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Twenty-Five Years Through the Virginia Law Review (with Gun and Camera)

Robert E. Scott
Columbia Law School, rscott@law.columbia.edu

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REMARKS

TWENTY-FIVE YEARS THROUGH THE VIRGINIA LAW REVIEW (WITH GUN AND CAMERA)

Robert E. Scott[*]

IT is a great honor to be asked to offer a few remarks to such an august gathering. But I must confess to having had a certain puzzlement when the invitation to speak to the Law Review banquet first came. I asked one of my colleagues, "Why would they have asked me?" "It's obvious," he replied. "Their first three choices turned them down."

With that in mind, I asked my secretary, "What do they want me to talk about?" "The Future of Legal Education," she replied (somewhat portentously). This suggestion didn't ring quite true to me. I have been to many Law Review banquets and not once has the after-dinner speaker talked about the future of legal education. So I sought some assistance from a managing board member at a function several weeks later. "Be honest, what should I do?" Her candid reply: "Keep it short and sweet, but above all, focus on us." Well, as my colleagues will tell you, I don't do short. But I can try to do sweet. And it will certainly be about you.

After thinking about it for a while, it dawned on me that I was just the right choice for this occasion. After all, as a teacher I have encountered countless talented students over the years who went on to great success, a success propelled primarily by their participa-

* Dean and Lewis F. Powell, Jr. Professor of Law, University of Virginia. This essay is based on remarks delivered at the Virginia Law Review Annual Meeting and Banquet on February 27, 2001. The Editors would like to thank Dean Scott for his service as Dean and as a trusted advisor to the Virginia Law Review. On July 1, 2001, he will step down as Dean of the Law School.

tion on the Virginia Law Review. As Dean, I have had countless meetings with Law Review representatives over matters of grave import to the future of the Review and the Law School. And, finally, as an author, I have struggled countless times to fit my prose and my arguments into the acceptable conventions of Review editors. The truth is: No one in the world knows more about the Virginia Law Review than I do. So, I am here tonight to share with you "Twenty-five Years Through the Virginia Law Review (with Gun and Camera)."

TEACHER

Let's begin with the classroom. My claim to fame as a teacher is longevity and large classes. As a result, since I arrived at Virginia in 1974, I have taught 443 students who have served as members of the editorial or managing boards of the Virginia Law Review. To be sure, it is common to make such sweeping statements at these affairs. Typically, no one pays too much attention. But I am sensitive to my audience. So here is my cite: the yellow post-it on which I made the calculation this morning.[1]

These 443 students made indelible contributions to the Law School and have gone on to great success after graduation. They are now federal judges, one U.S. Senator and several congresspersons, the managing partners of major firms, generous donors to their alma mater and, most rewarding to me, over forty of them are law teachers at schools throughout the country. The most rewarding part of teaching such talented students is to follow with pride their subsequent accomplishments and then to be able to say, "I can remember when they were doofuses just like everyone else." Two stories make the point.

Sharply imprinted on my memory is my very first class teaching at Virginia. I was twenty-seven years old and very, very green. To my surprise I discovered, when I saw the roster for my upper-level elective in commercial law, that the entire managing board of the Law Review was enrolled. (I was quite pleased by this at first until I was told that the other commercial law class, which met at 12:00 p.m., was affectionately referred to by the students as "darkness at

[1] Yellow post-it, on file with the Virginia Law Review Association.

noon.") I was also informed that this particular group of law students were part of a truly legendary class and that their intellectual leader was the Editor-in-Chief of the Law Review, a young man named John Calvin Jeffries, Jr.

My first encounter with Mr. Jeffries was on the very first day of class. He came up to see me after I had announced in class that my policy was to assume that everyone was prepared to be called on unless they informed me before class that they were not prepared that day. "Perhaps it would be more efficient," he said, "if you assumed that I am never prepared and I'll let you know if that ever changes." Well, I was a rookie so I said, "Sure," and that pretty much set the tone.

Actually, it was a great class. The entire managing board sat in the back. They seemed to take the class seriously. They had a designated spokesman, David Boyd, an Executive Editor.[2] If the discussion ever got interesting (an occasional phenomenon even in commercial law), they would whisper among themselves and then David would raise his hand and ask the group question. But the real hero of the class was a third-year student on the Law Review, Ben Legg, who sat in the very first row.[3] Ben answered every question I posed to the class from the very first day to the very last. Ben was such a star in the class that, at the end of the semester, the class gave *him* a standing ovation. The lesson here is that Virginia Law Review members are very self-confident and also very good.

Now we fast forward to 1982. I am teaching a large first-year contracts class that, it would subsequently turn out, had the majority of the students who would comprise the managing board two years later. The intellectual leader of this class, with every bit as much self-confidence as the young Jeffries, was a young man from Annapolis, Maryland—Bill Stuntz.[4] Stuntz was a gunner in class. His hand was always in the air, and, almost invariably, he made really smart points. But not always. This day, I was teaching how parties to relational contracts can agree on the optimal joint quantity of goods to produce and sell. I used a simple graphic of a

[2] David Boyd is currently a partner with the firm of Boies, Schiller & Flexner LLP in Washington, D.C.

[3] Ben Legg is now a federal district court judge in Baltimore, Maryland.

[4] Bill Stuntz is currently a Professor of Law at the Harvard Law School and one of the nation's most respected scholars in criminal law and procedure.

marginal cost curve sloping upward and a marginal revenue curve sloping downward and intersecting it.

So here is the softball question. If the parties know these curves, I asked, at what point would they want ideally for the agent to stop selling (from Introductory Economics, you will remember, it is at the point of maximum profitability where the curves intersect). There is Stuntz with his hand in the air, waving wildly. "Yes, Mr. Stuntz." "When the lines are the farthest apart," he said proudly. I was completely nonplused. All I could do (as he would later remind me for years to come) was to say, five times over, "NO! NO! NO! NO! NO!" The revised lesson, therefore, is this: Virginia Law Review members are very good, but they are not always *that* good.

DEAN

In addition to twenty-five years of teaching members of the Virginia Law Review, I have also just concluded my tenth year of engaging the Law Review as Dean. In truth, this has been a wonderfully gratifying experience. Each year, as this year, the leaders of the Review have been pleasant, courteous, and engaging people. In form, our relationship is a bit like a Japanese dance. It is a highly structured ritual that is designed to reinforce the supreme authority of the Dean over the Law Review. But, as Paul Harvey would say, and now for the rest of the story, one that reveals the true sources of power at the Law School. What follows is a play in three acts.

Act One: The Introduction

The scene is the Dean's office in late February. The outgoing Editor-in-Chief and Articles Development Editor have made an appointment to see me. Their purpose is to introduce two new faces, the new Editor-in-Chief and Articles Development Editor.

> *Old Editor-in-Chief*: (smiling broadly) Dean, this is Mary Kahuna and Harry Allstar, the new Editor-in-Chief and Articles Development Editor.
>
> *Scott*: Your predecessors have been the best we have ever had. They set the Law Review on the path to new heights. I hope you can do the same.

Kahuna and Allstar: (looking peculiarly green and glum, nod tentatively)

Old Editor-in-Chief and Articles Development Editor: (nod, graciously)

Scott: There is just one thing. I do know something about Law Reviews. I would welcome a chance to offer advice and guidance as the year goes along.

Old Editor-in-Chief and Articles Development Editor: (smile, knowingly)

Kahuna and Allstar: (in unison) Of course, Dean. We will *always* listen carefully to you and promise to follow your advice at every turn.

(The curtain falls on the first act.)

Act Two: The Consultation.

The scene is the Dean's office, a few months later. A meeting with Kahuna and Allstar. Once again, they speak in unison.

Kahuna and Allstar: (in unison) Dean, Professor Bigshot has submitted an article to us entitled *A Fresh Look at Article I, Section 8: The Strange Case of Letters of Marque and Reprisal.* Because Bigshot is a Virginia professor, we extended him the favor of an expedited review. This means we will actually read the article sometime within the next three months. As we promised, we want your advice. What do you think of it?

Scott: In my judgment this is a very insightful and useful article. Although the topic is a bit specialized, Bigshot has written the definitive treatment on Letters of Marque and Reprisal. I believe that you should publish it. What do you two think?

Kahuna and Allstar: (in unison) Our bylaws require us never to discuss our reactions to anything with anybody.

Scott: Oh.

(The second act curtain falls.)

Act Three: The Dean Takes a Fall.

The scene is the Dean's office, several months later. Professor Bigshot enters, waving his arms wildly.

> *Bigshot*: Can you believe it! Those idiots—whom I taught in Con Law—rejected my article on Letters of Marque and Reprisal.
>
> *Scott*: No!
>
> *Bigshot*: Yes! This is the best thing written about Letters of Marque in the past 100 years. In fact, it is the only piece written about Letters of Marque in the last 100 years. What are you going do about it? You are supposed to be in charge of this zoo.
>
> *Scott*: (looking peculiarly green and glum, sighs audibly) It only looks that way. In truth, the bylaws of the Virginia Law Review specify that they are free to ignore any advice under any circumstances and at any time. There is nothing anyone can do. The bylaws are the law, and we are, after all, a school of law.

(The curtain falls to scattered applause.)

The moral of this playlet is that the bylaws and conventions of the Law Review are the supreme law of the land. Thus, the more things change, the more they stay the same, and being Dean isn't nearly as much fun as being on the managing board of the Law Review.

AUTHOR

Thus far we have established two propositions: 1) Law review members are really smart, but they are not always *that* smart, and 2) Law reviews are autonomous organizations comprised of individuals who share a distaste for authority and who are closely bound to their rules and conventions. But, of course, you can say that about a lot of folks. Indeed, law faculties are perhaps the prime exemplars of both of these propositions. Does any of this matter in the greater scheme of things? I want to argue that the answer to this question is *yes*. It does matter. It matters to the future

prospects of the Law Review and to its capacity to continue as a shining jewel in the Law School's crown.

Let me turn, then, to my final perspective: the agony and the ecstasy of writing for this (or any other) law review. Since 1975, I have authored (or co-authored) eight articles that have been published in the Virginia Law Review.[5] I don't say this out of any great sense of pride. After all, this could mean any one of three things: 1) I am old; 2) I'm too lazy and set in my ways to submit my academic work to other journals; or 3) the Virginia Law Review has over that period developed the best reputation among the nation's leading law journals for printing on schedule, for avoiding silly and intrusive edits, and for publishing first-rate academic work. Obviously, I prefer explanation number three (and I imagine you do as well). So, what follows is a short personal history of one author's experience with his favorite law review.

Much of that experience has been salutary. The editors have always treated me with respect, even when I was a junior, untenured member of the faculty; their editing suggestions, while sometimes ill-advised, have never been silly; and they have always taken *stet* for an answer. But any author quickly learns that he or she must adapt to the peculiar conventions of the Review. Some of these conventions are harmless, such as the preference for the future tense (e.g., In this Article I *will* argue) and the aversion to gerunds (e.g., *Thinking* about contracts makes me happy). Other conventions tell us something about what law reviews used to be. My favorite in this category is the parenthetical that must always follow the citation signals "see also" and "see generally," as in "See also, The Bible (various stories with religious themes ranging over

[5] See Robert E. Scott, Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process, 61 Va. L. Rev. 807 (1975); Charles J. Goetz & Robert E. Scott, Principles of Relational Contracts, 67 Va. L. Rev. 1089 (1981); Charles J. Goetz & Robert E. Scott, The Mitigation Principle: Toward a General Theory of Contractual Obligation, 69 Va. L. Rev. 967 (1983); Thomas H. Jackson & Robert E. Scott, On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain, 75 Va. L. Rev. 155 (1989); Robert E. Scott, The Politics of Article 9, 80 Va. L. Rev. 1783 (1994); Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 Va. L. Rev. 2401 (1995); Elizabeth S. Scott & Robert E. Scott, Marriage as Relational Contract, 84 Va. L. Rev. 1225 (1998) [hereinafter Scott & Scott, Marriage]; Robert E. Scott, The Limits of Behavioral Theories of Law and Social Norms, 86 Va. L. Rev. 1603 (2000).

several thousand years)." It is easy to understand the genesis of the obligatory parenthetical. It is designed for the days when law review articles were written for practicing lawyers who were writing appellate briefs and who were too lazy or too busy to read the secondary sources for themselves.

But, as we all know, those days are long gone. Today, student-edited law reviews are academic journals written for and by full-time academic lawyers. Rather than adapting to that reality, however, most reviews are stuck with a model designed for the past. For example, I am embarrassed by two little-known facts about the articles I have written for the Virginia Law Review. Those articles account for more pages (531) and more footnotes (1408) in the Virginia Law Review in the period 1975 to 2000 than were contributed by any other single person living or dead.[6] Now let me be clear. There are some good ideas in those pieces, but not 531 pages worth. There are also some worthwhile references, but not 1408 of them.

Much of this disturbing tendency to prolixity is my own fault (and that of my co-authors, Charles Goetz, Thomas Jackson, and Elizabeth Scott.) But some of it is a cautionary tale for you. Articles get longer and longer because student editors need to be taught the intellectual history of the piece each time. If not, they may reject the piece because they don't appreciate its context. So, we comply and reinvent the wheel time after time. The excessive use of footnotes is also a shared problem. Young faculty seek advice from many colleagues and then feel compelled to show that they have fully explored various extraneous, and often contradictory, avenues of analysis. But beyond that, the demand for "authority" from the Review itself has increased exponentially and for little purpose in recent years. I have taken to simply citing myself whenever a request for authority is issued by a law review. Thus, an unsupported claim I made in an earlier article is now per-

[6] I have no support whatsoever for this bald claim other than a casual search of volumes 61 through 86 of the Virginia Law Review which reveals, at least to my eye, no serious competition for my dubious achievements. [Eds.' Note: Dean Scott's claim is accurate.]

fectly adequate support for a related, and equally unsupported, claim in the current piece.[7]

One admirable adaptation in recent years has been what law review editors call an "Essay." An essay is a thirty-five to forty-five page article with around 100 footnotes (give or take twenty-five) that advances only one thesis (rather than two or three). In other words, it is an ideal law review article. The problem, of course, is that the pressure of verbosity threatens to outstrip even this useful reform. Thus, in doing my research for this talk I came upon an "Essay" in a competing journal that was sixty-four pages in the journal and contained 247 footnotes! Clearly, reversing the trend toward prolixity is going to take more fundamental and radical changes.

Is this problem important enough to worry about? I think so. One of my good friends is a founding editor of the Social Science Research Network (SSRN). As you may know, within three years they have captured the market on academic articles in draft. Virtually all legal scholars now publish their papers first with SSRN before they appear in a journal. Here is the next step in their plan to corner the market for academic articles: In the next year or so, SSRN plans to introduce peer-reviewed, on-line journals in various areas of academic specialization that will supplement their current on-line publication of all works-in-progress. Once that happens, the elite, student-edited journals are going to face serious competition from a source that will carry both academic prestige and speed of publication. The law journals that survive, in my view, will be those that have switched aggressively to shorter, high quality academic pieces that add to an ongoing scholarly debate without tedious summaries of conventional wisdom and voluminous citations.

The Virginia Law Review has been a leader of student-edited journals for more than four generations. I urge you to assume that leadership once more. Twenty-nine years ago, a young Virginia

[7] [Eds.' Note: See Scott & Scott, Marriage, supra note 5, at 1266 n.98 (citing to Robert E. Scott, Conflict and Cooperation in Long-Term Contracts, 75 Cal. L. Rev. 2005, 2012-19 (1987) (lacking citation)). See also draft of Scott & Scott, Marriage, supra note 5, at 120 (pinned to the bulletin board in the conference room of the Virginia Law Review Association) (responding to the editor's request for support with the emphatic statement "I am the authority!").]

Law Review member was doing a cite check on a particularly tedious article that had been accepted for publication. (Although there is stiff competition, this piece, which common courtesy leads me not to identify further, is probably the most boring article ever published in the Virginia Law Review.)[8] The student inserted in footnote 167 of that article the following, unmistakably subversive sentence: "If any reader has gotten this far, please call the author at (202) 935-8181." The student's clear purpose was to challenge our obedience to outmoded conventions in general and the trend toward excessively long articles and unnecessary footnotes in particular. Unhappily, as he later recounted, an Executive Editor saw the footnote in galleys and took it out. On July 1, 2001, that subversive, former Law Review member will become the next Dean of the Law School.

This is as good a time as any for the Virginia Law Review to welcome John Jeffries to his new assignment by adopting the conventions that he argued for (albeit indirectly) in 1972:

1) We will accept no article that is more than fifty pages in the Review.
2) Footnotes are required only for those claims that are susceptible to authoritative support.
3) If you want to let your reader know what has gone before in the scholarly conversation, cite the prior work, but don't summarize anything that is common knowledge to others in the scholarly community.

If you take bold action by adopting these (or similar) conventions, I predict that within five years Virginia will have the most highly regarded and prestigious student-edited journal in the world. And, more to the point, it will prove that the current members of the Virginia Law Review really are *that* smart after all.[9]

[8] Given the fact that I tell this story to illustrate the dysfunctional characteristics of an unsuccessful law review article, prudence dictates that I not identify publicly the author and the title. Interested readers can secure the citation from the Virginia Law Review and make their own judgments about the accuracy of my claim.

[9] [Eds.' Note: See supra, at Act Two ("*Kahuna and Allstar* (in unison): Our bylaws require us never to discuss our reactions to anything with anybody.").]