

## FOREWORD

### IN PRAISE OF LAW BOOKS AND LAW REVIEWS (AND JARGON-FILLED ACADEMIC WRITING)

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*Many people, including many lawyers and judges, disparage law reviews and the books that sometimes result from them on the ground that they often deal with abstruse topics, of little interest to the bar, and are sometimes full of jargon, including excessively academic and impenetrable writing. Some of the objections are warranted, but at their best, law books and law reviews show a high level of rigor, discipline, and care; they have a kind of internal morality. What might seem to be jargon is often a product of specialization, similar to what is observed in other fields (such as economics, psychology, and philosophy). Much academic writing in law is not intended for the bar, at least not in the short-term, but that is not a problem. Such writing is meant to add to the stock of knowledge. If it succeeds, it can have significant long-term effects, potentially affecting what everyone takes to be “common sense.”*

#### INTRODUCTION

When I served in the federal government during the first term of the Obama administration, some of my colleagues who had recently been academics wondered, with something like despair, how they could ever return to academic life. They asked: “After this, what could possibly be the point of going back to write academic articles?” When I asked them to elaborate, one of them sent me this quotation from Theodore Roosevelt:

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.<sup>1</sup>

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1. Theodore Roosevelt, *Citizenship in a Republic* (Apr. 23, 1910), <http://www.theodore-roosevelt.com/images/research/speeches/maninthearena.pdf> [<http://perma.cc/NC5V-SA5K>].

It is a powerful passage, and it can easily be enlisted against those who write law books or for law reviews. Wherever they are, academics are not in the arena. Their faces are never marred by dust, sweat, or blood. (If so, they are in the wrong profession.) They do not really know either victory or defeat. (Having an article accepted or rejected doesn't really count, nor does a citation or two from the Supreme Court.) Few people may read what they write, no matter how much they obsess over the title, abstract, or concluding paragraphs.

In their academic books and essays, professors and students spend a lot of time pointing out, sometimes with sadness, sometimes with outrage, "where the doer of deeds could have done them better." In one sense, they may know the triumph of high achievement (their work might be superb), but insofar as they write academic books and law review articles, they cannot be said to "strive to do the deeds." Writing an abstract, or finishing footnotes, are deeds—but hardly "the deeds."

As one of my White House colleagues asked another, who announced that he would return to the university after just one year of public service: "So you're going to go back, and do your . . . 'studies'?"

But there is a countervailing argument, and it comes from John Maynard Keynes:

[T]he ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist.<sup>2</sup>

Keynes's claim seems to one-up Theodore Roosevelt's. It's the ultimate revenge of the nerds. Those "men in the arena"? They're slaves of the theorists. Those who do the deeds? They're marching to the beat of someone else's drum. The drummer, it turns out, is an economist or political philosopher (or perhaps an academic lawyer). In the end, it's the critic who counts. From the sidelines, he calls the tune.

Maybe Keynes is right. But his argument is not only unbecomingly self-serving; it is also very far from self-evidently correct. Is he really claiming that ideas rule the world? Keynes himself had a lot of extraordinarily influential ideas, and so in his own case, that claim has a degree of truth. But are practical men—Theodore Roosevelt, Ronald Reagan, Barack Obama—really best seen as slaves of defunct economists? And if so, are lawyers and judges slaves of defunct law professors? And what does "defunct" mean, exactly? Might today's lawyers and judges be acting under the influence of theorists whose ideas are outmoded? Are they marching to the beat of academic drummers from the 1950s and 1960s? Do books and law review articles create the music to which the legal profession is marching—even if most lawyers never read those books and articles?

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2. JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* 383 (1936).

In my view, Keynes wrote far too confidently about the role of intellectual influences. Practical people might well be operating in accordance not with theory but with some version of “common sense,”<sup>3</sup> perhaps traceable to intellectuals and theorists, but more likely a product of the intensely pragmatic judgments of colleagues, friends and family members, and (maybe above all) relevant cultural influences: religious organizations, labor unions, public interest groups, political parties, and movies and television too. Common sense emerges from the interactions of numerous people, extending over time, and it creates the relevant music.

But Keynes certainly had a point. Common sense can be affected by academic influences, and teachers certainly matter. In constitutional law, for example, originalism might be seen either as a terrible betrayal of common sense or instead as the thing itself. And while purely political considerations surely matter (has an originalist been appointed to the Supreme Court<sup>4</sup>), academic work can help determine whether originalism is taken to fall in one category or the other. In public policy, it might seem self-evidently true that significant increases in the minimum wage would increase unemployment, or self-evidently true that they would not. Academic work helps determine which view counts as common sense.

Do law books enslave practical men? Do law reviews? If academics have the opportunity to serve in the White House, should they return to academic life not with despair and a little shame, but with enthusiasm and energy?

## I. SEVEN BOOKS

Here is a random (and admittedly personal) list of seven of the best law books from recent years: *Living Originalism*, by Jack Balkin;<sup>5</sup> *The Constitution of Risk*, by Adrian Vermeule;<sup>6</sup> *Creating the Administrative Constitution*, by Jerry Mashaw;<sup>7</sup> *Fairness Versus Welfare*, by Louis Kaplow and Steven Shavell;<sup>8</sup> *Retaking Rationality*, by Richard Revesz and Michael Livermore;<sup>9</sup> *The Failed Promise of Originalism*, by Frank Cross;<sup>10</sup> and *Well-Being and Fair*

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3. For the best discussion of “common sense,” see DUNCAN J. WATTS, *EVERYTHING IS OBVIOUS: ONCE YOU KNOW THE ANSWER* (2011).

4. In terms of the academic appeal of originalism, the appointment of Justice Antonin Scalia had extraordinary importance. If President Reagan had appointed another conservative, not committed to that method, the remarkable outpouring of academic work on originalism would not have occurred.

5. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

6. ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* (2014).

7. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

8. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

9. RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008).

10. FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2013).

*Distribution*, by Matthew Adler.<sup>11</sup> Anyone who reads these books is going to learn a lot—about constitutional law, about history, about economics, about judicial behavior, about philosophy.

It's a diverse group. But nearly all of them—and depending on how you count, perhaps every one—grew out of one or more law review articles. For example, *Living Originalism* develops an argument Balkin made in a series of academic essays.<sup>12</sup> Mashaw's book can be seen as a compilation of superb and provocative historical essays, all published in the *Yale Law Journal*.<sup>13</sup> Kaplow and Shavell first ventured their central argument in the pages of a law review.<sup>14</sup> There is nothing odd here. It is far from unusual—in fact, it seems to be standard—for law professors to publish books that draw heavily from earlier publications in law reviews. To be sure, some law books are written from scratch, but many of them expand on, or do little more than compile, claims that were originally made or developed in academic journals.

In my view, all of these books are terrific, and the same is true of the articles that preceded them. As we shall see, that claim has implications for Theodore Roosevelt's views and for all those who disparage academic work. But the books and articles certainly display “legal writing,” which many people do not admire. In his famous essay, *Goodbye to Law Reviews*, Fred Rodell wrote:

There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground. And though it is in the law reviews that the most highly regarded legal literature—and I by no means except those fancy rationalizations of legal action called judicial opinions—is regularly embalmed, it is in the law reviews that a pennyworth of content is most frequently concealed beneath a pound of so-called style. The average law review writer is peculiarly able to say nothing with an air of great importance. When I used to read law reviews, I used constantly to be reminded of an elephant trying to swat a fly.<sup>15</sup>

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11. MATTHEW D. ADLER, *WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS* (2012).

12. See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007).

13. See, e.g., Jerry L. Mashaw, *Administration and “The Democracy”*: *Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568 (2008); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362 (2010); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006).

14. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001).

15. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

Speaking of the singer Alicia Keyes, Bob Dylan once said, “There’s nothing about that girl I don’t like.”<sup>16</sup> There’s (almost) nothing I like about Rodell’s article. Rodell makes some excellent points, of course, but he is smug, and he sneers, and he’s full of contempt for both his students and his colleagues. Contempt is not the best thing to be full of, and in this case, it’s unjustified. He disparages something that has real value.

Rodell wasn’t opposed to the academic enterprise as such, but his article has at least a faint whiff of anti-intellectualism. Some modern critics of legal scholarship offer a bit more than a whiff. Justice Breyer was a distinguished academic, and he is unusually learned, but he complains: “[T]here is evidence that law review articles have left terra firma to soar into outer space. Will the busy practitioner or judge want to read, in February’s *Harvard Law Review*, ‘The Paradox of Extra-legal Activism: Critical Legal Consciousness and Transformative Politics?’”<sup>17</sup> Is it fair to ask whether that essay was written for the busy practitioner or judge? Or consider the words of Chief Justice Roberts:

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, 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.<sup>18</sup>

If you pick of a copy of any law review you see, I doubt you’ll find a discussion of that topic,<sup>19</sup> but is it fair to ask whether and to what extent “help to the bar” is the appropriate criterion for legal scholarship?

Justices Breyer and Roberts are speaking of the choice of topic, but there is a pervasive concern about academic writing itself. Revisiting his argument in 1962, Rodell emphasized that concern above all:

I now put the finger on style, not substance, as the greater evil. . . . Without a style that conceals all content and mangles all meaning, or lack of same, beneath impressive-sounding but unintelligible gibberish, most of the junk that reaches print in the law reviews and such scholarly journals could never get itself published anywhere—not even there. . . . I doubt that there are so many as a dozen professors of law in this whole country who could write an article about law, much less about anything else, and sell it, substantially as written, to a magazine of general circulation.<sup>20</sup>

16. Jonathan Lethem, *The Genius and Modern Times of Bob Dylan*, ROLLING STONE (Sept. 7, 2006), <http://www.rollingstone.com/music/news/the-genius-and-modern-times-of-bob-dylan-20060907> [http://perma.cc/BAP2-85ZC].

17. Stephen G. Breyer, *Response of Justice Stephen G. Breyer*, 64 N.Y.U. ANN. SURV. AM. L. 33, 33 (2008).

18. Kenneth Jost, *Roberts’ Ill-Informed Attack on Legal Scholarship*, JOST ON JUST. (July 19, 2011, 10:56 AM), <http://jostonjustice.blogspot.com/2011/07/roberts-ill-informed-attack-on-legal.html> [http://perma.cc/26CR-FC4K] (quoting the Chief Justice’s remarks at a judicial conference).

19. *But see* Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria*, 18 GREEN BAG 2D 251 (2015) (finding no such influence).

20. Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 287–88 (1962).

I confess that I have written many law review articles, and a number of law books, and also for magazines of general circulation, and there is no question that Rodell is right. Academic work could rarely be “sold” to such magazines. But what conclusion should we draw from that? The *Yale Law Journal* and the *Michigan Law Review* do not have the same audience as *Time*, the *Atlantic*, or the *New York Review of Books*. The great essays of Daniel Kahneman and Amos Tversky<sup>21</sup> could not be published in general-interest magazines, and that is not an objection to Kahneman and Tversky. The same is true of most of the great law review articles, such as Calabresi and Melamed’s exploration of property rules and liability rules<sup>22</sup> and Kaplow’s analysis of rules and standards.<sup>23</sup> So what?

For the record, those papers do not mangle “all meaning, or lack of same, beneath impressive-sounding but unintelligible gibberish,” and while Rodell has a fair point about the clumsiness of academic writing in law, most law review articles are not really subject to that objection. But they are written for a specialized audience, and that’s fine. For the most part, essays in general-interest magazines could not be published in law reviews or as parts of academic books, and one reason is a lack of sufficient rigor (a point to which I will return). In some ways, blogs are the modern equivalent of the magazines of Rodell’s time, and even when law professors write blog posts, they are usually too glib, cheap, conclusory, and superficial to be published in law reviews. That’s not an objection to blogs; they have a distinct audience of their own.<sup>24</sup> But for law reviews and law books, general-interest outlets are hardly the gold standard.

Attesting to their origins, each of the seven books I have mentioned is written in at least some version of the law review style that Rodell deplores. There are numerous footnotes. There is a fair bit of technical jargon. The authors don’t make a lot of jokes. They aren’t writing for nonspecialists. True, and importantly, none of them is swatting a fly. They are after some big game (which is part of what Rodell originally wanted, after all<sup>25</sup>). But are they useful to lawyers and judges?<sup>26</sup> Would the busy practitioner want to read them? Are they of much help to the bar?

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21. Two of these can be found as appendices to DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

22. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

23. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

24. The world’s best, by the way, is the superb *Marginal Revolution*, and while it is written mostly by economists Tyler Cowen and Alexander Tabarrok, it does deal, on occasion, with law. See Tyler Cowen & Alexander Tabarrok, *MARGINAL REVOLUTION*, <http://marginalrevolution.com> [<http://perma.cc/G6GU-SF4N>].

25. See Rodell, *supra* note 15, at 38, 42–43.

26. See Harry T. Edwards, *Another Look at Professor Rodell’s Goodbye to Law Reviews*, 100 VA. L. REV. 1483 (2014).

The short answer, I think, is “no,” but the longer and better one is more complicated, and it varies from book to book. Of the seven, *Retaking Rationality*<sup>27</sup> is the most squarely directed at actual practice. Focused on federal regulation, Revesz and Livermore offer a series of claims that bear directly on what federal regulators should do. Many of those regulators are lawyers. During my time in government, I did not have a lot of law books in my office, but *Retaking Rationality* was there, and I certainly consulted it. While it does not have much to say about legal doctrine as such, some of its arguments are directly relevant to the practice of administrative law. For example, courts review agency action for arbitrariness, and the authors’ arguments about cost-benefit analysis might well be invoked in imaginable legal controversies. I cannot quite say that this excellent book is indispensable reading for the bar, but administrative lawyers, and judges who deal with regulatory controversies, would do well to know what Revesz and Livermore have to say.

A parenthetical note: lawyers, law professors, and judges sometimes act as if “law” is what judges do, and suggest that law reviews and law books should be about “law,” so understood. But what judges do is, of course, just a small fraction of “law,” which comes from administrative agencies and Congress (!) as well.

Of the seven books, Adler’s *Well-Being and Fair Distribution*<sup>28</sup> is the most abstract and theoretical, and it would not engage many members of the legal profession. On the contrary, it would baffle and frustrate them. For those who believe that law professors have lost their way because they fail to engage with legal practice, Adler’s book might be taken as a decisive exhibit. I doubt that Chief Justice Roberts would be particularly enthusiastic about it. Consider this sentence, chosen at random: “More specifically, a prioritarian SWF with a fairly modest degree of inequality aversion would say that we should be indifferent between increasing the well-being of an individual at level  $U$  by small amount  $\Delta u/K$ , and increasing the well-being of an individual at level  $KU$  by amount  $\Delta u$ .”<sup>29</sup>

Most lawyers would struggle to understand that sentence, and would puzzle over its relevance. And yet Adler’s book is a truly exceptional contribution to legal (as well as political) theory. It tells us a great deal about the moral standing of cost-benefit analysis—about its foundations and its limitations. True, it would take a great deal of further work to see how Adler’s arguments might be applied; but the foundational analysis is a major contribution, whether or not “the bar” is helped by it. (I also had Adler’s book in my government office.)

In their outstanding book, Kaplow and Shavell cover related territory, and some of their arguments bear more directly not only on regulatory questions, but also on the common law.<sup>30</sup> What they say is relevant to the

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27. REVESZ & LIVERMORE, *supra* note 9.

28. ADLER, *supra* note 11.

29. *Id.* at 9.

30. KAPLOW & SHAVELL, *supra* note 8.

work of legislators, regulators, and judges. Nonetheless, its analysis is directed mostly at other academics. Many members of the bar would find the book difficult, and perhaps they would think that it has only marginal (or less) relevance to their work. In that respect, it can be placed in a broad category with other work of keen interest to law professors, including that of Kahneman and Tversky<sup>31</sup> and of philosophers such as John Rawls,<sup>32</sup> though Kaplow and Shavell do engage law at multiple points in their analysis.

To the extent that articles and books do not speak to the concerns of the bar, is there a problem?<sup>33</sup> What kind of problem? If you work in the arena, you will not be enthusiastic about law review articles or law books from which you cannot benefit or learn, or with which you might struggle. Abstraction is unlikely to be welcome, and new or unfamiliar terms (“prioritarianism”) might well seem off-putting. Rodell and those who agree with him are right to emphasize the value of work that does speak to the bar, and that illuminates the problems with which the bar engages. Justice Breyer and Chief Justice Roberts are right to call for work with those qualities.<sup>34</sup> But work can be valuable even if it does not have them. Papers in the *American Economic Review*, *Judgment and Decision Making*, and the *Quarterly Journal of Economics* do not often speak directly to CEOs, or to anyone whose job it is to run a business, but we would not disparage such papers for that reason. They have immense value.

A skeptic would fairly ask: What kind of value?<sup>35</sup> If we are speaking in instrumental terms, the answer might well depend, of course, on the long run. Keynes himself seemed to have a good sense of intergenerational dynamics.<sup>36</sup> Some academic work might be written partly for current students, who are forming their views, and who will have great influence in coming decades. Or it might be addressed to other people who lack influence now but will have it, soon or eventually. From Kaplow and Shavell, for example, readers might learn that the pursuit of “fairness,” in many areas of law, reduces social welfare, and that there is little that can be said on its behalf. (I am bracketing the question whether this argument is convincing.) They might also learn that if the goal is redistribution, the tax system is a far better instrument than other legal rules, such as tort law or occupational

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31. See *supra* note 21 and accompanying text.

32. See JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

33. A superb discussion and typology can be found in Martha Minow, *Archetypal Legal Scholarship: A Field Guide*, 63 J. LEGAL EDUC. 65 (2013).

34. See *supra* notes 17–18 and accompanying text.

35. For the author, the answer might be clear: the writing is fun. See Richard Thaler’s wise thought: “I think of fun as the ultimate hedge. If you enjoy what you are doing, you establish a pretty good floor on how life turns out. In contrast, if you suffer through every stage of the process, can becoming rich or famous really be worth it?” Richard H. Thaler, University of Chicago Graduate School of Business Convocation Address (June 15, 2003), <http://www.chicagobooth.edu/pdf/thalergrad.pdf> [<http://perma.cc/3EJG-7VMF>]. Fun aside, excellence and its pursuit might be their own rewards, at least for authors—and for reasons sketched in the text, they are also likely to have long-term value.

36. I am grateful to Adrian Vermeule for pressing this point.



safety and health law. (I am bracketing as well the question whether this argument is convincing.) As a matter of law and policy, that is an exceptionally important claim, even if it is spelled out in a way that might be hard going for busy practitioners.

From Vermeule,<sup>37</sup> academics might learn that a precautionary approach to the protection of free speech, building in a margin of safety, has serious downsides, which judges must take into account. (That claim has particular relevance in the context of recruitment for terrorism.) Vermeule argues for “optimizing constitutionalism,” as opposed to simple precautionary thinking.<sup>38</sup> That argument has strong implications for many contemporary questions in constitutional law. If Kaplow, Shavell, and Vermeule are right, their various insights do not merely add to knowledge; they have concrete lessons for practice.

Eventually, they might well have real impacts on those in the arena. Maybe not. But you never know.

## II. COSTS, BENEFITS, AND THE ARENA

These points hardly demonstrate that Rodell was wrong in every respect, or that there is nothing to be said for the many people who endorse some version of his argument.<sup>39</sup> Here is an effort at a general accounting.

1. *Costs.* It is true that law books and law reviews are often written with far too much formality, and also with too little wit. Adler’s book is difficult because he deals with issues that (in my view) require a degree of jargon and formality, but some legal writing is unnecessarily clogged. On this count, Rodell overstated the problem, but he was more right than wrong. Both law professors and law students would do well to read George Orwell’s *Politics and the English Language*,<sup>40</sup> which offers valuable guidance that is systematically violated by authors of law book and law review prose. Part of the problem lies with editors, who often discourage any kind of creativity with respect to style or format. They sometimes have rigid “conventions” that do not make much sense. Many editors also spend far too much time

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37. VERMEULE, *supra* note 6.

38. *Id.* at 52–87.

39. See Edwards, *supra* note 26.

40. GEORGE ORWELL, *POLITICS AND THE ENGLISH LANGUAGE* (1946), *reprinted in* 4 *THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL* 127 (Sonia Orwell & Ian Angus eds., 1968). In my first year as a law professor, Richard Posner, having read my very first article, and not being enthusiastic about my writing, told me to read Orwell. All thanks to him. See also these comments from the novelist Jennifer Pashley: “I’d much rather sling philosophy in everyday, minimalist language over beers in a shitty bar than bury it somewhere in high art. Because it’s always there, I just prefer it in plain speak. I don’t think big ideas should be limited to certain types of art; I’m a big fan of accessibility.” Molly O’Donnell, *3 Questions with Author Jennifer Pashley*, ARTSVEGAS (Nov. 5, 2014), <http://www.artsvegas.com/culture/3-questions-with-author-jennifer-pashley/> [<http://perma.cc/GW8Z-V273>].

Note, however, that there are several ways to write well, and some of them violate Orwell’s claims on behalf of the plain style. Henry James was a great writer, and so was James Joyce, and neither wrote in accordance with Orwell’s prescriptions.

on something called “line-editing,” which means that they rewrite the author’s prose—sometimes without making it better, sometimes making it worse, and usually just making it sound like the editor’s style, rather than the author’s.

Academic writing can be vulnerable to what Jon Elster calls “hard” and (especially) “soft” obscurantism.<sup>41</sup> Hard obscurantism involves formal or mathematical work that can be exceptionally impressive, but that does not illuminate anything about reality; it is a kind of display. It is rare in student-edited law reviews, but whenever economists bring formal models to bear on legal problems, hard obscurantism is a real risk. Soft obscurantism involves complex, sometimes impenetrable abstractions and theories, which do not adhere to the proper standards for argument in the social sciences. Functional explanations—easy to find in Marxism, postmodernism, and psychoanalysis, and also in Foucault—are examples. Law reviews generally avoid soft obscurantism, but “critical” work can include forms of it. And whenever large abstractions (such as “democracy” and especially “legitimacy”) do more work than they should, a form of soft obscurantism is at work.

It is also sad but true that most academic law books and law review articles, including student notes, have very few readers, and hence very little impact, even when they are excellent. I have singled out seven superb books, but I doubt the sales figures are impressive, and the numbers of readers is undoubtedly smaller than the number of purchasers. To be sure, a book or article with few readers might have a large impact. If a reader is the President of the United States, or the decisive vote on the Supreme Court, it might really matter. But let’s be realistic: that is unlikely in the extreme.

Most academic books in law and law review articles can be seen as a form of exercise—or a marathon—in which the ultimate product is a bit like a work of art: it might be beautiful, but it will not attract much of an audience. Many superb books and articles fall in this category. (Many years ago, a highly distinguished professor told me, “We write for our friends.”) And it must be said that on this count, book reviews are at particular risk. The *Michigan Law Review*’s annual book review issue is justly famous, and many law professors make it a habit to have a look. But it’s not unfair to wonder just how many of the reviews end up getting large numbers of careful readers. Is excellent work its own reward? That’s not a bad question, and it doesn’t have an obvious answer.

2. *Benefits.* For all that, there are countervailing factors, and they are considerable. First and foremost is the commitment to rigor, care, discipline, fairness, and sheer quality—and to avoidance of the narrowly ideological, and to mischaracterizing holdings or other people’s arguments. For law books and law reviews, a kind of fairness is frequently the coin of the realm. Academic work aspires to avoid arguments that are glib, sloppy, circular, or narrowly ideological. It also requires both development of and sympathetic

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41. See JON ELSTER, *EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 452–453 (rev. ed. 2015).

engagement with competing points of view, rather than easy or rapid dismissals. Counterarguments are strongly encouraged, even mandatory. There is a kind of *internal morality* to the genre,<sup>42</sup> one that is connected with and helps account for some of its rigidity. The morality involves respect for the integrity of the process of argument, which entails respect for a wide range of arguers as well.

Here is another way to put the point. Wayne Booth, the great literary critic, wrote of the “implied author”—the character or persona behind the text, who may or may not be similar to the actual author.<sup>43</sup> For all their diversity, law books and law review articles have broadly similar implied authors, who are usually careful, formal, earnest, diligent, serious, and fair-minded. They are rarely playful, funny, silly, joyful, angry, tricky, or outraged. There are exceptions, of course, but that is the general pattern. And while the usual implied authors of books and law review articles may not be people you’d like to go out drinking with, you know that you can probably trust them.

Rodell seemed to hold up general-interest magazines as the standard,<sup>44</sup> but rigor is not exactly their stock-in-trade. It should be unnecessary to say that the arguments that can be found there are often attention-grabbing, glib, result-oriented, appealing to the home team, and careless (and a little ridiculous). As for people, so too for genres: their vices are a product of their virtues. What Rodell deplored as unnecessary formality, and a kind of incomprehensibility, is the dark side of the effort to avoid superficiality and glibness. Notably, some contemporary law professors seem strongly drawn to more popular outlets, producing blog posts or online columns<sup>45</sup> where significant numbers of readers might be found, and where publication is essentially immediate. But a great deal is lost by writing of this kind, which tends not to be rigorous, and which does not really develop an argument or add to the stock of human knowledge.

Some academics, including some law professors, seem to have abandoned—to some extent or altogether—academic books and journals in favor of popular outlets. Rodell might have applauded. But I do not think there is any reason for applause. I wish that some of the immensely talented academics who write so much for popular outlets would reallocate some of their time in the direction of academic work.

Law books and reviews also show an intense concern for structure: Why is this part here, rather than there? Does the argument flow? Is there undue repetition? Is there an internal logic? To be sure, the insistence on footnotes

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42. I focus here on law reviews, but the genre can be understood to include academic journals of many different kinds.

43. See WAYNE C. BOOTH, *THE RHETORIC OF FICTION* (2d ed. 1983).

44. See *supra* note 20 and accompanying text.

45. See, e.g., *The Volokh Conspiracy*, WASH. POST, <https://www.washingtonpost.com/news/volokh-conspiracy/> [https://perma.cc/L275-7GTU].

and authorities (including the dreaded “pincites”) is excessive and sometimes absurd, but it also has great value, because it reduces the risk of sloppiness. In my own experience, the call for footnotes, and the insistence on checking them carefully, almost always produces greater clarity, and it almost always uncovers some errors. Law books that emerge from law articles are in crucial respects far better than they would otherwise be, precisely because of this attention to detail.

3. *Back to the arena.* Some critics of law reviews, including federal judges, focus on fair questions: What am I, personally, getting from all this? What do lawyers get? Judges? Chief Justice Roberts seems to think: essentially nothing. Maybe he’s right. But consider the books to which I have drawn attention here.

Cross’s empirical work raises serious doubts about the view that originalism can eliminate the role of political convictions from judicial decisionmaking.<sup>46</sup> A defender of originalism should be aware of his findings, because they provide reason to question a core argument on behalf of originalism, which is that it greatly reduces judicial discretion and the role of the ideology of the judges. (I do not claim that originalism stands defeated by Cross’s findings; it doesn’t.) Mashaw contends that something like open-ended administrative discretion has been with us from the beginning, and he raises real doubts about the view that the Constitution does not allow Congress to confer such discretion on executive agencies.<sup>47</sup> That argument is made carefully but not in the form of a brief, and it is not immediately adaptable for judicial use. But it bears directly on a range of contemporary controversies, which raise questions about the constitutional status of administrative agencies.<sup>48</sup>

Balkin offers a powerful picture of the American constitutional tradition, one that calls for fidelity to the original meaning of the text, but that understands it in a distinct way, and that also emphasizes the role of social movements.<sup>49</sup> In Balkin’s carefully elaborated view, judges must respect the original meaning, but they also engage in “construction,” which operates within the constraints of that meaning.<sup>50</sup> The Roberts Court, as it might be called, seems to attest to the power of Balkin’s analysis. Mightn’t members of the Roberts Court, and those who are interested in it, benefit from knowing that?<sup>51</sup>

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46. See CROSS, *supra* note 10.

47. See MASHAW, *supra* note 7.

48. See Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2016 SUP. CT. REV. (forthcoming 2016), <http://ssrn.com/abstract=2631873> [<http://perma.cc/2FKT-AUJ6>].

49. See BALKIN, *supra* note 5.

50. *Id.*

51. Minow, *supra* note 33, makes some valuable distinctions that bear on the answer to that question.

## CONCLUSION

It is not clear what, exactly, Rodell wanted law reviews to do, but many lawyers and judges seek more help in doing their jobs. There's room for that, of course.<sup>52</sup> For example, a law book or law review article could give the legal profession a sense of the context of some recent enactment, explain the source of ambiguities, and armed with that information, explore how the ambiguities should be resolved. It might show that there is a conflict in the circuits on some point and explain why the Supreme Court should endorse a particular view. It might demonstrate that according to the original understanding, the First Amendment did, or did not, protect commercial advertising, or that the Equal Protection Clause did, or did not, forbid affirmative action. It might show that an important regulation, challenged as arbitrary, does in fact rest on a sound empirical foundation.<sup>53</sup>

But far from discussing “the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria,”<sup>54</sup> contemporary law reviews, and at least some of the academic books that build on them, do every one of those things. Perhaps they should do more.<sup>55</sup> But whatever they do, they often display great care and rigor, in a way that makes op-eds, blog posts, and essays in general-interest magazines look like pretty thin gruel—mere bumper stickers, a kind of wind, even when written by law professors. Whether or not they are anyone's slaves, those in the arena have good reason to celebrate the law reviews, and the books that come from them.

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52. See *id.*; Edwards, *supra* note 26.

53. See Christine Jolls, *Debiasing Through Law and the First Amendment*, 67 STAN. L. REV. 1411 (2015).

54. But see Kerr, *supra* note 19.

55. See Edwards, *supra* note 26.