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"The Most Remarkable Institution": The American Law Review

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> The American law review properly has been called the most remarkable institution of the law school world. To a lawyer, its articles and comments may be indispensable professional tools. To a judge, . . . the review may be both a severe critic and a helpful guide. But perhaps most important, the review affords invaluable training to the students.[1]

Law is big business in the United States. A legal profession that now numbers about 650,000 members[2] (by contrast the English legal profession consists of about 35,000 solicitors and 4,500 barristers)[3] results in total expenditures on legal services of about $50 billion annually.[4] A profession of this magnitude supports an enormous variety of publications and specialized services that assist it in finding, understanding, and using relevant legal materials. But one type of publication—the "remarkable institution" of the student-edited law review—is found only in the field of law in the United States. The uniqueness arises from the combination of two characteristics: the publication is both professional and academic in purpose and is controlled and edited by students.[5]

American legal education is itself a large enterprise. There are 174 nationally accredited law schools that produce an annual crop of about

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1. Earl Warren, Message of Greeting to the U.C.L.A. Law Review, 1 U.C.L.A. L. Rev. 1 (1953).
2. Barbara A. Curran, The Lawyer Statistical Report: A Statistical Profile of the U.S. Legal Profession in the 1980's 2 (Chicago, 1985).
3. Michael Zander, The State of Knowledge about the English Legal Profession 1–3 (Chichester, Sussex, 1980).
4. See Lloyd N. Cutler, Conflicts of Interest, 30 Emory L.J. 1015, 1016 (1981); Roger C. Cramton, The Trouble with Lawyers (and Law Schools), 35 J. Legal Educ. 359, 360 (1985).
5. For a valuable discussion of the history of student-edited law reviews, on which I have relied, see Michael I. Swygert & Jon W. Bruce, The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews, Hastings L.J. 739 (1985). The body of literature discussing the student-edited law review is listed in notes 3, 5–8 of the Swygert & Bruce article.

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35,000 new "J.D.'s."[6] At nearly all of these schools, a number of students in the second and third years of law study are engaged in a largely extracurricular endeavor: managing and editing the professional and learned journals of the discipline of law. Over 250 school-centered law reviews, most of them edited exclusively by students, publish two to eight issues per year.[7] No one has bothered to count the total outpouring of pages, but it probably exceeds 150,000 page per year.[8] The American law review is truly a unique institution, with very few analogues elsewhere in the world or even in other disciplines in the United States. What explains its origin, initial success, and persistence? Why is it now becoming the center of controversy?

During the nineteenth century the American lawyer relied primarily on a handful of classic treatises, a small shelf of reported judicial decisions, and a one-volume collection of governing statutes.[9] Littleton, Coke, Hale, and especially Blackstone had been transported across the Atlantic and updated for American lawyers. An indigenous group of treatise writers (Kent, Story, Greenleaf, Parsons, and others) comprehensively expounded generalized legal doctrine on many subjects, often starting from natural-law principles. Gradually these ponderous and encyclopedic tomes were supplemented by newsletters and journals that generally were more local and topical in character and that discussed recent decisions and statutes in a particular state. These more concise and casual publications met increasing favor as the explosion of American law in innumerable decisions of many tribunals threatened to balkanize the American system. Of the many publications, a number had substantial circulations, high professional standards, and a large influence on bench and bar.[10]

The emergence of the student-edited law review coincides with the rise of the modern American law school about one hundred years ago.[11] Both were responses to the need of the legal profession for a more practical exegesis of the rules, precedents, and policy applicable to particular situations.

6. See American Bar Association Section of Legal Education and Admissions to the Bar, A Review of Legal Education in the United States, Fall 1984 (Chicago, 1985), which lists the approved law schools and provides information concerning them. In 1984 there were 125,698 students at the 174 approved law schools, and a total of 36,687 J.D. degrees were awarded (at 65). About 39 percent of the students were women; and 9.5 percent were classified as minority students (at 65, 68).

7. The Index to Legal Periodicals, xiii-xx (1984) includes about 250 legal publications that appear to be published at a law school with students controlling or participating in the editing. The actual number may be somewhat larger or smaller.

8. See Josh E. Fidler, Law Review Operations and Management, 33 J. Legal Educ. 48 (1983), the only empirical study of law review structure and operations, estimating the total page output as 160,000 pages.

9. See Swygert & Bruce, *supra* note 2, which is the source of most of this historical summary.

10. During the same era there were few noteworthy English legal publications; this situation changed with the establishment of the Law Quarterly Review in 1885, but the English situation has remained one of relative paucity as compared with the profusion of legal publications in the United States.

11. The basic source today on the modern evolution of legal education is Robert B. Stevens, Law School: Legal Education in America from the 1850s to the 1980s (Chapel Hill, 1983).

Although short-lived, student-edited law reviews appeared at Albany Law School in 1875 and Columbia in 1885, the oldest continuous such publication was founded at Harvard in 1887. It was an outgrowth of the revolution in legal education which Christopher Columbus Langdell inspired at the Harvard Law School after 1870.[12] Until then American legal education was an undergraduate course of lectures in which a handful of practicing lawyers, doubling as part-time teachers, read texts to bored students who might or might not have graduated from high school. There were few examinations, and standards for the LL.B. were frequently lower than those for other bachelor's degrees. Oliver Wendell Holmes, Jr., then practicing law in Boston, wrote in 1870 that the Harvard Law School was a "disgrace to the commonwealth of Massachusetts" which injured the profession and discouraged "real students."[13] Harvard's president, Charles Eliot, who was then engaged in a dramatic effort to remodel graduate and professional education along the "scientific" lines suggested by the model of German universities, seized the opportunity that widespread criticism provided.[14] He brought in Langdell to restructure the Harvard Law School along the modernist lines suggested by the German model.

Langdell is primarily remembered as the founder of the "case method" of instruction, a method in which a skilled teacher analyzes appellate judicial decisions through a dialectical technique requiring active student participation. But Langdell was largely responsible for other enduring elements of the modern American law school: a full-time faculty with scholarly interests in law and less experience in law practice, a three-year curriculum, and more advanced study prior to admission to law school. (It was to be some time, during the 1920s at Harvard and the 1940s throughout most of the United States, that the full seven-year program—four years of college followed by three years of law school—was firmly established, but the seeds were planted by Langdell before the end of the nineteenth century.)[15]

It was in this setting in 1887 that eight Harvard law students, moved by the intellectual excitement of Langdell's new type of law school, converted an informal student discussion group into the first surviving student-edited law review, the *Harvard Law Review*. In the early issues, the students merely summarized and criticized recent judicial decisions and wrote short

12. The Langdellian revolution is fully and ably discussed in Stevens, *supra* note 11, at 51–72; and Anthony Chase, The Birth of the Modern Law School, 23 Am. J. Legal Hist. 329 (1979).

13. Arthur Sutherland, The Law at Harvard: A History of Ideas and Men, 1817–1967 164 (Cambridge, 1967).

14. Eliot's role in the remodeling of graduate and professional education at Harvard is discussed in Chase, *supra* note 12.

15. Harvard required a college degree for admission in 1900, but in 1920 only thirty-one law schools required at least two years of college. It was not until 1952 that the ABA required approved law schools to require three years of college before admission to law school. See Stevens, *supra* note 11, cc. 6 and 12. See also Harry First, The Business of Legal Education, 32 J. Legal Educ. 201 (1982), summarizing the role of the Association of American Law Schools (AALS) and American Bar Association (ABA) in the regulation of legal education.

comments on common law topics. They also persuaded Harvard faculty members to supply lead articles, which had the effect of disseminating Harvard's new-found interest in legal scholarship and its new brand of legal education to the rest of the profession. Perhaps it was an accident that persons destined to become distinguished academics—Julian Mack, Joseph Beale, and John Henry Wigmore—were among this group of eight students.[16] James Barr Ames, the perfect exemplar of the new style of law teacher—Ames was bright, intellectual, scholarly minded, and a marvelous case-method teacher—provided them with encouragement and support.[17] But the times were ripe; and if the developments had not come about at Harvard in 1887 they would probably have at Columbia or Pennsylvania or elsewhere a few years later.

The Harvard model of legal education, of which the student-edited review was an important element (even though not part of the formal curriculum), rapidly spread to all the better American law schools. By 1930 all major law schools had adopted "the most remarkable institution" and it was an accepted part of serious discourse on law either in the academy or the profession.[18] Law reviews focused on topical and relatively narrow matters, such as critical discussion of recent judicial decisions. They provided excellent training for law students,[19] and yet proved to be useful to both the academic development of law and to its judicial and legal practitioners. Almost from the beginning, lead articles were cited in major judicial decisions; at a later point, it became acceptable to cite and even to discuss student notes. Such prominent jurists as Benjamin Cardozo praised student-edited law reviews as the "organs of university life in the field of law and jurisprudence."[20] The value of the training was recognized (and its prestige heightened) by the tendency of major law firms to prefer law graduates who had served on the law review. As time went on, a mutually beneficial relationship between law-review experience and the need of judges for judicial clerks strengthened the law review as an institution.

The emergence of the student-edited law review has other important relationships to social and intellectual developments in the United States. In addition to its connection to intellectual currents in legal theory and legal education, the special status conferred by law-review participation was then viewed as consistent with democratic principles. The initial selection

16. For materials concerning Beale, Mack, and Wigmore, see Swygert & Bruce, *supra* note 5, at 769–71.

17. See Joseph H. Beale, James Barr Ames: His Life and Character, 23 Harv. L. Rev. 685 (1910).

18. Swygert & Bruce, *supra* note 5, at 778–86, provide details on the spread of the student-edited review to other major law schools. By 1930 forty-three law schools featured law reviews, most of them student edited.

19. It was not uncommon for prominent lawyers who had benefited from the law review experience to argue that legal education should be modified to extend the experience to all students. See Howard Westwood, The Law Review Should Become the Law School, 31 Va. L. Rev. 913 (1945).

20. Benjamin Cardozo, Selected Readings in the Law of Contracts vii, ix (1931), quoted in Swygert & Bruce, *supra* note 5, at 787, n. 399.

of student editors was based on academic performance in the first year of law school. Since everyone had an equal opportunity to serve, the student editors were viewed as a meritocracy whose talent justified the honor.[21] Their special status also entailed special responsibilities: they undertook burdens in addition to those of the ordinary curriculum. They were a true aristocracy of talent, open to all, even to Jews and ethnics who in other settings faced severe discrimination at that time.

The student-edited law review has always had critics. There has long been much complaining about the cool impersonality and stilted formality of the style of writing known as "law reviewese." The tendency to provide a citation for every proposition distracts the reader and may contribute more to form than substance. (As one unkind critic put it, "There are two things wrong with all [law review] writing. One is its style. The other is its content.")[22] Yet the law review as an institution, until very recently, has not only survived these critics but flourished. Changes in legal theory and legal education, however, have created problems for this now venerable institution. In particular, developments in recent years have undermined two of the three premises on which the student-edited law review was built. Although it remains unquestioned that law-review work is a valuable educational experience for most students who participate in it, the premises of meritocratic selection and scholarly contribution are no longer generally accepted.

Some years ago, the automatic selection of law-review editors according to their first-year grades was based on the assumption that the best and the brightest could be identified on the basis of academic credentials. In the era of open admissions (which persisted, even at the most prestigious law schools, until after World War II), the range of ability in any law school class was enormous.[23] The analytical and cognitive abilities demonstrated in succeeding on first-year law exams are an important aspect of a highly competent lawyer. "Law review students" prior to the late 1960s were markedly superior to other students in these respects. Other important qualities, such as character and interpersonal skills, were distributed in a more random fashion, and in any event were not so easily tested.

The assumption that first-year examinations would identify students with superior ability was also convenient from an institutional standpoint. In schools with many students and few faculty (American law schools have generally had student/faculty ratios of 25 to 1 and above), a more

21. Alan A. Stone, Book Review, 95 Harv. L. Rev. 346 (1981), provides a fuller discussion of the relationship between democratic theory and merit selection at elite educational institutions.

22. Fred Rodell, Goodbye to Law Reviews—Revisited, 48 Va. L. Rev. 279 (1962).

23. The Law School Admission Test was a post-World War II development which came into wide use only in the late 1950s. The test was given to more than 10,000 candidates for the first time in 1955; in recent years it has been administered annually to more than ten times as many candidates. See Thomas O. White, LSAC/LSAS: A Brief History, 34 J. Legal Educ. 369 (1984). Other articles in the same issue deal with questions raised by the universal reliance on the test in law school admissions today.

individualized and intensive mode of instruction could be provided to only a small portion of students—those chosen for law-review service. During the heyday of the law review from 1930 to 1970 faculty members were consulted regularly by law review writers and editors. Faculty then spent considerable time analyzing and critiquing student-authored notes, a practice that has sharply declined in more recent years. Pretending that law review students were the best (in one important dimension they were) and that legal scholarship would also be served made it acceptable to afford most law students a somewhat diminished education, preserving the best for the presumed aristocracy of talent.

Whatever merit this system had during the era of open admissions, it was threatened by social and educational changes a generation later. The rigid transplantation of the law review model to every law school—some of which lacked the requisite number of highly capable students and all of which lacked the inherited tradition that sustained quality in the leading schools—resulted in a plethora of mediocre publications that provided limited educational benefits to their participants. Further, the enormous increase in the demand for legal education which began in the late 1960s 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 (which were almost invariably quantified as an index combining LSAT and undergraduate grade point average). Simultaneously, improved resources for most law schools led to large improvements in the number and quality of law teachers. Providing a superior educational experience to a small portion of students who were only marginally better than the rest became an indefensible educational policy.

Unwilling to face the problem head on, most law schools and law reviews democratized the law review experience in one or more ways: by doubling the size of staffs, selecting staff members after arduous competitive writing exercises for which all students were eligible, creating additional law reviews (everyone must get a prize in today's America!), or by applying affirmative-active principles to the law review.[24] The fall of the citadel occurred several years ago when that symbolic bastion of meritocracy, the *Harvard Law Review* itself, departed from merit selection by adopting a selection system designed to ensure adequate representation of minorities

24. A statistical sampling over time of the mastheads and pages of three well-established reviews (Cornell Law Review, Michigan Law Review, and University of Chicago Law Review) indicates that law review staffs have increased from about fifteen students per class twenty-five years ago to more than thirty today. Although the total number of published pages is greater, the increase has been almost entirely devoted to major articles. The average length of both articles and student notes has approximately doubled (articles increasing in average length from 25 to over 40 pages and student notes from 10 to over 20 pages). Although more than twice as many students are engaged in law review work, the total number of pages devoted to student work has slightly declined. Moreover, the proportion of student editors who author a published note has dramatically declined: there were 1.9 student notes for every second-year law student in 1955–1958 and 0.4 student notes per second-year participant in 1980–1983.

and women.[25] Probably for the first time in its history, the student-edited law review was given prominent place in the leading periodicals of the day, as news stories, editorial comment, and letters to the editor focused on the Harvard plan.[26]

The other 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. In 1956, Dean Harold Havighurst, in typical law-review banquet style, premised the case for student editors as follows:

> It is a striking fact that once a person of superior intelligence learns to read the cases, acquires the vocabulary and becomes acquainted with legal materials, he is in a position to deal effectively with legal theory in almost any field, provided that he will devote to it the requisite amount of time. The excellence of the product, then, is mainly the result of native intellectual talent and long hours.[27]

Although Havighurst conceded that "experience, ripeness of judgment, and massiveness of learning" are important in "legal scholarship of a more philosophical nature," they were not essential to legal writing involving "arguing and deciding cases."[28] Even this justification of student editorial control was limited because of the "unique" character of law reviews: their principal purpose was not to advance scholarship but to educate students. "Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written."[29]

Probably it was never true that a second-year law student, on the basis of high intelligence and a year's training in the parsing of cases, could deal with any problem of traditional doctrinal scholarship. But this myth of omnicompetence clearly has no validity today, when the most experienced and able faculty members do not claim competence over the entire realm of legal scholarship. Law today is too complex and specialized; and 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

25. The new selection process is more complicated and discretionary; one-half of the new editors are chosen by outgoing editors on the basis of an evaluation of written work in which minority status may be considered. The purpose, apparently, is to provide a fuller representation of minorities (including women) on the editorial staff. As a student critic comments, the enormous attention given to this issue by the Harvard Law School communities and the outside world, flowed largely from the "failure to face fundamental conflicts of self-definition. Is the Harvard Law Review's purpose to publish legal scholarship, or to serve as a mechanism for the distribution of "goodies" in the legal community, a reward for those with the 'Right Stuff', a labeling device for the convenience for the most prestigious firms, judges, and law school faculties?" Letter to editor, Harv. Law Record, February 12, 1982, at 12. For a discussion of the new selection process, see *id.*, at 1, 16.

26. New York Times, March 3, 1981, section 1, at 1, col. 1.

27. Harold C. Havighurst, Law Reviews and Legal Education, 51 Nw. L. Rev. 22 (1956).

28. *Id.*

29. *Id.*, at 24. See also Richard H. Lee, Administration of the Law Review, 9 J. Legal Educ. 223, 224 (1956): "The first goal of any law review must be to teach. . . . A second . . . is the publication of scholarly articles in the field of law."

scholars as indefensible. Horror stories abound, such as the one involving a celebrated article in the past decade, an article that was rejected by some forty student-edited publications.[30] So, too, was the incident involving a famous Oxford legal philosopher whose brilliant article was substantially rewritten by a student editor, resulting in its withdrawal, intervention by a leading faculty member at the school, and prolonged negotiations before the article was finally published as originally written.[31]

The effects that the predominance of student-edited law reviews have on legal scholarship go beyond the commission of occasional sins by individual student editors. The extraordinary proliferation of law reviews, most of them student edited and all but a handful very erratic in quality, has been harmful for the nature, evaluation, and accessibility of legal scholarship. Student editors 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 faddish on the other. Student editors discourage scholarship that assumes an informed reader, presents its contribution to the literature succinctly, and is innovative or unusual. The recent creation and success of faculty-edited reviews represent a response to the widespread perception of legal scholars that the student-edited law review does not adequately meet all their scholarly needs.

The nature of student-published work has also changed over time. No longer do students restrict their efforts to short notes summarizing and critiquing recent judicial decisions. They now undertake much more serious and challenging endeavors, such as a 217-page exploration of the history, theory, and practice of evidentiary privileges which appears in a current issue of the *Harvard Law Review*.[32] This collaborative effort of a number of students is not limited to a synthesis of judicial decisions on the attorney-client and other privileges (although it includes that), but devotes many pages to an exploration of underlying policy and theory. Its citations are not limited to evidence scholars such as Wigmore and McCormick, but include moral philosophers and social theorists (Bentham, Mill, Parry, and even Gramsci!). Perhaps a few students at a few schools, given strong support by interested faculty, can carry off such broad endeavors, but the mass of student editors lack the required knowledge and scholarly perspective.

Changes in law review organization and goals since the late 1960s have adversely affected the educational experience provided by many law reviews. The growth in the size of law review staffs, combined with more participatory democracy in governance, has meant that more of the total student effort is spent in group decision making. Competitive writing

30. The article in question is Marc S. Galanter, Why the "Haves" Come Out Ahead: Speculations in the Limits of Legal Change, 9 Law & Soc'y Rev. 95 (1974).

31. The article in question is H. A. L. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958).

32. See Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1450-1666 (1985).

programs may or may not be a fairer method of selecting new editors, but a good portion of the total effort of editors is now devoted to this selection process. These efforts have few educational benefits for anyone and do not contribute in any way to publication of student notes or editing of lead articles. Selection on the basis of grades was more arbitrary, but the efforts of existing and new editors at least were devoted to writing and editing a legal publication, not merely selecting the recipients of an honor. At nearly all law schools the latter aspect, awarding an honor prior to the second-year placement swirl, has assumed a larger place in the law school milieu.

On today's law review the efforts of students are often a vast monument of wasted effort. The third-year editors are exhausted by running a writing competition and shepherding work in progress through endless committee meetings. Second-year writers are supposed to write notes worthy of publication, but fewer than one-half of them ever publish anything.[33] As major articles increase in length, more of the effort of student editors is spent on the drone-like work of ensuring the accuracy and completeness of citations. Unless the inherited tradition of the law review is a strong one, much of this effort looks more like going through the motions than the writing and editing of serious legal scholarship.

The perennial problems of student editorial boards—lack of continuity resulting from the annual turnover of editors, falloff in interest of third-year editors who are not elected to officer positions, limited scholarly perspective, and inexperience in legal research, writing, and editing—have always affected the timeliness and quality of the resulting publication. The more recent developments, however, have reduced the quality and value of the educational experience to participating students. This is one reason that an increasing number of top students at many law schools have declined to participate in law review work—a phenomenon virtually unheard of a decade or so ago.

When social change slowly undermines the premises of an established institution, a common response is the creation of alternatives and a slow withering of the once-dominant institution. Head-on challenges come later when the decay is obvious. That process is underway today with the student-edited law review. Groups of legal scholars with common interests have created a large number of specialized faculty-edited journals that publish an increasing portion of the leading articles in most of the "law and . . ." areas: legal history, law and economics, law and sociology, legal philosophy, and the like. Empirical studies dealing with legal institutions or the legal profession also find their way increasingly into new specialized faculty-edited journals. The Association of American Law Schools is considering a

33. See note 24, *supra*, which discusses data from an informal survey of the contents of three law reviews in 1955–1958 and 1980–1983. The basic conclusion that fewer than one-half of student editors ever publish a student note is confirmed by the only national empirical study. See also Josh E. Fidler, Law Review Operations and Management, 33 J. Legal Educ. 48, 56, 61 (1983): Although "60.7 percent of the publications require students to have written a piece in order to be considered for an editorial position . . . a student member has considerably less than a fifty-fifty chance of having a note or comment published."

dramatic proposal to follow the lead of other learned societies in publishing a comprehensive learned journal that would be faculty-edited and would utilize peer-review in the selection of articles. A few law faculties, disappointed with the quality of the local student-run law review and smarting from editorial difficulties in the handling of faculty submissions, are muttering dark threats of a faculty takeover. But direct challenges of this type probably remain a few years away. The student-run law reviews remain numerically dominant, but they now have rivals and their future is in doubt. Perhaps a hybrid model will emerge with faculty editors selecting and editing the lead articles and student editors continuing to provide case notes, comments, and other commentary.

From its beginning the student-edited law review has been associated with the model of legal education which emerged at Harvard in the late nineteenth century. The doubtful future of the student-edited review is also associated with ongoing changes in legal education, especially its relation to the American legal profession that employs its graduates and regulates it by controlling entry to the profession. American law schools today are not preoccupied with the analysis of appellate judicial decisions and the synthesis of legal doctrine. They are more theoretical in approach, eclectic in method, and scholarly in interest than formerly. Law faculty members, especially at the better schools, write primarily for other academics who approach the same subject matter using the same methods (whether economic, historical, or philosophical). Because these writings are not as directly applicable to the problems practitioners face, and because they frequently employ a scholarly jargon and theoretical framework that practitioners do not understand, they are of much less utility to the bench and bar.

A distinctive feature of the American legal landscape has been the close association of the law school world with that of the judge and the practicing lawyer. The law school model that emerged, along with the student-edited review, in the late nineteenth century, had one foot in the academy but the other was placed firmly in the midst of the profession. As American law schools become more abstract, theoretical, and academic, the role of student-edited reviews diminishes along with the close ties to the world of practice. At present no one can predict whether the increased separation of law schools from the legal profession will lead to tensions and conflict that radically alter future arrangements. All one can say is that change is underway and that its terminus is uncertain.