1987

In Defense of Student-Run Law Reviews

Michael Vitiello
University of the Pacific, mvitiello@pacific.edu

IN DEFENSE OF STUDENT-RUN LAW REVIEWS

MICHAEL VITIELLO*

I. INTRODUCTION

Before I was invited to speak at the *Cumberland Law Review* breakfast, I was only vaguely aware of the debate surrounding student-run law reviews. No doubt all law professors hear student criticisms about the manner in which candidates are chosen, about the elitism membership spawns, and about the unfair advantage those students enjoy in securing coveted jobs. Yet a more serious challenge to student-run law reviews was hard to ignore when the national press featured stories about a Harvard faculty edited journal to rival the *Harvard Law Review*.[1]

Once I decided that the debate about student-run law reviews was an appropriate topic for my talk, I learned that the subject has already produced extensive literature.[2] Much of the literature is critical of student-run law reviews.

This Article examines the criticisms directed at student-run law reviews. It divides those criticisms roughly into two separate camps. From one side, law reviews are seen as elitist, undemocratic and unfair. The argument is grounded on a number of questionable assumptions: one, that since the primary justification for law reviews is educational, other justifications, like service to courts and to the profession, may be dismissed as inconsequential; and two, that the selection process is irredeemably flawed and should be abandoned. As developed below, insofar as this argument raises legitimate concerns, it can be addressed without gutting student-run law reviews.

---

* Professor of Law, Loyola Law School, New Orleans, La., B.A. 1969, Swarthmore College; J.D., 1974, University of Pennsylvania.

[1] Gray, *Harvard's Faculty Stirs a Tempest With Plans for New Law Journal*, Wall. St. J., May 28, 1986, § 2, at 17, col. 3.

[2] *See, e.g.*, Cane, *The Role of Law Review in Legal Education*, 31 J. LEGAL EDUC. 215 (1981); Cramton, *The Most Remarkable Institution: The American Law Review*, 36 J. LEGAL EDUC. 1 (1986); Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093 (1986); Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317 (1985); Raymond, *Editing Law Reviews: Some Practical Suggestions and a Moderately Revolutionary Proposal*, 12 PEPPERDINE L. REV. 371 (1985); Richardson, *Law Reviews and the Courts*, 5 WHITTIER L. REV. 385 (1983); Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279 (1962); Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

Attacks from the egalitarians pose a less serious threat than the second group of critics of student-run law reviews. Even if we can develop a consensus that law reviews recognize excellence within a student body, we will not have silenced this second group. Its members make two important points: first, student editors, in effect, lack standing to choose what is publishable because the law has become too complex for student editors to discern innovative work. As a result, they reject really important articles, and accept instead unimaginative safe harbors. Their second, closely related point is that scholars write to conform to the law review editors' expectations. That is, they write humorless, overdocumented tracts because insecure editors confuse documentation with substance.

These criticisms have a longstanding pedigree. For example, Yale Professor Fred Rodell denounced student-run law reviews as early as 1936, ironically in the *Virginia Law Review*.[3] Today we hear these views expressed more frequently and in increasingly respectable circles. While Rodell was a maverick,[4] Harvard's Professor Larry Tribe and Cornell's Professor Roger Cramton, past president of the Association of American Law Schools, are formidable opponents of student-run law reviews.

There is some substance to these arguments. Better endowed law schools have the luxury of hiring nonlawyers to teach "Law and _____" courses, like Law and Economics, Law and Medicine, and Law and Society. Lawyer-trained candidates may also possess advanced degrees in traditional academic disciplines. As a result, new specialty journals reflect the interests of some of the new breed of scholars.[5] Editorial decisions for multidisciplinary journals pose problems for student editors if their selection has been based on grades and service without an additional requirement of expertise in the relevant discipline.

Conceding that student editors who lack expertise in the relevant field may have difficulty editing multidisciplinary journals, I am convinced that the attack on student-run journals is misguided and unfair. This Article develops those views more completely. Briefly, I doubt that many deserv-

---

[3] Rodell, *Goodbye to Law Reviews*, *supra* note 2.

[4] *See* Nowak, *supra* note 2.

[5] Goodrich, *Professor, Edit Thyself*, 6 CAL. LAW. 48, 49 (1986).

ing articles cannot be placed in respectable journals. The call for faculty-edited journals, if intended to replace student-run journals, is an unhealthy imitation of other traditional academic disciplines. If the call is successful, law professors and scholars will have fewer outlets for their scholarship. Further, we engage in overkill when we call for the demise of student-run journals. Apart from the irony of the parent blaming the child for the child's poor breeding, we can refuse to write stilted material or to accept stuffy editing. Perhaps a healthy product of the debate is the fact that some student editors are accommodating authors by inviting articles or commentaries that are less formal than traditional scholarship.

II. "ELITIST" JOURNALS AND THEIR CRITICS

I have divided into two distinct camps the lines of criticism of student-run law reviews. Critics often rely on arguments made by each other, despite what I see as inconsistent positions. For example, virtually everyone writing on the subject incorporates Rodell's critique into her own.[6] I divide the arguments and try to demonstrate their incompatibility. This section develops the position which asserts that law reviews are unjustifiably elitist.

A good example of this position appeared in the *Journal of Legal Education* several years ago.[7] Barbara Cane examined the Harvard educational and law review model, widely imitated elsewhere. That model, based on anonymous grading and competitive ranking, produced a meritocracy: "[t]he standards of evaluation were impersonal and objective, ignoring social class and ethnic lines and personality above a bare minimum, thus allowing individual success free from the constraints of patronage."[8] To implement this model, law schools have hired faculty members with strong academic records.[9]

To this point, one might question what is wrong with having a smart faculty that grades objectively. It would be ludi-

---

[6] *See, e.g.*, Cane, *supra* note 2, at 221; Cramton, *supra* note 2, at 5; Nowak, *supra* note 2, at 317; Martin, *supra* note 2, at 1093. Despite reliance on some of Rodell's arguments, as developed in this Article, critics like Cane and Cramton have little common ground.

[7] Cane, *supra* note 2. For a very similar analysis, see Martin, *supra* note 2.

[8] Cane, *supra* note 2, at 218.

[9] *Id.* at 220.

crous to suggest that mediocre faculties handing out grades in an arbitrary fashion would be a desideratum, even if it reduced anxiety and competition. But the argument is more subtle than that.

According to Cane, faculties "dominated by non-practitioners, most of whom were trained on law review, . . . perpetuated a single set of standards for 'selecting out' those students who receive honor, attention, encouragement, and career guidance."[10] Other important skills beyond analytical acumen are ignored because professors trained on the "common bond" of law review only "recognize . . . competitive success like their own."[11]

The law review system is part of an "old boy" network, with " 'old men always standing on the shoulders of the young ones.' "[12] Professors, themselves groomed by law review, intercede in securing prime jobs on behalf of law review students who have dutifully preened their professor's feathers by editing professors' articles.

Although not with a trace of antiintellectualism, Cane argues that law professors lack practical experience.[13] Therefore, she hypothesizes that we may be "eliminat[ing] many of those who would in fact make excellent practitioners."[14] Even if that were conceded, it does not mean that all excellent practitioners make excellent law review students. The crux of the argument is based on the premise that "law review is the best learning experience . . . in law school"[15] and that law review articles are unimportant except as a learning experience. After all, they are unreadable, and as evidenced by their inability to make a profit, the importance of law reviews to the profession must be insignificant.[16] Most importantly, because the raison d'être of law review is educational, the experience should not be limited to those few students

---

10 *Id.*

11 *Id.*

12 *Id.* at 221 (citing S. TUROW, ONE-L 246 (1977)).

13 *Id.*

14 *Id.*

15 *Id.* at 220 n.33.

16 *Id.* at 215. Cane asserts that "it is generally conceded that the law review is a species of publication which exists primarily to be written, not to be read." *Id.* Not all critics take quite so dim a view of the contribution to the profession made by law reviews. *See* Martin, *supra* note 2, at 1094. Rodell's view that law reviews turn out "stuff that is not fit to read . . . ignores the clear, if limited, roles that law review articles do play." *Id.*

for whom it is currently reserved.[17] That is especially true because the selection process is suspect.[18]

That is, the law review experience is elitist:

> [d]espite the size of the student body, law review experience is limited to between ten and fifty-five students at each school. In this way each school perpetuates the Harvard model and a "pedagogical strategy whereby a minority of their students are given an intensive training in some practical skills while the vast majority are inadequately trained." *Competitive selection risks exaggerating the worth of a tiny minority of students, lessening respect for all non-law review related activities, and encouraging students to value self-aggrandizement more than service to others.*[19]

Worse, it is phony elitism. That is, one might argue that recognition of merit will always entail some "self-aggrandizement." But law review's competitve selection process produces phony elitism because it is flawed. While recognizing that "[n]o selection process is perfect,"[20] Cane is especially critical of using first year grades as a means of selection.[21] Although most commonly used, first-year grades, argues Scott Martin, "are a notoriously arbitrary way of selecting review members."[22] Critics argue that exam grades poorly reflect the student's ability to write, an important skill for the law review student.[23]

Critics do not seem mollified by alternative selection processes like the use of a writing competition or second-year grades.[24] Here the various egalitarian concerns about law review come together. Law review is justified for its educational value, an experience denied to many deserving students. Those who make law review are selected arbitrarily but are given an unfair advantage in access to prestigious jobs and to the favor of the faculty. The work load is too great anyway. Pressure is detrimental to those who participate[25] and runs off some otherwise-qualified candidates.[26] One solution is to share the work. As Martin argues,

---

17 Cane, *supra* note 2, at 221. *See also* Martin, *supra* note 2, at 1099-1100.

18 Cane, *supra* note 2, at 221-24; Martin, *supra* note 2, at 1102-03.

19 Cane, *supra* note 2, at 222 (emphasis added).

20 *Id.* at 223.

21 *Id.*

22 Martin, *supra* note 2, at 1103.

23 Cane, *supra* note 2, at 223; Martin, *supra* note 2, at 1103.

24 Cane, *supra* note 2, at 223-24; Martin, *supra* note 2, at 1103.

25 Cane, *supra* note 2, at 228 (quoting fellow law student who observed that law

> The greatest fault of the system is the artificially small number of students who are able to reap the benefits of review membership at most schools . . . [N]ecessity does not dictate that law review staffs be kept at an arbitrarily selected small number. If well organized and administered, there is virtually no limit to the number of students who could effectively participate in a law review.[27]

Crane suggests the same solution.[28]

I believe that these arguments are seriously flawed. The critique starts out from a reasonably innocent seeming premise that law reviews are primarily educational in value. After all, if law review does not serve an important professional need, it is not important to secure the best and the brightest to edit articles. On that view, everyone tries her hand at editing whereby she learns important skills; then publication of marginally useful (and unreadable material) is a matter of indifference. "[L]aw review is a species of publication which exists primarily to be written, not to be read."[29]

The argument's premise is faulty because it leaps from the position that law review is primarily educational to the more debatable view that education is its only justification. But the final product is important. For example, Justice Cardozo observed that law review articles were " 'of conspicious utility in the performance of [his] judicial duties . . .' " and concluded that it was helpful to have " 'scholars . . . canalize the stream' " of a flood of precedents.[30] More recently Justice Frank Richardson, Associate Justice of the California Supreme Court, reiterated another of Justice Cardozo's themes that Supreme Court decisions may not be subject to reversal by a higher court, but law review criticisms prevent judges from ossifying. He concluded a 1983 speech to the *Whittier Law Review* as follows: "And after you

---

review members "seemed crazed. They lost all sense of proportion."); Martin, *supra* note 2, at 1103-04.

[26] Cane, *supra* note 2, at 228-29. Apparently, Cane falls into this group. *Id.* at 215 n.1.

[27] Martin, *supra* note 2, at 1104.

[28] Cane, *supra* note 2, at 230.

[29] *Id.* at 215 (citing Havighurst, *Law Reviews and Legal Education*, 51 NW. U.L. REV. 22, 24 (1956)).

[30] B. CARDOZO, SELECTED READINGS IN THE LAW OF CONTRACTS, vii, ix (1931), *cited in* Swygert & Bruce, *The Historical Origins, Founding and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 789 (1985).

have demolished our best efforts, please leave us with your flashlight so that we may find our way among the ruins. Be proud that you have shed some light."[31]

Courts do rely on law review articles. There are obvious examples. One such example is Warren and Brandeis' 1890 law review article on privacy[32] which has been credited by many as having given birth to that right of action. *The Restatement of Torts* definition of privacy is modeled on Professor Prosser's 1960 *California Law Review* article.[33] In turn, the Restatement has been almost universally adopted. In the speech quoted above, Justice Richardson cited three major cases decided by the California Supreme Court that were directly influenced by law review articles. Two of those cases are known nationwide: *Tarasoff v. Regents of the University of California*[34] and *Sindell v. Abbott Laboratories*.[35] I could multiply my examples.[36]

While relatively few articles have such a dramatic impact, that does not mean that law reviews are not significant aids to courts, lawyers, and students. Some moot court instructors, for example, recommend that a brief writer develop an overview of an area of law before focusing her research.[37] Law review articles are often the best source for that overview and may suggest effective arguments in addition to identifying relevant cases. Statistical studies demonstrate that there are "high impact" journals, frequently cited by courts.[38]

Closer to home, I checked to see which courts had recently relied on the *Cumberland Law Review*. Not surprisingly, I found several citations to the *Review* by the Fifth

---

[31] Richardson, *supra* note 2, at 393.

[32] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[33] Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

[34] 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

[35] 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

[36] *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186 (1977) (applying due process minimum contacts analysis to quasi-in-rem jurisdiction). In *Shaffer*, the Court adopted a view which had been developed in various law review articles. *See, e.g.*, Green, *Jurisdictional Reform in California*, 21 HASTINGS L.J. 1219 (1970); Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241; Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959); Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

[37] *See, e.g.*, M. FONTHAM, WRITTEN AND ORAL ADVOCACY, 266-67 (1985).

[38] *See, e.g.*, Mann, *The Use of Legal Periodicals by Courts and Journals*, 26 JURIMETRICS J. 400 (1986).

Circuit[39] and the Alabama Supreme Court.[40] I also found citations by courts in places such as Massachusetts,[41] Minnesota,[42] and New Jersey.[43] It is reasonable to assume that practitioners rely on reviews even more frequently than do courts.

An excellent product is thus important because courts and practitioners do rely on journal articles. Even if recognition of excellence were not sufficient justification for a law review, it may be justified by its utility to courts and attorneys.

Were critics to concede that point, they would still argue that the selection process is flawed and that the oppressive workload should be shared. Unless the second point, advocating a shared workload, is intended to mean that no selection (other than self-selection) is appropriate, I believe that the use of grades with some tampering is an appropriate basis of selection.

Critics suggest that reliance on grades may eliminate otherwise good writers and hardworking students willing to do the tedious tasks demanded of a law review. But that overlooks the fact that law school grades reflect a student's ability to do legal analysis. Further, there is evidence that writing style is reflected in law school grades.[44] That is certainly my own view, based on grading about three thousand essay exams since I began teaching. The claim that law professors fail to grade some skills important in practice[45] is irrelevant because skills measured by exams, analysis and legal writing, are essential to editing a law review. Finally, while an imperfect measure, grades almost certainly bear a correlation to hard work.

Selection always involves hard choices. At the margin, one may raise the question: should a law grade from a notoriously hard grader mean that Jim does not make the review while Sally does because she was fortunate enough to be as-

---

[39] *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 415 (5th Cir. 1986); Walters v. Inexco Oil Co., 670 F.2d 476, 478 (5th Cir. 1982).

[40] *See, e.g.*, Jackson v. Mannesmann Demag Corp., 435 So. 2d 725, 726 (Ala. 1983); Boyd v. State, 341 So. 2d 680, 686 n.2 (Ala. 1977).

[41] *See, e.g.*, Klein v. Catalano, 437 N.E.2d 514, 520 (Mass. 1982).

[42] *See, e.g.*, Pickerign v. Pasco Mktg., Inc., 228 N.W.2d 562, 565 n.1 (Minn. 1975).

[43] *See, e.g.*, *In re* Quinlan, 355 A.2d 647, 667 n.8 (N.J. 1976).

[44] *See, e.g.*, Marshall & Powells, *Writing, Neatness, Composition Errors and Essay Grades*, 6 S. EDUC. MEASUREMENT 97 (1969) (quality or composition affects grading of essay exam).

[45] *See* Cane, *supra* note 2, at 220.

signed to an easier grader? Accepting such results is inevitable if choices are to be made. It is trite to remind one's audience that we live in an imperfect world.

The rejoinder to my last point is that everyone ought to be able to participate or at least to self-select law review. At best, such a system may work at the very best schools, especially where absence of class rank may increase students' need to distinguish themselves.[46] I am less optimistic that all students at lesser schools can do the job. Average students editing a law journal at average law schools will produce a mediocre law review. I argued above that there is a professional need for a law review to be as good as it can be. There are less expensive ways than gutting law review to achieve the same educational result, such as imposing a writing requirement. For those schools with a wealth of talent, additional journals have proliferated.[47] That is, the majority of students can receive a significant writing and editing experience without diluting law review.

If we are confident that the selection process is fair, the workload may militate in favor of a larger staff. While there is obviously no perfect size for a law review staff, I am less optimistic than critics that unlimited numbers of students can do the job adequately. One suspects that there is an optimum number of people to make a project work well and that carving up a project into small units will be inefficient. Even mundane tasks require attention to detail, and attention to detail often distinguishes good from mediocre students. Opening law review to all-comers would increase the number of students' notes and comments if law review is to keep its educational appeal, but that multiplies editors' workload. While I have sympathy with those who decry the pressure and workload entailed by law review, I have the same sympathy for recent graduates who find that the practice of law is tedious. Students frequently lament that law school is not like the real world. But the pressure of law review is a fair simulation of the pressure of the practice of law.

One wonders whether the criticism of law reviews would

---

46 Law reviews at Yale and Stanford fit that model. *See* J. SELIGMAN, THE HIGH CITADEL 182 (1978).

47 Goodrich, *supra* note 5, at 52 (author gives example of Boalt Hall which now has seven journals).

be silenced if law schools provided a significant writing experience for all students, and kept their law review intact. At root, there may be a dislike for the type of people who succeed at law review and receive its rewards. For example, Cane laments that "[o]f all the law review students I spoke to none was interested in a career in legal services, public interest law, law reform, criminal law, legal clinics, small general practice, prepaid legal services, civil rights or civil liberties."[48] Elsewhere, she suggests that law review presents a difficult "socialization experience . . . for those who are concerned with people, warmed by approval, bothered by indifference, friendly, tactful, sympathetic and loyal."[49]

I share the concern that law school alters us, sometimes in unattractive ways. But until the practice of law changes, law schools must train self-reliant, self-starters who can survive pressure and uncertainty. Law review is the wrong target for attack. We would ill serve our students or the profession if we rewarded personal attributes only marginally related to the practice of law and ignored other skills necessary for its practice.

I believe that dramatically altering law reviews as Cane and others suggest would lead to an inferior product.[50] Assume for a moment that critics like Crane prevailed, and that law reviews opened their doors to all-comers. Law schools would develop alternative ways to recognize excellence and law reviews would decline in quality. The profession would suffer. Law reviews would suffer. The "old boy" network would find new channels. Students would benefit marginally, perhaps getting an advantage in the interview market until employers realized that law review no longer meant what it once did. At that point, the student would be as well served by being required to do a seminar paper or an independent research paper in which she would receive greater supervision than she would by doing a law review comment. The poorer student would receive those benefits without having to make the time commitment to law review.

---

48 Cane, *supra* note 2, at 229. *See also* Martin, *supra* note 2, at 1100-01.

49 Cane, *supra* note 2, at 230.

50 I do not intend to suggest that law reviews are beyond improvement. As indicated below some of the suggestions made by critics of student run law reviews are worthy of attention. The remedy offered by critics like Cane and Martin strikes me as misguided.

The balance tilts against a proposal to open law review to any interested student.

If my own experience is typical, legal educators are aware that we need to improve all students' writing skills. For example, at Loyola, we require a student to write a substantial paper before graduation. The paper is supposed to be the equivalent of a law review comment.

It is harder to solve problems relating to the values taught in law school. While that concerns me, solving problems caused by the pressure and individualism of law school are beyond the scope of this paper. It seems singularly shortsighted to impair one of the positive aspects of law school. We ought to be able to recognize excellence without being embarrassed. We ought to recognize the contribution law reviews make to the profession. As discussed below, we may need to modify the rigid law review writing style to make it more useful, but we should not erode the product by overreacting to real problems in the practice and in law schools that have much deeper causes than the existence of law review.

III. The Heavy Weight Challengers and Law Review

Student run law reviews will weather the challenge from egalitarians, probably for the wrong reasons. Significant change can occur only by agreement with those in charge. Those people have been identified by their critics as having a vested interest in law review.[51] After all, law professors are where they are because of law review.

Student-run law reviews face a more formidable challenge not from egalitarians, but from super-elitists. Prominently placed law professors have challenged the institution. Faculty-edited journals have existed for some time, but most have been specialized journals.[52] The challenge to student-run law reviews received national attention in 1985 when the *Wall Street Journal* published an article reporting the unanimous decision of the Harvard law faculty to start a scholarly journal in direct competition with the Harvard Law

[51] *See* Cane, *supra* note 2, at 220. "What most professors do recognize is competitive success like their own. . . . Faculty members quite correctly recall their own law review experience as the most valuable part of their legal education, and look upon the current crop of law review students as versions of their earlier selves." *Id.*

[52] Cramton, *supra* note 2, at 9.

Review. Professor Tribe was to edit the journal.[53]

The fact that the Harvard faculty subsequently deferred decision to publish that journal has not ended the matter.[54] The executive committee of the Association of American Law Schools voted in January 1986 to start a faculty-edited journal.[55] Several prominent law professors are on record as opposing student-run law reviews.[56]

Professor Roger Cramton, past president of the Association of American Law Schools, developed the case against student-edited journals in an article which also appeared in the *Journal of Legal Education*.[57] After briefly tracing the development of student-run law reviews, Cramton observed that they have "always had critics. . . . Yet the law review as an institution, until very recently, has not only survived these critics but flourished."[58]

Cramton, like Cane, suggests that the selection process is flawed:

> Whatever merit this system [of relying on first year grades to select law review candidates] had during the era of open admissions, it was threatened by social and educational changes a generation later . . . . [T]he enormous increase in the demand for legal education which began in the late 1960's led to more homogeneous student populations in virtually all law schools. A more national market in legal education resulted in each school having students who represented a fairly narrow band of admission credentials. . . . Providing a superior educational experience to a small portion of students who were only marginally better than the rest became an indefensible educational policy.[59]

But Cramton is no egalitarian. Quite the contrary, he believes that law schools chose the wrong solutions when faced with the argument just quoted. He criticizes law schools for allowing too much democracy in the selection process.[60]

---

53 Gray, *supra* note 1.

54 *See* Mextaxas, *Harvard Faculty Journal Loses Tribe to Bicentennial of the Constitution*, NAT'L LAW JOURNAL, July 21, 1986, at 4.

55 *See* Mextaxas, *Two New Faculty-Edited Journals Enter the Legal Scholarship Arena*, NAT'L L.J., Jan. 27, 1986, at 4.

56 *See* Goodrich, *supra* note 5 *passim*.

57 Cramton, *supra* note 2. Coincidentally, it was published in the *Journal of Legal Education*, edited at the time by Professor Cramton.

58 *Id.*, *supra* note 2, at 5.

59 *Id.* at 6.

60 *Id.*

Cramton does not long for the old days when the most prestigious law reviews selected candidates on less egalitarian bases. He challenges the entire enterprise:

> The . . . premise, that legal scholarship would be well served by student editorship, was always shaky, but the modern evolution of legal scholarship has demolished it entirely. Law today is too complex and specialized; legal scholarship is too theoretical and interdisciplinary. The claim that student editors can recognize whether scholarly articles make an original contribution throughout the domain of the law is now viewed by legal scholars as indefensible.[61]

While that is the core of Cramton's argument, he supports his position anecdotally. He states that "[h]orror stories abound," but cites only two specific instances: one, when a now "celebrated" article was "rejected by some forty student-edited publications"; two, when student-editors tried to rewrite an article by H.L.A. Hart.[62]

Perhaps the most curious argument made by Cramton is that the "predominance of student-edited law reviews . . . [has been] harmful for the nature, evaluation, and accessibility of legal scholarship."[63] Students make bad editorial choices because they are insecure. They "prefer pieces that recite prior developments at great length, contain voluminous and largely meaningless citations for every proposition, and deal with topics that are either safe and standard on the one hand, or currently fadish on the other."[64] Crampton believes that "[s]tudent editors discourage scholarship that . . . is innovative or unusual."[65]

Cramton suggests that the future of student-run law reviews is in doubt, and that direct challenges to their predominance "probably remain a few years away."[66] But Cramton revels in the challenges that he believes are coming.

I agree with Cramton in small part. At least at the more

---

61 *Id.* at 7-8.

62 *Id.* at 8. The article which was rejected is Galanter, *Why the "Haves" Come Out Ahead: Speculations in the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). The article by H.L.A. Hart in question is entitled *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1954).

63 Cramton, *supra* note 2, at 8.

64 *Id.*

65 *Id.*

66 *Id.* at 10.

prestigious schools, nontraditional scholarship has flourished. Those schools have the luxury of hiring nonlawyers or J.D.'s with doctorate degrees in other disciplines. Broadly philosophical discourse abounds and has little resemblance to the more mundane inquiry of the practicing lawyers. As observed by Cramton, "[l]aw faculty members, especially at the better schools, write primarily for other academics who approach the same subject matter using the same methods. . . ."[67] Those articles offer little for practitioners and judges.

I have no argument with faculty-edited journals in specialized fields, but I resist that model for the entire profession.[68] Cramton would have us imitate traditional academic disciplines in which scholars compete to publish in a small number of professionally edited journals.

We ought to ask whether we would be better off if student-run law reviews ceased to exist. Almost certainly, we would have far fewer places to publish our articles.[69] Currently, with a plethora of journals—a fact decried by Cramton[70]—publication opportunities abound. It is hard to imagine an author with a meritorious piece being unable to place it at all. She may not be able to place her article in a given journal, but the array of journals makes publication inevitable.

Cramton's position seems inconsistent. He points to one instance in which a subsequently acclaimed article was initially rejected by student-run journals as evidence of students' inability to identify genuine scholarship.[71] Apart from lack of evidence that such occurrences are frequent, I have a further concern that such instances will proliferate in Cramton's world of faculty-edited journals.

---

67 *Id.*

68 I agree with Dean Carrington's word of caution that "we may now be in danger of mistaking graduate schools as the model for elevating legal education intellectually." Carrington, *The Dangers of the Graduate School Model*, 36 J. LEGAL EDUC. 11 (1986).

69 My conclusion is based on comparison with graduate disciplines in which journals are fewer and authors must certify that they have not sent their articles contemporaneously to other journals. It is also based on the view that in a world of professionally run journals there will be relatively few journals because most professors would rather spend their time writing, consulting, teaching, or serving the community rather than editing. That seems to have been the case with Professor Tribe. *See* Mextaxas, *supra* note 52.

70 Cramton, *supra* note 2, at 8.

71 *See supra* note 60 and accompanying text.

With fewer journals, fewer articles can be published. Faculty editors are not immune from failing to see quality.[72] Further, while student editors obviously lack the same expertise as faculty editors, they also are more immune to pressure to publish based on whom one knows. That is, with fewer available journals, the pressure will be great to resort to an "old boy" network because promotion decisions will undoubtedly still be based on productivity. I suspect that in Cramton's world, authors will rely on sponsors to help them place articles in prestigious journals. Such editorial decisions are not so clearly superior to those made by student editors. I envision far more articles later acclaimed as important that cannot be placed in faculty edited journals, than now go unpublished.

Cramton also overstates the case for specialized journals. While some elite faculty members choose to talk to each other to the exclusion of practitioners, one suspects that Cramton, like the seven blind men trying to describe an elephant, has a feel for a very small part of the law review universe. Many articles still aim for a wide audience including practitioners and judges.[73] As long as that remains true, student editors are not out of their league when they make editorial choices.

I reject Cramton's assertion that student editors are responsible for the lack of innovative scholarship. While much scholarship is poor, probably written for promotion, a review of scholarship demonstrates diversity and innovation. The critical legal studies movement, for example, has started a debate that challenges our basic assumptions.[74] Diversity is aided by the wide array of journals available.

---

[72] Writers can tell many anecdotes about later acclaimed works which were rejected by professional editors. While working as a publisher's reader, Andre Gide, for example, refused even to open the package in which Marcel Proust mailed a manuscript of *Remembrance of Things Past* because he believed Proust to be incapable of writing anything worthy of reading. E. WEBER, FRANCE, FIN DE SIÈCLE (1986). Closer to home, John Kennedy Toole's Pulitzer Prize winning novel, *A Confederacy of Dunces* was repeatedly rejected by publishers. It was finally published years after Toole's death when novelist Walker Percy brought it to the attention of the editor of the *Louisiana State University Press*.

[73] Martin, *supra* note 2, at 1095-97. *See also* Carrington, *supra* note 66, at 11-12.

[74] At Loyola, we have seen some of the energy generated by the debate over critical legal studies. Even before David Fraser's article on critical legal studies and the *Louisiana Civil Code* was published, it produced active debate among faculty members in informal discussions and in a faculty colloquium where our dean, Tom Sponsler, delivered a paper responding to Fraser. *See generally* Fraser, *The Day the Music Died:*

Unlike traditional academics, legal scholars can be innovative and confident that their piece will see the light of day in one of the myriad journals.

I am less confident than Cramton that faculty editors will nourish innovation. They will bring doctrinal biases to their task. In Cramton's best of all possible worlds, I envision scholars timidly conforming their perspective to that of reigning faculty editors.[75]

Even if I agreed that scholarship lacks innovation, a sense of fairness prevents me from blaming students. We must accept responsibility for our own lack of wit or innovative thinking.[76] If student editors seek conforming style from insecurity, secure professionals ought to be able to play on that same insecurity to force student editors to change their views. In fact, student-run law reviews are responding to criticism. Prominent law reviews are accepting nontraditional commentaries and other innovative works.[77]

Like the egalitarians, Cramton identifies weaknesses in the current system and argues for the demise of the creature. Far less dramatic solutions are available. Faculties ought to encourage innovation by writing innovative articles and by lobbying our law reviews to follow the lead of those student-run journals which are accommodating change.

In the long run, I do not believe that student-run law reviews will vanish. Law professors benefit from the system. We have an enviable place within academia. We are not restricted in sending an article to one journal at a time. We have a seller's market because so many journals have proliferated. Perhaps most importantly, we are spared the drudgery entailed in editing a journal.

The Civil Law Tradition From a Critical Legal Studies Perspective, 32 LOY. L. REV. 861 (1987).

[75] Given the hostility expressed towards critical legal studies scholars by some prominently placed people within the profession, see Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984), one wonders how receptive those professors would be to CRIT scholarship, were they editors of professional journals. Further, knowing that she must publish for promotion, the young professor might reasonably attempt to conform her views to that of the ruling elite.

[76] Probably the most common sense view of this debate is found in Zenoff, *I Have Seen the Enemy and They Are Us*, 36 J. LEGAL EDUC. 21, 23 (1986) ("dear colleagues, the law reviews' flaws may lie not in our students but in ourselves.").

[77] *See* Mextaxas, *supra* note 53, at 4 (various student-run law reviews to feature less traditional types of articles).

IV. Some Suggestions and Conclusions

I find the debate about student-run law reviews to be stimulating. Law reviews do have problems; I believe that the debate will benefit us all in the end.

My own list of criticisms is fairly small. The editorial process is too slow. Editors sometimes make unwarranted stylistic changes. Some of the criticism about stilted style should stick. Editors may be able to stem a tide of criticism by exercising more humility in dealing with their authors. They can consult them about proposed changes and keep them abreast of the slow progress toward publication. Editors should learn, as lawyers learn, that it is easy to keep clients satisfied by treating them with courtesy.

The public debate ought to alert student editors that they face a serious challenge. No one disputes that law review editors are smart people. Like lawyers generally, they are adaptive creatures. It is my advice and my belief that student editors listen to the debate and modify the system. Instead of basking in the glory of achievement, they might develop some humility in dealing with their authors. That, along with more flexibility in matters of style, ought to preserve the institution. That accommodation ought to be made, because I believe the instituion is worth saving.