

University of California, Hastings College of Law

From the Selected Works of Scott Dodson

2014

The Short Paper

Scott Dodson



Available at: https://works.bepress.com/scott_dodson/36/

The Short Paper

Scott Dodson

In November every year, my 1L Civil Procedure students, paralyzed by the prospect of their final exam but uncertain about how to alleviate their fear, invariably ask me, “How long of an answer should I write?” My standard response is: “As long as the question deserves.” I do not mean to sound coy; this response seems quite obvious to me. And it strikes me as obvious in other contexts as well: court briefs, for example. Why irritate a busy federal judge by maxing out one’s page limits on a brief when far fewer pages would have sufficed? Worse, perhaps the judge is not just irritated but actually fatigued by verbosity and so opts to skim—and perhaps even skip—critical parts of the argument.¹ Students, like lawyers, should give a project the length it deserves—and no more.

The same holds, I think most would agree, for academic scholarship. The topic drives the length of the article. Nevertheless, when we look around at law scholarship, the gold standard remains largely the same: a law-review article of around 40-60 law-review pages and 200-250 footnotes. Anything less is relegated to the ignominy of a “plus” piece.

You may see tension here. The theory is that different questions demand different lengths. The observation is that highly valued scholarship is of a uniform length. Therefore, you may think, there’s tension between the theory and the observed reality.

But I think most law professors do not see such tension. They reason that the valuation of scholarship is not wholly dependent upon the success of the scholar in answering the question; rather, the valuation also is dependent upon the question itself. A small idea is not worth the same as a big idea. Therefore, it is sensible to value long articles (assuming they are the product of big ideas) more highly than short articles.

This is the concept that I want to knead a bit. To begin, I will offer two analytic observations that suggest the traditional view is too simplistic. Then, I will argue for a normative shift in the way we as an academy view the short

Scott Dodson is Professor of Law and Harry & Lillian Hastings Research Chair, University of California Hastings College of the Law. Many thanks to my UC Hastings colleagues for playing the parlor game of debating “the most influential short paper ever.”

1. See Richard A. Posner, *Effective Appellate Writing*, App. Prac. J. (Spring 2010), *available at* http://apps.americanbar.org/litigation/litigationnews/trial_skills/appellate-brief-writing-posner.html (acknowledging that this occurs).

paper, with some prescriptions for implementing those norms. Finally, I will close with some remarks about the implications of my argument for broader discussions about the nature and role of scholarship in all of its forms.

I. Challenging Assumptions about Length

The coin of the realm in our business is the full-length law-review article; we marginalize shorter works. The reason is that we use length as a proxy for the value of the work, and the assumption behind this proxy is that short works cannot be the product of big ideas. But two observations call this practice into question.

The first observation is that we usually mean “big” in a qualitative sense. A big idea means something important, perhaps even game changing.² We do not generally mean “big” in a quantitative sense. The ubiquitous and resourceful *Black’s Law Dictionary* is certainly a big project,³ but it is not really what we would classify as a big idea in legal scholarship today. Thus, ideas, though qualitatively big, may be quantitatively small. A famous example is Albert Einstein’s $E=mc^2$, in part for which he won the Nobel Prize. Do you know the length of the paper in which he published his famous equation? Fewer than three pages.⁴ So, point one: not all big ideas justify long answers. Indeed, some big ideas can be explained and defended with short answers.

Can’t be done in law, you suggest? Hogwash. Samuel Warren and Louis Brandeis’s famous article “The Right to Privacy” was fewer than 7,300 words (its whopping five footnotes included),⁵ yet it is widely regarded as one of the most influential papers in American law⁶ and stands as the second most-cited law review article of all time.⁷ Justice Brennan’s “State Constitutions and the Protection of Individual Rights” is fewer than 7,300 words, including its 93 footnotes.⁸ It is the ninth most-cited article of all time.⁹ Owen Fiss’s

2. Cf. Eugene Volokh, Writing a Student Article, 48 J. Legal Educ. 247, 248 (1998) (arguing that a meaningful contribution should meet the tripartite definition of patentability: novel, useful, and nonobvious).
3. See *Black’s Law Dictionary* (Bryan A. Garner ed., 8th ed. 2004) (spanning more than 1,800 pages).
4. See Albert Einstein, Ist die Trägheit eines Körpers von seinem Energieinhalt abhängig? [Does the Inertia of a Body Depend Upon Its Energy Content?], 18 *Annalen der Physik* 639 (1905).
5. Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).
6. See, e.g., Melville B. Nimmer, The Right of Publicity, 19 L. & Contemp. Probs. 203, 203 (1954) (calling it “perhaps the most famous and certainly the most influential law review article ever written”).
7. See Fred R. Shapiro & Michelle Pearse, The Most-Cited Law Review Articles of All Time, 110 Mich. L. Rev. 1483, 1489 (2012).
8. William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).
9. See Shapiro & Pearse, *supra* note 7, at 1489.

monumental effort “Against Settlement” is merely 17 pages and under 10,000 words;¹⁰ it is the 22nd most-cited article.¹¹ Other examples abound.¹² Big ideas can come in small packages.

The second observation is that we can’t all have big ideas all the time. Even if it were possible, we would go crazy. And, in my view, the world can’t take it. Big ideas are disruptive, confusing, and—at least in the short term—costly. “Rethinking Law” would no doubt be a blockbuster of a tome, but, man, how exhausting to read and implement!¹³

Fortunately, even small ideas can become qualitatively big if conglomerated. Small steps can build gradually to a momentous result. That is exactly how books, research agendas, and even whole careers are made. These are packages of multiple, discrete, smaller scholarly efforts. Although perhaps related enough to be viewed as a whole, the packages are often offered and defended as stand-alone projects, testing the waters, getting buy-in, and developing the larger idea. The same can apply, on a slightly smaller scale, to standard articles.

My point here is not that two halves of an article are always worth the same as the whole. I do think that a sum can be greater than its parts. But that is not always the case, and we should be open to the possibility that a short paper or series of short papers can achieve the same qualitative value as a long article.

These observations suggest that short papers can be valuable scholarship. A single short paper could be valuable on its own if it makes a meaningful impact in legal scholarship. And even multiple short papers that alone do not make such an impact may be valuable if, taken together, they do.

II. Reconsidering Value

If I’m right that the short paper can be valuable, where does that lead us? Normatively, we as an academy ought to value more highly such works, and we ought to encourage them from scholars.

As it stands, the pervasive perception of such papers is that they either are “plus” pieces that count for very little, that they count not at all, or, worse, that they count against an author because they raise the presumption that either (1) the author exercised poor judgment by writing such papers instead of spending time writing the traditional law-review article or (2) that the author has no “big” ideas. These judgments are made not based on merit but rather based purely on length as a proxy for merit.

10. Owen M. Fiss, Comment, *Against Settlement*, 93 Yale L.J. 1073 (1984).

11. See Shapiro & Pearce, *supra* note 7, at 1489.

12. *E.g.*, John C. Coffee, Jr., *Understanding Enron: “It’s About the Gatekeepers, Stupid,”* 57 Bus. Law. 1403 (2002) (under 10,000 words); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897) (under 10,000 words); Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int’l L. 43 (2004) (just over 10,000 words).

13. *But see* Orin S. Kerr, *A Theory of Law*, 16 Green Bag 2d 111 (2012).

But unless one believes that length is a perfect proxy for value, the traditional assessment of the short paper cannot be valid. Perhaps one can presume that a certain minimum length is usually necessary to fully develop and defend a “big” idea—and that may indeed be true—but unless the presumption is to become an un rebuttable rule, there is no excuse for relying on length instead of reading the paper and assessing its value directly.

Now, I am not saying that all short papers are valuable. Just like full-length articles, some are highly valuable, some are less valuable, and perhaps some are not valuable at all. And it certainly behooves a scholar to assemble a corpus that shows facility with the coin of the realm—the traditional law-review article. But my point is that short essays should not be discounted on a qualitative metric simply because of their length. They should be evaluated based on their own merits. And there is something particularly impressive about a scholar who shows facility with a variety of different forms of scholarship.

Thus, scholars, especially junior scholars, should be encouraged to explore short essays. More openness to the short paper would lead to a couple of benefits.

First, it would incent scholars across the academy to fit the paper to the project. Einstein didn’t bury his equation in a 60-page article. He wrote the right paper for the project. I suspect that many “articles” are really smaller projects that have been bloated into a kind of Frankenstein’s monster to fit the expected norm. Our scholarship in general could benefit from more attentive consideration of what form best fits the project.

Second, and related to the first, short papers can be more readable and accessible than long papers. In contrast to a lengthy article’s “lecture” feel, short papers can be more dialogic, engaging, and welcoming. They lend themselves more easily to a conversation or debate.¹⁴ They generally can be read and digested easily in a single sitting. And in a world of busy consumers of scholarship, all of these features mean, all else equal, that a short paper is more likely to be actually read than a long paper.

Third, the short paper enables junior scholars to develop expertise in an area without backloading production. Junior scholars have to be somewhat careful. The scholarship marketplace is crowded and caters to a highly critical audience. A junior scholar could try to write the next big article right out of the gate. But perhaps a safer course would be to leverage scholarship by staking a claim to a niche with a few short papers early on that establish the grounding (and allow for feedback) to then develop a more sustained project. Just as multiple, discrete articles can comprise a fuller “research agenda,” so too may multiple, short papers come together to form a big idea, and it may be that the ultimate contribution is more persuasive for having been assembled gradually.

14. See, e.g., Stephen B. Burbank, Mark Hermann & James M. Beck, Plausible Denial: Should Congress Overrule *Twombly* and *Iqbal*?, 158 U. Pa. L. Rev. Pennumbra 141 (2009), available at <http://www.pennlawreview.com/debates/index.php?id=24>.

Sometimes two small steps, made separately with time for adjustment and acceptance, can be better than one big leap.

Fourth, greater acceptance of the short paper dovetails with academic norms in other areas. Most journals outside of the U.S. and in other disciplines seek submissions far shorter than the typical U.S. law review.¹⁵ Expanding the norm of U.S. law papers to embrace the short paper may facilitate interdisciplinary and international scholarship by U.S. law professors.

For these reasons, I would argue for systemic shift in the way the academy views short papers. Short papers should be encouraged, and they should be evaluated qualitatively, just as traditional articles are evaluated. In short, we should be more open to them.

III. Prescriptions

How might we assimilate openness to the short paper into the academy as an institution? We might, first, applaud recent trends founded upon the premise that length for length's sake can be detrimental. Many of the most prestigious student-run law reviews have expressed a preference for articles with word counts under a certain threshold that varies, depending upon journal, from 25,000 to 35,000.¹⁶ The premise behind the trend is that paper ideas can generally be conveyed and defended in fewer words than had become customary.¹⁷ Whether that premise is so definitive as to justify a presumptive selection preference based on such an upper bound is beside the point; the point is that there is no lower bound. The thrust of the word-count rule thus encourages shorter papers in general while simultaneously leaving space for significantly shorter works.

We might also move toward a greater institutional willingness to consider short papers in hiring, promotion, and tenure reviews. Some may interject here that evaluations of a person's accomplishments over a certain period of time may reasonably have a quantitative component to them. I do not disagree. If a monograph "counts" more than a single article from a quantitative standpoint, so too should a full-length article "count" for more than a short paper. But whatever quantitative discount we apply to the short paper should not influence its qualitative value. And if the quantitative premise is that short papers take less time to write, then their discounted quantitative value should be able to be made up cumulatively with more papers. If you can write three full-length articles every two years, then you can probably write two full-length

15. See, e.g., Submission Guidelines for Oxford Journal of Legal Studies, *available at* http://www.oxfordjournals.org/our_journals/oxjlsj/for_authors/index.html (admonishing that articles "should not normally be in excess of 10,000 words").

16. See, e.g., Articles Submission Page of the Virginia Law Review, *available at* <http://www.virginialawreview.org/submissions/articles-essays> ("We strongly prefer Articles under 25,000 words (including footnotes). We will publish manuscripts over 30,000 words only under exceptional circumstances.").

17. See Joint Statement Regarding Articles Length, Harv. L. Rev., *available at* www.harvardlawreview.org/PDF/articles_length_policy.pdf.

articles and three or four short papers in the same time span. Quantitatively, the short papers probably should “count” at least the same as a full-length article, and perhaps even more. I myself prefer a \$10 bill to a \$5 bill, but I’ll trade that ten for three fives any day.

Finally, we are fortunate, in my view, to have recently seen an explosion in the available forums for the short paper. More than 30 traditional law reviews now offer an online platform for short papers, and placing in those forums is far easier than competing for a print spot.¹⁸ They offer expedited processing so that the paper is more timely. And they can reach a broader and more diverse audience. Some of the academy’s most revered scholars have taken advantage of these forms of scholarship.¹⁹ We as an academy ought to continue to do so, with gusto.

IV. Concluding Thoughts

My argument here is that we should evaluate the quality of a short paper without inherent prejudices based on length. Although I have tried to maintain focus on this one form of scholarship, I acknowledge that my argument’s broader implications reach into a complicated conversation about defining and evaluating scholarship in other various forms. For example, how should we assess the scholarly value of blog posts and comments? That difficult question could be so easily resolved (and often is) by the proxy of length. But perhaps it should not be.

18. See Colin Miller, Submission Guide for Online Law Review Supplements, Version 6.1 (draft of Aug. 30, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1410093.

19. In 2012 alone, those scholars include—but are certainly not limited to—Randy Barnett, Steven Calabresi, Neal Devins, Mike Dorf, Richard Epstein, Tom Ginsburg, Aziz Huq, Vicki Jackson, Alison LaCroix, Lawrence Lessig, Deborah Hensler, Thomas Merrill, Neil Siegel, David Strauss, and G. Edward White.