

## A STUDENT DEFENSE OF STUDENT EDITED JOURNALS: IN RESPONSE TO PROFESSOR ROGER CRAMTON

Somewhere in America.

"I really think we should take this piece; the author has a good publication record and it's really well researched."

"What is it on?"

"Separation of Church and State. She explains a couple of recent Supreme Court decisions."

"Oh yeah—that must be a hot topic. We got about sixty pieces on that in the last couple weeks. We better take one of them."

"Well, this one has more footnotes than any of them."

"Look guys, I skimmed through that piece. If we take it—it hasn't got any historical section, and it only gives a couple page explanation of the first amendment."

"No problem, we'll just send it back to her to fill in that stuff."

"Better get her to beef up some of these footnotes: this one section looks a little thin."

"O.K. I guess it's settled, we'll take the piece. Anyone here take a first amendment course? . . . well, that's all right—we all had constitutional law. Anything else we gotta take care of today?"

"Yeah—some jerk author called. That economics piece. He's all bent out of shape because we fixed his piece up without telling him."

"I knew we shouldn't have taken that piece. That's the last piece we take without footnotes. What was wrong with it?"

"It had all this gibberish about some new theory I couldn't figure out, so I changed it to fit traditional economic doctrine."

"Well the hell with the author. We're publishing it, not him. Anything else? . . ."

Professor Roger Cramton would have one believe that this conversation is commonplace at student edited law reviews.<sup>1</sup> Professor Cramton paints a dreary picture of law reviews peopled by randomly selected students whose sole qualification is the ability to blunt academic dialogue and make discourse bland. Worse, in Cramton's universe, these inept students have a veritable stranglehold on academic publications. Professor Cramton ends his very dire picture with a call for those academics held hostage by the student editor regime to break their chains, to rise en masse and take from the students the very tool of oppression—he calls for replacement of all student edited journals with a very small number

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1. See Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. LEGAL EDUC. 1, 8 (1986).

of faculty edited journals,<sup>2</sup> decreasing both the number and variety of journals. Professor Cramton wants to make sure that the above conversation never happens again.

The above conversation, however, never occurred. Student edited journals are not run that way. It is interesting that in the current debate over the value of student edited journals<sup>3</sup> the student voice is conspicuously absent—probably because by the time most students either are aware of the debate or are in a position to care, they are too busy working on journals to defend them. Students do *hear* the debate, however, and it is a little like having your parents talk about you in front of you. The difference is that students are not children; they have opinions based on legitimate experiences. This note does not pretend to speak for any particular law review,<sup>4</sup> it merely points to some of the false assumptions Professor Cramton makes and shows how these false assumptions weaken his arguments.<sup>5</sup>

Professor Cramton attacks student edited journals in three ways: students are not sufficiently sophisticated to “deal with any problem of traditional doctrinal scholarship”;<sup>6</sup> the staffs of journals no longer represent meritocracies;<sup>7</sup> and student note writing is inadequate.<sup>8</sup> This note first examines each of these three criticisms.<sup>9</sup> After pointing out the inaccuracies of some of Professor Cramton’s assumptions, the note then briefly looks at the viability of a law review staffed only by faculty members.<sup>10</sup>

2. *Id.* at 8; see also Cramton, *Faculty-Edited Law Reviews: Yes*, Syllabus, Sept. 1985, at 3, col. 2.

3. See Vitiello, *In Defense of Student-Run Law Reviews*, 17 CUMB. L. REV. 859, 859-61 (1987) (outlining debate over student edited law reviews).

4. None of the material in this note refers to authors who have published with the *Duke Law Journal*. Furthermore, none of the references to “Cramton’s student edited law review” are meant to refer to the *Cornell Law Review*, to which Professor Cramton served as an advisor.

5. It is easy to provide an example of the danger of Professor Cramton’s assumptions. Near the beginning of his article, he asserts that there are “[o]ver 250 school-centered law reviews, most of them edited *exclusively* by students.” Cramton, *supra* note 1, at 2 (emphasis added). He supports this assertion with a footnote explaining that *The Index to Legal Periodicals* “includes about 250 legal publications that *appear* to be published at a law school with students controlling or *participating* in the editing.” *Id.* at 2 n.7 (emphasis added). Nonetheless, his somewhat shaky assertion that there are over 250 student edited journals has been seized upon and presented as a fact throughout the debate. See, e.g., Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131, 1137 n.26 (1987); Zenoff, *I Have Seen the Enemy and They Are Us*, 36 J. LEGAL EDUC. 21, 21 n.2 (1986).

6. Cramton, *supra* note 1, at 7.

7. See *id.* at 6-7.

8. See *id.* at 8.

9. See *infra* notes 11-72 and accompanying text.

10. See *infra* notes 73-75 and accompanying text. This paragraph is, of course, the infamous road map, which also has been faulted by critics of legal writing. See Zenoff, *supra* note 5, at 22.

## I

A. *Student Ability.*

In Cramton's student edited law review, the unsophistication of student editors manifests itself at two places: the selection of pieces and the editing of those pieces that are selected. While Cramton's criticisms of the selection and editing process have some emotional appeal, they do not stand up either to common sense or to the small amount of empirical research that has been done in this area.

1. *Article Selection.* Professor Cramton sees much harm in student selection of pieces. Among his many criticisms, Professor Cramton contends that students

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.<sup>11</sup>

Professor Cramton does not reveal how he has divined the preferences of student editors. Perhaps he infers their preferences from what is printed (or more accurately, from what he reads of what is printed); I hesitate, however, to accept his conclusions. Even if law reviews do publish some pieces such as those described by Professor Cramton, law reviews are not the only party to blame. Whether staffed by faculty or by students, law reviews can publish only what they receive; despite Professor Cramton's fuming, law reviews do not write the pieces that they publish.<sup>12</sup> The source of these pieces must lie outside the journals, perhaps in the tenure process.

While it is neither my place nor my purpose to discuss the tenure process, that process *is* tied to publication.<sup>13</sup> An interesting study done by Professor Ellman compared the published work of Acting Professors,

11. Cramton, *supra* note 1, at 8.

12. See Zenoff, *supra* note 5, at 22 ("A substantial number of those allegedly poorly conceived, repetitious, and tedious articles are written by us . . .").

13. See *id.* at 22 ("The sixty-page contribution disgorging every article, statute, and case ingested may be a response to the requirement of at least one 'major publication' for the award of tenure and at least one more for promotion. It is even rumored that some legal academics measure scholarly achievement by citation mass."); see also Austin, *supra* note 5, at 1136-43 (discussing use of unnecessary footnotes in tenure pieces); Raymond, *Editing Law Reviews: Some Practical Suggestions and a Moderately Revolutionary Proposal*, 12 PEPPERDINE L. REV. 371, 371-72 (1985) ("The notion that law review articles ought to be stylistically interesting is actually considered subversive by some academic lawyers. They will argue, in private at least, that dullness is often a sign of good scholarship . . ."); Zenoff & Moody, *Law Faculty Attrition: Are We Doing Something Wrong?*, 36 J. LEGAL EDUC. 209, 222-24 (1986) (discussing publication pressure on nontenured faculty).

Assistant Professors, Associate Professors, Professors and Deans. As each category of academics became more secure in the tenure track (e.g., Associate Professor over Assistant Professor), the number of pages per article decreased, as did the number of footnotes per page and the number of footnotes per article.<sup>14</sup> In other words, the less secure an academic's position on a faculty is, the more likely that academic is to produce lengthy, heavily annotated pieces. Because many more academics are at the bottom rather than the top of the tenure ladder, many of the pieces that Cramton criticizes as "standard," "lengthy," or "heavily annotated," arrive with these weaknesses at the doorstep of the law review office. It is not the student editors who mysteriously transform an otherwise "good" article into a somehow less desirable one. If Professor Cramton's faculty edited review turns down pieces merely because they are dull or over annotated, it may publish very little at all.<sup>15</sup>

At any rate, Professor Cramton's sweeping characterization of law review pieces is overinclusive; in fact his assumption is about five years behind reality. Journals are turning away from long, thesis-like pieces in favor of shorter pieces that do not contain lengthy histories and do not explore every tangent of a legal topic or issue. Ellman's study helps to illustrate that shorter, less annotated pieces *are* published.<sup>16</sup> Journals are also publishing a greater number of "Comments," "Replies," "Dialogues" and similar pieces that are normally shorter and less heavily annotated than the traditional law review articles. Shorter pieces are very attractive to student edited journals: they are easier to edit and cite-check, and they don't eat up valuable page space.

The student edited law review that Professor Cramton envisions seems to be staffed by an unambitious group that selects "safe or standard" pieces because it is afraid to stand out. Nothing could be further from the truth. For better or worse, law review editors are generally achievement oriented and—particularly after investing a considerable amount of time—identify themselves closely with their law reviews.<sup>17</sup> Law reviews succeed by being innovative and interesting, not by hanging

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14. Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. LEGAL EDUC. 681, 683 (1983).

15. See Goodrich, *Professor, edit thyself*, CALIF. LAW., July 1986, at 49, 50 (discussing *Stanford Law Review's* dearth of good submissions).

16. Judge Mikva regularly publishes articles with *no* footnotes. E.g., Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380; see also Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 651 (1985) (article criticizing footnotes, containing but a single whimsical footnote).

17. See Julin, *Faculty-Edited Law Reviews: No*, Syllabus, Sept. 1985, at 1, col. 2, 3, col. 1 (discussing law review experience).

back and letting others take the lead.<sup>18</sup>

I do not doubt that "horror stories abound" concerning rejection of good pieces.<sup>19</sup> I also do not doubt that the student editors felt a twinge of regret while signing the rejection letters. In order to publish a balanced and interesting journal *and* stay within reasonable page limits, some worthwhile material must be rejected.<sup>20</sup> The one solace a student editor has is that good material will surely be accepted by another law review. The great number and variety of publications, which Cramton censures as *harmful* to the accessibility of legal scholarship,<sup>21</sup> ensures that every worthwhile contribution will find an outlet.<sup>22</sup> In fact, pieces that are blatantly unusual almost always find their way into print.<sup>23</sup> For example, *Supreme Court Haiku*,<sup>24</sup> which some reviews turned down as "off-the-wall," was published by the *New York University Law Review*, a review that has its pick of many fine articles.

Nonetheless, to combat the horrors of student selection, Cramton suggests that pieces be selected at the minimum by a faculty member; ideally, he suggests, by a peer review committee.<sup>25</sup> It is unclear that peer review would improve upon the student editor selection process. Peer review is not the panacea to other academic fields that Professor Cramton would have one believe. Of the seven academic fields surveyed by the

18. See Stokes, *How To Get Your Article Published by a Law Review*, 71 A.B.A. J. 144, 144 (1985) (noting that the success of student edited law reviews is measured by the quality and intrigue of its pieces).

19. Cramton, *supra* note 1, at 8.

20. The *Duke Law Journal* receives 25 to 35 unsolicited manuscripts *each week*, yet only publishes that number *each year*.

My favorite rejection story is that told by Professor Rotunda concerning Dean Prosser's famous article *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). Apparently, the editors of the *Harvard Law Review* felt Dean Prosser's article had too many footnotes. Dean Prosser did not want the footnotes to be edited out, and took his piece to the *Yale Law Journal*, where it went on to become one of the most cited law review articles ever published. Rotunda, *Law Reviews—The Extreme Centrist Position*, 62 IND. L.J. 1, 2 n.3 (1986).

I like this story for two reasons. First, it illustrates the damned-if-you-do and damned-if-you-don't position that student editors are in: if you accept a heavily annotated piece you are accused of trivializing academic debate, if you reject the piece you are accused of cutting out debate altogether. Second, the story shows that even if a good piece is rejected by one journal, another (in this case equally prestigious) journal will pick it up.

21. Cramton, *supra* note 1, at 8.

22. See Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093, 1097 (1986) (The large number of publications allows even unknowns to publish.).

23. The assertion that student editors will not select innovative pieces is patently ridiculous—those are the very pieces student editors are looking to find. See Goodrich, *supra* note 15, at 50 (quoting *Stanford Law Review* as looking for "unusual, overlooked kinds of articles").

24. Sirico, *Supreme Court Haiku*, 61 N.Y.U. L. REV. 1224 (1986). The piece consists of six haiku inspired by Supreme Court decisions. One has to wonder if Professor Cramton's faculty edited journal would have published them.

25. Cramton, *supra* note 2, at 3, col. 2.

American Council of Learned Societies, strong majorities in each reported that "the peer-review system for deciding what gets published in scholarly journals is biased in favor of 'established' researchers, scholars from prestigious institutions, and those who use 'currently fashionable approaches' to their subjects."<sup>26</sup> Nor is peer review immune from the lack of consistency for which Cramton censures student edited journals.<sup>27</sup> In order to test peer review in the field of psychology, a dozen articles by well-known scholars were resubmitted, under new titles and with faked author's names, to the same journals that had published them. Eight of the twelve were rejected by peer reviews on the grounds of poor scholarship.<sup>28</sup>

The student selection process has two advantages over peer review. One is simply time. Timely publication is crucial in a field that changes as often and as rapidly as the law. While peer review often takes over a year,<sup>29</sup> student edited journals—which compete with one another for pieces—are *forced* to review pieces as rapidly as possible, and have elaborate processes set up to do so.<sup>30</sup>

A second advantage is that one viewpoint can never capture student edited law reviews. Every year, the editorial staff completely changes, and every two years the entire staff is completely replaced. Furthermore, as long as grades play some role in staff selection, editors will be unable to mold future staffs in their own images.

On the other hand, faculty edited law reviews are extremely vulnerable to being captured by one viewpoint. This vulnerability is a large concern of those academics who have considered Professor Cramton's proposal.<sup>31</sup> Professor Rotunda points out that if a group such as Critical Legal Studies edited the review, much legal scholarship would be excluded;<sup>32</sup> undoubtedly there are also groups that would like to exclude

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26. The Chronicle of Higher Educ., Aug. 6, 1986, at 1, col. 2.

27. Cramton, *supra* note 1, at 9.

28. Peters & Ceci, *Peer-Review Practices of Psychological Journals: The Fate of Published Articles Submitted Again*, 5 BEHAVIORAL & BRAIN SCI. 187 (1982).

29. See Rotunda, *supra* note 20, at 6.

30. See *id.* at 7.

Why are student edited journals faster than peer review? Partially because of the large staffs that Cramton decries. Partially because for one year of their lives, student editors eat, sleep, and breathe for the law review, a luxury academics do not have. And partially because student edited journals have to be faster, so they are.

31. See, e.g., Schlegel, *An Endangered Species?*, 36 J. LEGAL EDUC. 18, 20 (1986) (discussing "faculty-edited journals whose growth seems to reflect the need of each little piece of the academically oriented wing of the teaching profession to impose its own orthodoxy").

32. Rotunda, *supra* note 20, at 9. The thirty-sixth volume of the *Stanford Law Review* illustrates Professor Rotunda's point nicely. The first two-thirds of the volume contains *only* CLS related pieces.

the scholarship of Critical Legal Studies.<sup>33</sup>

I do not mean to suggest by the above arguments that selection of articles by student edited journals is perfect; in fact, I think it is the weakest aspect of the process. Student editors are inexperienced and are bound to be somewhat cautious.<sup>34</sup> It is difficult to explain what it feels like to accept an article for publication: in comparison to the many hundreds of manuscripts received each year, the thirty or so slots available for publication seem a very scarce resource indeed. Furthermore, an offer to publish is normally irrevocable—if you make a mistake you are going to live with it for the rest of the year. A great deal of agonizing precedes every offer.

I, for one, would welcome more faculty advice. I do not think the faculties have an *obligation* to render aid to student edited journals; nonetheless, faculty advice would be an invaluable, and in many instances a predominant factor in the equation leading to publication.<sup>35</sup> For the above reasons, however, the final decision should rest with the editors of the publication.

2. *Editing.* Selection of articles, of course, is only the first step toward publication. Professor Cramton also feels that student editors are incapable of editing legal scholarship. Cramton's criticism is two-fold: student editors turn good pieces bad (as Cramton has already criticized students for *not* picking good pieces, I'm not sure where these pieces come from), and students are incapable of dealing with the finer points of doctrinal legal scholarship.

Before dealing with Cramton's accusations about student editors, the nature of editing itself should be looked at. Editing is not fun: for the writer because it looks like the destruction of something the writer individually created,<sup>36</sup> and for the editor because it involves an ungodly amount of time and often is more like pulling teeth than it is rewarding.<sup>37</sup>

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33. See, e.g., Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (arguing that nihilist branch of CLS has no place in legal academics); Kennedy, *Are Lawyers Really Necessary?*, 14 BARRISTER 11, 12 (1987) (discussing Carrington's statement).

34. Kester, *Faculty Participation in the Student-Edited Law Review*, 36 J. LEGAL EDUC. 14, 17 (1986) (Student members of law reviews are inherently cautious and "lack the confidence to distinguish the truly innovative from the foolish.").

35. See generally *id.* at 14 (A former *Harvard Law Review* president describes benefits of close consultation with faculty in the editorial process.).

36. See Lansing, *The Creative Bridge Between Authors and Editors*, 45 MD. L. REV. 241 (1986) (expressing views of authors in editing process).

37. To those who have forgotten the experience of editing a manuscript, I recommend the first three pages of a chapter in *The Elements of Editing* titled, accurately enough, *The Agony and the Agony*. Editing, says this book, "is an excruciating act of self-discipline, mind-reading, and stable-cleaning. If it seems like a pleasure, something is probably wrong." A. PLOTNIK, *THE ELEMENTS*

*The Elements of Editing* describes the editing process as "hand-to-hand combat."<sup>38</sup> While the editing process is not *always* antagonistic, any discussion of it must recognize its emotional component and the tension it creates. Perhaps the most artificial aspect of the dialogue concerning student edited law reviews is that only the author's side of the author/editor process has been heard from. The absence of the editor's perspective creates an illusion that all of the problems lie on the editor's side.

There is no reason to believe that law school students cannot edit. Law school students are all college graduates and in general have high verbal skills.<sup>39</sup> Those selected for law review, by whatever method, also exhibit some ability to organize thoughts and express them clearly. All of these qualities are the essential skills for editing *qua* editing.<sup>40</sup>

Student editors, however, possess more than the minimum skills required to edit a law review piece. In light of the purpose of a law review and the nature of its audience,<sup>41</sup> student editors are perhaps more qualified to edit pieces than their faculty counterparts would be.

Law reviews are *not* trade magazines.<sup>42</sup> That niche is filled by magazines such as the *ABA Journal*. It is even questionable whether law reviews should be something someone picks up and reads cover to cover. And there is little truth in the old saw that "law reviews are published primarily in order that they may be written."<sup>43</sup> Instead, law reviews are functional. They provide a practical service for the majority of people who read them. In fact, law reviews are best defined by looking at those who use them: students, practicing attorneys, judges and legal academics.

As Cramton himself points out, law has become a bewilderingly vast and complex discipline<sup>44</sup> and students, practicing attorneys and judges cannot be intimate with the entire field.<sup>45</sup> Although Professor Cramton

OF EDITING 34-36 (1982). See also Martin, *supra* note 22, at 1103-04 (noting pressures on law review editors and staff).

38. A. PLOTNIK, *supra* note 37, at 29-31.

39. See Vernon & Zimmer, *The Size and Quality of the Law School Applicant Pool: 1982-1986 and Beyond*, 1987 DUKE L.J. 204, 213-15.

40. See generally A. PLOTNIK, *supra* note 37, at 1-10.

41. See *id.* at 25 (discussing editor's responsibility to the readership).

42. See Martin, *supra* note 22, at 1096 (law reviews more analogous to case reporters than newspapers). The original student edited law reviews were far more newsy than those published today. The first several volumes of the *Harvard Law Review*, for example, contained class notes and news of what was going on at the school. Swygert & Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 773 (1985).

43. Havighurst, *Law Reviews and Legal Education*, 51 NW. U.L. REV. 22, 24 (1956).

44. Cramton, *supra* note 1, at 2.

45. Roughly speaking, there are 125,000 law students, 675,000 practicing attorneys and 1,000 federal judges in the United States, THE LAWYER'S ALMANAC 1988, at 237, 164, 720, as well as over



may be right in insinuating that academics are capable of understanding the finer doctrinal points of every aspect of the law, it is important that law review material be accessible to its larger audience.<sup>46</sup>

Therein lies the value of student editors. Students are less specialized than they will ever be again, possessing the fundamentals of legal reasoning without years of exposure to only one or two branches. An article that makes sense to a student editor will make sense to a tax lawyer who needs to understand the implications of a family law doctrine, or to a recent judicial appointee who spent twenty years doing securities work and now has to decide a unique criminal case. It will also be accessible to *any* academic, no matter how specialized that academic has become.

Making academic pieces understandable does not mean that they must be made simple and that subtle play with doctrine must be abandoned. It only means that some steps in the analysis have to be explained, and insider jargon and shorthand eliminated. Clarity should not dampen scholarship; it should merely make it accessible to *all* members of the legal community.

A further benefit of student editing is that it provides a check against sloppy scholarship. Student editors are invariably skeptical, and like to see support for statements of how the law works or what the law is. Just like Santa's list, everything is checked twice. While it doubtlessly is frustrating to a scholar to be told that her research is lacking, her frustration does not justify the publication of something that is misleading.

Additionally, it is simply not true that student editing results in pieces that are stylistically flat. Criticism of style is as old as criticism of student edited journals,<sup>47</sup> but critics cannot draw any link between the flat style of legal writing and the fact that journals are edited by students. Unfortunately, those in the most visible position are the least capable of defending themselves.<sup>48</sup>

There are many other possible explanations besides student editing that account for flat legal writing, not the least of which is that that may be how a piece arrives at the law review office. Law review pieces are edited with an eye toward making them easy to understand rather than making them provocative or haunting to the reader. Furthermore, law

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8,000 state judges, 26 COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 155-58 tables 4.1, 4.2. There are less than 9,000 academics. THE LAWYER'S ALMANAC 1988, at 236.

46. See Carrington, *The Dangers of the Graduate School Model*, 36 J. LEGAL EDUC. 11, 12 (1986) (warning of danger in academic work of abandoning students and alumni).

47. See Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

48. Most, if not all, students are too busy.

review editors are sensitive to grammar; a surprising amount of stylistic differences between authors is levelled when the same rules of grammar are used for each piece. Sensitivity to comprehension and grammar is not, however, unique to law students.<sup>49</sup>

Cramton also accuses student editors of forcing authors to overannotate. The currently fashionable criticism of the use of footnotes<sup>50</sup> should not, however, be accepted merely because Professor Cramton does not like footnotes. Some find footnotes to be a valuable and necessary part of an academic piece. Practitioners in particular benefit from thoroughly annotated pieces.<sup>51</sup> There is nothing that forces a reader to read every footnote<sup>52</sup>—in fact a common joke among law review editors is that no one reads footnotes anyway.<sup>53</sup> Professor Cramton's criticism is basically a criticism of style; if he is to be the sole arbiter of style then perhaps student edited journals *should* leave the field.

In general, editing can turn many marginal pieces into good or excellent pieces.<sup>54</sup> In particular, student editors are willing to put extraordinary amounts of time into pieces, and law reviews as a whole are capable of bringing considerable resources into making a piece as good as it can be. Done properly, this process can be rewarding for the author as well as for the student.<sup>55</sup>

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49. See A. PLOTNIK, *supra* note 37, at 2-4 (cautioning editors against compulsive editing: "A little Strunk and White is a dangerous thing.")

50. For a discussion of the criticism of footnoting, see Austin, *supra* note 5, at 1132-33 & nn.6-9.

51. See, e.g., Martin, *supra* note 22, at 1096-97 (describing "fat footnote" as a vein of gold); Slomanson, *Footnote Logic in Law Review Writing: Previously Unaddressed in the Criminal Justice System*, 9 CRIM. JUSTICE J. 65, 68-71 (1986) (describing functions of footnotes and noting that footnotes have replaced bibliographies). For a vivid illustration of legal writing without annotation, compare Nader, *Tax Treatment of Lump-sum Distributions from Previously Qualified Employee Pension Plans*, DIGEST OF TAX ARTICLES, Nov. 1987, at 46 with Note, *Tax Treatment of Lump-Sum Distributions from Previously Qualified Employee Pension Plans*, 1986 DUKE L.J. 1055 (1986). Although the former is essentially a reprint of the latter, it contains no footnotes and seems more like a primer than a scholarly piece.

52. John Kenneth Galbraith noted that "[n]o literate person can possibly be disturbed by a little small type at the bottom of a page." J. GALBRAITH, *A Note on Sources*, in THE GREAT CRASH (1972), quoted in Wheeler, *The Bottom Lines: Fifty Years of Legal Footnoting in Review*, 72 LAW LIBR. J. 245, 245 (1979). On the other hand, "[e]ncountering [a footnote], is like going downstairs to answer the doorbell while making love." Austin, *supra* note 5, at 1152 (quoting Noel Coward).

53. Nonetheless, authors seem to be very attached to their footnotes. Austin, *supra* note 5, at 1136, provides a valuable discussion of what motivates authors to use footnotes. I can only add that it is easier to write about the need for less heavily annotated pieces than it is to persuade authors to edit out footnotes. Once again, one has to wonder how Professor Cramton's faculty edited journal is going to improve on this situation.

54. Rotunda, *supra* note 20, at 8-9.

55. I am always surprised at the hostility some authors have toward being edited. As discussed above, being edited is painful, but it seems clear that if several bright people do not understand what is being written, it could be written better. If nothing else, an author will probably never get as close

Some authors *do* have legitimate complaints about how journals are run (complaints that editors, student or faculty, should listen to). Mistakes are made. These mistakes, however, do not necessarily arise from the fact that journals are edited by students: in any process as complex as publishing a journal mistakes are inevitable. With sincere respect, faculty members are not immune to error. Furthermore, many of the hundreds of decisions are made in ambiguous contexts—any decision made in these contexts will leave someone unhappy. These ambiguous contexts will not disappear with the mere replacement of editors.

I also do not feel that student edited reviews are blameless in the actual editing of pieces (I also do not feel that Professor Cramton's faculty edited review will be blameless—it is very difficult not to over-edit). Editors *should* be more sensitive to the personal style of the author, and probably should be less rigid about simple constructions, adequate support, and proper grammar. Sensitivity, however, is not a lesson that cannot be learned by students merely because they are students; the bland and somewhat detailed style of legal writing does not constitute a reason for taking law reviews from the students' hands.

#### B. *Meritocracy.*

Professor Cramton presents a rather confusing discussion of the "meritocracy" of student edited journals.<sup>56</sup> He begins by discussing the increased quality of and decreased difference between recent law school classes, and then condemns journals for selecting students on criteria other than first year grades. I am at a loss to discern—given the narrow difference Cramton claims in overall quality of students—how a selection process that does not use first year grades affects the quality of the journals.<sup>57</sup>

Professor Cramton's argument is probably anchored in his belief that the only benefit of student edited journals is that they provide a unique education to their members.<sup>58</sup> Because all students are of similar quality, he argues that "[p]roviding a superior educational experience to a small portion of students who [are] only marginally better than the rest

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a reading as she will get from a student editor. Furthermore, a (surprising) number of scholars have come to expect student editors to fill in blank footnotes and to put citations in proper form.

56. Cramton, *supra* note 1, at 5-7.

57. It is sometimes difficult to see how grades are indicative of anything. Several studies have indicated that grades are at best poor indicators of ability and at worst arbitrary. See, e.g., Feinman & Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 881, 918-24 (1985). Given the hardships that journal work places on students, finding students who *will* do the work is at least as important as finding students who *can* do the work.

58. Cramton, *supra* note 1, at 8-9.

[is] an indefensible educational policy.”<sup>59</sup> If this is his argument, it is an argument not to disband student edited journals but rather to expand their membership—although, for unexplained reasons, Cranston condemns any attempt to do so.<sup>60</sup> Furthermore, the assumption that student edited reviews are nothing more than educational tools is not one that should be accepted out of hand. Student edited reviews do contribute to academic dialogue.

First, student edited journals provide a large market for the work of legal academics. Professor Rotunda argues that this huge market has many benefits for an academic. For instance, it provides the academic an opportunity to publish innumerable pieces. Constant writing hones the writer’s skills. In addition, the opportunity to explore the law through a number of publishing efforts increases the chances that the writer will produce a truly valuable piece.<sup>61</sup> It is somewhat surprising to hear academics arguing to reduce the current publication market; perhaps they are not aware of the tremendous volume of work that other academics are producing. Their self-confidence is inspiring, but perhaps, if the number of outlets for publication were decreased, some of these critics could be in for a surprise the next time they tried to publish.

Second, student journals play a very active role in encouraging debate in the academic community. Perhaps Professor Cranston should turn to the back covers of, for example, *Yale Law Journal* or *Michigan Law Review*, where he will find solicitations for responses to articles published in those journals. These solicitations guarantee “minimal editing.” Most student edited journals do, in fact, spend considerable time trying to foster debate. Student commitment to academic debate does not, of course, mean that faculty edited reviews would not do the same thing; nonetheless, it is difficult to see what faculty edited reviews would do better.

Dean Paul Carrington, in a companion piece to Professor Cranston’s, touches obliquely on the value of student edited reviews to legal dialogue, saying that if student edited reviews “cannot survive fair competition [from faculty edited reviews], so be it.”<sup>62</sup> Dean Carrington fails to note that student edited and faculty edited reviews have coexisted for

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59. *Id.* at 6.

60. *Id.* at 6-7 (“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 and women.”). Professor Cranston’s aversion to diversification is also unexplained; a very strong argument can be made for the benefits of having an editorial board with diverse backgrounds, interests and areas of expertise.

61. Rotunda, *supra* note 20, at 9.

62. Carrington, *supra* note 46, at 11.

many years, and *both* seem to be surviving.<sup>63</sup> It might even be argued that student edited journals are winning: a survey performed by Margaret Goldblatt showed that a higher percentage of student edited journals are used than are faculty edited journals.<sup>64</sup>

The merits of meritocracy are dubious at best. To treat members of law reviews as special merely because they are members of law reviews is frustrating, both to the ninety percent of the students who are not on the law review<sup>65</sup> and to student editors trying to create a viable work atmosphere. The debate over what criteria should be used to select law review members has become controversial and exceeds the scope of this note; nonetheless, Cramton fails to show how selection processes that utilize factors other than grades harm the quality of the final product.

### C. *Student Writing.*

Professor Cramton attacks both the quantity and quality of student writing.<sup>66</sup> He notes that less than half of the members of the student edited journals publish a note.<sup>67</sup> This is a problem; it is not, however, a reason to disband student edited journals. There are several reasons that this number is so low, and only one of them is—as Cramton suggests<sup>68</sup>—because some students join law reviews for resume value rather than to do work. Second year notes can fall prey to a number of hazards. Some topics inevitably become moot before a note is finished. The increase in the number of journals has increased the chances that a note will be preempted. Some topics just turn out to be dead ends, a phenomenon not unique to student efforts. Considering the other demands that are made on second year law students—not the least of which are classwork and cite-checking—it is understandable, albeit not commendable, that so many student notes do not make it to publication. Furthermore, much

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63. Dean Carrington's oversight is surprising, considering the fact that the law school over which he presides publishes the student edited *Duke Law Journal*, and the faculty edited *Law and Contemporary Problems* and *Alaska Law Review*. All of the journals are doing fine.

64. Goldblatt, *Current Legal Periodicals: A Use Study*, 78 LAW LIBR. J. 55 (1986). Goldblatt divided legal periodicals into several categories including: general subject law school reviews, specific subject law school reviews, specific subject reviews not affiliated with a school, and bar association journals. It is fairly safe to assume that all or almost all of the first category are student edited, and that none of the latter two are. A usage study over a 12 month period showed that 83.5% of the titles in the first category were used, compared to only 69.9% for the second category, 67.4% for the third, and 60.7% for the fourth. *Id.* at 56, 61 table 4. This *proves* little, but it does make one hesitate before accepting Professor Cramton's unsupported assertions regarding the usefulness of student edited journals.

65. See Putney, *Law Review Elitism: A Solution*, 14 STUDENT LAWYER, Jan. 1986, at 3.

66. Cramton, *supra* note 1, at 7-9.

67. *Id.* at 9 n.33.

68. *Id.* at 9.

effort often goes into notes that do not get published; even trying to write a note has some educational value.

Professor Cramton attacks the quality of student notes, not because they are too simple, but rather because they are too ambitious to be completed. His anecdotal support for this point falls short: he illustrates the overambitiousness of student notes by pointing to a note that got published.<sup>69</sup> Cramton is shocked that students are looking beyond the bounds of case law and comment; he feels that “the mass of student editors lack the required knowledge and scholarly perspective” to synthesize law with other disciplines.<sup>70</sup>

It is with this argument that Professor Cramton crosses the line into arrogance.<sup>71</sup> Even here, however, one gets the feeling that Professor Cramton speaks more out of naïveté about student edited journals than out of maliciousness. In the first place, how many beleaguered second year students are eager to take on ambitious cross-discipline topics? Even when students insist on such topics they normally get a thorough grilling from their note editors. Second, a number of law students, having been forced by financial considerations to go to law school,<sup>72</sup> have or are in the process of receiving masters or doctoral degrees. These students are certainly capable of bringing thought from other disciplines to the law and should be encouraged to do so. Although these students may not have the “scholarly perspective” Cramton treasures, it certainly would be a disservice for these students not to share the very latest in thinking from other fields.

Aside from being unfounded, Professor Cramton’s fear that students are going to step out of line or encroach on the theoretical or doctrinal grounds traditionally reserved for scholars, does not justify taking law reviews out of the hands of students. At the very most, it indicates a need for student note writers to be advised on setting realistic goals.

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69. *Id.* at 8. Similarly, he attempts to show that student editors will not select good pieces by pointing to a good piece that got published. *Id.*

Professor Cramton missed a student comment published in a recent issue of the *Duquesne Law Review*. This comment is over 360 pages long and contains over 2,100 footnotes. See Comment, *Behind The Hysteria of Compulsory Drug Screening In Employment: Urinalysis Can Be A Legitimate Tool For Helping Resolve The Nation’s Drug Problem If Competing Interests of Employer and Employee Are Equitably Balanced*, 25 DUQ. L. REV. 597 (1987). While length is no indication of merit, the comment is yet another example of ambitious notes that *are* published.

70. Cramton, *supra* note 1, at 8. Ironically, “scholarly” writing has been criticized for the same reason. See Schlag, *The Brilliant, the Curious, and the Wrong*, 39 STAN. L. REV. 917 (1987).

71. See Vitiello, *supra* note 3, at 869 (identifying Cramton as a “super-elitist”).

72. See Vernon & Zimmer, *supra* note 39, at 206.

## II

Having addressed Professor Cramton's criticisms of student edited journals, it is worth taking some time to consider how Professor Cramton's faculty edited review would fare in the real world. As a student, I have little to offer, other than the observation that editing is hard work, with little immediate reward. There is probably not a student editor alive who would not at one time or another have paid money to have a faculty member take his or her place.

Therefore, one must ask of Professor Cramton where he will find the bodies to staff his journals. What few immediate rewards there are are quite sufficient to entice students,<sup>73</sup> particularly when coupled with the longer term benefits of possible clerkships and jobs with law firms. An academic, however, would accrue none of those rewards. In fact, not only would a faculty editor not accrue any benefits, that faculty member would be so busy advancing other people's work that she would have little time to advance her own.<sup>74</sup> Unless tenure and promotion criteria were to change drastically, such a position would be very unattractive.

Harvard Law School's recent attempt to publish an all faculty edited law review illustrates this point nicely. After one year without putting out any issues, the editor-in-chief of the faculty review decided his scholarly work took precedence and quit the job.<sup>75</sup> Surely even Professor Cramton must be willing to admit that some student edited work is better than no work at all.

## III

Rather than condemn student edited journals merely because they are unique among academic publications, perhaps legal scholars should consider the benefits student editing provides. Good pieces are virtually guaranteed publication due to the large number of outlets. Authors are provided—at no cost—with a legion of workers who are willing to put in the many tedious hours necessary to cite-check a piece. Furthermore, the legal community as a whole benefits from scholarly work that, optimally, is accessible to all members of the community and at the same time advances theoretical boundaries.

No process, however, is without flaws—particularly a process as subjective as editing. Those who choose to criticize student edited law

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73. See Martin, *supra* note 22, at 1104 (some privileges necessary to induce students to do work); see also Zenoff, *supra* note 5, at 22 (mentioning salaries and luxurious facilities). Professor Zenoff obviously has never been to Duke.

74. See Goodrich, *supra* note 15, at 52. See generally Carrington, *Why Deans Quit*, 1987 DUKE L.J. 342, 343-44 (discussing sacrifices and opportunity costs of position such as dean).

75. Rotunda, *supra* note 20, at 6 n.19.

reviews will find much to criticize. Those who accept Professor Cramton's assumptions will find even more to criticize, perhaps even enough to justify disbanding student edited journals. Unfortunately, most of Professor Cramton's assumptions are merely assumptions, and could be dispelled if those who are troubled by the editorial process would speak *to* students instead of *about* them.

*Phil Nichols*