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Law Reviews

Richard A. Posner*

I'm delighted to have this opportunity to talk about law reviews. I was a law review editor once, almost half a century ago, and I have published many articles in law reviews, and I think I have a pretty good idea of the history and the problems of what is, after all, an unusual, somewhat questionable, but tenacious institution.

I am going to be critical, but I know that you will take my criticisms in the proper spirit. I know that each of you wants to do a good job as a law review editor. That is hard to do because law review editors are inexperienced both as lawyers and as editors. That is not their fault; it is an inherent characteristic of the system.

In every academic field except (as far as I know) law, scholarly journals are edited by seasoned specialists, usually professors, who have had years—often many years—of experience as specialists in their field but also, in many cases, as journal editors. Nevertheless, in deciding what to publish, they place great, often decisive, weight on the advice they receive from other professors, to whom they refer submitted articles for review. These “peer reviewers,” or referees, submit to the editor their recommendation on whether to publish the article, and also make criticisms and suggestions that are forwarded to the author, usually anonymously. (Often the article is submitted to the reviewers anonymously as well.) However, neither the editor nor his or her staff—if the editor *has* a staff—will worry much about the author's style or check the author's citations. But because journal space is usually quite limited in relation to the number of publishable articles, the editor will often insist on the author's shortening the article as well as on making changes responsive to the recommendations of the referees (usually there are two referees, sometimes more).

To minimize the burden on reviewers, the vast majority of scholarly journals forbid authors to submit an article to more than one journal at a time. This rule, coupled with the use of peer reviewers, often results in a delay of a year or more between the initial submission of an article to a journal and its publication by that or another journal. Delay is the principal criticism made of the system I have just described, although

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there is also of course occasional dissatisfaction with the selection, conscientiousness, and competence of reviewers. The delay is far from being a total waste, however, because, as I have said, the referees' comments will often enable a significant improvement in the article. And nowadays the article is likely to be posted online in working-paper form long before publication in a journal, so that the publication lag does not delay communication of the article's principal findings to interested specialists.

As you know as well as I, the system for publishing scholarly articles in law—the system of which you are the temporary custodians—is strikingly different. The law reviews are numerous, edited by students, published at frequent intervals, do not employ peer review, are seemingly unconstrained in length, and have large student staffs. With such abundant manpower and no reliance on peer review, law reviews do not forbid simultaneous submission or insist on brevity, and the interval between initial submission and final publication is shorter than in other scholarly fields. The size of law review staffs enables them not only to check the author's citations but also to make many substantive comments and also engage in line-by-line copyediting.

This system evolved at a time when legal scholarship was primarily a professional rather than an academic product. Its primary aim was to serve judges and practicing lawyers rather than other professors. And so the reviews hewed to the conceptual framework of legal practice and adjudication, a framework that consisted then and to a great extent still consists of legal doctrines plus the rhetorical moves that are used to adjust legal doctrines to fit novel cases. That was the framework to which the students had been introduced on their first day in law school and in which the best of them had become fairly expert by the end of their first year of study. And so they were competent editors of law professors' articles.

The system was not ideal even in its heyday. The fact that students spent at most two years as members of a law review—two years *as part-time* members of law reviews, since they were (nominally at least) full-time students—prevented them from becoming experienced editors; and remember that they were novice editors when they started. And the fact that no self-respecting law school could afford not to have a law review meant that competitive pressures were weak. There was no fear that a law review that did not perform well would be driven from the market. So law review editors could indulge their whims, and thus for example publish the “tenure article” of a junior professor not because it was a good article but because he was a popular teacher or because the editors felt sorry for him and didn't want to see him fired.

The system of student-edited law reviews has persisted with little

change despite a major change in the character of legal scholarship that has made the weaknesses that I have mentioned both more conspicuous and more harmful to legal scholarship. The change has not been complete. Most articles by law professors today are still, as they were a half century ago, rather narrowly, conventionally doctrinal; and good law students can evaluate and improve such articles. But many of today's law professors (at the leading law schools, most) have, for good or ill, broken the doctrinal mold. Their work draws very heavily on sources other than legal doctrine, whether it is economics, history, political or moral philosophy, cognitive psychology, statistics, epistemology, anthropology, linguistics, cultural studies, or literary theory. The use of insights from these fields in analyzing law has given rise to a cornucopia of interdisciplinary fields of legal studies ("law and . . ." fields), ranging from law and economics (the largest and most influential) to feminist jurisprudence and critical race theory. The external (I mean external to law) disciplines on which these interdisciplinary fields draw are generally not ones about which, except by accident, a law review editor will be knowledgeable. This might not matter much if the analytical core were legal, but it is not. "Law and economics," for example, is the application of economic theory to law, not the application of legal reasoning to economics. So the law review editor cannot get much mileage from what he or she has learned about legal reasoning.

Submissions in "law and . . ." fields thus magnify the bad effects of the inexperience of student editors and their failure to use peer review to winnow the wheat from the chaff. One result is that a lot of mediocre, evanescent, and faddish stuff is published. Another is that neither author nor reader is likely to benefit from the editing process. The author, indeed, is likely to suffer, because the student editors, having a great deal of time to devote to each article because law journal staffs are so large, often torment the author with stylistic revisions. (These are to be distinguished from correcting erroneous citations; that is a genuine service to scholarship.)

This is a good example of the bad effects of a noncompetitive market. Law review editors treat authors badly because law reviews do not pay a price if they drive away authors by tormenting them in the editing process. To the student editors, the cost of an author's time is zero; and because the students are not trained or experienced editors, the average quality of their editorial revisions is low. Many of the revisions they suggest (or impose) exacerbate the leaden, plethoric style that comes naturally to lawyers (including law professors). And usually the author is subjected not to one, but to two or three, rounds of editing.

The editors, moreover, do not limit their suggestions to style. On the side of substance, their especial preoccupation is with trying to

maximize the number of footnotes, citations, and cross-references; they insist as well on inserting parenthetical summaries of cited references, even when the reference is to an entire book (e.g., Plato, *Republic* (sketch of proto-communist society ruled by philosophers); Sophocles, *Oedipus* (play about mother-son incest)).

But I do want to say something more about what law review editors do with style. Too many of them believe that good style means conformity to rules found in grammar and style books, for example rules requiring that independent clauses be set off by commas, or that the active voice be substituted for the passive, or that sentences should not begin with “But” or “And,” or that infinitives should never be split. These are silly, fusty rules. The object of revising an author’s style should be to make his writing clearer. Period.

I commend to you an article called “Remaking Law Review,” by Jonathan Mermin, published in the *Rutgers Law Review* in 2004.¹ Mermin’s article is full of penetrating criticisms and provocative suggestions, and also contains quite a full review of the previous literature on law reviews, which is extensive, and which all of you could consult with profit. Mermin, for example, quotes James Lindgren’s observation² that student editors enforce “schoolmarmish superstitions about good prose style.” Mermin ridicules the obsession of law review editors with bluebooking, pointing out that “the *Bluebook* obsession looks all the more mysterious from the perspective of actual law practice. Judges, it turns out, are indifferent to the *Bluebook*’s elaborate requirements [M]astering the *Bluebook* . . . is . . . essentially pointless, unless one happens to be editing a law review article.”³ I do not conform my judicial opinions to the *Bluebook*, and no one has complained yet.

A pernicious feature of the operation of student-edited law reviews is the editors’ use of the length of a submitted article as a signal of its quality. The longer the article, and therefore (in all likelihood) the more time the author invested in writing it, the likelier it is to strike the novice editor as being solid work. The shorter the article, the more that evaluation requires the ability to assess the ideas in it, since there isn’t a lot of harmless padding to base a judgment on. The defensiveness, the intellectual insecurity, of student editors is reflected in their penchant, which I’ve already noted, for insisting that authors maximize the number of footnotes and citations in order to create the impression that everything in the article is proven fact. Novelty and imagination, freshness and liveliness, and originality are all discouraged. Mermin quotes Ber-

1. Jonathan Mermin, *Remaking Law Review*, 56 RUTGERS L. REV. 603 (2004).

2. James Lindgren, *Reforming The American Law Review*, 47 STAN. L. REV. 1123, 1124 (1995).

3. Mermin, *supra* note 1, at 613.

nard Hibbitts on the selection preferences of student editors, owing to inexperience. “[M]uch of what they prefer to publish,” says Hibbitts, “turns out not to be what is academically best or innovative or remarkable, but what is recognizable (to them), what is ‘safe’ or alternatively fashionable, what is written by familiar ‘names,’ what catches their fancy on stylistic grounds, or what will cause them the fewest hassles at cite-checking time.”⁴

The result of the law review system is that too many articles are too long, too dull, and too heavily annotated, and that many interdisciplinary articles are published that have no merit at all. Worse is the effect of these characteristics of law reviews in marginalizing the kind of legal scholarship that student editors can handle well—articles that criticize judicial decisions or, more constructively, discern new directions in law by careful analysis of decisions. Such articles are of great value to the profession, including its judicial branch—and there I speak from experience.

I can perhaps add some color to these criticisms by quoting from what is by now quite a substantial literature of law professors’ “horror stories” about their experiences with having their articles edited by law reviews. Here is a small sample, quoted mainly from Professor Lindgren of Northwestern, whom I mentioned earlier:

While editing a symposium, the editors of one journal kept cutting down the length of an article by a pair of contributors from a nonelite law school, claiming that the arguments weren’t worth publishing. Then by some strange process of osmosis, text cut from the pair’s submission began appearing in the manuscript of a famous professor from the editors’ home school. Apparently, the editors were pasting pieces of one manuscript into someone else’s. The pair demanded that their work be published as submitted. The journal refused. The authors pulled their article and published it in a less elite review.

....

One review accepted a manuscript and edited it, introducing over two hundred style errors into the manuscript. The author responded with a letter detailing the errors and providing excerpts from style manuals to illustrate them. The author requested either no style editing or a new, competent editor. The review refused. The author pulled the article, revised it, and years later published it in a faculty-edited law review.

A law journal recently tried to change case citations in a historical article to courts listed in *The Blue Book*, rather than the courts that actually decided them. When the author objected to these changes, he was threatened by an editor who warned that the journal had “a long memory.”

A law review accepted a manuscript, praising it as the best-written article they were publishing that year. Then they tried to rewrite every sentence, saying that they were surprised to find so many errors. The only reason that they thought there were errors is that they had based their correc-

4. *Id.* at 606.

tions on false folklore rules about proper prose style. When pressed, the editors honored their commitment to publish the text as the author wished.

One law review editor thought that many uses of the word “the” were errors. Following this bizarre rule of thumb, he took as many “thes” out of manuscripts as he could, thus reducing many sentences to a kind of pidgin.

....

A former editor of one journal admitted that during her year as an editor, the journal received an article that the editors very much liked from a professor at a nonelite law school. After much debate, they decided that they couldn’t “take a chance” on that professor’s law school. Later that year, they received an article in the same field from a professor at an elite law school, an article that they thought inferior. But they accepted it anyway.

Editors of one law review once rejected a comment that criticized an article they were about to publish because they thought that the comment was too devastating to the article. They said that the strength of the comment worked against their accepting it. They were embarrassed to be publishing the original article by one of their own faculty members and didn’t want to spend any more space on it in their review.⁵

Everyone has his or her own examples of absolute editorial adherence to a rule from some style manual, obeisance sometimes replacing common sense as the manual becomes more an edict and less a guide to good writing. “But,” for example, is forever banned from starting a sentence because, in some vague analogy to Family Law, a conjunction may only figure between two equally weighted clauses in a conventional relationship. In consequence, texts are weighted down with dozens of compulsory “howevers.”⁶

I have had several law reviews fight me over retaining copyright. In so doing, they make a variety of misrepresentations. A law review told me they had never in their history permitted an author to retain copyright, at which I pointed them to my two previous publications with the same review, in which I had retained copyright. The same review told me they couldn’t change their copyright agreement without the approval of the Dean and the University counsel, and when I offered to negotiate directly with the Dean they ended up modifying their agreement substantially without consulting either the Dean or the counsel’s office. Another review told me that they had a “consistent policy since 1948” of not permitting an author to use contractions in an article. A quick Westlaw search for some common contractions in that review turned up 419 publications with contractions, including one with a contraction in the title from the year before.⁷

I have spoken thus far of the law reviews as publishers of scholarly articles submitted to them. But in addition of course they publish arti-

5. James Lindgren, *An Author’s Manifesto*, 61 U. CHI. L. REV. 527, 528-31 (1994) (numbering on original omitted).

6. Carol Sanger, *Editing*, 82 GEO. L.J. 513, 521 (1993).

7. Email from Richard Posner, Judge, U.S. Court of Appeals for the Seventh Circuit and Senior Lecturer, University of Chicago Law School, to Richard C. Stevens, Managing Editor, *Washburn Law Journal*, Volume 46 (Aug. 21, 2006, 04:02:00 CST) (on file with *Washburn Law Journal*) (attributing quote to personal correspondence between Judge Posner and Professor James Lindgren).

cles (usually and misleadingly called “notes” or “comments”) written by the members of the law review’s staff. The opportunity to publish provides valuable experience. This, plus the rising quality of law students, may explain the enormous increase in the number of law reviews—law schools which used to have just one now often have two and sometimes three or four. My only criticism of the student-written portions of the law reviews is that the students have an understandable proclivity for writing about “hot” subjects, like partial-birth abortion, gay marriage, and capital punishment, to the neglect of equally important commercial subjects that cry out for informed doctrinal analysis.

But the need for reform centers on the role of the law reviews in publishing professorial articles, and the biggest obstacle to reform is that the present system provides useful training for law students and also signals the quality of particular law students to prospective employers. The law review editors tend to be the elite of the student body; prospective employers know this and so the elite students tend to be sorted to the elite firms. This service function of law review is so important, and the rapid turnaround of submissions is so valued by law professors, that I do not anticipate fundamental reforms, desirable as they may be in the abstract. I should like to see the law schools “take back” their law reviews, assigning editorial responsibilities to members of the faculty. Students would still work and write for law reviews, but would do so under faculty supervision. Their care in citechecking would be valued by the authors, but the tendency to poor judgment and thoughtless impositions on authors that the “horror stories” illustrate would be held in check. But I realize this proposal is quixotic.

Some modest improvements may be possible, however. Law review editors might adopt a presumption against publishing interdisciplinary articles—leave them to faculty-edited reviews, of which, for example, there are already a half dozen in law and economics alone. Editors might also refocus the law reviews away from articles dealing with the Supreme Court. The reviews are inordinately preoccupied with the Supreme Court. Not that it isn’t the most important court in the United States; but the eighty or so decisions that it renders every year do not deserve as much attention as the many thousands of decisions rendered by other appellate courts, especially since of all judges the Justices of the Supreme Court are the least likely to be influenced by critical academic reflection on their work, though there is some trickle down; ideas of academic origin may be repackaged in briefs or oral arguments to the Court.

I see one ray of hope on the horizon, and that is the growth of the law-related blog. Blogs such as “How Appealing,” “The Volokh Conspiracy,” “Law Blog,” “Legal Theory Blog,” the University of Chicago

“Faculty Blog,” and “Balkinization” are gaining attention and respect. They are becoming legitimate venues for academic publication. They are much more timely than law reviews and, best of all, they bypass the student editors. I believe that the law reviews are beginning to take notice of this competitive medium and, like the mainstream print and electronic media may find themselves compelled by competition to alter their practices in order to hold authors and readers. Let us hope so.