

Writing the Short Paper

Andrew Jensen Kerr

“It is a laborious madness and an impoverishing one, the madness of composing vast books—setting out in five hundred pages an idea that can be perfectly related orally in five minutes. The better way to go about it is to pretend that those books already exist, and offer a summary, a commentary on them.”

—Jorge Luis Borges

Introduction to *The Garden of Forking Paths* (1941)

In dialogue with: Scott Dodson, *The Short Paper*, 63 J. LEGAL EDUC. 667 (2014).

Reintroducing the Short Form

A decade has passed since Professor Vladeck suggested that the Internet might bring with it the demise of short-form law student publication.¹ The advent of the blog meant a disintermediation between writer and reader² and a disruption of the glacial publication cycle of the print law review. Law scholars need not concern themselves with only uncovering unities or discerning fault lines in the tectonic movements of case law, or waiting diligently for their next eureka moment to form. They could jot their thoughts on the ephemeral, the topical, the newsworthy. As proposed by Orin Kerr, the law professor could now become a public intellectual.³ This ambition for the universal is core to the lawyer psyche. Mark Tushnet’s jocular metaphor of the “the lawyer as astrophysicist”⁴ is meant to poke fun at our mutual sense of entitlement to opine on matters well beyond our ken or training. For example, few historians subscribe to the certainty of originalist construction.⁵

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1. Stephen I. Vladeck, *That’s So Six Months Ago: Challenges to Student Scholarship in the Age of Blogging*, 116 YALE L.J. POCKET PART 31 (2006).
2. Lawrence B. Solum, *Download It While It’s Hot: Open Access and Legal Scholarship*, 10 LEWIS & CLARK L. REV. 841, 854 (2006).
3. Orin S. Kerr, *Blogs and the Legal Academy*, 84 WASH. U. L. REV. 1127, 1131-34 (2006).
4. Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 163 (2006).
5. E.g., Joshua Stein, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J.L. & HUMAN. 359, 362 (2013) (“Historical study and originalist legal advocacy are at fundamental odds with one another when it comes to one key issue: certainty.”).

The Internet has helped break down the walls of our ivory tower. One don of academic legal writing, Eugene Volokh, commands a wide readership on his blog (the Conspiracy), now published as a *Washington Post* editorial.⁶ We can think of other high-profile legal bloggers. But this essay is not about the blog. (A survey of Tumblr might lead one to question whether the “traditional” blog has been replaced by a clickbait mosaic of GIFs, JPEGs and insular captions.) This essay concerns another genre made possible by the Internet medium—the Short Paper,⁷ specifically that published on The Online Companion. Prescient editors of these novel forums recognized the possibility of a sort of writing that fits somewhere between the immediate treatment of the blog post and the comprehensiveness of the long-form law review article.⁸ Professor Colin Miller of the University of South Carolina maintains an SSRN (SOCIAL SCIENCE RESEARCH NETWORK) database of these companions, which per his last count in 2013 totaled forty-nine *generalist* online reviews.⁹ This figure has surely grown in the past two years,¹⁰ and does not even include a number of specialty companions.¹¹

Andrew Yaphe quipped that a law review article might be defined as whatever is accepted for publication by a law review.¹² There is some truth to this tautology. Still, authorities such as Professors Volokh, Fajans, Falk and Delgado have sensed an intuition shared by many law students, academics and journal staff—that there is indeed a convention to legal scholarship, and editors expect print review submissions to conform to it. Excepting topics like legal history, or if you happen to enjoy the name-brand prestige of Professor Volokh (or his compadre Judge Kozinski),¹³ you should aim to craft a linear, claim-based paper that fills a gap in our academic literature and is somehow useful to its intended audience. In short, write something that provides a reasoned solution to a practical legal problem.

6. *E.g.*, *The Volokh Conspiracy*, THE WASH. POST, <https://www.washingtonpost.com/news/volokh-conspiracy/> (last visited Aug. 6, 2016).
7. Scott Dodson, *The Short Paper*, 63 J. LEGAL EDUC. 667 (2014).
8. *E.g.*, Matthew T. Bodie, *Thoughts on the New Era of Law Review Companion Sites*, 39 CONNTEMPLATIONS 1, 4 (2007).
9. Colin Miller, *Submission Guide for Online Law Review Supplements, Version 7.0*, SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1410093 (last visited Aug. 6, 2016).
10. *E.g.*, USF LAW REVIEW FORUM, <http://lawblog.usfca.edu/lawreview/> (last visited July 24, 2016).
11. *E.g.*, SANTA CLARA HIGH TECH. L.J. ONLINE EDITION, <http://htlj.org/category/online-edition/> (last visited Jan. 6, 2016).
12. Andrew Yaphe, *Taking Note of Notes: Student Legal Scholarship in Theory and Practice*, 62 J. LEGAL EDUC. 259, 260 (2012).
13. *E.g.*, Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit*, 103 YALE L.J. 463 (1993). *See also* Alex Kozinski & Alexander Volokh, *The Appeal*, 103 MICH. L. REV. 1391 (2005) (It runs in the family.).

Chief Justice Roberts joked (and Judge Harry Edwards¹⁴ wrote an entire article lamenting) that much of contemporary scholarship indulges a level of abstruseness and irrelevance similar to connecting Kant to early modern Bulgarian evidence law.¹⁵ Still, I wonder if many judges would readily accept the academic diagnosis of a crit theorist or postmodern (perhaps they should be careful what they wish for—does the conservative wing really want Duncan Kennedy to keep submitting amicus briefs?¹⁶). From my limited experience reading and writing legal scholarship, much of it seems pretty much, well . . . legal. Here I am trawling the *Harvard Law Review* web page, and most of the articles feel of interest to your average jurist.¹⁷ And, interestingly, the Review also publishes a sizable number of case notes (it is surely useful to situate an important new case within an evolving doctrine). So it seems that Professor Vladeck's prophecy has not been realized. Nor has Professor Lindsay Gustafson's fear—that the iconic case note might go extinct.¹⁸ I assume the Harvard case notes to be student-written (I can't think of many profs who would offer to publish something anonymously).¹⁹ Cross the Charles to the *Boston College Environmental Affairs Law Review* and it appears its online companion might be dedicated exclusively to student-authored case notes.²⁰ The short form is alive and well.

The Pith and Poetry of the Short Form

I share Professor Gustafson's sentiment that there is a unique and important skill set that comes with crafting the short form. The *student-as-lawyer* must achieve the spare, economical prose of the advocate. Locate and relay only the most essential facts; delete the unpersuasive argument; extirpate fluff. Write only what the reader needs or wants to read. Write with pith.

Some case notes might achieve this elegant, haiku-like simplicity. And they serve an important purpose, one many scholars—at least historically—might

14. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).
15. J. Harvie Wilkinson III, *A Conversation with Chief Justice Roberts*, C-SPAN (June 25, 2011), www.c-span.org/video/?300203-1/conversation-chief-justice-roberts (at approx. 30:40). See also Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in Eighteenth Century Bulgaria*, 18 THE GREEN BAG 2D 251 (2015).
16. See, e.g., Brief for Professors William Alford, William Andrews et al. as Amici Curiae Supporting Respondents, *Rumsfeld v. Forum for Acad. and Institutional Rights*, 547 U.S. 47 (2005) (No. 04-1152), 2005 WL 2367595.
17. *Issues: Volume 128*, HARV. L. REV., <http://harvardlawreview.org/issues/volume-128-issue-8/> (last visited July 24, 2016) (including publications related to the canon of constitutional avoidance, the First Amendment, environmental law and sexual assault).
18. Lindsey P. Gustafson, *Blawgs Can't Do It All: Let's Save Short, Student-Authored Scholarship*, 38 U. DAYTON L. REV. 33 (2012).
19. It has been institutional practice for student writings in the *Review* to be published anonymously. E.g., *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986).
20. BOSTON COLLEGE ENVIRONMENTAL AFFAIRS E. SUPP., <http://calr.bclawreview.org/e-supp-current-issue/> (last visited July 26, 2016).

not deign to undertake. But what excites me—and what I think is an important assignment for the *student-as-writer*—is what Scott Dodson refers to as The Short Paper, or Professor Lawrence Solum as The Idea Paper.²¹ The meditation with citation; the think piece with style. In the lexicon of the law review—the response,²² the commentary, the essay.

The Online Companion defies an exclusive definition. And I argue that this is what gives it much of its utility and charm. LRW teachers have long resisted the formalist expectations of legal writing.²³ Our epistemic community understands that an academic paper need not be 20,000 words, or 10,000 words (a more reasonable UK guideline),²⁴ but that a paper should be only as long as it needs to be to realize its own singular ambition and identity. Big ideas can still be presented in small packages.²⁵ And forcing a short-form essay into a too-long article hampered by logorrhea, circumlocution and verbosity should not impress any reader. I'm sure that many of you can relate to having the student who is stylish and concise in the reaction paper, and then submits the bloated, heavy-handed term paper when confronted with a page count. Metalanguage (“In Part I . . .”) and roadmapping can be guiding for the reader. Though how often do you also experience the student-author who tells you that he will later tell you something, and then later tells you that he already told you that thing earlier, but you are left wondering if he actually ever said anything at all? Now, that is truly *meta*.

Speaking of, a common metaphor is of the academic paper as an utterance in our ongoing, textual conversation (I'm talking to you, the future you and the past you right now). But if we share an epistemic community, then why the need for pages and pages of law review articles dedicated to doctrinal evolution and context?²⁶ We possess the same background, so why include so much description in our background section?²⁷ A relevant debate from the LRW literature is that between Professors Kristen Tiscione²⁸ and Kirsten

21. Solum, *supra* note 2 at 855.

22. *E.g.*, *Responses*, U. PA. L. REV., <https://www.pennlawreview.com/responses/> (last visited July 24, 2016).

23. Doctrinal professors have also commented on the unfortunate prolixity of law review articles. *See* James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 537 (1994) (“Most long articles would be better if they were half their length.”). *But see* Natalie C. Cotton, *The Competence of Students as Editors of Law Reviews: A Response to Judge Posner*, 154 U. PA. L. REV. 951, 967 n.49 (2006) (“[P]ractitioners and judges are generalists who need well-explained articles to help with their own analysis and research.”).

24. *See, e.g.*, *Notes for Contributors*, OXFORD J. LEGAL STUD., http://www.oxfordjournals.org/our_journals/oxjlsj/for_authors/index.html (last visited July 24, 2016) (*cited in* Dodson, *supra* note 7 at 671 n.15).

25. Dodson, *supra* note 7 at 668.

26. *Id.* at 670.

27. *Cf.* Arthur D. Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009 (1990).

28. *E.g.*, Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 J. LEGAL EDUC. 32 (2008).

Davis²⁹ on the value of the “traditional memo.” A quick summary of this fruitful discussion: It is an empirical truth that fewer firm associates are asked to produce something akin to the 1L objective memo (Tiscione). Therefore, we shouldn’t exhaust so much time teaching to this model (Tiscione). However, we should also mind the pedagogic benefits that attach to completing this formal assignment (Davis). Students develop an analytic rigor and sense of common law argument that is prerequisite to crafting the “real-life” substantive email, etc. (Davis).

I expand here on the Davis thesis. The conventional formula to the long-form paper (representative example–prescription–roadmap–context–argument–conclusion) is a useful heuristic, and helps to acculturate the foreign-trained student to our U.S. legal discourse community. Indeed, mastering this form might be prerequisite to more artful kinds of argument. But as flagged by Professor Gustafson, sociolinguistics literature also equates *formulaic writing* with *linguistic insecurity*.³⁰ By the time the third-year student graduates from law school she should be encouraged to experiment with writing conventions outside of the organizational paradigms of IRAC or problem-solution. The open texture of the short form allows for the aesthetic piece, or the non-linear argument.³¹ The Short Paper requires a dialectic or alchemy of the writer’s internal sense of structure (i.e., the golden braid of analysis and exposition; the use of references to signal one’s orientation without explicating it). Perhaps soon The Short Paper will also become a more prestige credential on the *student-as-professional’s* CV.

The Volokh articulation of a “claim”; the “thesis statement”—to me these are helpful ways to approximate the notion of the original contribution. I do enjoy the Yaphe article. But I also take issue with Yaphe’s posture toward student writing, and his channeling of the legal realists in his circular sense that scholarship is merely what is determined by other scholars (or student editors) to be scholarship. To me, what counts as scholarship is writing that is interesting, erudite and *original*. It is fabulous if one can achieve these things in a fully developed, airtight long-form article. But there should still be room for the short form that feels more like a tapestry of an argument than an arrow, or that is formed around an epiphany rather than inside a circuit split. The aphorism of the writer’s workshop is “show, don’t tell.” I hope that the Online Companion can continue to evolve as a platform for papers that adumbrate the most intriguing problems even if they lack effable solutions, rather than being reduced to yet another portal for legal writers to tell us what they’re about to tell us.

29. E.g., Kirsten K. Davis, “*The Reports of My Death Are Greatly Exaggerated*”: Reading and Writing Objective Legal Memoranda in a Mobile Computing Age, 92 OR. L. REV. 471 (2013).

30. Gustafson, *supra* note 18 at 53.

31. See, e.g., M. Alexander Pearl, *How to Be an Authentic Indian*, 5 CAL. L. REV. CIRCUIT 392 (2014) (“arguing” that the recent quality of Washington Redskins football is tarnishing the tribal “brand”).