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BLAWGS CAN'T DO IT ALL: LET'S SAVE SHORT, STUDENT-AUTHORED SCHOLARSHIP

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I. INTRODUCTION

The time has come for the renaissance of student-authored recent-developments notes—brief scholarly articles, usually under ten pages, that use as their analytical center a recent case or statute.[2] Once the staple of student law review writing,[3] they have been discarded in favor of more sophisticated scholarship and as a concession to students' heavy editing burdens.[4] What used to be a significant contribution of student-edited law reviews and a required training step for student editors is disappearing from scholarship, and its decline has not even been mourned.

But while we may not have missed the recent-developments note, legal scholarship is suffering from its absence because students who write less scholarship are less likely to be effective writers and editors. Since 1908, when most journals dropped shorter student-authored scholarship from their publications,[5] judicial citation of longer student notes has declined dramatically. One scholar, tracking the decline in the citation of student scholarship, noted that student scholarship is "decreasingly relevant to judges—judicial citation of student notes has plunged since 1980. It is clear that something has happened, but it's not clear what."[6] And during the same period, a "tsunami" wave of criticism has "exploded"—from faculty authors complaining about student editing, to readers complaining about the irrelevant, dense content of the reviews.[7]

In a 2010 address to the Ninth Circuit Judicial Conference, Justice Kennedy noted that, during his early years on the Court, he found law review articles useful in deciding whether to grant certiorari on an issue.[8] Now, he finds that if the issue is covered by a note at all, it is published too

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[2] While much of student scholarship appears to be suffering, this article addresses only the need for improved recent-development notes, which are distinguished from longer student-authored comments and notes by both length and scope. *See infra* note 83 and accompanying text.

[3] *See* Stephen I. Vladeck, *That's So Six Months Ago: Challenges to Student Scholarship in the Age of Blogging*, 116 YALE L.J. POCKET PART (2006), http://www.thepocketpart.org/2006/09/06/vladeck.html (noting that for structural and logistical reasons "students have long played the role of reporters in the legal academy," and discussing the disruptive impact electronic blogging is having upon traditional print law reviews).

[4] The recent-developments note is not the only shorter piece disappearing from law reviews. *See* Sanford Levinson, *The Vanishing Book Review in Student-Edited Law Reviews and Potential Responses*, 87 TEX. L. REV. 1205 (2009). "One can, after all, sympathize with the editors of law reviews, who are increasingly inundated with what one assumes are good, sometimes even excellent, articles produced by the ever-increasing members of what might be termed the 'producing' legal academy." *Id.* at 1217. Noting that because students bring diverse backgrounds to law school, "[i]t is a shame, frankly, that so much of that talent is displaced, because of the conventions of what note writing is supposed to entail, into the preparation of doctrine-oriented notes whose impact will, with rare exceptions, be minimal." *Id.* at 1219.

[5] *See infra* note 61 and accompanying text.

[6] *See* Blake Rohrbacher, *Decline: Twenty-Five Years of Student Scholarship in Judicial Opinions*, 80 AM. BANKR. L.J. 553 (2006).

[7] Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 637 (1996).

[8] *See* Richard A. Danner et al., *The Durham Statement Two Years Later: Open Access in the Law School Journal Environment*, 103 L. LIBR. J. 39, 44 (2011).

late to be of help because of the time taken for print publication.[9] As a result, Justice Kennedy and his clerks look to legal blogs, or "blawgs," for comments on recent cases. He noted, "It's perfectly possible and feasible, it seems to me, for law review commentary immediately to come out with reference to important three-judge district court cases, so we have some neutral, detached, critical, intellectual commentary and analysis of the case. We need that."[10]

Recent-developments notes should be brief, "neutral, detached, critical, intellectual commentary and analysis" of a single important case or piece of legislation, and now, with the advent of improved dissemination technology, is the time for their reintroduction into law reviews.[11] Part II uses the development of student writing at the *Harvard Law Review* to illustrate the critical, valued role the recent-developments note has historically played. They began modestly, with only a brief summary of a case's holding, but they evolved in many law reviews into short scholarship, with original theses supported by rigorous, albeit brief, analysis.[12]

Part III charts the current anemic state of the recent-developments note and discusses two possible causes: the editorial burden created by the increased use of discursive footnotes; and the belief by some that the role of legal reporter, once played by the recent-developments note, is now adequately (if not completely) filled by blogs and legal news services.

To test this assumption that blogs are making recent-development notes obsolete, Part III also analyzes the blog traffic of one recent case from the United States Court of Appeals for the Eighth Circuit, *United States v. Kramer*,[13] to demonstrate that because blog traffic tends to be reactionary or limited in its coverage, it does not always adequately address the issues raised by a decision. And if this one sample decision from a federal appeals court does not receive adequate attention, it is even more likely to be true of lower federal court or state court decisions. There is space in our legal discourse for strong student scholarship, which adds breadth and depth to an analysis of an issue, and, in this age of improved dissemination, the notes can even be timely.

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] For recent examples, see Recent Case, *Criminal Law—Search and Seizure—D.C. Circuit Holds That Police Checkpoint Program Likely Violates the Fourth Amendment*—Mills v. District of Columbia, *571 F.3d 1304 (D.C. Cir. 2009)*, 123 HARV. L. REV. 588 (2009); Recent Case, *Constitutional Law—Fourth Amendment—Seventh Circuit Holds That GPS Tracking Is Not A Search*—United States v. Garcia, *474 F.3d 994 (7th Cir. 2007), Reh'g and Suggestion for Reh'g En Banc Denied, No. 06-2741, 2007 U.S. App. LEXIS 8397 (7th Cir. Mar. 29, 2007)*, 120 HARV. L. REV. 2230 (2007); Recent Case, *Constitutional Law—Article III Judicial Power—Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect*—Anastasoff v. United States, *223 F.3d 898 (8th Cir. 2000)*, 114 HARV. L. REV. 940 (2001).

[13] 631 F.3d 900, 902 (8th Cir. 2011); *see infra* notes 87–93 and accompanying text.

Reintroducing these notes into the law review will benefit the legal readership, but—as discussed in Part IV—it will also have significant benefit for the students learning the form and substance of legal scholarship, and for the faculty authors who will benefit from more experienced editors. The article ends with a few suggestions for ensuring that recent-developments notes are efficiently produced without significant additional burden on law review staffs, and are timely and effectively offered to readers.

In short, recent-developments notes have been and should be again a critical part of law review student training and scholarship. We must not abandon student-authored recent-development notes without considering their true value to readers and to students learning to create and edit legal scholarship.[14]

II. THE HISTORY OF STUDENT-AUTHORED RECENT-DEVELOPMENTS NOTES

Each student-edited law review has a unique history and tradition, but they all share an important defining characteristic: They are reborn each year as new students assume positions on the editorial board. This annual rebirth, with students who only have a year to learn and perform their demanding jobs, jeopardizes institutional memory, which may include the justifying reasons behind the structure, substance, and expectations of the law review. Compounding this is a lack of idea sharing between institutions; beyond a basic training for new law review editors provided annually by the National Conference of Law Reviews,[15] law reviews may compete with and mimic other publications, but they do not often learn from each other.[16]

Recent-developments notes were part of the essential work of law review for more than a century, and yet law reviews are eliminating them from their publications. There may be many reasons for this, but recent-developments notes should not be discarded without considering their historical purpose and value. The history of student writing on the *Harvard*

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[14] *See* Ann Althouse, *Let the Law Journal Be the Law Journal and the Blog Be the Blog*, 116 YALE L.J. POCKET PART 8 (2006), http://www.thepocketpart.org/2006/09/06/althouse.html ("It's especially important now, when there is so much ephemeral writing, that we pay proper respect to the longstanding practice of crafting sustained works of scholarship.").

[15] *See* NATIONAL CONFERENCE OF LAW REVIEWS, INC., http://www.nclrlaw.com/index.php (last visited Feb. 11, 2012).

[16] One recent exception to law review coordination was the *Joint Statement on Article Length*, which represented "the commitment of 12 leading law journals across the country to play an active role in moderating the length of law review articles." *Joint Statement on Article Length*, CORNELL UNIV. LAW SCH., http://www.lawschool.cornell.edu/research/cornell-law-review/joint-statement-on-article-length.cfm (last visited Sept. 10, 2012) (listing as endorsing bodies the law reviews at Berkeley, Columbia, Cornell, Duke, Georgetown, Harvard, Michigan, Stanford, Texas, University of Pennsylvania, Virginia, and Yale); *see also* Matt Bodie, *Article Length Limits: Some Early Results*, http://prawfsblawg.blogs.com/prawfsblawg/2006/07/article_length_.html (July 24, 2006, 08:05 AM) (observing that the reviews' joint commitment seemed to be impacting article length dramatically).

Law Review, the first still-extant student-edited law review, offers an instructive example. Student writing was part of the *Harvard Law Review*'s initial charter, and the *Review* made critical choices throughout its early history to preserve and improve student scholarship, with particular value given to the student writing of the recent-developments notes.[17]

A. Early Law Reviews Relied on and Valued Student Writing.

One of the first decisions of the founding student editors of the *Harvard Law Review* was to rely upon student writing: In 1887, the Board resolved to include as lead articles in its first issue "at least one contribution from a student in the School, and at least one contribution from someone not a student in the School."[18] In addition, the first volume and all of the volumes following had students writing the Notes and the Recent Cases sections.

For this first volume the students obviously needed material, and although they received critical support from faculty, the onus was on students to produce. But the belief that they could add to the scholarly dialogue is bold, nonetheless. They note early their hope that, as well as inform students of the happenings at the school, "the *Review* may be serviceable to the profession at large."[19] The Board members acknowledged the assistance they had received from their professors and from alumni, and credited it for the published volume, which they believed "will prove of permanent value."[20]

It was, after all, a momentous time for these students and their faculty, who were in the midst of a growing educational excitement about Harvard's approach to the study of law.[21] Its dean, Christopher Columbus Langdell, who viewed the study of law as a science rather than a collection of facts that could be mastered, used casebooks rather than textbooks, and led his students in a Socratic dialogue by asking a series of questions designed to train students to "think like a lawyer."[22] Under this system, "intellectual agility is all that matters,"[23] and students who did well under

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[17] Thiru Vignarajah, Presidents' Perspectives: A History of Student Writing on the Harvard Law Review, 1887–1952, at 1 (Spring 2005) (unpublished manuscript) (on file with Professor Dan Coquillette) (quoting "Constitution, By-Laws, and Minutes," which are on file with the *Harvard Law Review*). The reasons for many of these early choices are documented through the Harvard Law Review's collection of "President's Reports," unpublished records of each Board's "present methods of work, and especially recent changes, together with improvements which should be considered" by future Boards. *Id.* Mr. Vignarajah's unpublished paper summarizing the President's Reports provides unique detail from these reports and is consequently cited frequently in this historical section.

[18] *Id.* at 8 (internal citation omitted).

[19] Notes, 1 HARV. L. REV. 35 (1887).

[20] *Id.*

[21] Barbara H. Cane, *The Role of Law Review in Legal Education*, 31 J. LEGAL EDUC. 215, 216–17 (1981).

[22] *Id.* at 217.

[23] *Id.*

the system wrote for the *Harvard Law Review* and applied this "scientific analysis" to newly decided decisions.[24] These students "had been taught to analyze, . . . [a]nd they wanted the legal profession to take notice."[25]

At least initially, the legal community did not object to student scholarship. The first volume published two feature articles, one written by an academic, Professor J.B. Ames,[26] and the other by a student, Joseph H. Beale, Jr.[27] Both articles were sixteen pages long, with sparse footnotes, and "both were well-researched *and* extremely well-received."[28] None of the contemporary commentators, either nationally or internationally, ever mentioned that Beale was a student.[29]

While this may have given the early student Boards confidence that they could contribute to legal scholarship, the quality of early student writing "was not uniformly strong."[30] Student-authored "Notes" read more like informal commentary on the happenings in the classroom, in moot court, and in the world at large. For example, volume 1, number 3, included an announcement that a course in the history of early English common law would only be offered by Professor Ames in alternate years; a listing of the total number of students enrolled in the Law School and the states they come from; and a brief summary, without commentary or opinion, of "[a] DECISION of special interest to professors and students" given by the House of Lords, "that the oral delivery of class-room lectures is not such a publication as to entitle any one to print them without permission of the author."[31]

And the precursor to recent-developments notes, the "Recent Cases" notes, were impressive in number (thirty-one in volume 1, number 3), but were consequently brief—no more than two very short paragraphs—and did little more than summarize the facts and the courts' holdings and reasoning.[32] In a policy that continues today, the summaries were not attributed to any one author.[33] Only occasionally would a recent case description include some original student thought, like the comment on

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[24] *Id.*

[25] Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 776 (1985).

[26] J.B. Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1 (1887).

[27] Joseph H. Beale, Jr., *Tickets*, 1 HARV. L. REV. 17 (1887).

[28] Vignarajah, *supra* note 17, at 12.

[29] *Id.* (noting that positive reviews in the *Chicago Legal Advisor* and the *Washington Law Reporter* made no mention that Beale was a student); *see id.* at 13 ("[s]omewhat surprisingly, student scholarship had started on an equal footing with 'professional' scholarship, and no one had blinked").

[30] Bruce A. Kimball, *Before the Paper Chase*, 61 J. OF LEGAL EDUC. 30, 40 (2011).

[31] Notes, 1 HARV. L. REV. 132, 145–46 (1887) (citing *Caird v. Sime*, 12 App. Cas. 326).

[32] *See* Recent Cases, 1 HARV. L. REV. 154–58.

[33] *See* HARVARD LAW REVIEW, http://www.harvardlawreview.org/about.php (last visited Sept. 4, 2012) ("This policy reflects the fact that many members of the *Review*, besides the author, make a contribution to each published piece.").

Thompson v. Gloucester City Savings Institution (N. J. CH)[34] that criticizes the theory of trusts upon which the opinion rests, and asserts that simple equity and unjust enrichment should instead have been the grounds for the decision.[35]

Within a year, likely as a result of increased submissions, the Board shifted student writing out of its lead articles section and began to place increased attention on the Recent Cases section, reaffirming its commitment to providing summaries of recent cases "which show the progress and general tendencies of law."[36] One commentator claims that with this "bold stroke," the Board "raised the profile and purpose of recent cases," and created a structure for student writing that became part of "the 'prototypical' model that American law reviews would embrace for the next century."[37]

B. The Emphasis on Recent-Developments Notes, with Their Source-Specific Focus, Improved Student Scholarship Generally.

According to the Harvard Presidents' Notes, beginning about 1910, the legal community grew less tolerant of student scholarship. Scholars complained "that students were simply ill-equipped to write intelligibly, let alone intelligently, about a growing number of fields: 'There is a small field of legal theory in which students may often equal the work of older men, and it seems best to confine ourselves strictly to that ground.'"[38] Not coincidently, editors during the same period of time complained that student authors of the Notes section had begun summarizing cases of marginal import, only to "use them as a springboard for an unrelated discussion of their choice."[39]

The Board reacted to its own concerns and to the broader legal community's complaints about appropriate student topics for scholarship by directing students to single-case topics in the Recent Cases section, and thereby delineated the differences between the Recent Cases notes and the broader comments published in the Notes section.[40] Consequently, by the 1920s, student writings in the Notes section had become more topical, longer, and heavily footnoted.[41] This left the single-case analysis to the Recent Cases section, which also grew in complexity. During the 1920s the recent Case Notes grew in length and frequently included a thesis with

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[34] 8 A. 97 (N.J. Ch. 1887).
[35] *Trust—Trustee or Debtor*, 1 HARV. L. REV. 158.
[36] Vignarajah, *supra* note 17 (citing the *Boston Advertiser*, May 17, 1888).
[37] *Id.* at 14–15.
[38] *Id.* at 20–21 (citing 1923 President's Report).
[39] *Id.* at 16.
[40] *Id.* at 21.
[41] *Compare* Notes, 3 HARV. L. REV. 125, 132–33 (1889), *with* Notes, 43 HARV. L. REV. 100, 100–21 (1929).

original student analysis.[42] A separate section on recent legislation was added in 1929, in part to "reach[] towards topics more suitable for editors to analyze."[43]

C. Historically, Boards Valued Recent-Developments Notes Enough to Continue Them, Even While Discontinuing Other Writing and Editing Tasks.

An indication of just how dedicated the early members of the Review were to student writing and to recent-developments notes was their reaction to the shortage of students available for work during the first World War. The proofreading that occupies so much of current law review work was contracted to outside editors, and students were given more time to develop scholarship.[44] The Board was pleased enough with this arrangement to recommend that it be continued "into normal years."[45] During the second World War, students stopped writing notes, which were replaced by faculty writing brief commentaries on recent cases from 1942–45.[46] However, students kept writing recent-developments notes, and they consequently "became the centerpiece of the educational mandate of the *Review* to its editors."[47]

While there were, on average, fewer recent-developments notes published during the war years, student editors resisted the option of writing more recent-developments notes by making them shorter and more of a summary.[48] The recent-developments notes continued to be scholarly, with clear, original theses and broad, supporting research. The student-authored

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[42] *See, e.g.*, Recent Case, *Administrative Law—Judicial Control—Scope of Judicial Review Under Longshoremen's and Harbor Workers' Compensation Act*, 43 HARV. L. REV. 131, 132 (1929) ("The court's construction of the Act, therefore, seems unwarranted, and if it prevails will in many cases render worse than useless the hearing before the administrative officer.") (analyzing *Benson v. Crowell*, 33 F.2d 137 (S.D. Ala. 1929)); Recent Case, *Admissions—By Parties and Privies—Beneficiary's Proofs of Loss as Admission of Contents*, 43 HARV. L. REV. 132, 133 (1929) ("The somewhat strained theory of admissions represented by the principal case may find its explanation in the practical consideration that beneficiaries in objecting to the receipt of evidence of this sort are less often moved by a distrust of its truthfulness than by a desire to recover for risks outside the policy.") (analyzing *Rudolph v. John Hancock Mutual Life Ins. Co.*, 167 N.E. 223 (N.Y. 1929)); Recent Case, *Agency—Nature of Relation—Father's Liability for Wrongful Use of Motorcycle Owned and Driven by Son*, 43 HARV. L. REV. 133, 133 (1929) ("To hold as the court did is to jump from the frying pan of extension the of family purpose doctrine back into the fire of a fictitious agency.") (analyzing *Meinhardt v. Vaughn*, 17 S.W.2d 5 (Tenn. 1929)).

[43] Vignarajah, *supra* note 17, at 21.

[44] *Id.* at 19–20 (citing President's Report for 1918).

[45] *Id.* at 20 (citing President's Report for 1918). Obviously, it has not.

[46] *Id.* at 28–29. These faculty-authored notes are published in volumes 56–58 of the *Harvard Law Review*, where the faculty contributors to the Note Department are indicated on the title pages. At this point, the *Harvard Law Review* and many other student-edited publications had also added book reviews as regular features, and they were also authored by faculty during the war years. *See, e.g.*, Book Reviews, 56 HARV. L. REV. 1338, 1338–58 (1943); Book Reviews, 43 COLUM. L. REV. 261, 261–71 (1943); Reviews, 53 YALE L.J. 195, 195–206 (1943).

[47] Vignarajah, *supra* note 17, at 29.

[48] *See id.*

pieces criticized one court for reaching "an unfortunate conclusion,"[49] and another for making a "serious inroad upon the principle of *stare decisis*."[50] Other law reviews, which, by this time, had adopted similar models of student writing, dealt with the shortage of student editors with varied models.[51]

Although there are variations in the historic content of the student-authored law reviews, student scholarship—and in particular the recent-developments note—has been consistently and broadly valued as a key component for training editors and informing the public of legal developments.

Law schools embraced the "apprenticeship in scholarship" that writing and editing for a law review provided students,[52] and the tremendous level of work required by the law review added to the impression that law school was intellectually demanding and that law graduates would be accustomed to the demands, both physical and mental, of law practice.[53] Other law schools rapidly followed Harvard's example, primarily because those schools recognized the educational benefits student-edited reviews offered. Before many decades had passed, "a law school without a law review was considered a lesser institution."[54]

III. THE CURRENT ANEMIC STATE OF RECENT-DEVELOPMENTS NOTES

Do law reviews still offer a valuable apprenticeship in scholarship, the same high level of training for the intellectual rigor of law practice? The answer is too often, no. While law review editors still work hard, they are

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[49] Recent Cases, *Labor Law—Fair Labor Standards Act—Union's Discrimination Against Company Employee Held Not Unlawful Under FLSA*, 56 HARV. L. REV. 651 (1943) (criticizing the decision in *Skidmore v. Swift & Co.*, 53 F. Supp. 1020 (N.D. Tex. 1942)).

[50] *Id.* at 654 (criticizing the decision in *Barnett v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251 (S.D. W. Va. 1942)).

[51] For example, the *Columbia Law Review* continued to publish an impressive amount of student scholarship, which included lengthy, heavily footnoted student notes, *see, e.g.*, Note, *The "Grandfather" Clause in Federal Motor Carrier Regulation*, 43 COLUM. L. REV. 207 (1943); "Recent Decisions," which followed the Harvard template in length and structure and contained similar criticisms of court decisions, *see, e.g.*, Recent Decisions, *id.* at 229 ("it is submitted that a better basis for the result reached can be found in the impropriety of vesting the trustee in bankruptcy with rights greater than those enjoyed by individual creditors"); and "Cases Noted," which categorized and summarized cases, *see, e.g.*, Cases Noted, *id.* at 253. The *Yale Law Journal* (which only lists seven students on its 1943-44 masthead), also continued to publish lengthy, well-footnoted student notes on general topics, *see, e.g.*, Note, *Deportation of Alien Seamen Owing Allegiance to Governments-in-Exile*, 53 YALE L.J. 183 (1943), but did not offer any recent cases summaries or analysis. The *New York University Law Review*, which included student-authored Recent Decisions in its 1942 volume (also listing only seven members), *see, e.g.*, Recent Decisions, 19 N.Y.U. L. QUARTERLY REV. 433, 433–48 (1941), did not publish a volume in 1943 at all.

[52] *See* Wendy J. Gordon, *Counter-Manifesto: Student-Edited Reviews and the Intellectual Properties of Scholarship*, 61 U. CHI. L. REV. 541, 543 (1994) (recognizing that when a student works closely with a professor to complete a note, it is one of the last vestiges of apprenticeship in the law).

[53] *See* Cane, *supra* note 21, at 216–17; Swygert & Bruce, *supra* note 25, at 779 (law schools recognized the educational benefits student-edited reviews offered).

[54] Swygert & Bruce, *supra* note 25, at 779.

being published less.[55] The decrease in student opportunities for having their work published—and the considerable increase in the time it takes to edit heavily footnoted, lengthy faculty-authored pieces—is troubling, and may explain some general law review complaints.

A. Law Review Students Have Shifted from Writing to Editing.

A contrast between today's student scholarly output and the output of the early days of law review is telling. The first *Harvard Law Review* students were remarkably prolific writers. According to one author, just two of the student editors (both later Harvard professors), Joseph Beale, Jr., and Samuel Williston, contributed an astonishing eighty-five articles during their tenure on the law review.[56] Admittedly, these early student-authored pieces were shorter and less doctrinally complex than much of the student work published today. But the frequency of the early writing gave students valuable practice.

Judge Dolores K. Sloviter of the United States Court of Appeals for the Third Circuit, in her article, *In Praise of Law Reviews*, makes a remarkable claim: that the two years spent on law review "were the most influential in my career. As soon as I graduated from law school and passed the bar examination, I forgot almost every matter of substantive law, which I soon realized I could find in textbooks or cases, but I could never replicate the law review experience."[57] Specifically, she notes the effort put into writing shorter case notes, where she was forced to put "months of research into the three paragraphs."[58] Editors made her rewrite "again, and again, like the singer in the opera house, until [she] got it 'right.'"[59] Only after successfully passing this stage were students allowed to write more discursive notes. She credits to this early training her ability to "write sparingly, without frills and excess."[60]

During Judge Sloviter's tenure at *Penn Law Review*, student-authored "Recent Cases" were a regularly published feature.[61] As they have in most student-edited law reviews, things have changed at *Penn Law Review*, where now students are "assist[ed]" in "preparing an original work

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[55] *See infra* note 62 and accompanying text.

[56] Swygert & Bruce, *supra* note 25, at 778 (citing the HARVARD LAW REVIEW, CUMULATIVE INDEX AND TABLE OF CASES, VOLUMES ONE TO FIFTY 1887-1937 (1938) for claim "that Professor Ames contributed twenty-eight signed articles, Dean Langdell authored twenty-seven, Professor Thayer produced nineteen, and Professor Gray wrote twelve").

[57] Dolores K. Sloviter, *In Praise of Law Reviews*, 75 TEMP. L. REV. 7, 11 (2002); *see also* Beldar, *Student Law Review Editors*, BELDARBLOG (Feb. 5, 2004, 7:22 PM), http://beldar.blogs.com/beldarblog/2004/02/law_review.html (claiming that his law review service, and—in particular—his experience going through the editing process of his own note, "did more to improve my own writing, legal and nonlegal, than anything before or since," with a Fifth Circuit clerkship running a close second).

[58] Sloviter, *supra* note 57.

[59] *Id.*

[60] *Id.*

[61] *See, e.g.*, Recent Cases, 104 U. PA. L. REV. 112–28 (1955).

of scholarship suitable for professional publication" but only "up to twelve comments" are then selected for publication.[62] Many law review students will not, therefore, ever be subjected to the level of editing that Judge Sloviter describes because they will not author pieces that are subjected to the rigorous attention and revision required to publish a piece.

Most major law reviews, like the *Penn Law Review*, ceased publication of shorter student scholarship—including recent-development notes—between 1970 and 1980.[63] From that point on, almost all law reviews publish only selected student notes that are longer, more sophisticated scholarship; students are typically writing only once during their law review tenure, and only a fraction have their writings rigorously edited and published.[64] Consequently, the law review experience has become more about developing proofreading skills than about developing scholars.[65]

B. Recent-Developments Notes Were Dropped as a Concession Both to Students' Increasing Editorial Burdens and to Competing Legal Reporters.

So what happened during those decades that shifted students from the writing of these shorter pieces of scholarship? Law reviews did not announce or justify the change, and if trends in student scholarship are hard to track, reasons for the changes made at each of the hundreds of student-edited reviews are even more difficult to identify. [66] Much has changed;

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[62] *University of Pennsylvania Law Review*, http://pennumbra.com/about/ (last visited Feb. 26, 2012).

[63] Based on a review of the following top twenty student-edited law reviews as ranked by Washington & Lee School of Law, http://lawlib.wlu.edu/LJ/index.aspx (visited April 16, 2012): *Harvard Law Review*, *Columbia Law Review*, *Yale Law Review*, *Stanford Law Review*, *Michigan Law Review*, *California Law Review*, *University of Pennsylvania Law Review*, *Texas Law Review*, *Virginia Law Review*, *Minnesota Law Review*, *UCLA Law Review*, *The Georgetown Law Journal*, *New York University Law Review*, *Cornell Law Review*, *Northwestern Law Review*, *Fordham Law Review*, *Notre Dame Law Review*, *Vanderbilt Law Review*, *William and Mary Law Review*, and *The University of Chicago Law Review*. All of these journals published student-authored recent-developments notes in their initial volumes, but all of them (except Harvard) had ceased doing so by 1980.

[64] In fact, most law reviews publish very few student-written pieces at all, short or long. The *Harvard Law Review* is the exception, continuing to publish recent-development notes as part of its effort to publish more student writing than any journal in the country. In every volume, the *Review* publishes about twenty Supreme Court case comments written by rising third-year editors, every second-year editor has an opportunity to write a "Recent Case" (on legislation, book, state, district or circuit court opinion), and all third-year editors are encouraged to publish a full-length note on a topic they choose. *See* HARVARD LAW REVIEW, http://www.harvardlawreview.org/about.php (last visited Feb. 1, 2012). In addition, a "developments in the law" issue is published annually with student-written pieces on a timely area of law. *Id.* To be fair, the pressure on other law reviews may not be felt in the same way by the *Harvard Law Review*, which currently boasts an 88-member Board of Editors. *Id.*

[65] *See generally* Magat, *infra* note 73, at 67.

[66] *See* Danner, *supra* note 8, at 54 n.20 ("One source suggests that there are presently about 650 student-edited journals published at U.S. law schools and 980 legal journals in all, counting those published by societies, bar associations, and commercial publishers."); Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15 (1996) (discussing the rise of the student-edited law review journals). There has been an ongoing debate about the wisdom of increasing the law faculty involvement in the editorial process. Few reviews are faculty-edited in whole or in part. *See* David M. Richardson, *Improving the Law Review Model: A Case in Point*,

faculties are larger with more demanding tenure requirements, and so one reason may be a simple allocation of print space and editorial resources. Starting in the 1970s, student editors were forced to edit (and some would say then encouraged the production of) longer, more footnoted articles, and these longer articles take up more space in the print volumes. Another reason is that students are no longer the only reporters of recent legal developments, and there are some who argue that legal news services and now blogs have so occupied the field that students would be better served by writing more topical pieces.[67]

1. The Rise of the Discursive Footnote and its Editorial Demands

Much has been said about the increasing length of law review articles,[68] and longer articles—all other things being equal—take longer to edit. The increase in footnotes, particularly in discursive footnotes with extensive citation, is particularly relevant to the workload of the student editors, and this increase in editorial work came at the same time law reviews began cutting back on student writing.

A study completed in 1979 on discursive footnotes—which were defined as footnotes more than half a page in length and subjectively tangential—documented a sharp rise in their use in legal scholarship; there has been a more than six-fold increase since 1958.[69] By 1979, footnotes were increasingly used less for attribution and more "as a bibliographic surrogate, a method of infusing the author's opinions with credibility (through allusion to recognized authority) and lastly, and least fortunately, a mere residue of scholarly habit."[70] Footnotes were enlarged through the use of string citations, supplemental quotes, and the heavy use of signal words to introduce material not directly supportive of the proposition.[71]

In 1989, a similar analysis found that article density (defined as "[t]he quotient derived by dividing the number of lines of footnotes by the total number of text and footnote lines") was "increasing at exponential rates."[72] The study's author blamed the unabated rise in article density in

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44 J. LEGAL EDUC. 6 (1994); John G. Kester, *Faculty Participation in the Student-Edited Law Review*, 36 J. LEGAL EDUC. 14 (1986).

[67] *See* Vladeck, *supra* note 3, at 31.

[68] *See* Joint Statement on Article Length, *supra* note 16; *see also* John Doyle, *The Law Reviews: Do Their Paths of Glory Lead but to the Grave?*, 10 J. APP. PRAC. & PROCESS 179, 189–90 (2009) (comparing footnoting in U.S. law journals with footnoting in non-U.S. law journals, and finding "[a]s a general order of magnitude, lead articles (distinguished from essays, comments, and the like) in elite U.S. law reviews weigh in around 30,000 words with over 300 footnotes, and lead articles in U.K. equivalent journals are around 14,000 words with fewer than 150 footnotes").

[69] Edd D. Wheeler, *The Bottom Lines: Fifty Years of Legal Footnoting in Review*, 72 LAW LIBR. J. 245, 255 (1979).

[70] *Id.* at 254.

[71] *Id.*

[72] Arthur D. Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009, 1013 (1989) (quoting Wheeler, *supra* note 69, at 248).

part on the methods used to rank private law schools, which included as part of its determinate the number of pages published by faculty, and in part on the value students themselves placed on heavily footnoted articles.[73]

Some faculty authors claim that student editors now follow a "2:1 footnote ratio rule," which requires twice the lines of footnotes as text per page,[74] and, according to a recent commentator, one-third the writing in law reviews is in the footnotes.[75] Consequently, as compared to the sixty or seventy years ago, an extraordinary amount of law review work is spent on the footnotes, checking each citation for its substantive accuracy, and "yanking the articles and essays of legal academics into compliance with the dictates of *The Bluebook*."[76]

2. The Blog as a Substitute for Student Notes

As editors faced increased editing demands during this time, recent-developments notes and other shorter student writing were an obvious cut for a pressed staff because student scholarship is no longer the sole, or often most timely, reporter of legal developments.

Members of the bench and bar can now learn about a court's decision the day the opinion is issued, can access the decision immediately through court websites and online databases, and can read expert analysis of some decisions on blogs within minutes or days. But careful analysis of the treatment of a single case demonstrates that current legal discourse needs the short, scholarly analysis provided by the recent-developments note.

a. The Death of Student Notes, as Predicted in 2006

In 2006, Professor Stephen Vladeck predicted that, as a consequence of the rising use of blogs in particular, "[t]he days of the case note—and of student scholarship focusing on current developments in the law more generally—may well be numbered."[77] Bloggers are often expert practitioners or scholars, who are positioned to quickly chime in on the

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[73] *Id.* at 1013, 1015 ("[b]oth writers and editors thus have a common goal: the use of notes to lengthen articles"); *see also* James W. Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261, 1268 (1998) (discussing the historical development of the student-run law review and "its mania for footnotes"); Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. LEGAL EDUC. 65, 71 (2010) (noting that when used appropriately "[a] good, fat footnote is like standing at the library shelf with the book one seeks under one's nose and even better ones, perhaps, aligned to the left and right").

[74] *See* Magat, *supra* note 73, at 65 (citing a listserve discussion among legal writing professors whose students follow the "2:1 footnote ratio rule").

[75] *See* Adam Kobler, *Law Review Footnotes*, CONCURRING OPINIONS (Dec. 12, 2007), http://www.concurringopinions.com/archives/2007/12/law_review_foot.html.

[76] Michael Bacchus, Comment, *Strung Out: Legal Citation,* The Bluebook, *and the Anxiety of Authority*, 151 U. PA. L. REV. 245, 246 (2002).

[77] *See* Vladeck, *supra* note 3, at 31 (urging faculty to discourage students from writing recent-development notes and to encourage articles that take a more holistic view of the field). Professor Vladeck noted that, with the rise of expert-authored blogs, "rare indeed is the important legal development that goes unnoticed in its immediate aftermath." *Id.*

merits of important decisions.[78] When blogs work best, their accessibility—which usually allow comments on posts—then invites a conversation among blog followers, and may tighten up any loose thinking in the original post.[79] Other scholars agree, arguing that case notes may have been valuable "[i]n a pre-blawg world" because they were "the first piece of analysis on the case," but that "[t]he role of first responder is now played by the blogosphere."[80]

But even in 2006, this was not the consensus opinion. Some commentators recognized instead that the purpose, audience, and permanence of scholarship will continue to separate it from blogs.[81] Although blogs may announce new developments, like newspapers and magazines, they typically do not "provide in-depth analyses of unfamiliar legal issues or support for particular propositions or arguments," which is what attorneys, law professors, and law students are looking for in legal databases.[82] Blogs are conversations or "calling cards" written for discovery rather than distinct mediums with particular messages.[83]

These opposing predictions from 2006 on the promise of the blog and the doom of student-authored recent-developments notes are all dated in the current accelerated pace of the world, and there has not been an update on the actual impact of blogs on student scholarship. Scholars have tracked the growing citation of blogs in opinions and in scholarship,[84] and scholars have, for years, tracked the declining citation of student scholarship in opinions and scholarship,[85] but no one has compared the relative values or

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[78] *Id.*; *see* Orin S. Kerr, *Blogs and the Legal Academy*, 84 WASH. U. L. REV. 1127, 1132 (2006).

[79] *See* Orin S. Kerr, *Will Blogs Kill the Law Review Case Comment?*, THE VOLOKH CONSPIRACY, http://volokh.com/posts/1109009511.shtml (Feb. 21, 2005 12:11 PM); *see also* Kerr, *supra* note 78, at 1131 ("If 'journalism is the first rough draft of history,' blog posts are likely to become the first rough draft of legal scholarship on new developments.").

[80] *See* Kerr, *Will Blogs Kill the Law Review Case Comment?*, *supra* note 79.

[81] *See* Althouse, *supra* note 14, at 11 (warning students away from "glittering things" luring them away from the rigors of sustained scholarship); *see also* Anthony Ciolli, *Much Ado About Nothing: Why Student Scholarship Has Nothing To Fear from Blogs*, 116 YALE L.J. POCKET PART 210 (2006), http://thepocketpart.org/2006/12/18/ciolli.html (responding to Professor Vladeck).

[82] *See* Ciolli, *supra* note 81, at 211.

[83] *See* Ann Althouse, *Why a Narrowly Defined Legal Scholarship Blog is Not What I Want: An Argument in Pseudo-Blog Form*, 84 WASH. U. L. REV. 1221, 1230 (2006); Michael A. Froomkin, *The Plural of Anecdote is Blog*, 84 WASH. U. L. REV. 1149, 1151 (2006) (classifying law blogs as another form of quick and simple communication, similar to magazines).

[84] Lee F. Peoples, *The Citation of Blogs in Judicial Opinions*, 13 TUL. J. TECH. & INTELL. PROP. 39, 40 (2010) (summarizing the discussions of substantive legal issues in blogs and their impact on and citation by courts).

[85] *See* Blake Rohrbacher, *Decline: Twenty-Five Years of Student Scholarship in Judicial Opinions*, 80 AM. BANKR. L.J. 553 (2006); Bart Sloan, *What Are We Writing For? Student Works as Authority and Their Citation by the Federal Bench, 1986-1990*, 61 GEO. WASH. L. REV. 221 (1992) (noting the results of the data collected and concluding "courts very rarely cite student works. When student works are cited, courts are most likely to include only one citation per opinion. Courts clearly favor certain periodicals over others, and prefer recent notes. Taken alone, these results strongly disprove the notion that student law review notes are an influential source of authority in federal court opinions"); *see also* Eugene Volokh, *Citations of Student Articles*, THE VOLOKH CONSPIRACY (June 4, 2007, 2:11 PM), http://volokh.com/posts/1180980704.shtml (tentatively concluding that "[e]very average weekday, two court decisions are citing a student article").

showed that the rise of blogs is actually contributing to the declining value of student scholarship.[86]

b. The Inadequate Blog Treatment of a Single Sample Case

Blog posts will at times fully and insightfully analyze a recent decision, leaving no space for student notes.[87] But, as an examination of one recent case illustrates, blog comments do not always fully examine an issue, and they frequently do not rise to the level of scholarship that is helpful to researching practitioners and scholars. And while what is true for this single case may not be true for all, it will be true for many; the examined case was decided by a federal circuit court of appeals, and so it is a relatively high-profile case. If blog treatment of this case does not adequately cover the case's holding and significance, it surely will not for most state court cases, which typically have a more limited geographic impact.

On February 8, 2011, in *United States v. Kramer,* the United States Court of Appeals for the Eighth Circuit held that, for the purposes of the federal sentencing guidelines, a basic cellular phone—one used only to place calls and send text messages—was a computer.[88] As a result, because Mr. Kramer used a phone to facilitate his offense, the court affirmed the lower court's application of a two-level enhancement to Mr. Kramer's sentence, adding twenty-eight months—more than two years—to his prison sentence.[89]

The court's broad interpretation of the term "computer" has implications beyond Mr. Kramer, but the blog traffic following the decision, while immediate, was minimal and brief.[90] Bloggers warned that, under the

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[86] Scholars have tried. In 2006, one scholar compared the number of subscribers of the *Harvard Law Review* with the daily hits on the popular legal blog, *The Volokh Conspiracy.* Kerr, *Blogs and the Legal Academy, supra* n. 78, at 1129. Those numbers are even more dramatic today: In 2011, the HARVARD LAW REVIEW had 1,896 subscribers, *see* Ross E. Davies, *Law Review Circulation 2011: More Change, More Same,* J. LEGAL METRICS (claiming that law reviews have hit a new low in 2011 in paid subscribers); and *The Volokh Conspiracy* had more than 25,000 unique visitors per weekday, *see* Eugene Volokh, *Faculty Profile,* UCLA, http://www2.law.ucla.edu/volokh/.

[87] *See, e.g.,* Vladeck, *supra* note 3, at 33. A recent-developments note published by the *Harvard Law Review* in June 2006—"a perfectly well-conceived and thought-provoking student piece" on the pattern of error in immigration cases, focusing on especially vitriolic decisions of the Third and Seventh Circuits from late 2005—was published six months after extensive blog coverage of the same topic. *Id.* at 32.

[88] United States v. Kramer, 631 F.3d 900, 903–05 (8th Cir. 2011).

[89] *Id.*

[90] *See, e.g.,* Michael Gorman, *Eighth Circuit Declares RAZR a Computer Under Federal Law,* ENGAGET (Feb. 12, 2011, 9:14 PM), http://www.engadget.com/2011/02/12/eighth-circuit-declares-razr-a-computer-under-federal-law/ ("Seems a bit silly to call a RAZR a computer, but courts can only interpret existing laws, not make new ones—and US law says a computer is 'an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions.' . . . [T]he Eighth Circuit . . . is aware such a definition may include microwaves and coffee makers, and informed Congress that it should change the law if it doesn't like it.") (emphasis omitted) (quoting *Kramer,* 631 F.3d at 902); Scott H. Greenfield, *If It Walks Like a Duck, Cellphone Edition,* SIMPLE JUST. (Feb. 9, 2011, 7:42 AM) http://blog.simplejustice.us/2011/02/09/if-it-walks-like-a-duck.aspx ("Yet again, the clash between technology and the law shows that neither Congress nor the

broad decision, the definition of "computer" "may include coffeemakers and microwaves."[91] One blogger noted that the court's definition "[s]eems a bit silly," but that is because "this was the first time a federal appeals court had ruled on the issue, the Eighth Circuit set a precedent that other courts are likely to follow."[92] Another blogger urged Congress, in light of *Kramer*, to clarify whether the term "computer" was already intended to include "smartphones," or whether new legislation was required.[93] Yet another noted that *Kramer* created a "curious" inconsistency "when one considers that computers received significant protection under the Fourth Amendment, while cellphones are entirely different."[94]

Kramer is like hundreds of recent cases. Blog postings, many written by experts, quickly identified its implications and raised questions and concerns about the decision, but the blog postings failed to provide a complete, scholarly analysis of the decision, and most did not suggest solutions to the problems they identified. As of the time of this writing—almost a year after the decision—there is still not a thorough, scholarly analysis of *Kramer* available to the legal community.[95]

This is not true of all cases, but this treatment of one case demonstrates that often a thoughtful, scholarly recent-developments note would meaningfully add to the literature. Without a recent-developments note, the blog posts tend to feel like the blind men describing the elephant:[96] The observations are interesting and accurate of a narrow implication of the

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courts can be trusted to handle the unintended consequences. . . . What sort of computer did he use, you ask? Was it an Apple? (Oh, please don't let it be an iPad, please, please, please . . .) No, it wasn't a Mac. It wasn't even a PC. It was (ta da) a Motorola."); Dan Siegel, *Cell Phones Are Computers*, DAN SIEGEL'S PA. L. BLOG (Mar. 10, 2011, 5:50 PM), http://palegalblog.com/?p=29&print=1 ("For most people, the word 'computer' conjures up images of a traditional desktop computer . . . . However . . . modern cell phones are . . . performing tasks for which we would ordinarily use our computers. We can check our email, surf the web, stream music and videos, and download software . . . . Additionally, as was the case for Neil Scott Kramer, defendants may face a sentencing enhancement for 'use of a computer' to facilitate the commission of certain crimes.").

[91] THE NERD INSURANCE (Feb. 12, 2011, 9:14 PM), http://thenerdinsurance.us/?tag=us-v-kramer ("Seems a bit silly to call a RAZR a computer, but courts can only *interpret* existing laws, not make new ones—and US law says a computer is 'an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions.'").

[92] *Id.*

[93] Shawn Tuma, *Smartphones and the Computer Fraud and Abuse Act—Already Covered?*, L. BLOG (Apr. 13, 2011, 5:37 PM), http://shawnetuma.com/2011/04/13/smartphones-and-the-computer-fraud-and-abuse-act-already-covered.

[94] Greenfield, *supra* note 90.

[95] There are many cases to cover, and of course the law review can't cover them all, so the phenomenon of missed opportunities for scholarly comment is not new. *See* John T. Noonan, *Law Reviews*, 47 STAN. L. REV. 1117, 1118 (1995) (including *Plessy v. Ferguson* as one of the "small universe of Supreme Court decisions . . . which the reviews spectacularly missed").

[96] *See* JOHN GODFREY SAXE, *The Blind Men and the Elephant*, THE POEMS OF JOHN GODFREY SAXE 259–61 (Boston: James R. Osgood & Co., 1872) (reciting the oldest known version of the Indian fable). In the fable, six blind men each touch a different part of the elephant and describe it to their fellows. *Id.* They argue amongst themselves "loud and long, [e]ach in his own opinion, [e]xceeding stiff and strong, [t]hough each was partly in the right, [a]nd all were in the wrong!" *Id.* at 260. The moral of the fable is that "So oft in theologic wars, [t]he disputants . . . rail on in utter ignorance, [o]f what each other mean, *[a]nd prate about an Elephant, [n]ot one of them has seen!*" *Id.* at 261.

decision, but they do not give a description of the entire case, its problem, or its solution.

IV. REVIVING THE STUDENT-AUTHORED RECENT-DEVELOPMENTS NOTE

Law reviews may be convinced to once again require that students complete a recent-developments note if the benefits of doing so outweigh the added workload and administrative duties. As discussed below, key to the renaissance of the recent-developments note is an emphasis on its role as short scholarship, and on the use of improved dissemination techniques to ensure that they are openly accessible and timely.

A. When Students Write More, We All Benefit.

Early law review boards not only valued recent-development notes for their contribution to legal scholarship generally but also recognized writing a recent-developments note as an essential step in a student's development as a scholar.[97] When law reviews remove that step, they risk introducing students to editing and writing more sophisticated legal scholarship when they are too green to do it well. Indeed, many faculty authors can trace their complaints about student-edited law reviews—everything from poor article selection to incompetent editing—to student inexperience in scholarship and editing.

Reintroducing a requirement that students complete at least one strong recent-developments note before being introduced to broader legal scholarship would therefore benefit law review students, faculty authors, and the law-trained audience. First, it would further a core purpose of law review to train students to be better writers and thereby more careful thinkers. Second, writers who have been through a rigorous editing of their own work are more likely to be better editors of scholarship. And third, recent-developments notes are, by definition, scholarship about the workings of the courts and the legislatures, and may therefore address the concerns from the judiciary and practitioners that legal scholarship is no longer relevant to them.

1. The Benefit to Students: More Writing and Editing Leads to Stronger Writing and Thinking

In 1953, Chief Justice Earl Warren reminded students of the *U.C.L.A. Law Review* that, of all the purposes of law review, "perhaps most important" is that "the review affords invaluable training to the students who

[97] *See* Magat, *supra* note 73, at 67 (discussing the "valuable skills" that students learn while participating in law review, such as "careful and critical perspective" gained from "checking cites, critical reading of analysis, a sense of sound organization and development, an eye for detail, an ear for writing that is concise, clear, and fluid").

participate in its writing and editing."[98] This training in creating and evaluating written argument is critical to prepare lawyers to function in our text-based legal system; "[n]o other common law legal system, past or present, has relied so persistently on the written word as a vehicle for legal communication."[99] When most law review editors now spend a majority of their time editing and do not author scholarship that goes through a rigorous publication process, they miss an important opportunity to further their legal education.[100] In addition, by emphasizing editing over writing, a law review risks eroding some of the scholarly culture in the law school that frequent, rigorous student scholarship fosters.[101]

Law students should write more, not only because as future attorneys they will often rely on their written work product, but also because the writing process itself builds creative and critical thinking skills.[102] Writing is an "organic, developmental process"; in short, writing is thinking.[103] Writing is "essential" to creative thinking, and it enhances our ability to engage in critical thinking because "[t]he recursive process of writing, reading a draft, and rewriting creates continuous dialogue between a writer's partially completed text and his thoughts."[104] Writing "increases the analytic potential of the human mind."[105]

As recognized by the Harvard Law Review Board when the legal community challenged the strength of its student scholarship, and by the subsequent law reviews that adopted similar structures, a well-structured recent-developments note has unique characteristics that make it a valuable training ground for new legal academic writers.

First, a recent-developments note is focused on an appropriate topic for a beginning student scholar: the single case or statute. At its best, this

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[98] *Messages of Greeting to the U.C.L.A. Law Review*, 1 U.C.L.A. L. REV. 1 (1953) (offered by Earl Warren, Chief Justice of the United States).

[99] Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1161 (2004).

[100] *See* Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 622 (1996).

[101] *See* Michael J. Madison, *The Lawyer as Legal Scholar*, 65 U. PITT. L. REV. 63, 69–75 (2003) (discussing "useful scholarship" and arguing that notes can and should "make a (i) claim that is (ii) novel, (iii) nonobvious, (iv) useful, and (v) sound" (citing EUGENE VOLOKH, ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES AND SEMINAR PAPERS 28 (2003)).

[102] Ehrenberg, *supra* note 99, at 1187 ("Writing enhances our ability to engage in 'second-order' or critical thinking, as well as our ability to engage in creative thinking."); NAT'L. COMM'N ON WRITING, THE NEGLECTED "R"; THE NEED FOR A WRITING REVOLUTION 5 (2003), http://www.writingcommision.org/prod_downloads/writingcom/neglectedr.pdf ("[d]eveloping critical thinkers and writers [is] . . . one of the central works of education") (last visited Sept. 5, 2012).

[103] *See* Ehrenberg, *supra* note 99, at 1187 ("[t]hrough the writing process, particularly the process of free writing or exploratory writing, the writer may generate ideas that may not have been apparent initially to him").

[104] *Id.* at 1187–88.

[105] *Id.* at 1188; *see also* Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881, 882–83 (2009) (encouraging law faculty to write because writing "helps the author understand an area better and clarify his or her thoughts").

brief note is, as Justice Kennedy described, a "neutral, detached, critical, intellectual commentary and analysis of [a] case."[106] The ability to fully understand and to accurately explain a case and its place in a series of decisions is a fundamental legal skill. "[T]he single case, understood in all its factual complexity, is the place to start the study of a problem."[107] Students learn to *think* like lawyers by critiquing a court's reasoning or holding and by identifying problems and proposing solutions.[108] In addition, law students are the ultimate generalists and are, therefore, often best positioned to respond quickly to a variety of topics with the appropriate level of detail.

Second, a critical characteristic of a strong recent-developments note is that it involves scholarship, even if it is modest scholarship. One reason students have been discouraged from writing recent-developments notes is that they easily fall out of the scholarship category; even longer case notes often focus too much on describing the case and too little on finding a problem and suggesting a solution.[109] Recent-developments notes are less valuable, both to the reader and to the student author, when they do not rise to the level of legal scholarship by failing to analyze a case's place in the legal landscape and suggest a novel and useful view of the case.[110]

Writing a scholarly article, even a brief article like a recent-developments note, can reinforce the skills of zealous advocacy, aggressive argument, and persuasive framing of issues and counterarguments. Most legal scholarship is less like scientific scholarship, which exists to convey information, and more like advocacy scholarship, which exists to prove a position.[111] The thesis of an article is therefore similar to the conclusion of an appellate brief: The purpose of each writing is to prove a central point.

This training in scholarly writing therefore offers an important expansion of the learning associated with instrumental or practical legal writing. To narrow a topic and develop a thesis, students must engage in critical cognitive processes. Students writing a scholarly piece, even a brief piece, must become an expert in an area of law, which requires research

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[106] *See* Danner, *supra* note 8, at 44.

[107] *See* John T. Noonan, *Law Reviews*, 47 STAN. L. REV. 1117, 1118 (1995).

[108] *See* Nancy B. Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach?*, 1 J. ASS'N LEGAL WRITING DIRECTORS 91, 101 (2002) (noting that while the skills involved in editing and cite-checking are much like being an apprentice law professor, "the writing of a law review *note* comes the closest to what I think we mean when we say that we want students to think like lawyers").

[109] *See* VOLOKH, *supra* note 101, at 28 (warning students that case note critiques are likely to be obvious, and that case notes don't "show off your skills at research and at tying together threads from different contexts").

[110] *See id.* (arguing that strong legal scholarship makes a claim that is "novel, nonobvious, and useful" and proves that claim efficiently and effectively to the reader).

[111] *See* David A. Rier, *The Future of Legal Scholarship and Scholarly Communication: Publication in the Age of Cyberspace*, 30 AKRON L. REV. 183, 183 (1996) (arguing that while the purpose of scientific journals is to convey information, the purpose of legal journals is to train students and forward the interests of the authors).

over a possibly vast field; critical reading; and, importantly, synthesizing various sources for a unified analysis. Students must understand which pieces of information to discard, which pieces to save, and how to fit those pieces together to cohesively forward an argument. They must "make comparative judgments, move up and down the ladder of abstraction, apply principles, predict consequences, make recommendations, and delineate causes and effects."[112] The increased scope alone of scholarly writing projects provides opportunities for students to learn more about the writing process, about "how to break an intellectual enterprise down into manageable units."[113]

Third, while many notes require that a student find a problem and propose a solution, the recent-developments note is unique in its length. Communicating complexity in a short article of no more than ten pages requires more skill than communicating in twenty to forty pages, the length of a typical note. A recursive process of writing, editing, and rewriting disciplines the students to place value in every sentence they write. Additionally, the process allows students to understand which aspects of a case's facts and procedural history, a court's reasoning, and a decision's impact should be explained and proved because they are critical to the recent-developments note's thesis and accuracy, and which can be cut. This intense editing may make writing a shorter recent-developments note more instructive on the writing process as "a way to grow and cook a message,"[114] and on the accurate and compelling use of authority to prove a thesis.

2. The Benefit to Faculty Authors: Students More Experienced with Scholarship Will Be Better Editors of Scholarship

The benefits of having students write more scholarship would reach beyond the students themselves. A vocal critic of student-edited law reviews, Richard Posner, summarized years of author complaints recently when he claimed that "inexperienced editors, preoccupied with citation forms and other rule-bound approaches to editing, abet the worst tendencies of legal and academic writing."[115] When students have limited experience as writers and sometimes no experience as editors, they cling rigidly to rules and traditional formats. One law review critic noted, "As has been argued in

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[112] Elizabeth Fajans & Mary R. Falk, *Comments Worth Making: Supervising Scholarly Writing in Law School*, 46 J. LEGAL EDUC. 342, 344 (1996).

[113] *Id.*

[114] *See* Ehrenberg, *supra* note 99, at 1187 (quoting PETER ELBOW, WRITING WITHOUT TEACHERS 15 (1973)).

[115] Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1134 (1995). For another explanation of students' editing aggression, see J.C. Oleson, *You Make Me [Sic]: Confessions of a Sadistic Law Review Editor*, 37 U.C. DAVIS L. REV. 1135, 1142–45 (2004), who attributes the student-editor's obsession with rules to their "deeply held need for achievement," to "transforming the pathologies of obsessive-compulsive disorder into virtues" and, finally, to payback—reclaiming "some of the personhood" lost in their first year of law school.

the sociolinguistics literature, a rule-oriented approach to writing is a reflection of linguistic insecurity."[116]

Although it takes both an author and an editor to create an unreadable article cluttered with distracting footnotes, students who are better trained in the broader purposes and structures of scholarship are less likely to pay undue attention to technical rules. While technical accuracy is not a flaw, over-attention to the trivial may cramp an author's style and may blind a student to the author's larger creative goals or any problems of proof or organization of an article. In the words of Professor Friedman, "I think law review work fosters an overly cautious, unimaginative mode of thinking among many editors. As a result, many become quite exercised over the most trivial of issues."[117] Law review editing has not always been this technical.[118] The best way to move inexperienced editors from shallow, rule-bound editing is to provide more exposure to the demands and purposes of scholarship.

3. The Benefit to the Legal Reader: Recent-Development Notes Are Classic Source-Based Scholarship, Answering the Call from Judges and Practitioners that Scholarship Be More Relevant

Even though writing recent-developments notes would be educationally beneficial to students and would give them more experience as editors of faculty scholarship, recent-developments notes should not be re-introduced to law reviews if they are never to be read. Law reviews, because they are still the primary publisher of legal scholarship, must consider the value its material adds to the body of legal scholarship.

The frequent criticism that legal scholarship is too erudite to be of use to the practitioner and the judiciary[119] has recently been given fresh legs by Chief Justice John Roberts's comments to the Fourth Circuit Judicial Conference in 2011, in which he admitted that he cannot remember the last time he read a law review:

> Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria,

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[116] James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 531 (1994) (citing Mary Vaiana Taylor, *The Folklore of Usage*, 35 COLLEGE ENG. 756, 761–68 (1974)).

[117] Richard Friedman, *Making Law Review: What Price Glory?*, 5 STUDENT LAWYER 34, 37 (1976) (noting that "Law reviews were not always so technically minded as they are today. Decades ago they had a more free-wheeling style, not shaped around the necessity of providing authority for even the most obvious statements").

[118] *Id.*

[119] *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992) ("Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it.").

> or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.[120]

Debate swirls around the perceived divide[121] and the accuracy of data used to track citations of scholarship in court opinions,[122] scholars and judges do have different goals: Academics need to be innovative and prolific to gain tenure, while judges have to solve problems.[123] Recent-developments notes, because they should be analyses of current problems, have the potential to add to the scholarship that is perceived by the bar to be more practical and relevant.

B. Online Publishing Offers Paths Around the Traditional Roadblocks of Increased Editorial Burdens and Untimely Reporting.

Even with all of their promise, if recent-developments notes were discarded by law reviews because of the students' increasing editorial burdens and the perceived irrelevance of student notes, recent-developments notes will not return unless their practicality and relevance are improved. Their production must not add significantly to the already burdened law review staff, and they must be published quickly so as to be useful to scholars and practitioners. To implement a requirement that students write brief recent-developments notes and that these notes be published before students move on to editing and possibly authoring longer articles, many law reviews must change expectations of membership and must streamline the editing process and re-imagine the publication process to build efficiencies.

The added editorial burdens on the law review are not insignificant, but some organizational strategies may make the burden lighter. First, a careful monitoring of reputable blogs may aid the selection of topics for recent-developments notes.[124] Even with the most streamlined editing process, blog posts and even newsletter updates will almost always beat

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[120] Chief Justice John Roberts, Annual Fourth Circuit Court of Appeals Conference (June 25, 2011), *available at* http://www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/.

[121] For a summary, see Richard Brust, *The High Bench vs. The Ivory Tower*, A.B.A. J., Feb. 2012.

[122] *Compare* Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 682–84 (1998) (showing a forty-seven percent drop from 1975 to 1996 in the number of citations by the United States Supreme Court, lower federal and state courts), *with* Whit D. Pierce & Anne E. Reuben, *The Law Review Is Dead; Long Live the Law Review: A Closer Look at the Declining Judicial Citation of Legal Scholarship*, 45 WAKE FOREST L. REV. 1185, 1196–97 (2010) (arguing that judges prefer to cite law reviews and journals in areas of unsettled law, of which there are fewer).

[123] *See* Brust, *supra*, note 121. In a recent interview, Chief Judge Harry T. Edwards of the Court of Appeals for the District of Columbia Circuit complained that, while academics are writing for tenure, "[w]e have to deal with real problems that have to be decided." *Id.*

[124] The search for an appropriate topic is not new. *See* Vignarajah, *supra* note 17, at 25 (noting that early law review editors searching for appropriate subject for student writing complained either "that they had no choices because all of arguments had been scooped up by their forebears or that the soil in a field was too fertile to harvest any topics narrow enough to study").

recent-developments notes to the public. Editors should routinely review these resources to find cases that have not already been adequately analyzed. Blogs, instead of competing with student-authored recent-developments notes, may improve them by bringing significant decisions to students' attention and by guiding their early thinking.[125]

Second, law reviews should put recent-developments notes through an integrated editing process, where the author and one assigned, experienced editor communicate continually from the conception of the piece to completion, aiming for a final copy in two well-planned drafts.[126] This idea was first mentioned in a 1975 article by Richard Friedman, who lamented the "tortuous procedure" of assigning, writing, and editing student scholarship.[127] He claimed that the multiple steps of drafting and editing resembled not "the wisdom of the decades," but "the movement of a glacier, slow and aimless."[128] With an inefficient system, he claimed that the repeated edits were damaging: "The repeated ripping up and reconstruction of pieces is about as efficient as Penelope's knitting system, with this exception: awaiting Ulysses's return, she was *trying* to get nothing done."[129] This is, of course, a risk of requiring an intensive experience in writing with feedback and several drafts before a student can advance to more sophisticated scholarship.

When the editing of the recent-developments notes is assigned to a smaller review group—the author and an assigned editor, with an additional editor giving a final review—notes will likely be completed at different times. Law reviews could add student-authored recent-developments notes to their online offerings (which are too often just electronic versions of the paper issues), or they may mail them electronically to subscribers on a rolling basis as soon as they are accepted, without having to wait for an issue's worth of material.[130] This is the irony in the argument that improved dissemination techniques should push out recent-developments notes: The ability to publish scholarship quickly makes this a perfect time to resurrect the recent-developments note and make it a timely resource for readers.

V. CONCLUSION

The recent-developments note is a historical, foundational piece of student scholarship, and it should be reintroduced into the writing requirements of law reviews. Doing so will improve more sophisticated student scholarship, will make students better editors of faculty-authored

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[125] *See* Ciolli, *supra* note 81, at 213.
[126] *See* Friedman, *supra* note 117, at 50.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *See* Rier, *supra* note 111, at 212.

scholarship, and will meaningfully add to primary-source scholarship. And the current dissemination techniques that offer quick, open access to articles posted on law review websites make this time ripe for the reintroduction of this short, focused, and timely scholarship. With this modest step, law reviews will "[r]ededicate [themselves] to the essential work that law students did before anyone conceived of the Internet."[131]

[131] *See* Althouse, *supra* note 14, at 13.