



MICRO- SYMPOSIUM

I pass with relief
from the tossing sea
of Cause and Theory
to the firm ground
of Result and Fact.

Winston S. Churchill

The Story of the Malakand Field Force (1898)



INTRODUCTION TO THE MICRO-SYMPOSIUM ON

ORIN KERR'S
"A THEORY OF LAW"

Ross E. Davies

FOR MORE THAN A CENTURY, careful readers of the *Green Bag* have known that "[t]here is nothing sacred in a theory of law . . . which has outlived its usefulness or which was radically wrong from the beginning. . . . The question is What is the law and what is the true public policy?"¹ Professor Orin Kerr bravely, creatively, and eloquently answered that question in his article, "A Theory of Law," in the Autumn 2012 issue of the *Green Bag*.² Uniquely among all theories of law that I know of, Kerr's answer to the fundamental question of law and true public policy enables all scholars to answer that same question in their own ways. Not surprisingly, Kerr's fine work has been well-received by thoughtful observers, none of whom appear to think it has outlived its usefulness or that it is fundamentally wrong.³

Ross Davies is a professor of law at George Mason University and editor of the *Green Bag*.

¹ Andrew Alexander Bruce, *The Wilson Act and the Constitution*, 21 GREEN BAG 211, 220 (1909) (capitalization in the original).

² Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

³ See, e.g., Benjamin Wittes, *Readings: Orin Kerr on "A Theory of Law,"* LAWFARE, www.lawfareblog.com/2012/11/readings-orin-kerr-on-a-theory-of-law/ (Nov. 25, 2012); Dan Filler, *Green Bag Call For Micro-Papers*, THE FACULTY LOUNGE, www.thefacultylounge.org/2012/11/green-bag-call-for-micro-papers-.html (Nov. 28, 2012).

Micro-Symposium: Orin Kerr's "A Theory of Law"

The *Green Bag* has a history of successful publication of Kerr's work.⁴ And so we are especially pleased to be featuring his "A Theory of Law" in our first micro-symposium. Our call for papers (reproduced on the next page) attracted scores of thought-provoking micro-essays: 101 of them, to be exact. Blessed with an abundance of good work but cursed by a shortage of space, we were compelled to select a small set – representative and excellent – of those essays to publish here. Fortunately, the most recent issue of our sibling publication, the *Journal of Law*, could spare a few pages for the presentation of more (but still not all) of the worthy submissions – specifically, papers by Laura I Appleman, Shawn Bayern and Jeffrey Kahn, Adam D. Chandler, Robert D. Cheren, Miriam A. Cherry and Anders Walker, Paul Gowder, Robert A. James, Jacob T. Levy, Orly Lobel, Theodore P. "Jack" Metzler, Ronak Patel, Jeffrey A. Pojanowski, Alexandra J. Roberts, and Kent Scheidegger.⁵ We regret that we cannot do full justice to the outpouring of first-rate legal-theoretical commentary we received.

Before getting to the micro-symposium itself, an editorial note is called for regarding the overlong commentary by Geoffrey Manne.⁶ Our call for papers specified a 164-word maximum. Manne's paper is 232 words long. Nevertheless, it appears here. Our only excuse is that we are following in the footsteps of the *Harvard Law Review*, which explains its stance on excessive article length on its website:

The *Review* strongly prefers articles under 25,000 words in length . . . including text and footnotes. The *Review* will not publish articles exceeding 30,000 words . . . except in extraordinary circumstances.⁷

Our length limit is much lower, but our rationale is the same: the excellence of Manne's commentary is extraordinary.⁸ Enjoy.

⁴ See, e.g., Orin S. Kerr, *How to Read a Legal Opinion*, 11 GREEN BAG 2D 51 (2007); Frontispiece, 15 GREEN BAG 2D i (2012) (quoting Kerr).

⁵ See 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 487 *et seq.* (2012).

⁶ See Geoffrey A. Manne, *A Signaling Theory of Law*, 16 GREEN BAG 2D 221 (2013).

⁷ *Submissions*, www.harvardlawreview.org/submissions.php.

⁸ This is not precedent for violating the *Green Bag's* ban on articles of more than 5,000 words. Cf. *Sorchini v. City of Covina*, 250 F.3d 706, 709 n.2 (9th Cir. 2001).

CALL FOR PAPERS

The *Green Bag* invites submissions for its first micro-symposium, to be published in our Winter 2013 issue.

Theme: Professor Orin S. Kerr's new work: *A Theory of Law*, 16 GREEN BAG 2D 111 (2012). *Invited topics:* Any commentary on *A Theory of Law* that is novel, interesting, and not mean-spirited. Humor optional. Professor Kerr will, of course, be given a chance to have the last word. Whether he will take that chance remains to be seen. *Length limit:* No longer than the original *A Theory of Law*, which is 164 words long, including title, byline, and footnotes. (It is reproduced in its entirety below.) *Deadline:* Finished works must be received at editors@greenbag.org by December 25, 2012. No extensions will be granted and no post-deadline tinkering will be permitted. *Selection criteria:* Works will be selected for publication by the *Green Bag* and Professor Kerr based on their novelty, interest-ness, and good-spiritedness.

A THEORY OF LAW

Orin S. Kerr

It is a common practice among law review editors to demand that authors support every claim with a citation. These demands can cause major headaches for legal scholars. Some claims are so obvious or obscure that they have not been made before. Other claims are made up or false, making them more difficult to support using references to the existing literature.

Legal scholars need a source they can cite when confronted with these challenges. It should be something with an impressive but generic title. I offer this page, with the following conclusion: If you have been directed to this page by a citation elsewhere, it is plainly true that the author's claim is correct. For further support, consult the extensive scholarship on the point.¹

Orin Kerr is the Fred C. Stevenson Research Professor at the George Washington University Law School.

¹ See generally Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).



A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

AGAINST
"A THEORY OF LAW"

Kieran Healy

ORIN S. KERR MAKES A VALUABLE contribution to the legal literature.¹ However, its undeniable utility is limited by the routine need for authors to suggest that, while the work they are citing is of real value, scholarly opinion is nevertheless divided on the matter. The judicious assessment of imaginary positions in notional debates is a core function of credible, legitimating footnotes. Thus, the present article is made available to those who need to show Kerr's approach is incomplete, and perhaps even misguided. It seems likely that further research is required, together with grant funding, and perhaps a conference at a congenial location.



Associate Professor in Sociology and the Kenan Institute for Ethics, Duke University.

¹ Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012). *But see* Kieran Healy, *Against "A Theory of Law"*, 16 GREEN BAG 2D 218 (2013).



A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

AN APPROACH TO LEGAL THEORY AND ACADEMIA

Caitlin M. Hartsell

OFTEN, LAW REVIEW EDITORS STRUGGLE with poorly cited manuscripts. As Orin Kerr noted in his now-canonical article, *A Theory of Law*, some statements are either “so obvious” or “false” that they elude citation.¹ While Kerr offers a solution for true propositions, he offers no recourse for propositions that the author totally fabricated.

Thus, I offer this for the benefit of those beleaguered and exasperated editors faced with an uncited proposition and an unhelpful author. If an author insists on keeping a statement that is clearly erroneous or unsupported by the literature, cite here. If this citation makes it to publication, understand it contains this caveat emptor: this law review does not warrant the accuracy of the cited statement, and the author did not care enough to check the editor’s suggested source.



Caitlin Hartsell is an Articles Editor on the Washington University Law Review.

¹ Orin Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).



A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

TURTLES

Chad M. Oldfather

ORIN S. KERR'S MAGISTERIAL *A Theory of Law*¹ stands as an important contribution to legal theory. Yet, as its very title suggests, it is incomplete. For we must never forget that it is Kerr's *theory* that we are expounding. This title-generated ambiguity leaves the article with two flaws. First, it undermines the article's ability to support empirical claims. Scholars need a source for those, too. Second, it suggests that while impressive-but-generic titles are nice,² enigmatic, one-word titles are better.³

This article seeks to fill the resulting gaps. Thus: any and all empirical claims that seemed reasonable enough to an author for that author to have included them in an article are clearly accurate.⁴ Also: it really is turtles all the way down. I checked.



Chad Oldfather is a Professor of Law at the Marquette University Law School.

¹ 16 GREEN BAG 2D 111 (2012).

² *Id.*

³ *E.g.*, Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049 (2009).

⁴ See Kerr, *supra* note 1, at 111.



A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

A SIGNALING THEORY OF LAW

Geoffrey A. Manne

IN HIS SEMINAL – NAY, CANONICAL – article, *A Theory of Law*, Orin Kerr writes that

[s]ome claims are so obvious or obscure that they have not been made before. Other claims are made up or false, making them more difficult to support using references to the existing literature.¹

Distinguishing between obvious/obscure and false citations is impossible under conditions of uncertainty.² Meticulous law review editors seeking to distinguish between them must infer type from market or other signals.³ But because authors of both false and merely obscure claims may cite at equal cost to Professor Kerr's article, doing so is merely "cheap talk," and there is no separating equilibrium.⁴

To rectify this, "I offer this page, with the following conclusion: If you have been directed to this page by a citation elsewhere, it is

Geoffrey Manne is a Lecturer in Law at the Lewis & Clark Law School.

¹ Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

² *Id.*

³ *Id.*

⁴ *Id.*

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plainly true that the author's claim is true,"⁵ and, by citing to this article, if it is not true the author agrees to pay me \$5,000.⁶

Checks may be mailed to:

Geoffrey Manne
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219



⁵ *Id.*

⁶ Geoffrey A. Manne, *A Signaling Theory of Law*, 16 GREEN BAG 2D 221 (2013).



A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

A THEORY OF LAW'S INCOMPLETENESS

Ryan C. Williams

PROFESSOR ORIN KERR'S MAGISTERIAL ARTICLE, *A Theory of Law*, promises an important breakthrough in legal scholarship by providing authors with a single all-purpose citation for any claim that is sufficiently obvious or obscure (or made up or false) as to be otherwise unciteable.¹

Unfortunately, Professor Kerr's argument is incomplete in that he fails to explain why authors should also cite my own work. I therefore offer this more thoroughly sourced – and hence, more persuasive – rejoinder, which corrects this glaring oversight and which should hereafter be cited alongside any future citation to Kerr's *A Theory of Law*.²



Ryan Williams is a Sharswood Fellow at the University of Pennsylvania Law School.

¹ See Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012) ("If you have been directed to this page by a citation elsewhere, it is plainly true that the author's claim is correct.").

² *Id.*; see also Ryan C. Williams, *A Theory of Law's Incompleteness*, 16 GREEN BAG 2D 223 (2013).



A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

THEORY V. PRACTICE

Arthur Stock

KERR'S ARTICLE PROVIDES YET ANOTHER instance of the failure of the legal academy to produce scholarship useful to practicing lawyers. Law review editors are not unique in demanding citations for propositions that may be obvious, obscure, or false. Similar demands may emanate from clients and co-counsel who review drafts, and opposing counsel and judges who read filed briefs.

However, citation to "A Theory of Law" will not satisfy the demands of client, co-counsel, opposing counsel or the judiciary, all of whom agree that titles cited in briefs must consist of two words or phrases separated by "v." and must be published in the Westlaw and/or Lexis databases.¹ This micro-symposium contribution extends Kerr's work to meet the practicing lawyers' needs.



Arthur Stock is a practicing lawyer.

¹ See, e.g., *Theory v. Practice*, 16 GREEN BAG 2D 224 (2013), 2013 Westlaw ____ at *1.



A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

THESIS SENTENCE

Jeffrey M. Lipshaw

ORIN KERR'S CONTRIBUTION¹ to the literature of over-citation is commendable, but unfortunately lacking in one critical area.² Law review editors regularly request a citation for the thesis sentence of the paragraph, usually requiring the author to place a comment note on the draft to the effect: "This is the thesis sentence for the paragraph. It's my contribution to the literature. It doesn't need a footnote." A citation to Professor Kerr's otherwise perspicacious essay will not solve the problem.

This essay's unique contribution to the micro-symposium is to provide a solution to this specific conundrum.³ A citation to this essay demonstrates conclusively that the sentence so demarcated is not otherwise dependent on citation, but is the product of the author's original thought.



Jeffrey Lipshaw is an Associate Professor at the Suffolk Law School. He has nobody to thank.

¹ Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

² Jeffrey M. Lipshaw, *Thesis Sentence*, 16 GREEN BAG 2D 225 (2013).

³ *Id.*



A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

AN ANALOGIC THEORY OF LAW

Lee Anne Fennell

PROFESSOR KERR'S ARTICLE IS ELEGANT and ambitious. It is also demonstrably false: the sun revolves around the moon.¹ Kerr aims too high because he misunderstands the problem. Law review editors do not "demand that authors support every claim with a citation."² Rather, they merely demand that authors *append* a citation to every claim. The artfully dodgy *cf.* will serve as well as any *see*.

To paraphrase words attributed to Tolstoy, all stories boil down to two:

1. Someone goes on a journey.
2. A stranger comes to town.

So it is with law. If you were directed here by a citation elsewhere, you will find an analogy to the claim the author was making.



Lee Anne Fennell is Max Pam Professor of Law and Herbert & Marjorie Fried Research Scholar at the University of Chicago Law School. Copyright 2013 by Lee Anne Fennell.

¹ See Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

² *Id.* (emphasis added).