, e.g., Roger Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 538-41 (1994) (referring to the notion of generalist lawyers as a 19th century conception); Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1338 n.140 (1979) (ridiculing the idea that "the generalist training of lawyers allows any lawyer to read a text on astrophysics over the weekend and launch a rocket on Monday.").

<sup>143</sup> See *supra* notes 139-42 and accompanying text.

<sup>144</sup> The author may also find that, unfortunately, the editors also lack knowledge of some realities of legal practice such as good advocacy skills, negotiation, the culture of law, courtroom etiquette, and other lessons that are usually learned after law school. Nonetheless, the substantive knowledge gained in the first two years of law school is the background common to all law review editors.

<sup>145</sup> See *supra* notes 139-42 and accompanying text.

<sup>146</sup> See Phil Nichols, Comment, *A Student Defense of Student Edited Journals: In Response to Professor Roger Cramton*, 1987 DUKE L.J. 1122, 1130 (1987) ("An article that makes sense to a student editor will make sense to a tax lawyer who needs to understand the implications of family law doctrine, or to a recent judicial appointee who spent 20 years doing securities work and now has to decide a unique criminal case. It will also be accessible to any academic, no matter how specialized that academic has become."). The process law review editors have described as their article selection process indicates that, unless they find the article too daunting and seek faculty help, they publish articles they understand. See Liebman & White, *supra* note 44, at 402-10. This advantage of law reviews over other forms of academic literature was also noted briefly in Wendy J. Gordon, *Counter-Manifesto: Student-Edited Reviews and the Intellectual Properties of Scholarship*, 61 U. CHI. L. REV. 541, 548 (1994).

<sup>147</sup> See *supra* note 141 and accompanying text. Law reviews must do more than assist the bar. Their function includes writing for scholars. Even scholars need to read in unfamiliar areas, and can pick their way through law review articles in topics outside their expertise. This is not the case in other academic fields. See *infra* notes 150-53 and accompanying text.

cessible to non-specialists, even those with the same formal education as the author. Scholarly articles outside the law are written to those interested in some small sub-field, and so are often incomprehensible to all but the very few who share the author's scholarly focus.<sup>148</sup>

University teaching itself is becoming more sub-specialized, as professors find it to their advantage to limit their range of subjects in return for deeper understanding of a few chosen areas.<sup>149</sup> The natural consequence of specialization in academics is that scholarly articles become increasingly encoded in a language impenetrable to all but those few who concentrate in a given subfield.<sup>150</sup> When scholars write only for their own immediate subgroups:

The publication of scholarly research represents a vicious circle. The researchers inevitably develop a professional dialect, and when they write, they normally have in mind the in-group who use the same dialect and who will be the ultimate judges of the validity of the findings. [Peer reviewed] [j]ournals tend to be increasingly specialized in language and content. . . .<sup>151</sup>

Authors who target their works for third-year student-generalists avoid the "vicious circle" to a degree not possible in most of scholarly writing. If, as Professor Hibbitts suggests, student editors—indeed, any editors at all—are to be eliminated, then authors will choose their own audience. A few authors might respond to the lay Internet audience by making their work maddeningly simple, explaining at length points that a lawyer might understand easily. The experience in other disciplines, however, suggests that scholarship would take the opposite path, becoming increasingly encoded in a language particular to one of its many scholarly subdivisions.<sup>152</sup> Today the audience of the general-subject reviews is governed by the student editors who know some of the basics of law, and thus they may force the author to speak to something ap-

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<sup>148</sup> See Eugene A. Nida, *Sociolinguistic Implications of Academic Writing*, 21 *LANGUAGE IN SOC'Y* 477-85 (1992); Roger Sullivan, *Favorite Books Hold Special Place in Minds; Hearts*, *THE COLUMBIAN*, July 28, 1994, at B2 (quoting a retired professor of history saying that he enjoyed Barbara Tuchman's writing because "she committed the academic crime of writing understandable and enjoyable history.").

<sup>149</sup> See, e.g., KENNETH E. EBLE, *THE AIMS OF COLLEGE TEACHING* 84 (1983) (Professor Eble noted, with regard to specialization in academe that, "[k]nowing more is easier when followed along a congenial line and within manageable dimensions. . . . The individual's urge to be a professional, which implies being a specialist . . . is overpoweringly strong.").

<sup>150</sup> See Nida, *supra* note 148 at 484-85. See also Gordon, *supra* note 146, at 548.

<sup>151</sup> Nida, *supra* note 148, at 485.

<sup>152</sup> See *supra* notes 149-52 and accompanying text; see also Nida, *supra* note 148, at 484 (noting a proliferation of highly-specialized academic sub-fields).

proaching the substantive knowledge of the non-specialist lawyer.<sup>153</sup> Without student editorial controls, the field will lose that focus.<sup>154</sup> Complaints about the unreadability of other branches of academic literature raise serious questions about whether legal scholarship would improve by ousting student editors.

## 2. Students Do Not Determine the Topics Covered by Legal Literature

One of the complaints echoed by Professor Hibbitts is that legal scholarship increasingly addresses issues outside the interest of practicing lawyers.<sup>155</sup> The proffered answer, which is self-publication to avoid the preferences of student-editors, is unlikely to focus legal scholarship on the needs of practicing lawyers. Indeed, abandoning the need to write for the knowledge level of top law students threatens to decrease the reviews' usefulness. There is some evidence that student editors at "elite" journals prefer articles in the areas of practice they wish to pursue.<sup>156</sup> If these topics are of little immediate use to average practicing lawyers then so are the elite reviews.<sup>157</sup>

There appears to be no research about publishing biases in the vast majority of law reviews. The high prestige reviews may be very influential,<sup>158</sup> but they are only one segment of legal scholarship. When one changes focus from the elite journals to those of lower prestige, the criticism is directed against "the low or at best uneven quality of many law reviews."<sup>159</sup> Accordingly, there is a feeling among professors that any article will ultimately find a law review to publish it, though not necessarily the author's first choice.<sup>160</sup> Thus, an article on a topic outside the editors' career

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<sup>153</sup> See *supra* notes 139-48 and accompanying text.

<sup>154</sup> See *supra* notes 139-48 and accompanying text.

<sup>155</sup> See Hibbitts, *supra* note 3, at notes 162-165, ¶ 2.25.

<sup>156</sup> See *id.*; Lindgren, *supra* note 44, at 533. Professor Lindgren used the word "elite" to describe the law reviews under discussion. The study considered only the ten most frequently cited law reviews.

<sup>157</sup> See *id.*

<sup>158</sup> See generally Olavi Maru, *Measuring the Impact of Legal Periodicals*, 1976 AM. B. FOUND. RES. J. 227 (providing a citation analysis of law reviews to determine which law reviews publish articles that are cited most often). See also Colleen M. Cullen & S. Randall Kalbert, *Chicago-Kent Law Review Faculty Scholarship Survey*, 70 CHI.-KENT L. REV. 1445, 1445-55 (1995) (same).

<sup>159</sup> Hibbitts, *supra* note 3, at note 118, ¶ 2.16.

<sup>160</sup> Comment, *A Response*, 61 U. CHI. L. REV. 553, 554 (1994) ("The stark truth is that authors submit many articles that do not meet basic criteria of logic and clarity, and somewhat fewer that do. In the end, nearly all the good ones and far too many of the bad are published."). See also Erik M. Jensen, *The Law Review Manuscript Glut: The*



plans is still likely to be printed if it is written well.<sup>161</sup>

Those who wish to write on less lofty topics can find a home for their work in journals that do not receive the highest accolades of academic prestige.<sup>162</sup> The preferences of those editors do not preclude other journals from publishing topics the elite reviews would not pursue.<sup>163</sup> To the extent this is true, it is not the preference of editors, but of authors as a group, that determine the content of legal literature as a whole.

If professors all self-publish there will be no need to fit the authors' interests to students' interests. Deprived of editorial review, authors will presumably write about what pleases them. The question then becomes, "what interests the authors of law review articles?"

As to the professors who write, the answer may be that their interests are not the same as practitioners. Learned professions are taught at universities by scholars who choose not to practice full time in the field itself.<sup>164</sup> Their interests can be expected to di-

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*Need for Guidelines*, 39 J. LEGAL EDUC. 383, 383 (1990) ("With less prestigious publications crying for material, it is hard to imagine any manuscript, no matter how amateurishly done, failing to find a home eventually."); Richard Delgado, 30 AKRON L. REV. 233 (forthcoming 1996) (reporting that resubmission of rejected manuscripts to other journals has won him publication).

<sup>161</sup> See *id.*

<sup>162</sup> Law review critic Professor James Lindgren noted that practicing lawyers often work with wills, but that the Yale Law Journal has not published an article on wills in his entire lifetime. Lindgren, *supra* note 44, at 532. The Index to Legal Periodicals and Books, as found on the WilsonDisc system, has indexed 246 articles on wills since 1980. Those interested in wills probably research their topic through an index rather than reading the Yale Law Journal, as do scholars in other areas. See Howard A. Denmark, *Too Many Articles in Too Many Law Reviews*, 30 AKRON L. REV. 215 (forthcoming 1996) (observing that lawyers research questions as they arise rather than stay current in all fields of the law by reading law reviews); Robert Weisberg, *Some Ways to Think About Law Reviews*, 47 STAN. L. REV. 1147, 1152 (1995) ("Practicing lawyers tend only to read law reviews on a specific recommendation from someone that an article bears very directly on a problem facing them."). Thus, the student-editors at Yale, or any other elite institution, do not control the content of the legal literature.

To explore further the question of publication of articles in non-elite areas of practice I opened the most recent hardbound INDEX TO LEGAL PERIODICALS & BOOKS, vol. 34. Guessing at what might be considered non-elite practice, I found indexed during the period September 1994 through May 1995, ten student-written and two non-student law review articles about driving while intoxicated. See 34 INDEX TO LEGAL PERIODICALS & BOOKS 244-45 (1995). I also found one article on collections law. *Id.* at 137. None of these publications were in the nation's most prestigious journals. Nevertheless, they are a part of the legal literature, available for scholars, practitioners, students, judges, or the merely curious.

<sup>163</sup> See *supra* note 161.

<sup>164</sup> See ELIOT FREIDSON, PROFESSIONAL POWERS 209, 225-30 (1986); see also ANTHONY KRONMAN, THE LOST LAWYER 264-66 (1993) (identifying the differences between the

verge from the everyday concerns of practitioners.<sup>165</sup> Were it not so, the professors might well have become or remained full-time practitioners. Since it is the preference of academic authors that determines the content of law review writing,<sup>166</sup> freeing them from all editorial controls will only reinforce their ability to write on whatever topics they choose, without regard to what anyone—practitioner, peer, or student—may find useful.

*B. Assurances of Technical Accuracy and Citation*

It is easy to make light of the role of law review editors in assuring the technical accuracy of articles. The need to conform citations to a specific format and to give proper identifying information so that readers can find an author's sources is, by its nature, niggling work. Nonetheless, the great strength of footnoting is that those interested in carrying the author's subject to a deeper level may use the prior research as a beginning to their own work.<sup>167</sup>

Once one is proficient with the format and the expectation that one does not make assertions without support, both writing and reading law review articles are not terribly oppressive tasks. A well-written article can be understood without stopping to read the footnotes, and perhaps even a poorly-written article can be understood by reading only a few footnotes.

A glimpse of what self-publication without editorial controls might produce comes from reading books about law published by non-legal publishers.<sup>168</sup> This legal literature includes an example of an author whose books have been criticized as grossly inaccurate but whose law review articles do not seem to have suffered the same fate.<sup>169</sup>

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interests of legal scholars and practicing lawyers as a weakness unique to legal education).

<sup>165</sup> See *id.*

<sup>166</sup> See *supra* notes 157-65 and accompanying text.

<sup>167</sup> This may be what one author meant about law review footnotes preventing us from "reinventing the wheel" by "standing on the shoulders of giants." See Gordon, *supra* note 146, at 548-49.

<sup>168</sup> The contributions of university press editors may be more valuable. See Posner, *supra* note 43, at 1134 n.10 (praising university press editors at Harvard University and the University of Chicago with whom he has worked); see also William G. Ross, *Scholarly Legal Monographs: Advantages of the Road Less Taken*, 30 AKRON L. REV. 254 (forthcoming 1996) (providing a balanced discussion of the advantages and disadvantages of publishing legal material in books with peer and professional editing as opposed to law review editing).

<sup>169</sup> PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988). This author cited one of Dr. Huber's early articles and, while disagreeing with its

In 1988, Peter Huber's *Liability: The Legal Revolution and its Consequences* appeared, and found its way to national prominence.<sup>170</sup> The book had broad political influence during the Bush and early Clinton administrations,<sup>171</sup> and was even cited as authority by the United States Supreme Court.<sup>172</sup> *Liability* was published by Basic Books, so one may presume that it was edited by someone in the publishing house, not a law review editor. Mr. Huber included the following analysis in a discussion of how lawyers argue that civil juries should award money to plaintiffs for physical pain:

Once the jury's mind has been focused on the gravity of the phenomenon of pain, the question becomes how to monetize it. A trick of the trade known as the *golden rule* or *job offer* is highly effective. Jurors are urged to consider how much they would demand in exchange for having to suffer the plaintiff's pain, either gratuitously or as part of a job that required them to endure it. The *per diem* is a variation on the same theme. The lawyer suggests a modest per-minute or per-hour figure for what suffering should be worth—a cent a minute, say—which is then converted into a six-month total of \$310,000 by performing the appropriate multiplication.<sup>173</sup>

The arithmetic in the quoted paragraph contains a glaring error that went uncorrected by Basic Books' editorial staff and Dr. Huber himself, who holds a Ph.D. in Engineering from M.I.T. and would presumably have been able to correct: One cent per minute is \$14.40 per day (24 hours times 60 minutes per hour is 1440 minutes, times \$.01 is \$14.40). Six months of \$14.40 per day is \$14.40 times 182.5 days (one-half of a 365-day year). To use Dr. Huber's term, the "appropriate multiplication" yields damages of \$2628, approximately 59 times smaller than the figure asserted in the book.

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conclusion, found it to be sufficiently accurate. See Denemark, *supra* note 35, at 415 n.13. For criticisms of Dr. Huber's books, see Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENVER U. L. REV. 77, 83-90 (1993) (criticizing the accuracy of an assertion in Peter Huber's book, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES*); Marc Galanter, *The Debased Debate on Civil Justice*, 65 WIS. LAW. 5, 7 (July 1992) (same); Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1644-50 (1993) (criticizing the accuracy of assertions in Peter Huber's book, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTS*).

<sup>170</sup> Several authors have noted that Vice President Dan Quayle used Peter Huber's estimates of the costs of litigation in an attempt to set national policy on tort reform. See *id.* The book was also cited by the United States Supreme Court. See *Mertins v. Hewitt Assoc.*, 508 U.S. 248, 259 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 49 (1991) (O'Connor, J., dissenting); *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting).

<sup>171</sup> See generally Chesebro, *supra* note 169.

<sup>172</sup> See *supra* note 170.

<sup>173</sup> See Huber, *supra* note 169, at 121.

There is a very good chance that law review editors would have challenged those numbers out of the same spirit of precision that motivates their insistence on footnote format and punctuation rules. At a minimum, a law review editor might have asked the author to perform a written calculation,<sup>174</sup> which might have been an annoying task for the author had his numbers been correct, but would certainly have been sufficient to identify the arithmetic error.

A more serious point that a law review editor would likely question is that Dr. Huber suggests that one may argue to jurors that they should set damage awards by deciding how much *they* would feel appropriate in compensation if *they* were the ones injured.<sup>175</sup> Courts routinely hold this type of argument impermissible.<sup>176</sup> Readers are thus misled into the belief that the law allows this argument, leaving tort defendants to listen helplessly while plaintiffs' counsel play on jurors' fears for their personal health and safety.<sup>177</sup> This is a distortion that the law reviews' requirement of meticulous documentation might have corrected.

Complaints about law review editors insisting on heavy footnoting<sup>178</sup> indicate that they would probably demand at least a

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<sup>174</sup> Articles in other student-edited law reviews have shown calculations, suggesting the authors' or editors' preference for showing one's arithmetic. See, e.g., Walter C. Cliff & Philip J. Levine, *Interest Accrual and the Time Value of Money*, 34 AM. U. L. REV. 107, 110 n.9 (1985) (explaining with calculations an interest accrual); Elmer J. Schaefer, *Basing-Point Pricing Establishes Illegal Vertical Agreements*, 18 GA. L. REV. 529, 549-50 n.106 (1984) (showing calculations for a simple multiplication); Warren Paul Kean, Comment, *After the Facelift, Is Subchapter S Any More Attractive?*, 46 LA. L. REV. 87, 105, 111 n.154 (1985) (setting out various calculations no more complicated than basic arithmetic).

<sup>175</sup> See *supra* note 173 and accompanying text.

<sup>176</sup> *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978) *rev. on other grounds*, 606 F.2d 524 (5th Cir. 1979) (en banc) (holding that the "Golden Rule" argument is "universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence."); *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1246 (7th Cir. 1984) (adopting the holding of *Ivy v. Security Barge Lines, Inc.*); *United States v. Vario*, 484 F.2d 1052, 1055 (2d Cir. 1973) ("defense counsel had reverted to the 'Golden Rule' standard for jury determination—a standard [for jury determination] long since rejected by this Court."); Kevin W. Brown, Annotation, *Propriety and Prejudicial Effect of Attorney's "Golden Rule" Argument to Jury in Federal Civil Case*, 68 A.L.R. FED. 333, 334 (1984 & 1995 supp.) ("The courts have generally found the "Golden Rule" argument improper because a jury which has put itself in the shoes of one of the parties is no longer an impartial jury").

It has been observed that, although admitting the argument at trial is error, it will frequently be held harmless. See generally Brown, *supra*, at 335.

<sup>177</sup> See Huber, *supra* note 169, at 121.

<sup>178</sup> See Hibbitts, *supra* note 3, at notes 166-72, ¶ 2.26 (revealing this complaint about law review writing).

source for calling an argument the “golden rule” or “job offer rule,” and would thus give the author a greater chance to find the numerous sources that say such an argument is impermissible.<sup>179</sup> The “*per diem*” argument fares slightly better in court, but the author’s statements are still misleading when the reader is not told that numerous courts also disallow this form of argument.<sup>180</sup> Law review editors might have known enough not to allow the statement quoted above without some word of explanation that the arguments Peter Huber represented as “highly effective” in American courts are, in fact, banned.<sup>181</sup>

### C. *The Proposed Method of Assuring Reliability*

Professor Hibbitts has suggested that the ability of readers to comment on articles posted to a home page provides some form of peer review.<sup>182</sup> Under this model the readers will improve articles by pointing out difficulties that the author is then free to correct.<sup>183</sup> This is, argues Hibbitts, to be the new mechanism to guarantee reliability of legal scholarship once the student editors are replaced by self-publication.<sup>184</sup>

If the “Readers’ Forum” after the “Last Writes” article is an indication of this process then it illustrates both the strength and shortcoming of Internet post-publication review. The strength is that people who read the article on-line will be in front of their computers, ready to give an immediate reaction to the ideas they

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<sup>179</sup> See *supra* note 176.

<sup>180</sup> See *Baron Tube Co. v. Transport Ins. Co.*, 365 F.2d 858, 863-64, nn.3 & 4 (1966) for citations to courts disallowing the argument and law review articles criticizing it.

<sup>181</sup> This author remembers learning not to use the “Golden Rule” in an Evidence class in law school and has mentioned it in teaching Remedies. I have since discovered that the existence of a rule against this line of argument is mentioned in Evidence and Torts classes at my home institution, in addition to my Remedies class. Two popular trial advocacy texts mention these points of law. See ROBERT HAYDOCK & JOHN SONSTENG, *TRIAL* 651, 659 (1991) (“Many jurisdictions prohibit *per diem* arguments.”). “The ‘Golden Rule’ argument is a statement by an attorney asking the jurors to put themselves in the place of a party or witness. An example is ‘. . . How would you want yourself to be treated?’—Avoid making this statement [because an objection to it should be sustained].” THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUE* 365 (3d ed. 1992) (“In many jurisdictions it is improper when arguing damages in personal injury cases to ask for a specific cash amount on any element of damages on a *per diem* bases. . . . This usually leads to astronomical figures. . . .”). Accordingly, it seems likely that law review editors could detect the misleading nature of Peter Huber’s statement.

<sup>182</sup> Hibbitts, *supra* note 3, at note 235a, ¶ 4.7.

<sup>183</sup> *Id.* at notes 228-30, ¶¶ 4.1-5.

<sup>184</sup> *Id.*

have just read.<sup>185</sup> This form of communication expands one's circle of commentators to include anyone on the Internet interested enough to read and comment.

A weakness appears in that most of the comments to Professor Hibbitts' article were short, chatty, and many were not particularly substantive.<sup>186</sup> They were what law professors may have grown to expect when circulating a manuscript among casual readers before publication. The readers did not sit at the keyboard and respond to the article with as extensive an analysis as is warranted.<sup>187</sup> As in the sciences, pre-publication distribution could possibly be an effective way to test the reactions one may receive upon publication.<sup>188</sup> It solicits minor comments and collegial electronic "chat."<sup>189</sup> The quality of the comments may deserve a place in the

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<sup>185</sup> Professor Hibbitts assures us that one need not read an on-line article staring at a computer screen. To the extent readers prefer hard copy, this advantage is not realized. One may print the article and read it in what Professor Hibbitts calls the "cozy" paper format. Hibbitts, *supra* note 3, at notes 242-43, ¶ 4.12.

<sup>186</sup> Characterization of the comments is purely that of the author. See <<http://www.law.pitt.edu/hibbitts/readlw.htm>>.

<sup>187</sup> Obviously, a long response is warranted. Nor is this article the only response Professor Hibbitts' proposal has induced. An upcoming symposium issue of another journal will be devoted entirely to Professor Hibbitts proposal. See 30 AKRON L. REV. 173 (forthcoming 1996). Responses of this depth are not to be found in the "Reader's Forum."

<sup>188</sup> See KELLY, *supra* note 16, at 117 (noting the value of pre-publication electronic distribution of manuscripts in physics, but distinguishing between their value before and after peer-reviewed publication). Note, however, that the objections raised in this Article are not mentioned by contribution to the *Last Writes* "Reader's Forum."

<sup>189</sup> Electronic discussions, like their counterpart in print or orally, vary in quality. One discussion moderator of an academic service noted that "I have had some of the most stimulating intellectual conversations of my life . . . on the net. . . . I have also had some of the stupidest, dumbest conversations in my life. . . ." Elaine Brennan, *Information Publication and the Scholarly Record: Bits and Bytes from the Experience of Editing Humanist and Other Electronic Lists*, in SCHOLARLY COMMUNICATION IN AN ELECTRONIC ENVIRONMENT: ISSUES FOR RESEARCH LIBRARIES 39, 52 (Robert S. Martin ed., 1993).

Pierre Salinger, a respected journalist, recently learned this lesson to his detriment. In discussing the tragic crash of TWA Flight 800 on July 17, 1996, he quoted a document available on the Internet which asserted that the aircraft was shot down by the United States military in a "friendly fire" accident. See, e.g., James Coates, *Bogus News on the Internet*, DES MOINES REG. (Nov. 10, 1996) at 16; Charles Stough, *How Pierre Salinger Got Roped In by the Internet*, THE ORLANDO SENTINEL, Nov. 13, 1996, at A15. The subsequent indeterminacy of the investigators' reports would then be merely a cover-up to avoid taking responsibility for the accidental shooting. The document upon which Mr. Salinger relied has been shuttling around the Internet for months, and is part of the fund of so-called "bogus news" that the Internet makes available world-wide. See *id.*

It is easy to cloak phony documents (and news of alien autopsies) with seeming authority on the Internet, can be taken in. See *id.* In this electronic environment the need for law review editors to act as gatekeepers would seem to be more pressing than in print media, not less so.

electronic library, or may be worthless.<sup>190</sup> Will the author of the original article decide which comments to publish? Will comments that result in the article being altered be kept available? If so, will the comments appear illogical, since they respond only to a prior version that may no longer exist?<sup>191</sup> Will future scholars be dissuaded from writing in-depth answers to articles for fear that the articles will no longer be part of the record or will be superseded before a careful response can be adequately researched and drafted?<sup>192</sup> Scholars, whose careers depend on receiving credit for their ideas, lack strong incentives to expend the great editorial energy necessary to improve the efforts of a colleague they may never meet, whose ideas they dispute, and whose article could disappear or be replaced by the touch of a button.<sup>193</sup>

These difficulties militate against relying on a "comments" page for peer review. The "Readers' Forum" seems a better place for collegial chat than serious editorial review, thus leaving home page self-publication as unreviewed, unedited literature.

#### CONCLUSION

Electronic publishing is destined to change the way scholars communicate with each other.<sup>194</sup> The low costs of electronic publishing relative to paper publishing make some shift away from paper all but inevitable.<sup>195</sup> This does not mean, however, that legal

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<sup>190</sup> *Id.*

<sup>191</sup> See *supra* notes 63-83 and accompanying text for a discussion of the impermanence of electronic articles.

<sup>192</sup> This Article responding to "Last Writes?" faced that precise problem. It was originally drafted in response to what is now known as "version 1.0." See Hibbitts, *supra* note 3. "Version 1.1" is closer to be the version published in a journal, but still more changes were made at that juncture. See <<http://www.law.pitt.edu/hibbitts/copylw.htm>>; 70 N.Y.U. L. REV. 615 (1996). The release of the new version required this author to match the new version against the old version to determine what changes were made and provide new references to the new version. Even though the changes to the text were slight, the burden of reading one version of an article against another is not a trivial task. Responding to a document that is not fixed will undoubtedly discourage in-depth scholarly responses, since the task of answering an argument that has the potential to shift at any time is daunting indeed. It is encouraging that the original version of "Last Writes?" is still available to readers, but that is merely the personal choice of its author. Knowing that an Internet article could disappear at any time is a great deterrent to drafting in-depth reactions.

<sup>193</sup> See *id.* See also, Robert K. Merton, *Science and Democratic Social Structure*, in SOCIAL THEORY AND SOCIAL STRUCTURE 550, 556-58 (rev. ed. 1957) for a discussion of how scholars in the sciences release their findings in return for credit as originators or discoverers. It has been noted that the same is true for legal scholars. See Gordon, *supra* note 146, at 549-50.

<sup>194</sup> See *supra* notes 6-31 and accompanying text.

<sup>195</sup> See *supra* notes 10-16 and accompanying text.

scholarship must abandon all editorial controls on its literature.<sup>196</sup> The editorial model of paper journals could be fully adopted by electronic journals, or fully rejected. Professor Hibbitts' article stands as an eloquent testimony to the technical feasibility of his proposal. Many issues remain to be resolved, however, before the legal community should plunge into a system of electronic self-publication without any editorial controls on authors.

One benefit inherent in paper journals is their historical function of maintaining true and immutable records of scholars' opinions at a given moment.<sup>197</sup> Electronic media may, but need not necessarily, rob the field of that certainty. Any proposal that allows scholars to update their work and make prior released writings unavailable threatens judges' ability to rely on scholarly articles and future inquiry into the history of ideas.<sup>198</sup> In addition, several benefits accompany the student-editorial system: students provide a defense against the almost universal tendency of academic literature to address a smaller and smaller audience, developing a jargon that excludes even those with the same formal education as the author.<sup>199</sup> Further, the student-editors force authors to justify their assertions. Law, which is so often based on authority, depends upon accurate transmission of that authority.<sup>200</sup> No group of editors will be infallible—errors will always exist in a body of scholarly literature—but the student-editors' ethic of forcing authors to support their assertions makes building on a prior article far easier, supporting the further advance of the state of legal knowledge.<sup>201</sup>

Legal scholarship has the technological ability to choose to escape from its self-imposed editorial system. Indeed, it may escape any editorial system at all, establishing complete textual indeterminacy and allowing post-publication comments to be the only limits on ever-diminishing readability and unbridled assertions. The journey into electronic publication may be inevitable, but a change to self-publication should not be undertaken without recognizing all that legal scholarship may lose when the last law review shuts down.

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<sup>196</sup> See *supra* notes 47-51 and accompanying text.

<sup>197</sup> See *supra* notes 63-132 and accompanying text.

<sup>198</sup> See *id.*

<sup>199</sup> See *supra* notes 135-55 and accompanying text.

<sup>200</sup> See KATSH, *supra* note 29, at 95.

<sup>201</sup> See Gordon, *supra* note 146, at 548-49.