The Law Review Article

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THE LAW REVIEW ARTICLE

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Abstract: This very short piece describes the form, structure and vexations of the law review article qua scholarly artifact. It also contains Professor Max Stein’s latest thoughts as articulated in Schlag’s recently published book, “American Absurd”.

INTRODUCTION

The most important thing at the beginning of a law review article is to excite the reader’s imagination, to evoke the hope that what comes next is truly gripping. A page-turner. Something totally out of the ordinary. Perhaps not even a law review article at all. Once this moment is reached, it must be brought gradually but firmly to an end—perhaps with the aid of a long elliptical sentence (punctuated by parenthesis) that leaves the reader stunned—wondering what has just happened as he tries to regain his wits.

There. Done.

With that out of the way, and before the reader can recover, one needs to begin the second paragraph. Here segues and transitions beckon—the reader needs to be gentled into recognizing that, as so much else in life, things are often what they appear to be; that here, as elsewhere, escape and exception are unlikely and the typescript now underway is indeed a law review article after all. At this point, the hook of the first
paragraph has to be domesticated into a manageable overarching statement that will capture the serious and sober work that is to follow in the relentless march of the various Parts. Thus, for instance, Part I. Part II. Part III.

It may be, of course, that what follows will contain a few digressions, a bit of errant humor, even a couple of gestalt shifts, but in the main, the prose to follow will be a measured display of expertise and mastery—weighted down by the accumulating gravitas of available data sets, archival references, serial bouts of case-crunching, and appeal to the normative stakes. Seriousness is in the offing. Moderation predicted.

Voila. We are only at the fifth paragraph and already expectations have been excited, subdued and dramatically lowered. Thus cowed into mid-level resignation, the reader is ready to undertake the familiar journey. With readerly expectations lowered, now is the time to capitalize on and lower the burden of argument as well. This can be done explicitly (not very good form) or through a more subtle frame-setting.

We will call this “entry-framing”—to distinguish it from other kinds of framing that will occur later in the law review article. Among other things, entry-framing allows the author to elicit certain kinds of readerly attention (and inattention) as well as readerly hopes (and anxieties). This is the law review equivalent of the trial lawyer’s opening argument. It is a question of putting certain readerly faculties and orientations on high alert, while lulling others to sleep. In the main, we will be foregrounding and backgrounding. For the committed advocate, entry-framing is the place to smuggle in the most controversial claims and to do so not in the guise of claims at all, but rather more subtly as unobserved aspects of the scene.  

University Distinguished Professor & Byron R. White Professor of Law, University of Colorado. A version of this essay was presented at the IGLP conference on

1 Reference is made here to David Foster Wallace’s incomparable description of the plane flight of the tax auditor. David Foster Wallace, The Pale King (2012).

2 Reference is here made to Kenneth Burke’s dramatistic approach and his terministic screens. Kenneth Burke, Language as Symbolic Action (1966).
Soon (I sense that the reader may be growing impatient) it will be time to close the introduction. But not yet. One more thing: We need to pose the inquiry that will organize all that is yet to come. What inquiry? It will have to be the sort of inquiry that is susceptible to a plausible resolution through law or law-like surrogates. The latter are not quite law, but take the place of law. Legal theory, for instance, is a good example of a law-surrogate. Legal theory very often presents (without ever actually saying so) as the law of laws, the norm of norms, the doctrine of the doctrine.

The important thing about stating an inquiry is that the formulation must enable a resolution to take place. The point is obvious and nearly indisputable: Law review writers never discuss that which they cannot fix. No one writes a law review article where the end line reads: “Well, in conclusion, it seems like we’re pretty much screwed.” That simply doesn’t happen. Which means—and this is important—if ever we are screwed, you won’t hear about it in a law review article. Ever.

This, if you think about it, is truly perverse.

Let’s not think about it too much. The important thing, always in a law review article, is to carry on. I will note, though, that the persistent tendency of legal thinkers to address only the problems they can resolve (or frame so as to be-able-to-resolve) does facilitate things tremendously. Why? Well, in one sense, it’s obvious. Notice that because of our rhetorical situation and our chosen profession, we professional writers of law review articles are not in a position to fix much of anything at all. We can assist, but an actual fix—that is beyond our “capacities and offices,” as Peter Goodrich might say. We don’t have the authority. Unless, of course, we are pure unreconstructed formalists—in which case, fixing the words of law on the page (or on the screen) is co-extensive with fixing the law itself.\(^3\)

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\(^3\) It is difficult to imagine any legal formalism that would not have to commit to linguistic formalism (e.g. “sentence meaning”) as a pre-condition of its validity. Linguistic formalism, however, is controversial in linguistics.
All in all, the commitment to address only those problems we can resolve renders topic selection much easier than might first appear. As with so many other things in contemporary life, the thing to do is to start at the end and reverse engineer. That is what lawyers do for their clients and what we legal academics do for our juridical utopias.

So then, what is the inquiry here? Very simply, it is an inquiry into the character of the law review article qua formal artifact. Formal as in “of form,” formal as in “formative,” and formal as in “formalism.” The basic idea is that the very form of the law review article is stylized and thus ineluctably enacts, narrows, and channels what can be said and thought. That in itself is not a terribly interesting insight. Of course it does! So do the dissertation, the picaresque novel, the comic book, and so on.

The thing that is of interest isn’t that the law review article qua artifact is constraining, channeling, enabling. The interesting thing lies in the how—how and in what ways does the law review article enact, narrow, and channel thought? That is the inquiry we will pursue here.

Begin by considering what sort of overarching structure is appropriate for a law review article. The genre furnishes the answer. Indeed, genres always furnish their own answers. That is both the virtue and vice of genres. To give an example, it is commonly said that in novels there are only two kinds of stories to tell: “A stranger comes to town” and “Someone goes on a journey.” The same is true of a law review article, except that with a law review article, it’s not much of a journey (the starting point and the end point are rarely all that far apart) and strangers—at least real strangers—virtually never come to town. And when real strangers do come to town, they are quickly sent packing and enjoined never to come by again. All in all, in a law review article, there is only one story to tell and the story is always the same: “There is a problem, a conflict, an issue, a puzzle, a contradiction, a paradox in the law. This Article will resolve it.”

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4 The number 2 is but a first approximation of the number 48—as in 48 stories to tell. For those of you having difficulty getting past two, try Greimas’ square. Algirdas J. Greimas, STRUCTURAL SEMANTICS: AN ATTEMPT AT A METHOD (1983).
Notice that we are fast reaching the limits of the average attention span for an introduction. The reader is likely to become impatient. If an oral presentation is at stake, then listeners even more so. This is the point where the author should relieve the tension created by offering up a joke. Preferably something subtle.

**Part I**

Here in Part I, the author seeks to elaborate, fortify, and cement the frames he has already activated in the introduction. This is called scope setting and it involves a formalization and specification of the entry-frame evoked in the Introduction. Scope setting involves fashioning out of the seamless web of history (or law) some relatively discrete something amenable to investigation or analysis or argument—the object of inquiry. Again, it is best, rhetorically speaking, not to be too obvious about the whole thing—but rather to allow the fusion of horizons (to coin a phrase) of the reader and the author to gently merge. We could also call this (to coin another phrase) the suspension of disbelief.

The next step is to stabilize the putative object of inquiry in one or a few, but certainly not many, disciplinary contexts so that it becomes possible to say something about it, as opposed to... saying everything about it. (You people who do cultural studies, pay no attention here.)

The most interesting thing about scope-setting is that it is utterly impossible. Indeed, of all the perfectly preposterous moments in a law review article, scope-setting is among the most outrageous and improbable of them all. It cannot be done. It cannot succeed. And yet—like petitionary prayer—it is done all the time.\(^5\)

Scope-setting is the point where, if we had a lucid author, he would close his laptop, dim the lights, breathe in the darkness, reach for the

\(^5\) Now here I should caution that many writings in law reviews are not law review articles at all. And thus they may not have this scope-setting problem. They may have other problems, but they might well evade this one. For instance, this article totally eludes scope-setting. Why? Well, because I have left scope-setting for the reader (you) to determine. That’s right, it’s on you.
scotch, and brood various gloomy thoughts about his ill-chosen career. A person of real integrity would think seriously about taking up writers’ block.

Obviously, that doesn’t include anyone here.

Why is scope setting impossible? I refuse to go into it. If I go into it, you and I will be wandering this text for hours, possibly days. O.K. Never mind, here it is really quickly: Everything we, as moderns, think we know about law and world—Maitland’s seamless web, the butterfly effect, bad infinities, Piaget’s nesting, Thomas Reed Powell’s legal mind, Lukacs’ reification of the disciplines, Sartre’s worm at the heart of being, Derrida’s Differance, Lyotard’s Differend, Baudrillard’s Simulacra, dynamic causation—all of this and so much more tell us incontrovertibly that scope-setting in social life (e.g. law) is an illusory act. It is, to put it too simply, an attempt by force of text to impose a static frame on matters we know or strongly believe will not stay put and exceed any and all efforts at conceptual localization and containment.

I am not actually going to offer up an argument for this view here, but will instead offer a quote from Bakhtin that I have been saving on my hard drive for a more than a decade. It’s beginning to look (given the track record) that I better use it up now lest I not use it at all. For those of you interested in Austin, ask yourselves this about the quote below: Is the constative chasing the performative or is it the other way around? Be careful. Don’t get lost. Here goes:

The word, directed toward its object, enters a dialogically agitated and tension-filled environment of alien words, value judgments and accents, weaves in and out of complex interrelationships, merges with some, recoils from others, intersects with yet a third group: and this may crucially shape discourse, may leave a trace in all its semantic layers, may complicate its expression and influence its entire stylistic profile.⁶

There.

Perhaps the quote is worth a second read? Just a suggestion. It really is the right sort of confusion. It is important to be confused sometimes. If you are not ever confused, you are simply not paying attention. (And that arguably is worse because, of course, you have no idea what you are missing.) A second look? No?

O.K. Moving on then.

**PART II**

This would be the literature review and methodology section.

O.K. Well, enough on that.  

**PART III**

Here we get to the theory part of the law review article. This is the part that will be nearly unintelligible to law review editors and may well lead one or more (or possibly all of them) to question whether the article should be published at all. The disturbing question will loom for the editors—does this author know what she is talking about or are we about to embarrass ourselves in print…. for eternity? Here credentialism—for instance, the right email address (i.e. someone@harvard.edu) or the right name—is extremely useful to allay fears or concerns. I mean, if the article crashes…. I mean, who would have thought—right?

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7 It is possible that in this section, the reader is apprised that while the issues have been discussed before in productive and enlightening ways, prior discussions have been less than entirely satisfactory in some respects. (“Less than entirely satisfactory” here is a technical term meaning roughly, “not worth even a glance after my Article.” Prior discussions very likely have miscast or misprised the crucial issues. Or they have failed to plumb the full depths of the dilemma. Or there is some new learning, as yet untapped, that now needs to be brought to bear on the issue. Or yet again prior work may have deployed the wrong method or proceeded from the wrong vantage or…. (and so on).

After this recitation of successive failures, the author must announce that, in sharp (and wholly improbable) contrast to all prior discussions, this Article will take a different approach. Specifically: Where countless others have failed (body counts are still being tabulated) the present article will succeed.
We are about to dig in.

Notice that all the difficulties that throttle the possibility of scope-setting—let’s give them a name: let’s call them agencies of flux and disturbance—are not matters that we can fix by addressing them explicitly. That will not do because, of course, when we address these agencies of flux and disturbance (“AFAD”) *explicitly in our texts*—we do so by first trying to stabilize them—which is to say, we try to do the very thing that Bakhtin and later, Derrida, describe as well nigh impossible.

Still, many of our readers do not read Bakhtin ("Who?") or Derrida ("Oh yeah, that guy") and so there is some possibility that when AFAD is mentioned in our texts, AFAD will stay put. AFAD is AFAD. Perhaps the best way to establish that AFAD can be stabilized is to break it down into its constituent elements. Like this. There are four parts to AFAD:

A
F
A
D

See: It works. Justice Scalia famously used the same M.O. in the case of *District of Columbia v. Heller* to decipher the meaning of the Second Amendment’s “right to keep and bear arms.”

There are four parts to the right to keep and bear arms:

R
K
B
A

Justice Scalia’s approach was in stark opposition to Justice Stevens who in his dissent analyzed the thing as follows:

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This made for striking disagreement: Which is it? Is it...

R
K
B
A

or

R
K
B
A

KBA?

The important thing here is to try to keep a straight face through it all.

The eyes of the law review article editor are glazing over. Eyelids are drooping. The mind wanders. Images come into focus: a drop of condensation sliding down a glass of Sauvignon Blanc, the liquid gold of a rye on the rocks, a steaming cup of espresso on a marble table. The rain has stopped. The streetlights and the puddles sparkle. All right. Everybody take a break.

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Remember AFAD and the quote from Bakhtin above?

Imagine now that we treat AFAD—the “agencies of flux and disturbance”—seriously. If we start delving seriously into AFAD, things will likely get dynamic, mutable, and uncontainable. That in turn would be antithetical to the obvious aims of the law review article—namely, to present an identifiable, stabilized, bit of stand-alone, portable, off the shelf, bit of knowledge—supported by a massive and utterly forgettable substructure of documents, data, artifacts, and the like. If that is the desired endpoint, then it is desirable to minimize the flux and disturbance at inception. Indeed, the genre of the law review article is a performative confirmation that the best way to reach the end of an argument successfully is, well…. to begin very close to the end while claiming nonetheless to start very far.

As for me, clearly I am already in trouble. We have way too much flux and disturbance going on here.

PART IV

This part is generally the piece de resistance—the place where the argument kicks in. This is the place where things are really going to happen. Picking up the thread in Part I, the crucial question is whether

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10 See generally the work of...
there is something entrenched in the artifact we know as the law review article that effectively contributes to its stabilizing effects.

Uhm—yes. Emphatically, serially, and synergistically so. Notice that one way of thinking about the law review article is that *qua* artifact it is itself a precipitation, a freezing in genre of the state of the art of legal thought and legal knowledge.

Where intellectual life (or indeed, any kind of life) is concerned, freezing is seldom an auspicious metaphor. In law, we are all supposedly beyond the freeze-dried forms of formalism. And yet in the highly stylized character of the law review article, its stock of stereotyped gestures, its frequent pretenses to knowledge, its predictable (and predictably inconclusive) policy and principle analysis, we repeatedly honor and comply with the form... which when you think about it is all that really matters to formalism.

Pause on that.

Why the honoring of such a dated and quite possibly archaic form? Is it a failure of imagination? Why is it that legal academics don’t break out more often? Why do they, for instance, seek out the protective shelter of a sub-disciplinary genre (e.g. ELS) or a *grand maître* (e.g. Foucault) and try so (so) hard to conform to its methodologies or his protocols, respectively? What is the draw of compliance and submission for academics? What is it that appeals in this quest for paradigm-compliance? Why are they doing this?

The little homunculus on my shoulder is already whispering an answer in my ear: “Because they’re academics, dude. That’s academia. It’s what they do. It’s who they are. Pay attention, dude!”

But I do not listen to the homunculus. And instead, I ask again:

Why do this? Why paradigm compliance?

This calls for explanation. And I would try my hand at it, but for the fact that in the post-postness of our post-millennial moment, explanation of social phenomena is either way too facile or, if one has real standards, insuperably difficult.
Here I want to refer to an anonymous speaker who at a recent colloquium presciently asked, concerning the phenomenon he was busily describing, “Why is this happening?”

Yes, indeed, why? Why is this colloquium happening? Why are you happening? Why am I? Hell, why is anything happening? Point being, of course, that the question (why is this happening?) immediately points to the impossibility of the answer. The “why?” in question will only be answered within a frame that everyone pretends is already stabilized (when, of course, it is not) for a subject presumed to be universal (but could not possibly be) from a limited set of vantages and specified orientations (which, of course, are neither).

Why is this happening? Really? You dare ask that? This late in the game?

Here I want to refer to the work of Professor Max Stein who in my recently published novel, “American Absurd” (currently available on Amazon) tries to do what he calls “the structures of the meaningless.” Fighting off what could be case of writer’s block, Max Stein has been striving to figure out why the other human beings around him are persistently pursuing meaningless human activities—going from A to B over and over again, without it seems actually getting anywhere. Or at least, that is one interpretation. In any event Professor Stein has made a list—a preliminary inventory of the possible permutations:

A to B—(progression)
A to A (stasis)
A to B which becomes an A for another B, etc. (serial repetition—neurosis)
A to B followed by B to A (circularity)
A never get to B (futility)
A to nowhere (nihilism)
Why B? (skepticism)
What B? (radical skepticism)
B to A (contrarianism)
A/B (gnosticism)
ABABABAB (schizophrenia)\(^\text{11}\)

But why go from A to B? Yes, why indeed? Here too Professor Stein has compiled preliminary list:

- Because B is better than A (progress)
- Because we’re fated (destiny)
- Because we’re hardwired (human nature)
- Because we so choose (existentialism)
- Because that’s what our people do (sociology)
- Because we have false consciousness (Marxism)
- Because no one has yet thought of anything else.\(^\text{12}\)

After compiling these lists, Professor Max Stein notes that the patterns and the explanations are all too facile.

Indeed. As the Charles M. Fairmont Chair in Cognitive and Rhetorical Studies at Berkeley (and a fictional character), Max Stein only occasionally writes about law.\(^\text{13}\) But his points are no less applicable. In law, if we are seeking explanation, we might ask, “Why is this particular law the way it is?” Well, consider the classic forms of the available answers: Because of this law’s object. Because of this law’s context. Because of this law’s normative, financial, political, professional authors. Because other laws are the way they are. Because our sentence structures always have subjects doing things by way of verbs to direct objects.\(^\text{14}\) Because....

\(^{11}\) Pierre Schlag, American Absurd 124-25 (2016).

\(^{12}\) Id.

\(^{13}\) Pierre Schlag, The Faculty Workshop (June 1, 2011). U of Colorado Law Legal Studies Research Paper No. 11-12. Available at SSRN: http://dx.doi.org/10.2139/ssrn.1857525 (comments of Max Stein on “stage 4” and “gaming”).

Max Stein is hardly a nihilist, but he does appreciate that the explanations he catalogues are academic fictions that work in part because they track the folk-logic of cultural myths. When we, as academics, invoke these fictions, they cannot help but resonate in the myths.

But, as Max Stein notes, our trouble is that we have lots of myths. And so there are lots and lots of resonances. And everything is overdetermined (lots of resonance) and under-determined (pay attention to the entry frame-setting that artificially narrows the range of possibilities).

Oh, it’s all so complicated! Uhm, actually, no—it’s not. As I have just finished saying, it’s not complicated at all. In fact, it’s pretty simple if you accept what I am saying. It’s just that accepting what I am saying is not going to make your life as an academic any easier. On the contrary, accepting what I am saying is going to make your life as an academic much (much) more difficult. It will certainly be harder for you to write that next law review article. I actually think that’s a good thing, but I totally get it if you don’t agree. Your call.

From my admittedly idiosyncratic perspective, it does not help entirely here (though it does help some) that when we academics meet together across the mediation of a screen or a text or even face-to-face, we spend our time testing our respective fictions against each other to see which one will resonate more than the others. Most of us focus on the contestation—the points of disagreement, dissonance, and disjuncture. We are natural born critics. And if we are not, then training or occupation will make us so.

One could reasonably think, then, what with all this criticism and reciprocal examination of each other’s work, that we are getting somewhere. Well, maybe. And then again, maybe not: It is important to recognize

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mnemonic, an abbreviative formula, to be an entity, finally as a cause, e.g., to say of lightning "it flashes." Or the little word "I." To make a kind of perspective in seeing the cause of seeing; that was what happened in the invention of the "subject," the I! Id. § 548, at 294.
that amidst the sometimes acute reciprocal criticism, there is a congenial symbiosis and at least a weak unity underlying our particular contest of faculties. Indeed, the expression of our differences performatively re-enforces a shared form, aesthetics, narrative structure, style—one which at a fundamental level affirms that law and world are understandable in terms of entailments within webs of intelligibility.

We differ to be sure in our preferred verbs. Here I offer a typology. Always a good move in a law review article and very much welcomed by the typical reader.

**Table 1: Typology**

**Linear Entailment.** For those predisposed to linear entailment, it can be said that X causes, constitutes, structures, performs, logically determines, reflects, shapes, and/or justifies Y. (Viewed grammatically, and with due attention to “lumpiness” and “indivisibilities,” the choices are not endless.)

**Reciprocal Entailment.** For those predisposed to reciprocal entailment, one adds adjectives that morph the one-way relation into much more problematic two-way relations: hence the relations are dialectical, dynamic, interactive, cyclical, looped, and so on.

**Dedifferentiation.** For those willing to consider an even more unsettling understanding in which the identities collapse into each other (thus making relations impossible) concepts such as dedifferentiation beckon.  

Are these three types of entailment plotted illusions? Well, yes they are illusions. But they are plotted as well. And many of them are plotted in ways sufficiently enduring (social construction) that they become the plots of our thinking and our lives. These illusions are made real through

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collective action (inter alia, law) and realized as institutional practice (inter alia, law again) which is to say that they are, at least, in part true.

Is this something to complain about? Well, no, not obviously. Look at it this way: It may well be that repeating these fictions are all we can hope for from our academic forays. And maybe that’s just fine. Why would it be just fine? Because describing law and world in tried and true fictional forms of entailment and webs of cultural intelligibility is what explanation and understanding mean (even if entailments and the webs of intelligibility are themselves fictions). Perhaps this is all there is—and until someone comes up with something else, all there is—is just fine.

Eh.

Two nagging thoughts remain.

Thought One. The more we awaken, the more we will find that our intellectual efforts are haunted by the possibility that we are not really thinking at all, but simply rehearsing conventional narratives of entailment. We think we are explaining and understanding, but in point of fact, maybe it’s just connect the dots. Or as Niels Bohr admonishes, “No, no, you’re not thinking; you're just being logical.” This would be somewhat dispiriting. Consider: for all our careful collection and painstaking assembly of details, and our elaborate presentation and arrangement of the evidence—this is the law review article par excellence!—it would all nonetheless be only one more repetition of the master patterns of our disciplines. Even the most innovative moments might be seen as the rehearsal of structure. Bruce Ackerman’s “higher and ordinary politics,” could be seen as law’s version of Thomas Kuhn’s “revolutionary and normal science.” Ackerman’s famous “constitutional moments” might be seen as a juridical mimesis of Kuhnian “paradigm shifts”? Calabresi’s Cathedral could be seen....

No, I have to stop. This is not nice. And it’s cheap. Everyone would fall here. You, me. Everyone. And even if it is right, so what? Surely we’ve known all along that to be creative in a good way means precisely this—the new, unexpected and previously unremarked enactment
of a possible permutation? But what if we are not Ackerman or Calabresi? (There is considerable evidence that we are not.) What if the patterns we’re enacting are more pedestrian, more routine? Or to say it outright: what if the patterns are banal? Are we really needed? Am I? Are you? All right, enough! This is not a 19th century Russian novel. This is a law review article. I apologize. I got carried away. Let’s move on.

Thought Two: The mutually re-enforcing aspect of the contest of fictions seems to yield a discourse in which we (you and I) try to make truth. That is to say, we get into the kind of academic meta-fiction that might be called rightness disputes. Rightness disputes are not the same thing as the quest for rightness (in the same sense that OCD is not the same thing as checking the stove before you go out). The pursuit of rightness (like checking the stove) are generally good things to do. By contrast, rightness disputes (like OCD) are sustained journeys into the redundant and the overwrought.

In rightness disputes, the little homunculi on your shoulder are all on speed, constantly asking you (even as you are writing your article or giving your talk), “Is this right?” “What arguments support your views?” “What establishes the validity of your argument?” “Is this claim consistent with your priors?” “Didn’t you say that... and now you say that...” And here you are trying to write your article or give your talk, but still the little speed-addled homunculi interrupt to ask, “Do you have a warrant for that?” “Where is the empirical corroboration?” “On what authority?”

And sooner or later, you realize (it comes to you with the force of revelation) that the homunculi you must answer to do not care one wit whether you are right or not. They care only about playing rightness disputes—showing that they are right and you are not. Indeed, you now realize that rightness disputes are no more about rightness than OCD is about stoves.

And then a second realization dawns on you: The topic of your talk, the very object of your legal passion, the very focus of your jural raison d’être, does not matter to them one wit either. They are just using your
article or your talk or—gasp!—you as the occasion to play their rightness disputes. Your article or your talk or even you could be anything! Oh, my god, you are as if a junior associate again! Totally generic. Totally replaceable. Totally abstract. How did you get here? How did it come to this?

And then yet a third realization breaks through: There is such a thing as rightness disputes—and rightness disputes are the trans-disciplinary and sur-disciplinary (pause on those words—they’re not here just for your polyphonic pleasure) structure of academic endeavor. It’s the lingua franca of meta-academia! And we are all in meta-academia!

What’s so wrong with rightness disputes? In one sense nothing. It is, however, like checking the stove. Once is good. Forty five times a day—probably not. If you check the literal or figurative stoves forty five times a day, you won’t have much of a life. The big problem with rightness disputes (as with OCD) is that they displace and encroach so much. As in all things—I’m currently experimenting with an Aristotelian period—it’s a question of emphasis: Why the rightness questions to the exclusion of the others? And why pursue rightness questions at such intricate levels of detail and specification when the frames and entailment patterns that support them are so contestable, when the priors are so vulnerable? 

PART V

There is a real irony in rightness disputes. The irony is that with rightness disputes, there is no reason the article should ever end. In the same way that checking the stove one more time (please note the marginal cost is low) couldn’t possibly hurt (“I’m gonna make doubly sure this time,”) asking one more rightness question is relatively costless. Come on, just one more.

No? O.K. Good for you.

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16 This is the gist of the overarching question pursued relentlessly and more seriously in “The Knowledge Bubble.” Schlag, supra note ___.

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This brings us to what I call exit-framing and abandonment. Exit framing as its name implies is the frame the author leaves the reader.

There is the explicit exit frame. This could be an edict. Or a balancing test or a nexus test or a default regime or a totality of circumstances test or an injunction to prove effect by reference to intent or intent by reference to effect. Or.... In short, any of the usual legal formulae can serve as exit framing.

There is also the implicit exit frame. We won’t go into the complexities on this one except to note that the implicit exit frame effectively constructs the reader as this kind of persona tasked with this kind of job to be performed in.... We’re not going into all that. We are not going into all the frames that the legal reader unconsciously enacts precisely in virtue of having been already constituted as a legal reader. Definitely not going there.17

There is a choice to be made by the author here: an edict is not a balancing test is not a default regime (though we could combine all three). And so the question is not just how did we get here (why balancing?). Presumably, I’ve got that covered.18 No—what is really interesting is how we stop. This is the moment I call abandonment. In order to have an exit framing, you need to have abandonment.

If you’re a judge, you need to decide that you’ve addressed the arguments by the parties sufficiently and that you must now simply decide. If you’re a law review writer, you need to determine that enough is enough, that the argument must cease and the rightness disputes stop. But how

17 Go read Goffman. Go read Burke.
18 Well, actually, no I don’t. You and I both know, of course, from the style or form of any given law review article which way it’s heading. The exit frame is rarely a surprise. In fact, very often we know from the entry frame what the exit frame will look like. And yet, I have to say, I am always a bit jolted when the edict, the test, is actually delivered there on page whatever. Jolted as in—really? Here we are again and you the author are going to do this to me, the reader, again? Really—you couldn’t think of anything else? Why is this happening?
do you do that? How do you let go? Why not another question? Just one more. How could it hurt?

See: It’s hard to stop.

How then do you do it?

CONCLUSION

Exactly.

Now among the several sections of the law review article vying for most absurd, the conclusion is undoubtedly the most stone cold absurd of them all. The conclusion is just simply preposterous.

Interestingly, it is often the place where readers will turn to first. If that’s you, it’s probably not working out so well for you right now. In fact my guess is that you’re probably wondering what’s going on here? How in the hell is this a conclusion? Why is this happening?

My advice? Go read the introduction.

For all you others, well, here we are again. You and I. On different sides of the text that is supposed to yield a conclusion.

The conclusion is supposed to be the wrap—almost always it will be a normative wrap. Perhaps less because we are committed normative thinkers (this is 2016) but because law review editors want some normative payoff and law review writers conform. The normative wrap is the academic equivalent of the legal brief’s prayer for relief. It all comes down to this—a few paragraphs, a string of sentences, the takeaway. (What a ghastly expression!)

The author, of course, has reason to feel pretty good about reaching this point. Not only is an arduous law review journey coming to an end, but this is the moment where the author hands off responsibility to the reader. It’s as if the author were telling the reader, “O.K., reader, my work is done now. You take it from here. You should... the court should... the agency should... somebody should...” That’s quite a
responsibility to place on the reader. It could cause anxiety if not properly handled.

In truth, this should be a moment of high anxiety for everyone involved (not just the reader). The author too. In fact, the legal academic community generally. Why? Well, because it is almost never clear, not clear at all, just what mechanism is supposed to bridge the yawning gap between the words on the page and the enactment of the recommended action.19 And that is because, just possibly, there may be none.

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19 Cf., Robert Cover, Violence and the Word, 95 YALE L. REV. 1601 (1986). See also the critiques of normativity.