1994

Faculty-Edited Law Journals

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RICHARD A. EPSTEIN*

The great majority of legal work is published in student-run law reviews, and any discussion of the oft-troubled, sometimes-harmonious, relationships between faculty authors and their student editors can easily fill additional law review volumes with stories to make faculty (and some student?) hairs stand on end. I have a broad repertoire of such stories: some of these place students in a favorable, indeed heroic light; others relegate them to the lower circles of Dante's Inferno. But my experiences are hardly atypical for faculty authors who have taken several turns around the track. My more distinctive role is that of a faculty editor of a journal that publishes no student work. I edited (mostly alone) *The Journal of Legal Studies* from the end of 1981 to the middle of 1990. Since that time I have taken a position as a junior editor of *The Journal of Law and Economics*. *The Journal of Legal Studies* publishes a mix of legal and nonlegal authors. Economics is the dominant coin of its realm and many of its authors have law degrees as well as Ph.Ds in economics. *The Journal of Law and Economics* publishes articles drawn from the same two urns, and concentrates heavily on economics articles, often with a heavily empirical and quantitative bent. I will not touch on my qualifications, or lack thereof, for this higher office.

On many occasions I have found reason to reflect on the differences between faculty-run and student-run journals. These are many, and perhaps, even profound, and they stem, I believe, from one basic problem with student editors that no course of instruction will ever be able to cure. Student editors—ever zealous and often knowledgeable—come to their positions with one or two years of legal education under their belts. Their selection is not perfectly random, but nonetheless has a high degree of variance. Sending an article into an unidentified student editor therefore is a little bit like buying a pig in a poke. Some of them will be future professors and even colleagues.

* James Parker Hall Distinguished Service Professor of Law, The University of Chicago. These comments are an expanded version of some unguarded remarks that I made to the section on law reviews at the American Association of Law Schools Conference held in Orlando, Florida in January 1994. My thanks to James Lindgren for pushing me to write up my remarks.

Dan Kahan, who edited my Harvard Foreword,[1] is a colleague of mine at the University of Chicago Law School. But at the other extreme I have received editing so poor, and prose so deathless, that I have offered the Law Review an ultimatum between starting over or having me pull the piece, only to be greeted with words of thanks from worried student co-editors who feared that I might meekly submit to the changes made. Needless to say, between these two extremes, I have observed virtually every level of editorial competence.

In general, however, my impression of student editors is that they do a good and conscientious job. They are diligent, often to a fault on footnotes, and they catch the elementary grammatical mistakes that I continue to make. But their work is hampered by limitations that stem from their inexperience in dealing with substantive issues. Frequently student editors feel insecure about the subject matter of an article. Since they cannot comment intelligently about the structure of the argument, the possible lines of counterattack, and the interpretation given to primary sources, they often overdose in making sure that books are cited in large and small caps, all the while missing major substantive difficulties that could, and should, be corrected. And if their obsessive tendencies dominate their level of wisdom, hours of strenuous labor can translate a witty sentence into a tired one, and a sprightly metaphor into tedious, if literal, prose.

Even the domain of student journals has shown some intelligent institutional response to the obsessive qualities of law reviews. The proliferation of student journals, especially of the "Law & Policy" variety, has eased some of the pressure by reducing the footnote apparatus and allowing you to cite to the Sherman Act by name without its full citation and a solemn explanation that it pertains to matters of antitrust. And I must say that I am quite receptive to the idea of publishing short papers with a single theme, stripped of the footnotes that so often speak to excessive diligence instead of new understanding.

But the difficulties with student-run journals explain why a niche has opened up for faculty-run journals, both as competitors and complements. The University of Chicago has, for example, four faculty-run journals and three student-run journals that have learned to coexist even as they seek to obtain articles from the same nucleus of faculty members. The faculty journals survive because their editors

1. Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988). Much of that Foreword survives in my extended book length treatment of the same subject. *See* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993).

can supply something that student editors cannot. Let me indicate what those missing ingredients are. In the first place, with faculty-run journals there is no struggle for control of text. Rarely (make that only once, and under atypical circumstances that do not bear recounting) have I entered into a noncooperative arrangement with an author. If I sense that an author and I will not get along—whether because of differences in temperament or in intellectual orientation—I will not accept an article.

Happily, however, that problem almost never arises because the faculty authors who submit articles to faculty journals have already been around the track as well, and they know the presuppositions and biases that I bring to my work. Relying on their commendable sense of self-interest, they will shy away from me if they see that incompatible intellectual styles could frustrate their own work. The reputation that one acquires, both as an editor and a scholar, exerts a useful sorting effect on the pieces that are submitted for review. The articles are well matched to the editor, and this immediately reduces the travail in readying them for publication.

The advantages of a faculty-run journal do not end with this matching function. In addition, the level of experience on all sides means that each editorial engagement is not a voyage into the unknown. One early decision is whether to send the paper out to a referee. I must say that early on—here on the sage advice of my colleague Phil Kurland, then editor of the *Supreme Court Review*—I decided that it was not necessary to consult a referee before disposing all submitted papers. Instead, when I read a paper that I really liked, I just accepted it by mail. My own view is that articles that have some real wit about them should be accepted even if they are wrong in some particulars.

To give but one example—by name, no less—George Priest and Benjamin Klein submitted a paper called *The Selection of Disputes for Litigation*.[2] The article dealt with the ways in which disputes were selected for litigation. The authors noted, correctly, that the suits that went furthest through the system were not a random subset of the cases originally filed. The easy cases either way were settled, because even under the American system for cost, it does not pay to litigate a (near) hopeless case. As the cases progressed further through the system, the odds tended to even up. The selection process took place

2. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

regardless of the choice of legal rule, be it wise or stupid. The mere fact that one could show that appellate decisions sometimes favored plaintiffs and sometimes favored defendants did not show that the system was fair or sensible. It only showed that the lawyers for both sides knew how to respond in a rational fashion to the incentives created by the dominant legal rules. In the end, appellate decisions will always tend to split about evenly, except in those periods when the law is in rapid transition when parties are likely to find it difficult to calculate correctly the odds of winning or losing. The task was to find what factors influenced the choice of cases for settlement and the terms on which settlement took place, an inquiry that has given rise to a number of insightful papers in the decade since the Priest/Klein paper was published.

But the paper also contained a stronger assumption, which was that when the stakes were symmetrical for the parties, the likelihood for plaintiff's success in cases where liability was in issue was exactly 50 percent. The intuition behind the point is that cases go to litigation most often when uncertainty is greatest and (to embellish on Priest and Klein) that point comes when the product of the likelihood of defeat for both parties is the greatest. Notwithstanding these simple intuitions, Priest and Klein supplied a defective formal proof for the 50 percent hypothesis, as they cheerfully acknowledged when the reviews came in. To make matters worse, some variables in the selection process cut against their views of the 50 percent solution: does it make a difference that the plaintiff is the first-mover? Is that an advantage or disadvantage or just a fact of life? But I decided to accept the paper and to reject the mathematical appendix because the article was so rich in ideas that it would prompt lots of responses, and sooner or later one would decide just how the selection process worked in different litigation settings. And it did initiate just that sort of literature.

In general therefore, my practice was to take the papers I liked, reject the ones I did not, and to ask for referees' opinions on those on which I could not quite make up my mind. My simple test was this: would a favorable referee's report, within the realm of reason, make me accept a paper that I would otherwise reject?; and would an unfavorable referee's report, within the range of reason, make me reject a paper I would otherwise accept? The first part of this task is not heroic: lots of faculty journals reject papers without referees, if only to economize on costs. But the opposite tack of taking papers without a referee's report is a bit bolder, and perhaps a bit more foolhardy.

Nonetheless, some of the most influential papers I had the privilege of publishing, I accepted on my own judgment. I would then move the paper immediately toward publication, talking its ideas over with others so as to help the author. I don't think that student editors have this kind of confidence in their own judgment. Speed on the uptake is an advantage that authors come to appreciate.

Students do not have as good an entry into the referee network; nor can they be as skilled in using it. Students find it hard to determine whom to ask, or how to value their opinions. Faculty members may be reluctant to say negative things about an author because they fear that a large student staff will be unable to keep the negative statements in confidence, so that unflattering statements will be revealed to the original author, and perhaps misinterpreted to boot. As a faculty editor with a track record it is easier to find the proper referee, and easier to coax that referee into giving a candid evaluation of the paper and usually some useful suggestions for reform. But a good referee's report is often better than a vote of student editors, who 8-5 decide to accept one paper and reject a second, which might well be better but less fashionable or trendy. (As an aside, the redundancy of student journals does offer one safeguard: it is highly unlikely that any meritorious article will not get published somewhere.)

The advantages of experience carry over to nurturing the article along the path to publication. The faculty editor has a certain legitimacy, and corrections and suggestions are taken, I have found, with seriousness by authors because they think that they can profit by listening to criticisms proffered by faculty editors and their cadre of referees. In some cases, I think that it is important to think about repackaging the paper that is submitted. I can recall several instances where I accepted a half or a third of the submission because it seemed best that a strong point not be lost in a longer paper that contained other material of somewhat lesser interest. In one case I can recall that I told a pair of authors who had submitted two distinct papers, that I would fold one-third of the second paper into two-thirds of the first and publish a slimmed down version of the combined paper, which turned out to be far stronger and more coherent than either of the longer papers standing alone. Even when merger or divestiture is not recommended, a faculty editor can do things that most student editors would not attempt. It is often critical to make sure that the sections of a paper are in the right order, or that new sections be added to fill gaps in the argument, or that certain portions be rewritten to respond to anticipated difficulties. Faculty editors can suggest or

perform radical surgery and live to tell about the event. Student editors usually cannot.

Once you have gotten past the questions of structure and packaging, is it time to start with a line edit of the paper? I think that the answer is often no, especially with faculty authors. In most, but not all, cases it is useful to sit down and to write a three or four, or even ten page letter to the author which sets out the strong and weak points of the paper and indicates where the author has to do more work to clarify the paper before line editing can begin. Usually authors know the field better than an editor, so that a suggestion will often prod them into improving their own work by quantum leaps, which no line edit can achieve. Most authors do not have to be told that these comments should be taken into account. It is their paper, and if they think they will profit, they do the extra work and do it in the right spirit so that they make a product better than they had previously made. It is often clear that these advances come in unanticipated ways. Lots of times the author comes back with arguments designed to show that I am wrong, and makes arguments that seem well-nigh overpowering. Fine, is my attitude. Incorporate them into the article. Indeed in many cases I tell authors that I wish that their articles were written with the clarity and passion of their letters to me defending their original position, or expressing some disagreement with my misplaced criticism. And in one form or another, the letter becomes part of the article. I am quite happy to publish articles with which I disagree. The point of an editor is to get the dialogue going, not to win all disputes with authors by TKO.

Once the substantive discussion is completed, it comes time for the line edit. The obvious question is—what kind of edit? There is no uniform rule to handle this problem. I have published careful papers without changing more than a word or two of the manuscript. In reading some papers, I have said to myself, I would not write this paper this way if it were my paper, but then I realize that the important task of editing a journal is to preserve the distinctive craggy voice of each author for the benefit of readers who quickly tire of homogenized articles written in standard corporate style. It is not a question of who is the better stylist. The point is that individuality has to shine through, and that one of the pleasures in reading a journal is to hear the cadence of familiar authors as you read their prose. Editing should highlight individual styles, not wipe them out. I don't think that the aspiration of a journal should be to imitate the recent volumes of the *United States Reports* where too many opinions read as

though they were written by clerks and signed by Justices. Good writing is not cut from a single cloth. Good editing respects those differences.

Of course some changes are often required, and it is useful to develop a procedure for making them. For grammatical errors (including those introduced in the editing process), elimination is desired on all sides: there is no fertile ground for conflict. Naturally the closer questions turn on style, emphasis, nuance, and mood. On these matters my usual rule is as follows. I say to the author, you are always free to reject my suggestions, but please do not go back to the original version of the text unless you are absolutely, positively, sure that it is correct. Chances are that I misunderstood something; chances are you could persuade me that the error is mine. But the real question is, if I made the error, then other readers are likely to make it as well (or so I flatter myself). So avoid all controversy by explaining yourself to a larger audience in a way that they can grasp the point, the first time. It is quite amazing how often a small change in a sentence provokes an extensive modification of the text. Ambiguous writing sometimes is a sign of inexact argumentation, and most authors I have dealt with wish to correct their mistakes before, and not after, publication. This game need not end with the second or even third round of revisions. If I am still unhappy I try again by the same rules until the game reaches cloture by mutual agreement, mutual exhaustion, or both. The faster the turn around the better. In following this method I have found that very little conflict exists between editor and author. In student-run journals, where many hands touch the same paper, the road from first draft to finished product is often far more bumpy.

A third matter is worth some brief comment. What should be done about footnotes and documentation? My own view is that in routine cases follow this maxim: less is best. There are lots of points that are well known in the literature, and while student-run law reviews often demand that authors reinvent the wheel, I see no reason to do so in a faculty-run journal, where the object is to highlight the *increment* to knowledge, not to prove to the reader that the author knows all that came before. Summarization of the existing literature with a single citation should be sufficient to do the job. The comprehensive recounting and documentation so often required in student journals is quite unnecessary, and only clutters the page and impairs the readability of the article.

Yet this view should not be taken as hostility to footnotes for its own sake. When I published articles written by historical sleuths, such

as Brian Simpson,[3] my attitude is quite different. Legal research of that sort can only be done by experts who comb original sources that no one else could ever locate. By all means cite fully and completely whatever tidbits you find in the *Manchester Guardian* or the Midgely funeral records if such there be. I cannot check these citations, or warrant the outcome of the search. But I don't believe that my readers expect that level of field detective work from an immobile Chicago-based editor. They know Brian Simpson and his work, and they trust him, not me. I am quite willing to stand behind unknown authors and vouch that they have something to say. But experienced authors have to stand on their own reputations, and their own footnotes. And they do.

With all this said, one question remains: should anyone ever become an editor of a faculty journal? Surely it is not for the pay, which in round numbers is usually a round number. But there are compensations in helping to develop fields and authors. And note as well that while the labor is intensive, nothing is as labor intensive as student journals when 70 students seek to put out 2,000 or more pages a year. A faculty journal can aspire to less and do more. The issues are shorter, the technical aspects—copyediting, proofing, routine correspondence—can be handled by a professional staff. So the work load can be kept to tolerable levels. Duplication and inexperience are not the order of the day. And all can be done. When I started at *The Journal of Legal Studies*, a colleague—Russell Hardin, I believe, then editor of *Ethics*—gave me this advice as to the optimal term for a faculty journal editor. He said: "If you stay less than five years, you do a disservice to a journal. If you stay between five and ten years, you do a service to a journal at some sacrifice to yourself. If you stay more than ten years you do a disservice to both journal and yourself." I took his advice and resigned as editor of *The Journal of Legal Studies* after nine years.

3. *See* A.W.B. Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of* Rylands v. Fletcher, 13 J. LEGAL STUD. 209 (1984).