A Legal Lexicographer Looks at Law Reviews*

Bryan A. Garner

*Footnote. A few weeks after I accepted the assignment to give this speech, a couple of the outgoing editors called my office to inquire about whether it would be adequately sourced. I responded that I always try to source everything I say – just as a matter of everyday life. "Nevertheless," they sternly admonished, "the incoming board members would appreciate your throwing in a few footnotes." So here's the first of many. I aim to please.

End of footnote.

Footnote to the footnote. As some of you may know, I constantly preach against footnotes – except for citational footnotes. Apparently the editors got wind of this after our first phone call, and they called back. They asked whether I could make my footnotes substantive, and preferably equal in length to the text of the speech. The incoming editorial board, they said, was somewhat touchy about this issue. Believing that I might otherwise lose the opportunity to give this speech, I've acquiesced. At first I experimented with making my voice a little smaller while delivering the footnotes, but it made me too self-conscious – and at once raspy and squeaky. So

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Bryan Garner is the President of LawProse, Inc., and Distinguished Research Professor of Law at Southern Methodist University. *This is the text of a speech he recently gave at a law-review banquet.*

I'm going to use the same size voice pretty much throughout. I ask you to cooperate with me and just try to keep a mental note whether I'm in text or footnote as I proceed.

End of footnote.

West Publishing Company asked me to become editor in chief of *Black's Law Dictionary* in 1994 – almost immediately after my noncompetition agreement with Oxford University Press expired. That agreement had prohibited me from authoring a law dictionary from 1990 to 1994. I stipulated to West that I'd want full editorial freedom to rewrite the big reference book from beginning to end. Would I want to add words? the West representatives asked. Yes. Like what? Thousands, I said. Like *law review*. How could we omit *law review*? Or *law school*, with its subentry *accredited law school*, followed by *Law School Admissions Test*.

So one of my first additions to *Black's* was *law review*. The full entry in the 9th edition of 2009 – the third unabridged edition that I've prepared – reads as follows:

> **law review.** (1845) **1.** A journal containing scholarly articles, essays, and other commentary on legal topics by professors, judges, law students, and practitioners. ● Law reviews are usu. published at law schools and edited by law students <law reviews are often grossly overburdened with substantive footnotes>. **2.** The law-student staff and editorial board of such a journal <she made law review>. — Abbr. L. Rev. — Also termed *law journal*.

The terms *law review* and *law journal* are not exactly coterminous. Only sense 1 of *law review* applies to *law journal*. You can't say "I made law journal," but you can say, "I made law review."

Not that other law students who can't say that will love you for it. They typically wear t-shirts around school – t-shirts that proclaim, "Make love, not law review."

They seem to equate law review with waging war. Meanwhile, the message on those t-shirts isn't lost on those who do make law review. They become envious. They see these shirts and secretly wonder whether the rest of their classmates, unlike themselves, lead

lives of great sexual fulfillment. As if to say, "Oh dear, I made law review. *That's* what's wrong with my sex life."

But let's space out these daydream epiphanies and return to the cold shower of lexicography. My editions of *Black's Law Dictionary* don't contain an entry for *law reviewese*. When those editions were prepared, it was not yet well-enough documented. I coined the term *law reviewese* in my 1987 book *A Dictionary of Modern Legal Usage*. I can't put a term into *Black's* just because I – or anyone else – invented it. It must meet the general criteria for inclusion, meaning that the phrase must first gain acceptance and widespread use in legal literature.

Footnote: That's not entirely true. On one occasion I bowed to a lobbying effort. Second Circuit Judge Jon O. Newman called to my attention his neologism (or newly coined term) *gastonette* shortly after minting it in 1988. I wrote back saying that a single use by a single judge, or even many uses by a single judge, would not warrant a word's inclusion in *Black's Law Dictionary*. So the redoubtable Judge Newman undertook a personal campaign, as I understand it, to persuade his Second Circuit colleagues to use the word *gastonette* in print. A few did so over the next 20 years, and so I finally acquiesced and included the term in the 9th edition – having resisted in the 7th and again in the 8th, even though I added thousands of entries to each of those editions. I'm glad I relented because I think *gastonette* is one of the more charming entries in the 9th edition. I give a full disclosure of its origins in the entry, which reads in full:

> **gastonette.** (1988) A dilatory "dance" in which each of the two responsible parties waits until the other party acts — so that the delay seems interminable; esp., a standoff occurring when two courts simultaneously hear related claims arising from the same bases and delay acting while each court waits for the other to act first. ● The term was coined by Judge Jon O. Newman in *In re McLean Industries, Inc.*, 857 F.2d 88, 90 (2d Cir. 1988), on the model of "After you, my dear Alphonse." "No, after you, Gaston."

I think you'd agree that *gastonette* is more euphonious – has a

more dulcet sound – than *alphonsonette* or *alphonsette*. Now the word is in *Black's* forever.

Footnote within footnote. And it may well serve as a sort of *Mountweazel* or *ghost word*, which is a deliberately fictitious entry in a reference work inserted as a copyright trap. The term *Mountweazel* derives from a fake entry in the *New Columbia Encyclopedia* of 1975, which contained a bio for the fictitious Lillian Virginia Mountweazel.

Footnote within footnote within footnote. Ms. Mountweazel was reported to have been born in Bangs, Ohio, in 1942 and to have died in an explosion in 1973 while on a photography assignment for *Combustibles* magazine. So from bangs to boom. Her best known book, which never appeared, was *Flags Up!*: a collection of photographs of rural American mailboxes. Now this part is true: Wikipedia reports that Mountweazel was the subject of a museum exhibition in Dublin – presumably Dublin, Ohio, not Dublin, Ireland – in March 2009.

End of subsubfootnote.

It's easier to demonstrate copyright infringement if a fake entry is copied alongside other material. Hence the editors of the *New Oxford American Dictionary* listed the mountweazel *esquivalience*, supposedly meaning "the willful avoidance of one's official responsibilities." Anyone copying this would be guilty of what the nonword supposedly means.

In any event, some future lexicographer, probably producing an online knockoff of *Black's*, will incorporate *gastonette* into his work. We'll know that he was copying from *Black's*. You'll know it, I'll know it, and the American people will know it – dictionaries being such a frenzied national pastime.

There's at least one person who won't resent this plagiarism at all: Judge Jon O. Newman of the Second Circuit, who might just print it out, frame it, and hang it right beside his framed copy of page 750 of the 9th edition of *Black's Law Dictionary*.

End of all footnotes hereinabove announced.

Now where were we? Ah, *law reviewese*. Like other terms ending with the *-ese* suffix, it denotes a disease of language or writing, à la *legalese*, *bureaucratese*, *journalese*, *Johnsonese*, *businessese* (also known as

commercialese), etc. I may well include *law reviewese* in the 10th edition of *Black's*. Google Books reveals that I was indeed the first to use it, but it records many different authors having used it since, mostly without any attribution to me. This shows that the term has gained currency.

My entry for "Law Reviewese" in the Oxford usage dictionary – newly renamed by the publisher in its 2011 third edition and now called *Garner's Dictionary of Legal Usage* – is pretty harsh. I may, as a lexicographer, have been in a foul mood when I reached only the halfway point, in the middle of the L's on page 522. "Law Reviewese" is an essay entry that falls between two other challenging essay entries – "Latinisms" (followed by *laughing heir* and *laundry list*) and "Lawyers, Derogatory Names for" (which details the history and usage of such undignified terms as *ambulance chaser*, *dumptruck*, *flycatcher*, *horse lawyer*, *jackleg lawyer*, *jungle fighter*, *land shark*, *lawmonger*, *mob mouthpiece*, *pettifogger*, *shyster*, *soreback lawyer*, and *white-powder lawyer* – this last denoting "a lawyer who represents cocaine dealers"). There are dozens of other terms catalogued there, believe it or not.

In that same entry – "Lawyers, Derogatory Names for" – there is a part B: "Prejudicial Names for Other Forms of Life." There I say, "Sometimes people and things are referred to as lawyers, usually for the purpose of making the reference derogatory." Three examples: *lake lawyer*, *sea lawyer*, and *lawyer*. The term *lake lawyer* is a 19th-century Americanism referring to either of two fishes, the bow-fin and the burbot, because of their "ferocious looks and voracious habits." The term *sea lawyer*, meanwhile, is a 19th-century term denoting the *tiger shark*. (So *land shark* answers to *sea lawyer* or *lake lawyer*.) Finally, the term *lawyer* itself was hijacked by 19th-century slangy ornithologists to denote a bird – the black-legged stilt – which was called lawyer, get this, because of its long bill.

The entry for "Lawyers, Derogatory Names for," goes on for three full pages in *Garner's Dictionary of Legal Usage* or *GDLU*, as my LawProse colleagues and I affectionately refer to it. As you can see, speakers of English have certainly had their fun with the legal profession. It's rather like the non-law-review students with their ubiquitous t-shirts.

End of footnote. I'm not sure where it began.

All this is by way of saying, as I reconstruct it, that I could not have been in the finest mood, halfway through writing my 1000-page usage dictionary, when I penned the entry for "Law Reviewese." In fact, this whole speech, up to this point, has been a dilatory one – an elaborate attempt to delay confessing to you what the entry says. But now the time has come.

First, though, it seems only appropriate at this point to say that many law-review articles are rather like this speech. They contain more material in footnotes that they do in the text.

Which brings us, at long last, to the *GDLU* entry for "Law Reviewese." No more footnotes here – for a moment. The entry, beautifully typeset by Oxford University Press, reads as follows:

> **Law Reviewese** is the stilted, often jargonistic writing style characteristically found in law reviews. Judge Richard A. Posner, an accomplished stylist who has written in many law reviews, bemoans "the drab, Latinate, plethoric, euphemistic style of law reviews." Posner, *Goodbye to the Bluebook*, 53 U. Chi. L. Rev. 1343, 1349 (1986). Unless the author is a famous one whose prose the editors dare not tamper with, the edited and published writing usually takes on an "official" law-review style that is lacking in personality or individual idiom, overburdened with abstract phraseology, bottom-heavy with footnotes, humorless, and generally unobservant of good grammar and diction. The punctuation is often abysmal. These faults are perhaps ineradicable, at least in the U.S., since law students are called upon to be professional editors when not one in fifty has a background suitable to the task. Nevertheless, the industry and thought that go into publishing a law review are good training, however inconsequential the product is.
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> "The ideal law review," writes James C. Raymond in an iconoclastic essay,
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> > is one that is designed not only to be referred to, but actually (and here comes the revolutionary proposal) to be read. Its articles are selected not on the basis of the number of footnotes they contain, but on the basis of the timeliness of the topic and the soundness of the scholarship.

> They may have no footnotes or dozens of them—all that are necessary to satisfy the curiosity of intelligent readers who are particularly interested in the topic, but no more.
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> In the ideal review, articles are also selected, or even solicited, at least partly on the basis of how well their authors can write. Ideal editors are prepared to instruct their assistants and even their contributors on the elements of good writing. They refuse to publish anything that they consider dull, and they have the courage to demand a revision of anything they cannot understand. They know from their own reading that the best legal writers are always more than crabbed logicians of the law. They are capable of clarity without any compromise in precision, and, when the occasion warrants, of eloquence no less memorable than Cicero's.
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> James C. Raymond, *Editing Law Reviews*, 12 Pepp. L. Rev. 371, 378–79 (1985).

The fact is that law reviews can be of quite some consequence. When Justice Scalia and I started work on our treatise about legal interpretation four years ago, we first scoured the vast literature on the subject. Understandably he said he'd leave the law reviews to me. That meant that I had to peruse – that word, as any good usage dictionary will tell you, means "to read carefully," not "to skim" – I had to peruse some 1,500 articles on hermeneutics. Although some were incomprehensible garbage, and you had to wonder how they ever got printed, many were extremely informative and useful. In our 600-page treatise *Reading Law: The Interpretation of Legal Texts*, Justice Scalia and I ended up citing more than a thousand law-review articles – sometimes positively.

But thank goodness that dizzying wealth of literature was out there. You see, I'm not aligned with those who pooh-pooh legal theory by saying that most law reviews should publish almost exclusively articles of immediate interest to the local bar. Let the theoreticians publish, for goodness' sake. The late Ronald Dworkin established a huge reputation by publishing law-review articles – including one in *Texas Law Review* when I was on the editorial board in the 1980s – calling the wise judge "Hercules"

and claiming that Hercules, by which he meant ideal judges everywhere, should interpret statutes not according to their words but according to the judges' own personal aspirations for the law. People actually take this stuff seriously. I know I did – once upon a time.

I'm glad that we can laugh at ourselves. That's why, for the last several years, I've compiled "The Top Ten Grammatical Gaffes in Law Reviews" for the preceding year. It's published annually in *The Green Bag Almanac*, an indispensable publication, and usually in the ABA's *Student Lawyer* as well. It's quite some fun catching a top-ten law review repeatedly printing the word *irregardless* or mistaking pronouns by misusing *he* for *him*, *her* for *she*, and *whom* for *who*.

Every year, I think that my parade of grammatical horribles is impishly scandalous, and I await the reactions of those whose grammatical scandals have been publicly exposed – page one on "Above the Law," as I think it should be – and nothing ever happens. I never hear about it. And *irregardless* was printed several years in a row by the same top-ten law review. So we're all having fun, and no one feels scandalized as the language gets vandalized.

I'll conclude with suggested reforms. What would make for better law reviews? I'll give my top three:

(1) Any serious law review should adopt a strict word-limit on articles. Law professors are notorious bloviators: however taciturn we may be in person, when we start writing we turn loquacious. The current record for verbosity is held by a 500-page article analyzing one section of the Securities Exchange Act of 1934 – one section only of that statute. The article contains 4,284 footnotes. That's 8 or 9 footnotes per page and about 350,000 words. It sounds like an obscure book that he couldn't otherwise get published.

Footnote. By comparison, this speech contains 2,989 words, or less than 1% of the record-holder.

End of footnote.

Harvard Law Review now prefers articles under 25,000 words – about 50 printed pages – and will not publish anything beyond

35,000 words (except in extraordinary circumstances – they give themselves wiggle room with that exception). *Virginia Law Review* prefers articles under 20,000 words and will not exceed 30,000 (again, except under exceptional circumstances).

By contrast, *The Green Bag* – in my opinion the best law review in the country, and a faculty-edited one at that – has a strict 5,000-word limit, with an equally strict 50-footnote limit. If you haven't read *The Green Bag*, try it. Founded and edited by Professor Ross Davies of George Mason School of Law, *The Green Bag* has as its main criterion that each piece must be riveting. Now that's an unusual law review.

I'd like to see all law reviews adopt a strict 25,000-word limit, including footnotes. Law reviews shouldn't be publishing law professors' failed book manuscripts. And they should *never*, *never* publish any piece that the student editors cannot fully comprehend in both content and structure.

To that end, any article of 50 pages or more ought to have a table of contents – so that the structure will be clear to readers. At the moment, many law reviews are publishing 200-page articles with no table of contents. The articles just meander. They're like books with no sensible structure. And by the way, a table of contents is much preferable to a "paragraph roadmap" – the bane of modern law-review writing. Can you imagine if *Sports Illustrated* followed the law-review model? "In part one of this article, I will recount highlights of the first quarter. In part two, I will draw the reader's attention to the most exciting moments of the second quarter. In part three, ..." Etc.

Footnote: While we're at it, we might also put a 20-word limit on article titles. Here's a typical 36-word title:

> The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Antifragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration

Does anyone know what that's about?

End of footnote.

(2) All editorial-board members should pass an editing test to show that they are proficient with the subtleties of English usage, not to mention punctuation and capitalization. They need usage guides that are heftier and more reliable than *The Texas Law Review Manual on Usage and Style*. Every law-review office should stock a small library of at least five usage guides by different authors.

(3) We need a resurgence of book reviews (which are all but extinct) and casenotes (which have been superseded by lawnotes). Second-year law-review students should be required to explicate a single case through close reading and analysis – in no more than 1,000 words. It's a lost art. Third-years should then write lawnotes of no more than 3,500 words.

Footnote. It's been a pleasure to be here tonight. Thank you.

End of footnote.