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Recommended Citation

Richard A. Posner, "The Future of the Student-Edited Law Review," 47 *Stanford Law Review* 1131 (1995).

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The Future of the Student-Edited Law Review

Richard A. Posner*

This conference¹ is a welcome sign of self-awareness on the part of the editors of student-edited law reviews that all is not right with this venerable institution of legal education and scholarship.² And indeed all is not right. In particular what is wrong is the law reviews' failure, and perhaps inability, to adapt to the changing nature of American law and American legal scholarship.³

I claim to speak to this issue not with authority, but with the advantage conferred by multiple perspectives. I was president of the *Harvard Law Review* in the heyday of the student-edited review. I founded and for many years edited a faculty-edited review, the *Journal of Legal Studies*. I have published articles in many different law reviews, as well as in a number of refereed journals, not all of them economic journals. I have even published in nonscholarly journals, such as the *New Republic*. My academic scholarship is interdisciplinary (and not limited to economic analysis of law) rather than doctrinal, but as a federal court of appeals judge for the past fourteen years I have been a voracious consumer, as well as a producer, of doctrinal scholarship. I have published many books with academic presses and am even married to a manuscript editor.

I. THE PROBLEM: THE REVIEWS HAVE NOT ADAPTED TO CHANGES IN LEGAL SCHOLARSHIP

To determine whether the law reviews (I am speaking, as throughout this article, only of the student-edited reviews) are doing well, we must first have a clear idea of what they are doing. Apart from performing a screening function

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1. The Law Review Conference held at Stanford Law School on February 24–26, 1995. I was unable to attend the conference, but have received a full report of its proceedings, including videotapes of several of the sessions.

2. Venerable, but frequently, and sometimes sharply, criticized. See, e.g., James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527 (1994); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990); Roger C. Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. LEGAL EDUC. 1 (1986).

3. This is not a new theme for me. See, for example, my book *THE PROBLEMS OF JURISPRUDENCE* 424–33 (1990). Nor am I a voice crying in the wilderness. See note 2 *supra*.

for employers⁴ and providing an educational experience for the reviews' members, what they are doing is, of course, publishing articles, book reviews, and student notes. But publication is not a single thing; it is a composite of tasks. It will promote clarity to distinguish between faculty-written and student-written work. With respect to the former, the law reviews' tasks are selection, improvement, and editing. With respect to the latter, they are selection of topics, writing, improvement, and editing.

It should be obvious that in the performance of these tasks the reviews labor under grave handicaps. The gravest is that their staffs are composed primarily of young and inexperienced persons working part time: inexperienced not only as students of the law but also as editors, writers, supervisors, and managers. The next most serious handicap, which is related to the first, is high turnover: members of law review staffs spend less than two years in the job—a part-time job, as I have said. They do not have enough time on the job to gain much experience, and their planning horizon is foreshortened. A third handicap is the absence of market forces in law review publishing. Law reviews do not fold if their editors make foolish decisions with respect to what to publish; and the editors receive no financial rewards if they lower the costs or raise the quality and circulation of their reviews. There is some penalty, no doubt, for angering professors, especially at one's own law school; and now that law professors are chattering to each other over the internet about atrocities perpetrated by law review editors, the penalty is growing. But it is still slight.

Given the handicaps of ignorance, immaturity, inexperience, and inadequate incentives, the wonder is not that law reviews leave much to be desired as scholarly journals, but that they aren't *much* worse than they are.⁵ Indeed they used to be quite *good* by the scholarly standards prevailing at the time, but it was a time when legal scholarship was understood to be doctrinal scholarship, and the more technical and intricate the doctrine, the better.⁶ The narrow orbit in which legal scholarship revolved facilitated the job of law review editors. Inexperienced they might be, but as students who had earned a berth on their school's law review by doing well in their first-year classes they had demonstrated that they possessed the knack of legal doctrinal analysis that was the very heart of legal scholarship in that era. Adept, albeit apprentice, doctrinalists, they could write, select, improve, and edit doctrinal scholarship. No single

4. A function impaired by affirmative action in the selection of members. But I do not want to discuss affirmative action, which I think is a peripheral though not wholly negligible factor in the present crisis (to put the matter too dramatically) of the reviews.

5. A survey of practicing lawyers, law professors, and judges found that the consumers of law reviews are generally pleased with the institution. Max Stier, Kelly M. Klaus, Dan L. Bagatell, & Jeffrey J. Rachlinski, *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467 (1992). But the response rate was low, only 32.7 percent. *Id.* at 1479 tbl. 1. The displeased are probably overrepresented among nonresponders; those who have no use for law reviews are unlikely to want to bother filling out a detailed (*see id.* at 1506–13) questionnaire.

6. Doctrinal scholarship, and the conception of professional autonomy that places it at the center of legal scholarship, are and always have been more deeply entrenched in Europe (including England) than in the United States. Probably what nevertheless prevented the emergence of student-edited law reviews in Europe was that law in Europe (including England) was and is an undergraduate subject.

field of law mesmerized students, as constitutional law, then a small field, mesmerizes them today. The scholarship both that they wrote and that they chose from the submissions by faculty reflected the diversity of law itself.

This Golden Age, not for law or even for legal scholarship, merely for student-edited law reviews, drew to a gradual close between 1970 and 1990. Doctrinal scholarship as a fraction of all legal scholarship underwent a dramatic decline to make room for a host of new forms of legal scholarship—interdisciplinary, theoretical, nondoctrinal (the last is the term that I shall use).⁷ The principal nondoctrinal subfields of law are economic analysis of law, critical legal studies, law and literature, feminist jurisprudence, law and philosophy, law and society, law and political theory, critical race theory, gay and lesbian legal studies, and postmodernist legal studies. Nonlawyers such as Coase, Cooter, Ferguson, Fish, Landes, Nussbaum, Rawls, Rorty, and Shavell have become real presences in legal scholarship, while many of the most prominent and productive academic lawyers, whether named Ackerman or Michelman, Balkin or Priest, Dworkin or Epstein, Ellickson or Eskridge, Grey or MacKinnon, Kennedy or White, Levinson or Levmore, Radin or West, Sunstein or Unger, are writing articles of a kind (or rather kinds) that would barely have been recognized as legal scholarship in previous generations. The change in the character of legal scholarship has been accompanied by a collapse of political consensus among legal scholars and by a vast expansion in constitutional law, which is the most political field of law as a consequence of the nature of the issues it addresses, the remoteness of the governing text, and the field's domination by a court (the Supreme Court) from which there is no possibility of appeal to a still higher court to keep the judges in line. Legal scholarship became more political at the same time that it was becoming more centrifugal.

These developments beached not only a number of doctrinal scholars but also most law review editors. They were now dealing with a scholarly enterprise vast reaches of which they could barely comprehend, and they were being tempted by the increasing politicization of the enterprise to employ political criteria in their editorial decisions. Let us consider how the seismic changes in academic law affected the specific tasks of law review editors that I listed earlier. The first is the selection of articles. How baffling must seem the task of choosing among articles belonging to disparate genres—a doctrinal article on election of remedies under the Uniform Commercial Code, a narrative of slave revolts in the antebellum South, a Bayesian analysis of proof beyond a reasonable doubt, an angry polemic against pornography, a mathematical model of out-of-court settlement, an application of Wittgenstein to Article 2 of the UCC, an essay on normativity, a comparison of me to Kafka, and so on without end. Few student editors, certainly not enough to go around, are competent to evaluate nondoctrinal scholarship. So they do what other consumers do when faced with uncertainty about product quality; they look for signals of quality or other merit. The reputation of the author, corresponding to a familiar trademark in

7. This decline is documented in William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & Econ. 385, 407-23 (1993).

markets for goods and services, is one, and not the worst.⁸ Others, and these dysfunctional, are the congeniality of the author's politics to the editors, the author's commitment to gender-neutral grammatical forms, the prestige of the author's law school, a desire for equitable representation for minorities and other protected or favored groups, the sheer length of an article,⁹ the number and length of the footnotes in it, and whether the article is a "tenure article" on which the author's career may be riding.

Law review editors also do not know which books are worth reviewing or who is competent to review them. And they sometimes succumb to the unprofessional temptation to publish an unsolicited review, though it may have been written by an enemy of the author or, worse, a toady of the author, or to ask the author himself for suggestions as to whom to ask to review his book.

I have been speaking of the selection of articles (or book reviews) for publication and it is here I think that, in the changed climate of legal scholarship, law review editors fall down on the job worst; but they don't do much better when it comes to making suggestions for substantive improvement in the non-doctrinal pieces that occupy an ever-larger fraction of the space in law reviews. This is an important role of scholarly journals in other fields. Indeed, referees and editors in fields such as economics are far more interested in making suggestions for the substantive improvement of the articles that they review and publish than in trying to improve the author's prose. Law reviews do not use referees to vet articles, so they don't have referees' reports to show the author. And the editors themselves are rarely competent to offer substantive improvements, or catch analytic errors, or notice oversights in research, in non-doctrinal articles.

Law review editors are notoriously erratic in attempting to improve an author's style. This is not a problem limited to non-doctrinal articles. Manuscript editing is its own, specialized field. Academic presses use professional manuscript editors to edit books, but law reviews use amateur manuscript editors, the members of the review's staff, to edit law review articles, book reviews, and notes. These inexperienced editors, preoccupied with citation forms and other rule-bound approaches to editing, abet the worst tendencies of legal and academic writing.¹⁰ A partially redeeming factor is that the student editors do check the accuracy of the author's references. This is a useful service rarely offered by faculty-edited journals and never by publishers of books.

8. This will raise hackles; there is a movement to blind submissions, in which the author's name is deleted from the manuscript. Extensive scholarly evaluation of the practice has revealed, however, no net advantages. See, e.g., Rebecca M. Blank, *The Effects of Double-Blind versus Single-Blind Reviewing: Experimental Evidence from The American Economic Review*, 81 AM. ECON. REV. 1041, 1063-64 (1991).

9. Cf. Bennett A. Rafoth & Donald L. Rubin, *The Impact of Content and Mechanics on Judgments of Writing Quality*, 1 WRITTEN COMM. 446, 447 (1984). "The law reviews fetishize length. They often refuse to caption papers that would be articles of normal and even unusual length in any other field as articles, instead terming them essays, comments, or observations."

10. See, Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343 (1986); also the parade of horrors in Lindgren, *supra* note 2, at 528-31. I can attest from extensive personal experience to the superiority of the professional manuscript editors at the Harvard and University of Chicago Presses to the amateur editors at even the best law reviews.

Both the good and the bad of student editing are consequences in part of the sheer size of the reviews' staffs. Because membership in a law review is a valuable educational experience for law students, the tendency has been for the staffs to expand as well as for the number of reviews to mushroom. The expansion in staff triggers Parkinson's Law. The editors busy themselves in busy work, including intrusive editing that imposes significant time costs on the authors and actually reduces, in many though certainly not all instances, the quality of the final product. Not only is the marginal product of student editing frequently less than the marginal cost, it sometimes is negative.

I want to turn my attention now to the student-written sections of the reviews. Law review editors, a subset of law students, are, like the rest of the law students, apprentice lawyers. It is natural for them to imitate their masters: lawyers and, especially, because of proximity, law professors. If the masters do non-doctrinal work, the apprentices are tempted to try their hand at it. If the masters fulminate against the latest horror of the Rehnquist Court, it is natural for the apprentices to do likewise. If more courses are offered in constitutional law than in any other field, even though only a tiny fraction of the graduates of the law school will ever practice constitutional law, then law review editors will have their heads filled with constitutional law and will want to write their law review notes on constitutional topics,¹¹ which is almost the equivalent of saying, on cases decided by the Supreme Court since the Supreme Court wholly dominates the articulation and application of constitutional law. But constitutional law is only one field of law, and the Supreme Court decides only a tiny fraction of the interesting cases decided every year by American courts. The result of the preoccupation of law review editors with constitutional law and with the Supreme Court is an unfortunate warp in the coverage of American law by the student-written sections of the law reviews. It is particularly unfortunate because of all American judges, Justices of the Supreme Court are the least likely to take their cues from student-written notes. I suspect that student-written notes on constitutional topics have, with the rarest of exceptions, no readership at all. So here is an area where the absence of a market has a painful bite, reducing much law review publication to the level of a vanity press.

II. A FORECAST: HOPELESS, BUT NOT SERIOUS

What is to be done? The situation is basically hopeless, though fortunately not serious. Hopeless because the problems reside in the unchangeable structure of the institution—the inherent inexperience and immaturity of student editors, the absence of the spur of competition, and the absence of continuity, which reduces the incentive to make changes since the fruits are unlikely to

11. Twenty-two percent of all articles and notes in law reviews are on constitutional topics, according to Lindgren. Lindgren, *supra* note 2, at 533. This figure seems too low, at least for casenotes. I once found that 59% of all casenotes dealing with federal cases are Supreme Court cases. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 331 tbl. 11.1 (1985). I recently updated this computation. For 1993, the percentage was 54. The Supreme Court publishes roughly 1% of all opinions published by the federal courts.

ripen in time to be harvested by the editors who initiate them. It is easy to suggest reforms, but difficult to find grounds for thinking that any but the most trivial have any chance of being adopted. But so what? Law reviews have no market power. If other media for the publication of law-related scholarship are superior, the market will supply them. Indeed, it *is* supplying them. There are more and more faculty-edited journals; and more and more legal scholars are publishing books with academic presses. But it would be pushing *laissez-faire* too far to end this paper without *any* suggestions for improving law reviews, so here are mine:

1. Law reviews should focus on doctrinal scholarship in both the faculty-written and the student-written sections of the review, leaving to the growing number of faculty-edited journals the principal responsibility for screening, nurturing, improving, and editing nondoctrinal scholarship. Not only do law review editors generally lack the competence to select and improve this scholarship, but the need for heavy editing (that specialty of law reviews, enabled by their huge staffs) is reduced by the fact that nondoctrinal papers are usually given at workshops before being submitted for publication, so that the author has already received many of the sorts of criticism that he might expect from a dose of good law review editing.

Doctrinal scholarship has declined relatively to nondoctrinal, but it remains the largest field of legal scholarship and one of great importance to practitioners and judges—as well as to most law professors, if fewer (relatively) than in times of yore. There would be nothing dishonorable or archaic in the law reviews' rededicating themselves to the production and publication of such scholarship. I acknowledge the educational mission of the law review but I think it would be enhanced rather than impaired if the members of the review wrote and edited within the sphere of their competence and the orbit of the professional writing that they will do when they graduate from law school and become (as the vast majority, even at the most exclusive law schools, will) practicing lawyers.

I do not mean that law reviews should refuse to publish *any* nondoctrinal articles, or refuse to permit even students who come to law school from a rich background in another field, as many do nowadays, to write nondoctrinal notes. I suggest merely that the law reviews adopt a presumption in favor of the publication of doctrinal scholarship in both the faculty-written and the student-written sections of the reviews.

2. Law reviews should give serious consideration to having every plausible submission of a nondoctrinal piece refereed anonymously by one or preferably two scholars who specialize in the field to which the submission purports to contribute. The reviews will, I know, lose some good submissions by this procedure simply because it will slow down the publication process. One of the competitive advantages that law reviews enjoy over other scholarly journals is that their vast staffs, and the huge excess capacity of the law review industry (hundreds of law reviews chasing a relatively small number of worthwhile articles), enable the time between submission and publication to be minimized.

But since law reviews shouldn't be publishing so much non-doctrinal stuff anyway, the loss of some ground to other types of scholarly journal would not be cause for regret.

Refereed journals do not permit authors to submit their articles simultaneously to other journals, because it would produce a very high ratio of referee reports to articles actually published.¹² Having to submit an article seriatim rather than simultaneously will lengthen the time to publication and further deter authors of non-doctrinal scholarship from submitting their articles to the student-edited law reviews. But as I have explained, I cannot see that as a loss. I do however acknowledge that a problem of fuzzy classification would attend efforts to create different tracks for processing doctrinal and non-doctrinal submissions. The line between doctrinal and non-doctrinal scholarship is often unclear, as more and more doctrinal scholars feel obliged to give some consideration to economic, philosophical, or feminist perspectives.

3. The reviews should consult faculty on which books to review and whom to ask to review the books they decide they want reviewed. They should not accept unsolicited submissions or ask the author's advice on whom to ask to review a book. They should not solicit reviews from known friends or enemies of the author or from persons whose work the author praises or condemns.

4. The reviews should renounce, in their student-written sections, commentary on Supreme Court decisions, and perhaps topics in constitutional law generally. Law reviews should reconceive their central task as being to monitor the performance of other courts dealing with the vast range of technical legal questions to which the Supreme Court, preoccupied as it is with the Constitution, pays little attention. My experience as an appellate judge has been that there is a remarkable paucity of first-rate scholarship across the entire range of nonconstitutional issues with which modern courts grapple.

Do not worry that judges do not read law reviews. Scholarly journals are not meant to be read the way the daily newspaper is read. No one has time to read 500, or for that matter twenty-five, law reviews, each published four to eight times a year. The vast majority of articles in scholarly journals are destined to go directly from the subscriber to the library shelf, there to be available for future reference as the need arises. Law students find this difficult to understand, because they find the scholarly enterprise in general difficult to understand. Law review editors are constantly casting about for ways of making their review more "timely" in the sense of being more likely to be read cover to cover upon publication. (I thought that way when I was president of the *Harvard Law Review*.) It is a vain hope, as well as an unnecessary one. Law reviews are indispensable resources for judges and their clerks, whether or not the judge's opinion actually cites the article or student note that proved helpful

12. Suppose that the average author submits an article to 10 journals, each of which commissions reports from two referees. Then the ratio of referee reports to articles published will be 20 to one (assuming at least one of the journals accepts the article for publication), compared to six to one under a system in which multiple submissions are forbidden, assuming that the average author's article would be accepted by the third journal to which he submitted it. (Many authors, if their article were turned down by three consecutive journals, would give up.)

in the preparation of the opinion. Law reviews are indispensable resources for practitioners and law professors as well, and again this is true whether or not they are read when they first appear.

5. Recognizing their limitations as manuscript editors, law review staff should forswear line-by-line editing. The University of Chicago Law Review has publicly announced such a policy.¹³ It should help it to attract superior articles. If a manuscript that the review wants to publish is poorly written, the review should either turn it down or return it to the author with instructions to rewrite it, if need be with the aid of a manuscript editor hired by the author at his own expense or that of his school. Let the members of the law review practice line-editing on each other, if they think that it is a valuable skill to acquire.

I am not optimistic that many law reviews will adopt this package of proposals. But I predict that any that do will receive deserved recognition as constituting the vanguard of a revolution long overdue.

III. CONCLUSION

When the environment to which a species has become adapted changes, the species must change, or eventually die out. The student-edited law review arose in and became adapted to one environment, that of law conceived as an autonomous discipline centered on the attainment of logical consistency of legal doctrine—what Max Weber called formal rationality. The environment has changed. Preoccupation with the formal rationality of legal doctrine has given way, in the upper reaches of the legal academy at any rate, to preoccupation with the relation between those doctrines and the larger society that law is supposed to serve. The change has not been large enough to threaten the survival of the student-edited law review. It has been large enough to threaten its centrality in the publication of legal scholarship and by doing so to engender the disquiet that brought this valuable conference into being.

13. Articles Editors of the *University of Chicago Law Review*, *A Response*, 61 U. CHI. L. REV. 553, 558 (1994).