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## IN PRAISE OF STUDENT-EDITED LAW REVIEWS: A REPLY TO PROFESSOR DEKANAL\*

John Paul Jones\*\*

Loving historical trivia, I am deeply in debt to Dean Vernon for introducing me to Afton Dekanal and his writings. Chroniclers of legal education are preoccupied with past giants like George Wythe, Christopher Columbus Langdell, or Karl Llewellyn. They tend to give short shrift to minor luminaries like Afton Dekanal. His students and contemporaries might remember Professor Dekanal, but the rest of us are doubtless the poorer for our ignorance of his role in shepherding legal education into this century. Among my audience may I plant, perhaps, the seed of an idea for a commemorative issue collecting Professor Dekanal's writings and recording the reminiscences of his students?

Grateful as I am for an exposure to Professor Dekanal's ideas about law reviews, I disagree with his cure for what ails them. I do not think that shifting editorial responsibility from selected students to professors offers any real benefit for the genre, and, even if it did, I do not see enough faculty volunteers willing to carry out the general tasks *I* would assign to law reviews. Both the profession and the educational establishment are better off leaving the editing of the majority of our law reviews in the hands of the students.

Having professors edit law reviews sounds best the first time you hear it. It resonates with the presumption that an enormous gap exists between teacher and taught, that teachers are better at legal thinking and writing than their students. My recollections of five years on the student's side of the law school lectern, and my experiences for more than five years on the teacher's side, leave me skeptical. On the contrary, any year, any law school produces graduates better at thinking and communicating about the law than some or all of its faculty. This is not meant as an admission of our collective shortcomings, but as a declaration of our achievement.

Those who cannot sometimes *do* teach. I take as much satisfaction from that fact as does the short, slow basketball coach at our university. He is not embarrassed to be surrounded by tall, quick students of the game. Some students can play basketball better than some coaches. The same is true of law students and legal writing. Some students can write and think better than some professors. It ought to follow that some students can better discern good writing, or turn not-so-good writing into the publishable kind.

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\* This is an edited version of the largely extemporaneous remarks delivered at the National Conference of Law Reviews on March 24, 1988, hosted by The University of Richmond School of Law.

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Editing is a vague word often used to refer to several tasks. I think editing means evaluating ideas in manuscripts for their originality and usefulness, recognizing or developing clear communication, and correcting necessary footnotes for accuracy and convention.

Law professors presumptively are better equipped than students only in performing the first editing task, and then only sometimes. Recognizing the significance of a manuscript may depend on a relatively mature understanding of the conventional wisdom in a particular subject. A professor who has read, taught, and written on corporate officer fiduciary duties, for example, may be able to discover a diamond in the rough among manuscripts on the subject, where a third-year student who has only taken the professor's course could not. But this sort of opportunity knocks rarely. More often, an editor evaluating manuscripts contemplates writing which is patently good or bad. Some manuscripts contain ideas so original and useful that generalists can recognize their importance even on first reading. Charles Reich's articles on new property deserving due process protection come to mind. It ought not to have taken an editor of any greater expertise than that available from a basic course in constitutional law to see the revolutionary nature of Reich's idea. At the other end of the spectrum, bad writing is equally easy to identify; it is rarely the vehicle for clear thinking about anything. Using professors to evaluate all submitted manuscripts is inefficient. A good student editor can make the first sort, winnowing much of the manuscript chaff. An unsure student editor always is free to get a second opinion from a subject matter expert, whether the expert be professor or practitioner.

Even if professing has given us some expertise useful in evaluating ideas in manuscripts, that expertise is relatively narrow. As a public law teacher, I can speak with little real authority about much in my chosen fields of constitutional and administrative law. I can speak with even less authority than most of my students about the hidden brilliance of a commercial law manuscript. (All I know about commercial law came from my bar review course.) If it is subject matter specialization which sets professors apart from good students, then the intellectual discernment of a faculty-edited law review would depend upon the number of areas of expertise claimed by the faculty editors. Imagine the *Avalon Law Review of Search and Seizure, Estate Tax, and Roman Law*. To hew to a standard of editing by subject matter experts, a law review run by professors would have to limit its scope, or enlist the entire faculty for the editorial board. Otherwise, the few professor editors would end up editing outside their expertise more often than not. If that would happen, why not let students take a crack at it while we do our own writing?

Much editing is a lot less glamorous than perusing manuscripts for revolutionary ideas. When we talk about law review authors, we are not talking about *New Yorker* magazine authors obviously gifted in communicating clearly in writing. English don't come easy—ya know it don't come easy. If professors

were better at writing than their good students, it would not be because professors have more training in it.

Since I became a professor, I have looked seriously at the mechanics of composition only because I teach legal writing. Most law professors do not study composition as part of their calling, so most of them know nothing more about it than they did as law students. This should not surprise anybody who has spaded a lead article by a member of even the most prestigious faculty. Some professors may be exceptional legal thinkers, but they are often no better communicators than their students. If that is so, how do law reviews profit from employing the former as editors in lieu of the latter?

Even cleaning up a manuscript as a piece of writing is more satisfying than spading. There would not be such a task as spading if professor-authors exhibited the skills Professor Dekanal presumes they possess. If the profession continues to insist with all the rigor of the Roman Curia that adherence to the often empty conventions of the bluebook affects the credibility of the piece and its journal, then spading is essential to the power of each law review in the marketplace of legal ideas. Professors are no better at this editorial function than student editors. The recent evolution of both legal writing instruction and citation science persuades that professors actually are less qualified. They learned spading skills in the dark ages, not from a professional but from an upperclassman, if at all. Most have done little or nothing to refresh that training, not that they would want to be known for their spading skills. (Fortunately, this editorial function soon may be assigned where it belongs—to machines. Computer-assisted citation formatting is here, although not yet convenient. Soon, it will not matter whether professors would make better spaders, except to someone with a twisted sense of retribution).

So far I have been saying professors are not significantly better equipped than students for several tasks of editing law reviews. There is another weakness in Professor Dekanal's proposal. Our present system at least coordinates incentives with tasks. Professor Dekanal's scheme would not. Today many students edit law reviews because the experience gives them power in the employment market for law graduates. Do this, promises the legal establishment, and employment choices will be your reward. Many professors write law review articles because publication gives them power in the market place for academics. Do this, says the law school establishment, and employment choices will be your reward. Professor Dekanal's scheme shifts new burdens to professors without correlating new incentives. Editing a law review just does not help achieve a professor's goals. Moreover, in the zero-sum game of a professor's workday, editing can occur only at the expense of reward-producing activity like writing. Thanks, but no thanks; this professor would rather write his own stuff than edit someone else's.

Given the limited number of professors willing to edit, the present journal population would suffer a number of casualties were we to give Professor Dekanal his way and fire all the student editors. The profession can do without this kind

of attrition. I have heard it said that there are too many law reviews, and that, by some analog to genetics, too many law reviews produce inferior contents. Legal thought is not a gene pool, however, and sterilizing the masses will not produce a race of super journals filled with only the best articles. Professor Dekanal is not openly a journal elitist, but such elitists no doubt take comfort in his proposal.

There cannot be too many law reviews, or at least there are not yet. Law reviews *review* laws. They do not just report laws. They are, or should be, the watchdogs set against the establishment which exercises lawmaking power. The increase in the number of journals has not come near to matching the increase in lawmaking over the same period. Particularly in the last fifty years, we have created a social welfare state in America, a system of hands-on lawmaking. At the same time, we have enrolled in legal systems administered by international institutions like the United Nations. There is a lot more law out there to review these days, so growth in the number of law reviews ought to be encouraged not bemoaned.

After two decades, the *Harvard Law Review* faced fifty-nine competitors. By 1947, there were 182 law reviews. In 1987, there were 517. If the number of law reviews ought to vary directly with the development of the law, the explosion of new lawmaking systems and regulatory schemes at all levels, from local to international, more than justifies the increased journal population. Granted, the growth in journals has been dramatic, but the growth in the law has outstripped it by far, in the legislatures, the courts, and the bureaucratic agencies. For example, as a rough measure of what legislatures have been up to, look at the growth of the *Congressional Record*. It had fewer than 4000 pages in 1907 and fewer than 12,000 pages in 1947. It had reached nearly 35,000 pages by 1984. I would bet that state legislatures have been just as growth-minded, especially in the last ten years, as the New Federalists sent lawmaking back to the state capitals.

As a rough measure of judicial activity, look at the growth in the supervising federal courts. In 1907, there were thirty judges sitting on the federal courts of appeal and fifty-nine in 1947. Today, there are 127. Two years ago, Virginia did not even have an intermediate court. The new court is well into its sixth volume of reports already. If law reviews are the answer to the question of who is keeping an eye on the legislatures and courts while they are carrying on, then there is no surplus of watchdog journals.

I am an administrative law junkie. Let me remind you that the outputs of elected legislatures and tenured judges represent only the tip of the iceberg of lawmaking. Today, at the federal level alone, regulations newly proposed or adopted by the regulatory agencies multiply at a breathtaking rate. While we watched the NCAA Tournament, the body of law found in the Federal Register quietly grew by more than a thousand pages.

Meanwhile, the hearing officers employed by government agencies are deciding cases at rates that should give pause. In one year, the Social Security

Administration alone holds more than 250,000 hearings and entertains more than 40,000 appeals. Who can keep an eye on these guys if not the law reviews?

If not enough critical attention is being paid to federal lawmaking, imagine how much less is being paid to state lawmaking, or to what is going on downtown? The University of Washington's *Current Index to Legal Periodicals* rarely shows more than a handful of articles on administrative law, for example, regardless of the level of government being addressed.

I am not talking about keeping the bar and bench alerted to what is hot off the court's or the legislature's press. Law reviews do not and cannot react fast enough to get the word out adequately. They are misguided when they try. The legal newspapers, electronic note boards, loose leaf services, and commercial data bases do that job better. Instead, I am assigning law reviews the job of reviewing lawmaking for its utility, for unjustifiable legislative or judicial inertia, for necessary reform and amendment. The journals have no vested interest in the statutes, regulations, and decisions they monitor. They can and should be supplying carefully crafted criticism for the purpose of influencing lawmakers otherwise advised by the self-interested. Along the way, both law review staffs and law review contributors will show themselves to be the exceptional legal thinkers and writers that employers, public and private, are looking for. The need for a healthy and prolific fourth estate of law reviews in our legalistic society ought to be clear.

We need more not fewer law reviews, offering more analysis and less survey. There are not enough professors interested in editing the few faculty-administered journals we have now, much less the law reviews we need. The incentives are not there to attract faculty editors in any number, and, if they were, it would be a mistake to presume that professors would perform better than their students.

By and large, student editors can do—and are doing—the job.

I salute—you.