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## Volume VII

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## Volume VII

*Patrick T. Clendenen\**

I agree with Bryan A. Garner that the “ideal law review” does not exist.<sup>1</sup> Indeed, as Student Editor-in-Chief of Volume VII, I can say that the journal we inherited and left for our successors fell short of the ideal. Because, however, *The Journal of Contemporary Health Law and Policy* was relatively new not only to the field but also to our own law school, we faced both challenges and opportunities that more institutionalized journals did not. Unlike Congress and other well-funded law reviews, for example, we did (and do not) have permanent staff to tell us what to do and when (or how) to do it. And, if there was institutional knowledge, it was contained in a mass of the *Journal's* disorganized, student-generated files and the then-existing, occasional memoranda, directives, and musings of its faculty editors.

These facts, which may shock periodical editors in other fields, are not unfamiliar to law journals nationwide. Indeed, the first meeting of the Student Editorial Board for Volume VII was unremarkable as law journals go: the transition was marked by a bunch of intelligent but fledgling law students crammed into a small room in Leahy Hall with nothing more than our Bluebooks,<sup>2</sup> one computer, and our youth and enthusiasm. As such, we embarked upon the longest and most rewarding year of law school.

At that time, the Board had difficulty containing its enthusiasm at being “elevated” to the status of editors of scholarly works (or, as cynically described, the output of “professional purveyors of pretentious poppy-

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\* Associate, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; A.B., 1988, Colby College; J.D., 1991, The Catholic University of America; 1991, Student Editor-in-Chief, Volume VII, *The Journal of Contemporary Health Law and Policy*; 1991-1993, Law Clerk to the Honorable Ellen Bree Burns, United States District Court for the District of Connecticut.

1. BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 332 (1987) (“The ideal law review is one that is designed not only to be referred to, but actually (and here comes the revolutionary proposal) to be read.” (quoting James C. Raymond, *Editing Law Reviews: Some Practical Suggestions and a Moderately Revolutionary Proposal*, 12 PEPP. L. REV. 371, 378-79 (1985))).

2. THE BLUEBOOK, *A UNIFORM SYSTEM OF CITATION* (15th ed. 1992).

cock")<sup>3</sup> that presumably would be read by important decisionmakers primarily in the field of Bioethics, Law, and Medicine. However, we were not, as Fred Rodell characterized us, the smug "super-students who do the editorial or dirty work [with] the knowledge that [we would] get even better jobs"<sup>4</sup> because we assembled with goals other than self-aggrandizement professionally or among our law student peers. Nonetheless, with little or no collective professional experience in the fields of editing or publishing, much less a review of *Robert's Rules of Order*,<sup>5</sup> I wondered openly about my task of overseeing thirty-plus staff members and nine editors. We were undoubtedly fledgling though because we knew neither precisely how much work was involved in producing a journal, as opposed merely to checking and copying sources, nor much about the gargantuan field of law which we now encountered.

Erwin N. Griswold was, however, correct when he said of the mother of all law reviews, *The Harvard Law Review*, that "[t]he zeal and zest of youth, continuing year by year, have undoubtedly brought benefits to the *Review* far exceeding any loss that may have come from inexperience."<sup>6</sup> Thankfully, however, the student editors and staff of Volume VII were not adrift in the field of Health Law and Policy with nothing but their youthful enthusiasm.

Like myself as a law student and staff member, few on campus recognized Faculty Editor-in-Chief (and Professor) George P. Smith's unflagging determination to publish a first-rate, international legal journal that addressed the issues of the day in Health Law and Policy. Professor Smith (along with the temperate and exacting professional influence of The Reverend Raymond C. O'Brien) not only deserves almost exclusive congratulations for soliciting lead articles from authorities in the field from around the Globe<sup>7</sup> but also deserves some credit for shaping the

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3. Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 286 (1962).

4. *Id.* at 285.

5. GEN. HENRY M. ROBERT, *ROBERT'S RULES OF ORDER* (rev. ed. 1970).

6. Erwin N. Griswold, *Introduction to Essays Commemorating the One Hundredth Anniversary of the Harvard Law Review*, 100 HARV. L. REV. 728, 728 (1987).

7. A survey of the articles published in the *Journal* since 1991 reveals a veritable *Who's Who?* of authors in the field of Health Law and Policy. See, e.g., Margaret A. Somerville, *The Song of Death: The Lyrics of Euthanasia*, 9 J. CONTEMP. HEALTH L. & POL'Y 1 (1993); Russell Scott, *The Terrible Imbalance: Human Organs and Tissues for Therapy—A Review of Demand and Supply*, 9 J. CONTEMP. HEALTH L. & POL'Y 139 (1993); Dieter Giesen, *Vindicating the Patient's Rights: A Comparative Perspective*, 9 J. CONTEMP. HEALTH L. & POL'Y 273 (1993); Daniel Callahan, *What is a Reasonable Demand on Health Care Resources? Designing a Basic Package of Benefits*, 8 J. CONTEMP. HEALTH L. & POL'Y 1 (1992); Norman L. Cantor, *Prospective Autonomy: On the Limits of Shaping*

topicality of student writing with his continuous flow of newsprint, cases, and articles of import to the student editors. I recall his badgering the Board and Staff to prepare a comprehensive "topics list," so that *Journal* members would not only write and publish but also be read.<sup>8</sup>

I recall as well Professor Smith's wealth of knowledge about the field in which the *Journal* published and his access to those who had the requisite expertise, and that too proved invaluable in examining manuscripts submitted or solicited for publication. Indeed, the faculty input and professional editorial assistance and Professor Smith's broad orchestration of the *Journal* year-by-year reduced the incidence of student editors' "neophytic judgment"<sup>9</sup> to a minimum. The *Journal's* organization and structure was, however, both historically and unfortunately the subject of subtle and ongoing derision because it implicitly (and incorrectly) suggested either student incompetence or the *Journal's* irregularity, or both. When there "is a move afoot toward the establishment of faculty-edited law reviews" to bring about "much-needed reform,"<sup>10</sup> that derision was neither enlightened nor justified.

Since, however, the nuts-and-bolts of the *Journal's* publication, where the "chaotic complexity"<sup>11</sup> of text and footnotes are, line-by-line, citation-by-citation, and source-by-source, "checked, rechecked, and polished to a fine gloss,"<sup>12</sup> were left to the student editors and staff, we set about the business of correcting the two things wrong with most legal writing: "One is its style. The other is its content."<sup>13</sup>

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*One's Postcompetence Medical Fate*, 8 J. CONTEMP. HEALTH L. & POL'Y 13 (1992); Bernard M. Dickens, *Living Tissue and Organ Donors and Property Law: More on Moore*, 8 J. CONTEMP. HEALTH L. & POL'Y 73 (1992); John C. Fletcher, *Abortion Politics, Science, and Research Ethics: Take Down the Wall of Separation*, 8 J. CONTEMP. HEALTH L. & POL'Y 95 (1992); Josephine Y. King, *No Fault Compensation for Medical Injuries*, 8 J. CONTEMP. HEALTH L. & POL'Y 227 (1992); George J. Annas, *Mengele's Birthmark: The Nuremberg Code in United States Courts*, 7 J. CONTEMP. HEALTH L. & POL'Y 17 (1991).

8. See, e.g., *State v. Cauthron*, 846 P.2d 502, 506, n.5 (Wash. 1993) (en banc) (citing John C. Dougherty, Comment, *Beyond People v. Castro: A New Standard of Admissibility for DNA Fingerprinting*, 7 J. CONTEMP. HEALTH L. & POL'Y 269 (1991)).

9. Erik M. Jensen, *The Law Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL EDUC. 383, 383 (1989).

10. GARNER, *supra* note 1, at 332.

11. Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 918 (1961).

12. Jensen, *supra* note 9, at 383.

13. Rodell, *supra* note 3, at 279; see RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 3 (1979) (stating that legal writing is "(1) wordy, (2) unclear, (3) pompous, and (4) dull." (quoting DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 24 (1963)); Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1349-51 (1986) (listing 18 "of the anti-lessons that our heavily student-influenced legal culture enforces"); Gibson, *supra*

In this endeavor, I saw editors rereading *The Elements of Style*,<sup>14</sup> and many of us used the *Texas Law Review Manual on Style*<sup>15</sup> in an attempt “to dispel the canard that law reviews do not care about good writing or the proper use of language.”<sup>16</sup> To those works and a good dictionary and thesaurus, I would add Bryan A. Garner’s *A Dictionary of Modern Legal Usage*<sup>17</sup> and *The Elements of Legal Style*<sup>18</sup> and Richard C. Wydick’s *Plain English for Lawyers*.<sup>19</sup> I have used them all frequently (with varying degrees of success) since leaving the hallowed, albeit diminutive, office of the *Journal*.

For our task of citation verification, the *Journal*, in its pursuit of the law review’s “un-American . . . obsession with uniformity,”<sup>20</sup> relied on the Bluebook despite all of its apparent deficiencies<sup>21</sup> and despite the touted allure of the Maroonbook.<sup>22</sup> To reduce the shocking, initial complexity of the Bluebook, however, the *Journal* has annually attempted to distill the rules generally and those most pertinent to our areas of inquiry in one looseleaf handbook, with the caveat that the staff and editors were responsible for full compliance with the Bluebook. In addition, because it has been the *Journal*’s longstanding policy to copy and verify the page of each citation appearing in its pages, the Board of Volume VII added to that handbook a comprehensive list of local libraries, phone numbers, and hours to assist the staff members, who at times no doubt thought they were tracking down dodos rather than citations.

The genesis of the Staff’s time-consuming quest for sources to verify, Bluebooking, and editing came from the minds of a few senior editors

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note 11, at 915 (“To the literary man, the language of the law is likely to seem abstract, cumbersome, and remote from life, though alarmingly powerful over the actions of human beings.”).

14. WILLIAM STRUNK, JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* (3d ed. 1979).

15. TEXAS LAW REVIEW, *MANUAL ON STYLE* (7th ed. 1992).

16. Charles A. Wright, *Foreword to TEXAS LAW REVIEW, MANUAL ON STYLE* xv (7th ed. 1992).

17. GARNER, *supra* note 1.

18. BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* (1991).

19. WYDICK, *supra* note 13.

20. Posner, *supra* note 13, at 1349.

21. See, e.g., *id.* (“The Bluebook creates an atmosphere of formality and redundancy in which the drab, Latinate, plethoric, euphemistic style of law reviews and judicial opinions flourishes.”).

22. See THE UNIVERSITY OF CHICAGO MANUAL OF LEGAL CITATION (1989). Compare Posner, *supra* note 13, at 1351-52 (1986) and Douglas Laycock, *The Maroonbook v. The Bluebook: A Comparative Review*, 1 SCRIBES J. LEGAL WRITING 181, 183-86 (1990) with Bryan A. Garner, *An Uninformed System of Citation: The Maroonbook Blues*, 1 SCRIBES J. LEGAL WRITING 191, 192-95 (1990).

who sought to develop editorial processes that both uncovered problems in an article early and yielded fewer errors as the volume took shape, especially since our printer charged more for each edit as the volume neared completion, and since the *Journal* was chronically underfunded. I also believed strongly in involving senior editors, who had many other administrative responsibilities, in the sometimes mundane (but always essential) process of editing and Bluebooking.<sup>23</sup> The result, crudely yet simply split into, and graphically depicted in our handbook as, the Red Ink and Blue Ink stages, required senior editors to do substantial work on an article before it went to the Staff and then again after it had been edited, but before it was finally sent to the printer. When we received the page proofs from the printer, the article entered a similar, yet abbreviated, process again.

In one instance, when we were behind our publication schedule, the Board agreed to citecheck an article on its own, reliving the sometimes agonizing search for authorities to verify and copy, which, as editors, we thought was behind us. Although the Board's process bent and the Board and Staff's collective efforts yielded meritorious results and an operating surplus at the end of the fiscal year, we probably botched a few scattered citations here and there. The process, during most times, however, provided for us "the peace of mind that comes from thoroughgoing care."<sup>24</sup>

If I learned anything during my year as Student Editor-in-Chief, I learned that legal editing requires not only a mastery of the Bluebook and style (to the extent that is possible) but also an awareness of the authors and the audience, coupled with a healthy sense of humor.<sup>25</sup> For example, in editing one piece by a Roman Catholic nurse that included citations to the Holy Bible without any particular version (and there are, even for Roman Catholics, many),<sup>26</sup> I received the draft of red ink and corrections on my desk with references curiously supplied in the foot-

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23. For example, the lead articles editor, the managing editor, the note and comment editors, and I edited and Bluebooked each article in his or her area at least five times.

24. GARNER, *supra* note 18, at 209.

25. For a humorous diversion on, among other things, the law, legal writing, and law reviews, see DANIEL R. WHITE, *THE STILL OFFICIAL LAWYER'S HANDBOOK* 51-56, 171-76 (1991).

26. E.g., *The Holy Bible* (Douay-Rheims Version); *The Living Bible* (Catholic ed.); *The New Oxford Annotated Bible* (Revised Standard Version); see K.D. Whitehead, *The Catechism in English: The Art (or Artifice?) of Translation*, FELLOWSHIP CATHOLIC SCHOLARS, Dec. 1993, at 24, 28 (describing the New Revised Standard Version "an ideologic adaptation").

notes to the King James version! Needless to say, those references were promptly corrected before the author received the page proofs.

Similarly, with our editorial pens poised to impart upon our limited reading public the "sensitive and wise and gracious handling of language,"<sup>27</sup> the Board needed only to tinker with the lead articles of Volume VII, saving the wholesale revisions for the student pieces. With the risk of offending authors informing the Board's discretion, I can say that no lead author objected to the not insubstantial editorial and stylistic machinations of Volume VII. Indeed, one of the joys and rewards of our work was receiving the appreciation of authors, both student and professional.

Finally, while my own attempt at legal scholarship<sup>28</sup> unquestionably recognized that footnotes "are necessary and useful in scholarly writing,"<sup>29</sup> I concomitantly failed to recognize the (presumed) audience's need for a balance of footnotes and text, which is "disturbed when footnotes begin creeping up from the bottom of the page in a way that threatens the territory normally reserved for the text itself."<sup>30</sup> Were it not for the *Journal's* unique annual publication schedule, which, because of its limited budget, requires student authors who also happen to be editors to serve as such simultaneously, I could, as an author, have shared the blame with the editors. The *Journal's* unique annual publication schedule also created pitfalls for notes, including mine, which can (and often do) become stale from the time they are drafted to the time they go to print. For example, my note was in press and a few weeks to print when the Supreme Court reversed the circuit court decision I criticized.<sup>31</sup> (The Court apparently did not need my help.) If funding becomes (or has become) more abundant, it is high time for the *Journal* to publish semi-annually.

As editors for a relatively new journal, the Board of Volume VII also attempted with some success to improve its subscription base and increase its benefactors and exposure. After a year of sending cover letters and complimentary copies of Volume VI (and any volume we could get our hands on when they ran out) to schools, organizations, and others, we

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27. Gibson, *supra* note 11, at 930.

28. Patrick T. Clendenen, Note, *International Union, UAW v. Johnson Controls, Inc.: Fetal Protection and Title VII Revisited*, 7 J. CONTEMP. HEALTH L. & POL'Y 367 (1991).

29. See Raymond, *supra* note 1, at 376; see also GARNER, *supra* note 18, at 91 ("outlawing footnotes would oppress the responsible users").

30. Raymond, *supra* note 1, at 376; see Clendenen, *supra* note 28, at 377, 383-86, 388-97.

31. *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

succeeded in generating over sixty new subscribers and raising almost three thousand dollars, an amount which was then close to a third of our annual budget. As for its exposure, the *Journal* had been on WESTLAW for about a year, but LEXIS for some reason was a tough nut to crack. After receiving several appeals, briefs, memoranda, declarations, and courtesy copies from me, my predecessors, and successors, LEXIS finally gave in recently; it was no doubt tired of us. In 1991 BIOSIS, another indexing service, added the *Journal* to its rolls. Finally, although the University of Chicago's Maroonbook had the foresight to include the *Journal* among its list of "Recommended Abbreviations of Periodicals"<sup>32</sup> in 1989, the Bluebook was still oblivious to our existence. In 1991, however, a new edition was in the works, and, after completing an application (accompanied by yet another courtesy copy), the *Journal* entered the established world of law reviews,<sup>33</sup> and our own separate listing meant that the *Journal* was either "commonly cited or difficult to abbreviate."<sup>34</sup> We hoped that the former (but somehow knew that the latter) was true.

Despite our limited successes, the Board of Volume VII was occasionally frustrated by the historical dearth of lead article submissions from our own law school faculty, a situation that I truly hope will change promptly. Because of the then relative scarcity of annual unsolicited pieces, budding scholars on the Law School's faculty would no doubt have been well-received. Instead of fretting about the situation, however, the Board of Volume VII managed successfully on its own to solicit two articles, one of which was published in an area into which the *Journal* had not previously ventured.<sup>35</sup> Scouring the American Bar Association's seminar brochures can therefore with luck yield results for our readers.

At the end of the year and before graduation, the Board modestly accomplished its goals and published on time. In the process, the editors, by admirably working to perfect our submissions and by temporarily foregoing other personal and professional opportunities and rewards, became better lawyers and individuals. At the very least, the Board of Volume VII created a lasting reminder of the longest and most rewarding year of law school and served the University in a concrete and significant way.

At a time when law schools face "conspiracy" theories because of their

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32. THE UNIVERSITY OF CHICAGO MANUAL OF LEGAL CITATION 50 (1989).

33. A UNIFORM SYSTEM OF CITATION, *supra* note 2, at 284.

34. *Id.* at 276.

35. Michael G. Vita et al., *Economic Analysis in Health Care Antitrust*, 7 J. CONTEMP. HEALTH L. & POL'Y 73 (1991).

perceived, collective failure to educate students for the profession,<sup>36</sup> the *Journal* provides an imperfect, yet laudable, vehicle for students to better their legal writing and research skills in a professional manner.<sup>37</sup> Although I did not know it during my tenure (or at least until I attended the National Conference of Law Reviews in Detroit, Michigan), however, the law review generally has been a much-maligned metaphor for the state-of-the-art in legal writing and theory.<sup>38</sup> While this criticism is no doubt shared with the establishment of legal scholars,<sup>39</sup> future editorial

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36. See, e.g., Daniel B. Kennedy, *Fire and Brimstone: Legal Educators React to "Conspiracy Theory" Leveled at Them*, A.B.A. J., Dec. 1993, at 96 (discussing the present day concerns "about the quality of practical legal training" provided in the nation's law schools); see also John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343, 343 (1989) ("Most law faculty would not willingly slacken their scholarly efforts to satisfy demands for more emphasis on education for professional competence.") (footnote omitted); Dougals Laycock, *Why the First-Year Legal-Writing Course Cannot Do Much About Bad Legal Writing*, 1 SCRIBES J. LEGAL WRITING 83, 85 (1990) ("Any serious effort to improve our students' writing must go in the second or third year."); Christopher Simoni, *The Practicing Writer*, 1 SCRIBES J. LEGAL WRITING 167, 167 (1990) (book review) ("Responding to complaints by influential alumni that recent graduates cannot write, many law schools have strengthened the first-year legal-writing programs . . ."); Steven Stark, *Why Judges Have Nothing to Tell Lawyers About Writing*, 1 SCRIBES J. LEGAL WRITING 25, 30 (1990) (criticizing the law schools' emphasis on the case method of teaching because "opinions are hardly the best diet for the lawyer to be").

37. Jordan H. Liebman & James P. White, *How the Student-Edited Law Reviews Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 388 (1989) ("Law school faculty members, legal employers, the American Bar Association, and student law review participants—both current and alumni—agree that law review experience is valuable training for the practice of law.") (footnote omitted).

38. See Rodell, *supra* note 3, at 280 ("The average law review writer is peculiarly able to say nothing with an air of great importance."); *Id.* at 281 ("Then there is this business of footnotes, the flaunted Phi Beta Kappa keys of legal writing, and the pet peeve of everyone who has ever read a law review piece for any other reason than he was too lazy to look up his own cases."); see also Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 319 (1989) ("Prominent law reviews are increasingly dedicated to abstract, theoretical subjects, to federal constitutional law, and to federal law generally, and less and less to practice and professional issues, and to the grist of state court dockets."); Liebman & White, *supra* note 37, at 397 ("Critics are correct that virtually no one reads issues of generalist law reviews as they do news magazines or even trade publications.") (footnote omitted); John E. Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 323 (1985) ("The law review style has seriously hurt the modest role of descriptive scholarship in the legal system.").

39. See, e.g., Roger C. Cramton, *The Next Century: The Challenges: A Panel Discussion*, 73 CORNELL L. REV. 1275, 1277 (1988) ("Much that is currently fashionable in legal scholarship seems like pushing smoke into bottles, interminably and at great length."); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 927 (1990) ("But for every pure scholar we have a dozen-and-a-half of the innocent ersatz, for every diamond a heap of rhinestones."); Peter H. Schuck, *Why*

boards should be aware of the institutional strengths and weaknesses of law reviews generally and of those specific to the *Journal*. From that bench mark, each year the *Journal* can and will grow into its mission, described poignantly by Professor Smith, avoid inheriting and perpetuating its "traditions without examining them,"<sup>40</sup> and continue to be a responsible and readable member of the community of legal periodicals.

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*Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 336 (1989) ("[M]ost lawyers and judges find many of our articles irrelevant to their needs and are far too busy to read them anyway.").

40. Raymond, *supra* note 1, at 378.

