

## EDITOR'S NOTE

I think that you will all agree that we are living in most interesting times. (Hear, hear.) I never remember myself a time in which our history was so full, in which day by day brought us new objects of interest, and, let me say also, new objects for anxiety.

Joseph Chamberlain<sup>1</sup>

### I. LAW REVIEWS CAN SAVE THE WORLD

The quote above takes its place as the epigraph of this Editor's Note because of that specialty of law reviews: source checking. It comes from a speech Chamberlain gave in 1898, when he was British Colonial Secretary. Garson O'Toole believes that the speech is the original source of the apocryphal folk curse, "May you live in interesting times"<sup>2</sup>—and therein lies its purpose here.

In an early draft of this piece, I was planning to open with the "curse" itself, in honor of the state of the world in 2017; but, like any good editor, I checked its provenance first. According to O'Toole, Chamberlain's son Austen is probably the first person to attribute such a curse to Chinese folklore.<sup>3</sup> As another saying of dubious provenance<sup>4</sup>

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<sup>1</sup> *Mr. Chamberlain at Liverpool*, WESTERN DAILY PRESS (Bristol, Eng.), Jan. 21, 1898, at 8.

<sup>2</sup> Garson O'Toole, *May You Live in Interesting Times*, QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2015/12/18/live/#note-12645-7> (last visited Jan. 9, 2017).

<sup>3</sup> *Id.* Entire articles could be, and surely have been, written about the tendency of Westerners to overattribute wisdom to Asian cultures. See also Benjamin Zimmer, *Stop Him Before He Tropes Again*, LANGUAGE LOG (Mar. 22, 2007), <http://itre.cis.upenn.edu/~myl/languagelog/archives/004330.html>. Such overattribution reflects quite a bit on the attributor, none of it good.

<sup>4</sup> Garson O'Toole, *A Lie Can Travel Halfway Around the World While the Truth Is*

goes, a lie can travel around the world while the truth is putting on its shoes, and after its creation in the early 1900s, the “Chinese curse” has appeared in popular fantasy,<sup>5</sup> a speech by Robert F. Kennedy,<sup>6</sup> and Hillary Clinton’s autobiography.<sup>7</sup>

I’m not here to tell you that it required a source checker’s mind to look deeper into such an obviously apocryphal proverb before hitting publish, but I found it a handy synecdoche for the overall law review experience. If there is one thing participating in law review teaches—at least I hope that it teaches myself, my colleagues, and those who come after us—it’s that every assertion needs to be checked (even this one).<sup>8</sup>

That’s not a particularly profound observation—or at least it shouldn’t be. Surely, arguing from a position of fact should be a first principle, in society as well as law. Yet we find ourselves with a society filled with unverified assertions. Take the well-publicized “fake news epidemic” on Twitter and Facebook: From pseudoscience to conspiracy theory to gaslighting, people are filling our modern-day public forums with noise, and their listeners are left with a choice—to accept that noise as truth, or to look deeper for evidence supporting or contradicting it.

The evidence, right now, is that people are choosing the former. Oxford Dictionaries named “post-truth” its word of the year for 2016.<sup>9</sup> Both the Brexit campaign in the United Kingdom<sup>10</sup> and the presidential campaign in the United States<sup>11</sup> saw repeated instances of provable falsehoods advanced as gospel. Perhaps more disturbingly, a high percentage of Americans seem to have no interest in digging deeper to reverse that

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<sup>5</sup> Putting on Its Shoes, QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2014/07/13/truth/> (last visited Jan. 9, 2017).

<sup>6</sup> See TERRY PRATCHETT, INTERESTING TIMES (1994).

<sup>7</sup> Robert F. Kennedy, Day of Affirmation Address at the University of Capetown (S.A.) (June 6, 1966), <https://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/RFK-Speeches/Day-of-Affirmation-Address-as-delivered.aspx>.

<sup>8</sup> HILLARY RODHAM CLINTON, LIVING HISTORY 258 (2003).

<sup>9</sup> See Daniel Solove, *More on Law Review Citation: The Dreaded Pin Cite, CONCURRING OPINIONS* (Mar. 16, 2007), [https://concurringopinions.com/archives/2007/03/more\\_on\\_law\\_rev.html](https://concurringopinions.com/archives/2007/03/more_on_law_rev.html) (“The goal of citation should be to help the reader. But law review citation often differs from this goal—it is about justifying every proposition with painstaking accuracy.”).

<sup>10</sup> Word of the Year 2016 is..., OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> (last visited Jan. 9, 2017) (defining post-truth as “relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief”).

<sup>11</sup> See Ashley Kirk & Daniel Dunford, *EU Referendum: The Claims That Won It for Brexit, Fact Checked*, TELEGRAPH (June 29, 2016), <http://www.telegraph.co.uk/news/2016/06/22/eu-referendum-fact-checking-the-big-claims1/>.

<sup>12</sup> See Aaron Sharockman, *The Truth About the 2016 Presidential Campaign*, POLITIFACT (Sept. 26, 2016), <http://www.politifact.com/truth-o-meter/article/2016/sep/26/trump-clinton-fact-check-2016-president/>.

trend. A poll commissioned by BuzzFeed News found that “[f]ake news headlines fool American adults about 75% of the time.”<sup>12</sup> And although most Americans recognize that fake news “causes confusion,”<sup>13</sup> a large number of Americans nevertheless continue to get their news from Facebook, which the BuzzFeed survey found had a strong correlation with fake news.<sup>14</sup>

The clever heading to this Section aside, law reviews aren’t going to fix this problem. First, of course, we aren’t publishing news. Certainly law reviews seek to put forth work that is relevant to the developing law and, therefore, to developing society, but the process of publishing academic work means that we aren’t likely to be in a position to break a story. Second, if we’re being honest, no one outside the legal world tends to read us. But just because we are not a front-line part of the popular press doesn’t mean that the methodology and values we pursue might not contain lessons for the wider world.

Those who have worked on a law review are currently shaking their heads at this claim. Long nights spent in a law library tracking down “the authoritative printing of the 1975 iteration of a long-repealed statute” doesn’t feel like a transferable skill. Tracking down the correct, Blue-book-preferred reporter for a case—in lieu of the Westlaw version—is almost certainly something you haven’t had to do again since law school. But the important thing that source checking teaches, or reinforces, is the ability—and not just the ability, the *inclination*—to read a sentence, and then to evaluate it for its sense, its cogency, its *veracity*. That ability, combined with that inclination, is a skill that many were sorely missing in

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<sup>12</sup> Craig Silverman & Jeremy Singer-Vine, *Most Americans Who See Fake News Believe It, New Survey Says*, BuzzFEED (Dec. 6, 2016), [https://www.buzzfeed.com/craigsilverman/fake-news-survey?utm\\_term=.mrL59pQPLN#.juBXeN9KOA](https://www.buzzfeed.com/craigsilverman/fake-news-survey?utm_term=.mrL59pQPLN#.juBXeN9KOA). Although Republicans were slightly more likely to believe fake headlines than Democrats, the difference was not extreme. “It’s especially striking that both Democrats and Republicans think the stories are accurate in many cases . . . . Even partisan-motivated reasoning—which we might expect to make people question fake news that is harmful to their candidate—does not appear to protect people from believing in it.” *Id.*

<sup>13</sup> Emily Schultheis, *Two-Thirds of Americans Say Fake News Causes Confusion About Facts, Poll Finds*, CBSNEWS.COM (Dec. 15, 2016), <http://www.cbsnews.com/news/two-thirds-of-americans-say-fake-news-causes-confusion-about-facts-poll-finds/>.

<sup>14</sup> Silverman & Singer-Vine, *supra* note 12. Most recently, President Donald Trump and others have begun leveraging the term “fake news” and applying it to more-traditional media outlets doing more-traditional journalism. See Danielle Kurtzleben, *With ‘Fake News,’ Trump Moves from Alternative Facts to Alternative Language*, NPR (Feb. 17, 2017), <http://www.npr.org/2017/02/17/515630467/with-fake-news-trump-moves-from-alternative-facts-to-alternative-language> (“Anyone who has followed the news knows this isn’t what ‘fake news’ meant just a few months ago. Back then, it meant lies posing as news, made up by people from Macedonian teenagers to a dad in the Los Angeles suburbs.”). I will not attempt, in this space, to grapple with the meaning of the rapidity of this semantic shift.

2016. Here's to a reawakening of the source checker's spirit in Americans in 2017 and beyond.

## II. ON SECOND THOUGHT, LAW REVIEWS CANNOT EVEN SAVE THE LEGAL ACADEMY

In 2004, Judge Richard Posner published *Against the Law Reviews*, a polemic—as the name suggests—against the current atmosphere in, and into, which scholarly writings are published.<sup>15</sup> Judge Posner believed, among other things, that the focus on student editors and the increase in, as he describes them, “[s]ubmissions in ‘law and . . .’ fields” about which students have insufficient training has led to publications that, in some cases, “have no merit at all.”<sup>16</sup> In 2013, another article, written by a team of authors led by psychology professor Richard A. Wise, dove into a survey of 2,000 law review stakeholders—primarily “legal professionals and student editors.” The team also surveyed law review citation patterns, and found that systemic problems with the law review process were at risk of diluting the usefulness and use of reviews among legal professionals and educators.<sup>17</sup> As a cure for these ills, “respondents listed blind review, peer review, and increasing students’ knowledge as the three most important reforms for law reviews.”<sup>18</sup> Another problem the article identified with the current system, expedited review, is the subject of an Essay by Professor Joseph S. Miller that we are pleased to publish in this issue.<sup>19</sup>

To the extent blame is necessary, however, it doesn’t fall only on the structure of law review itself. Before Miller, before Wise et al., and before Judge Posner, Kenneth Lasson wrote:

Few professors today delude themselves about (or are able to luxuriate in) the long-romanticized lifestyle of Academia: walking the quiet quadrangles of neatly manicured college gardens, discoursing timelessly with colleagues, thinking higher thoughts. Fewer still aspire to scholarship purely in search of Truth. Nowadays the goal of publication is much less to find answers than to avoid perishing in pursuit of promotion and tenure.<sup>20</sup>

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<sup>15</sup> Richard A. Posner, *Against the Law Reviews*, *LEGAL AFFAIRS* (Nov.–Dec. 2004).

<sup>16</sup> *Id.* Though not everything in Judge Posner’s article comports with my experience on law review, I commend the entire piece to the reader, as he—like he does in his opinions—makes a compelling case for everything he says, which any honest defender of law review ought to at least grapple with before rejecting.

<sup>17</sup> Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 18–19 (2013).

<sup>18</sup> *Id.* at 71.

<sup>19</sup> Joseph Scott Miller, *The Immorality of Expedited Review*, 21 LEWIS & CLARK L. REV. 211 (2017).

<sup>20</sup> Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARVARD L. REV. 926, 927 (1990).

Such pressure on law professors, or aspiring law professors, may be one reason that, during one calendar year and involving articles solicited under two different editorships, this law review twice dealt with articles containing apparent plagiarism. Though neither of those articles went to print, finding serious, hidden problems in law review articles is a compliment to the hard work and skill of the source checkers and articles editors assigned to them. Further, the discovery is a testament to the importance of the student editing process—and puts a bit of the lie to Judge Posner's argument that source checkers pay *too* much attention to "maximiz[ing] the number of footnotes" at the expense of honoring the author's voice.<sup>21</sup> However, it's also a disturbing trend which, if extrapolated to the wider world of law reviews, throws into relief other shortcomings of our current system, and the limitations of suggestions like peer review to fix every ailment. Neither student nor faculty is likely to be so familiar with the canon as to spot unattributed quotes prior to a deep source check.

The articles we have published during my term as Editor-in-Chief and, indeed, over the 20-year history of Lewis & Clark Law Review, include exciting contributions to the legal academy. The just-completed volume, Volume 20, contained articles with envelope-pushing ideas on everything from marriage<sup>22</sup> to the regulation of lawyers.<sup>23</sup> The final issue of the volume contained a symposium organized by Lewis & Clark Professor James M. Oleske, Jr. and featured some of the most pre-eminent scholars on the subject of law & religion. The authors I have had the occasion to work with have been extremely patient, understanding, and professional. What's more, as Lasson suggests, those authors who have written papers which do *not* advance the academy—due to serious substantive deficiencies or worse—are, frankly, rational market actors, and responding to the realities of academic publication in this day and age. But to address the issues discussed by Posner and Wise et al., the solution will not come from the students, whose built-in lack of institutional

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<sup>21</sup> Posner, *supra* note 15; cf. Justin J. DeCamp, Letter to the Editor, *LEGAL AFFAIRS* (Nov.–Dec. 2004) ("It is precisely because the law reviews are entirely student-run that they feel the need to provide support for every factual or legal assertion made by an author. . . . Most of the time, the 'cite-check' confirms that the author is appropriately using a particular source. Occasionally, however, the wrong source is used, a citation is incorrect, support is not provided where it ought to be, or a factual or legal assertion is just plain wrong.").

<sup>22</sup> Jessica Feinberg, *Gradual Marriage*, 20 LEWIS & CLARK L. REV. 1 (2016). Since this article was published before I was elected, here is where I express my gratitude to Nicholas Lauren, my predecessor as Editor in Chief, as well as all of the managing board, editors, and members with whom I've been privileged to work.

<sup>23</sup> Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717 (2016).

memory is unlikely to create real reform.

As I suggest in Part I, law review as a teaching tool may need no reform at all; if that is all it aspires to be, it is a success. But law review as the voice of the academy may need improvement. If that improvement is to come, it will come from a robust peer review system to spot substantive problems with papers before they arise, but it will require more: It will require authors like Professor Miller, who writes “in the hope it may persuade others to join” him in one of many needed reforms.<sup>24</sup> Most urgently, it will come from a small subset of authors—who might be careless or worse in their rush to publish—improving their work before it gets to the law reviews at all.

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<sup>24</sup> Miller, *supra* note 19, at 213.