

# THE ROLE OF THE LAW REVIEW IN THE TRADITION OF JUDICIAL SCHOLARSHIP

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## INTRODUCTION

Several years ago, a distinguished member of the federal judiciary wrote an article whose title ended with the despairing exclamation: *Never Another Learned Hand*.<sup>1</sup> In that article, the judge predicted that the ranks of the federal appellate judiciary would never again see work product of the caliber of Learned Hand's day.<sup>2</sup> In the judge's view, the reason for that decline was the work pressures that today's federal judges bear and the concomitant lack of adequate time to participate in the broader intellectual life of the profession.<sup>3</sup>

Some judges question the severity and extent of the work pressures that caused that despairing exclamation.<sup>4</sup> Others, although accepting that the current situation impedes adequate study and reflection, differ on the precise causes of that pressure. Yet, it is difficult to find any federal appellate judge who is willing to accept the inevitability of the judge's blunt prediction about the future intellectual life of the nation's judiciary. There seems to be near unanimity that his exclamation must be treated not as a message of inevitable doom, but as a challenge.

Attempting to meet that challenge, judges participate in a variety of professional activities in an effort to keep current on the developments in the law and, indeed, in many other disciplines that intersect the legal enterprise. The efforts of the judiciary to continue to grow intellectually, despite the drain that their daily responsibilities place on their energies, has become a matter of significant public discussion. For instance, both within the legal profession and beyond it, thoughtful commentators have discussed

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1. Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371 (1988).

2. *See id.* at 371, 379-83.

3. *See id.* at 377, 379-83.

4. *See* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 150 n.46 (1996).

the ramifications of judicial attendance at various educational programs sponsored or financed by groups that have a direct or indirect interest in the resolution of matters that regularly come before the courts.<sup>5</sup>

This article explores one of the most important sources of judicial education, the law review. Part I first examines, by way of introduction, why continued intellectual growth is so important to the American jurist of today. It then sets forth the growth of the law review as an institution within the legal profession. Part II examines the various roles that law reviews play traditionally in the intellectual life of a judge and suggests, with respect to each, certain improvements in the judge-law review relationship designed both to enhance the effectiveness of the law review as an intellectual companion and to avoid ethical pitfalls that can corrupt the intellectual integrity of both the judge and the law review.

## I

### THE LAW REVIEW AS AN INSTITUTION WITHIN THE LEGAL PROFESSION

#### A. *The Jurist's Intellectual Life*

Why is it important that a jurist be a part of the profession's intellectual life? At least since the advent of Justice Cardozo's classic, *The Nature of the Judicial Process*,<sup>6</sup> it has been recognized that judging inevitably involves a law-making function. Whether one conceives of that law-making function as simply filling in the interstices of the legislature's handiwork or as engaging in far broader policy-making, today we frankly acknowledge that the case-deciding function performed daily by judges across this Land requires traversing the "gray areas" described so eloquently by the Supreme

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5. See, e.g., Judicial Education Reform Act of 2000, S. 2990, 106th Cong. (2000); *Judicial Conference Expresses Opposition to Proposed Restrictions on Educational Programs*, FED. DISCOVERY NEWS, Nov. 13, 2000; Douglas T. Kendall, *Don't Play Around with Judges*, LEGAL TIMES, July 31, 2000, at 59; *Rehnquist Opposes Bill That Would Restrict Federal Judges' Educational Opportunities; Arnold, Barnett, Higginbotham, Jamieson, and McLachlin Also Speak at Annual Meeting*, A.L.I. REP. 3 (Summer 2001); Abner J. Mikva, *Foreword to DOUG KENDALL ET AL., Nothing for Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public's Trust* (Cmty. Rights Counsel, Wash., D.C.), July 2000, at iii, available at <http://www.tripsforjudges.org/nothingforfree.html>.

6. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921). See generally Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965 (1993) (discussing at length Cardozo's book).

Court in *Estin v. Estin*<sup>7</sup> and, if not turning the grays into black and white, at least making the shades of gray more discernible.

As Cardozo suggested in his classic, this process requires that the judge become immersed first in the ancient traditions of the law.<sup>8</sup> The common law judge, faced with an ambiguity in the law, instinctively looks to the past in an effort to discern the values our law has embodied and the principles that have been fashioned out of those values. But, as Cardozo also pointed out, reference to the past, no matter how thorough and no matter how respectful, often cannot provide an answer, or at least a complete answer, to the problem at hand.<sup>9</sup> It is necessary, therefore, for the jurist to look beyond the traditional legal scholarship and to acquire a far broader understanding of our nation's values and the customs and traditions that embody those values.<sup>10</sup> Indeed, in gently remolding ancient principle to respond to present situations, contemporary social values and even scientific knowledge often become an important ingredient in the process of judicial decision-making. Of course, throughout this process, there is the heavy counterweight of the need for stability and certainty in the law. Indeed, Cardozo always made clear that this concern was a grave one.<sup>11</sup>

Because judges do—or rather must—make law, a preoccupation of our polity has been to ensure that this process is sufficiently disciplined to ensure that judges do not, while performing this function, rely on their personal predilections rather than on the values embodied in the legal principles developed by the political community they serve. Realizing that retaining principle in judicial decision-making is a priority of the highest order in a democratic society, we have placed in our constitutional system a variety of devices to ensure that judges craft their decisional law only while in “conversation” with the other organs of government. Indeed, one of the most important aspects of our constitutional system is that we have structured our public institutions and have protected our private institutions to ensure that the process of judicial law-making does not take place in a vacuum but in “conversation” with the other branches of government and, indeed, with private institutions

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7. 334 U.S. 541, 545 (1948) (“[T]here are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable.”).

8. See CARDOZO, *supra* note 6, at 53-54.

9. See *id.* at 69-71.

10. See *id.* at 53-54, 162.

11. See *id.* at 149.

of our polity. Chief Justice Rehnquist expressed this interdependence of the various parts of the legal profession very graphically:

I like to think of the profession of law as a multi-legged stool—one leg is the practicing bar, another leg is the judiciary, another leg is the academic lawyers, another leg the government lawyers. No leg of the stool can support the profession by itself, and each leg is heavily interdependent on the others.<sup>12</sup>

This process of dialogue constantly takes place among the branches of government and with the parallel processes of state governance.<sup>13</sup> It also involves, however, another “dialogue”—the continuous conversation between the judiciary and the academic bar. This conversation provides a great deal of intellectual stimulation to the judicial function and also serves as a significant discipline on the judicial process.

The “academic bar” is, at least in the common law world, a unique American contribution. The uniqueness of this American contribution was made particularly evident during the Anglo-American Judicial Interchange in 1980. In that exercise, a group of American lawyers and judges visited the United Kingdom to study and to observe British criminal procedure. A similar British delegation then came to this country to participate in the same experience in our courts. Notably, only the American delegation included law professors. Indeed, while British protocol ranked all the lawyers according to the date of their admission to the bar, American protocol gave precedence to the professorate over all members of the practicing bar.<sup>14</sup>

American protocol, although the product of a far more egalitarian culture in so many other ways, placed the legal academic community in such high esteem because the American legal culture has come to recognize that this part of the profession plays a key role in both stimulating and in disciplining the judicial process in its law-making function. In the United States, we have recognized, from the earliest days of the Republic, that the judicial function at the appellate level requires adherence to rigorous standards of scholarship in the judicial work product.

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12. William H. Rehnquist, *The Legal Profession Today*, 62 *IND. L.J.* 151, 157 (1987).

13. See Kenneth F. Ripple, *Process of Constitutional Decision Making*, 25 *VAL. U. L. REV.* 331 (1991).

14. Kenneth F. Ripple, *The Judge and the Academic Community*, 50 *OHIO ST. L.J.* 1237, 1237-38 (1989). The author was a member of the American delegation.

As Professor White of the University of Virginia has chronicled in his classic work,<sup>15</sup> the roots of this scholarly tradition in the nation's courts appear to have several branches. In the national government, Chief Justice Marshall's adherence to high standards of scholarship in his groundbreaking opinions for the Supreme Court of the United States not only enhanced the credibility of the new tribunal's work product but also permitted the Court—from the beginning regarded suspiciously by many as an anti-majoritarian element in the newly-created democratic polity—to present its most controversial decisions on the division of political power with an aura of scholarly “disinterestedness” and objectivity.<sup>16</sup> Shortly thereafter, Justice Story, Chancellor Kent of New York, and Chief Justice Shaw of Massachusetts developed another strain in American judicial tradition as they labored to develop a sufficiently comprehensive and ascertainable body of law to permit the principled adjudication of lawsuits brought by private litigants in the courts of the new country.<sup>17</sup> In our own time, the term “scholarly tradition” has most frequently been employed in a more focused way to describe those scholars and judges who view the tools of scholarship as an intellectual discipline, an effective instrument in curbing a willful jurist's attempt to impose personal views on the jurisprudence.<sup>18</sup> Although the use of academic scholarship to test the rigor of judicial analysis is an important element in the American craft of judging, the judiciary's reliance on the work product of the academic bar is more broadly based. As the following pages will explore, judges who do not believe that the scholar's tools are necessarily suited for the task of restraining the willful judge still rely on the work of the academic bar as a major source of intellectual stimulation.

*B. Intellectual Conversations Between Jurists and Law Reviews*

The nation's law reviews, through the publication of carefully edited articles, provide the primary medium for a continuing conversation between the judiciary and the best minds in the profession.

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15. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* (expanded ed. 1988).

16. *See id.* at 35-36.

17. *See id.* at 35-63.

18. *See* J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 770 n.5 (1971) (collecting principal academic sources).

Law reviews, as we know them today, are a relatively new institution in the intellectual life of the profession.<sup>19</sup> Although legal periodicals made their debut quite early in the Country's history (they were already known in England, Scotland, Ireland and India), student-edited journals did not appear until the end of the nineteenth century. The *Harvard Law Review*, which first published in 1887, is generally regarded as the first, although the University of Pennsylvania can make a credible claim to being the oldest continuously published law review because it traces its lineage back to the *American Law Register*, founded in 1852. Columbia and Yale soon followed Harvard. In the early days, according to Justice Douglas, many of the full-length articles were written by practitioners.<sup>20</sup> However, it did not take long for the academic bar to demonstrate its ability to make a unique contribution. Justice Cardozo pointedly noted this rise in the prestige of the law professors in the intellectual life of the profession:

Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of the universities. . . .

This change of leadership has stimulated a willingness to cite the law review essays in briefs and opinions in order to buttress a conclusion. More and more, the law reviews are becoming the organs of university life in the field of law and jurisprudence. The advance in the prestige of the universities has been accompanied, as might be expected, with a corresponding advance in the prestige of their organs.<sup>21</sup>

From the beginning, there was skepticism about whether such publications could make a significant contribution to the scholarly life of the profession. On the fiftieth anniversary of the *Yale Law Journal*, Chief Justice Hughes recalled that Justice Holmes once confronted counsel, who had just cited a review as authority in an argument before the Supreme Court, as having relied upon the "work of boys."<sup>22</sup> Chief Judge Kaye of the Court of Appeals of New York has noted that one of her predecessors, Benjamin Cardozo,

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19. See Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 315 n.8 (1989) (collecting other articles on the history of law reviews).

20. William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 227 (1965).

21. Benjamin N. Cardozo, *Introduction to SELECTED READINGS ON THE LAW OF CONTRACTS*, at vii, ix (Ass'n of Am. Law Sch. ed., 1931).

22. Charles E. Hughes, *Foreword*, 50 YALE L.J. 737, 737 (1941).

expressed similar sentiments.<sup>23</sup> Nevertheless, as Chief Justice Hughes also pointed out to the review at Yale, both student contributions and more extensive pieces by members of the professorate soon altered judicial attitudes toward the usefulness of the reviews.<sup>24</sup> The sheer excellence of performance soon changed the views of many. Of course, even in those days, selection of articles was a significant factor in building a law review's reputation. The editors of volume 4 of the *Harvard Law Review* certainly chose well when they published Louis Brandeis and Samuel Warren's *The Right to Privacy*.<sup>25</sup>

In the years that followed, the reviews served as a forum for many of the great debates in American jurisprudence. One of the best examples is the multilateral debate, hosted by a variety of law journals, on the need for change in the choice of law rules in the United States. The academic bar felt its way from the world of *lex loci delicti* to government interest analysis and beyond.<sup>26</sup> In other fields, the law journals laid the foundation for major doctrinal advances. For instance, the law reviews certainly have made major contributions on very fundamental methodological questions involving the interpretation of the Constitution<sup>27</sup> and, more recently, on the interpretation of statutes.<sup>28</sup>

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23. See Kaye, *supra* note 19, at 316.

24. See Hughes, *supra* note 22, at 737.

25. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890-91).

26. See, e.g., David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Elliott E. Cheatham & Willis L. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171 (1959); Robert A. Leflar, *True "False Conflicts," Et Alia*, 48 B.U. L. REV. 164 (1968).

27. See, e.g., John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901 (1979); Richard Davies Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223 (1981); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

28. See, e.g., Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995 (1982); Kenneth W. Starr, *Observations About the Uses of Legislative History*, 1987 DUKE L.J. 371 (1987); Albert Tate, Jr., *The Twentieth-Century Primacy of Statutory Law*, 81 MICH. L. REV. 746 (1982).

## II MULTIPLE ROLES OF THE LAW REVIEW IN JUDICIAL LIFE

The law reviews have a multifaceted and nuanced relationship with the nation's judiciary. Judges are, of course, readers of the reviews and, indeed, a great deal of what is published in law reviews is intended for the judiciary as one of the prime audiences. Judicial work product, including published decisions, is also one of the most important subjects of the articles, and law reviews therefore serve as one of the chief sources of responsible criticism of judicial decisions. Finally, judges often are contributors to the pages of the journals. In the following subsections, this article examines each of these roles and suggests adjustments which would improve the relationship of the judiciary and the academic bar.

### A. *The Law Review as Informer of the Judicial Community*

The practicing judge primarily reads the law reviews to stay current on significant developments in legal theory. In choosing among articles, most judges, like other members of the profession, tend to gravitate toward areas of personal intellectual interest. A judge steeped in economics probably spends more time reading in the field of law and economics. Those with strong philosophical backgrounds naturally gravitate toward articles from that perspective. All judges seem to have an interest in history and in government. Trained in the discipline of the common law, judges tend to look over their shoulders before they look ahead in confronting a new intellectual problem.<sup>29</sup> The affairs of government have a natural attraction to those who must reconcile daily the interests of those who govern and of those who are governed.

Judges certainly also depend on the law reviews to keep abreast of new books in various fields of law. Although most judges read constantly, even outside the scope of their judicial duties, the demands of judicial scheduling hardly leave time to read everything one wants to read or needs to read. Priorities must be set and constantly adjusted. Reviews of newly published books are a great help in this regard.

A judge's main interest in the law reviews, however, remains in the traditional areas of legal scholarship. Here, judges read not simply to "keep current," but as a part of the task of doing our primary work of deciding cases. Chief Justice Hughes put it well when he wrote: "It is not too much to say that, in confronting any serious

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29. See KENNETH F. RIPPLE, CONSTITUTIONAL LITIGATION 476-94 (1984).



problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed, in a good law periodical."<sup>30</sup> As Judge Coffin of the First Circuit and Chief Judge Judith Kaye of the New York Court of Appeals have both noted, a law review's treatment of an issue encountered in a case often provides the jump spark that allows the judge to get underway in the intellectual effort of shaping the opinion—of characterizing the issue and determining the significant arguments that must be addressed.<sup>31</sup> Judges are not looking simply for case compilations but for the author's intellectual contribution of suggesting the strand that holds—or should hold—all that has gone before together and also suggests the next step that must be taken. Faced with a difficult issue for which there is no direct precedent, the working judge will look to the law review to provide a dispassionate, carefully crafted exposition of the development of the principle in question across the country. As the law becomes more complex because the fields of human endeavor it touches become more complex, a judge is required, almost on a daily basis, to comprehend—perhaps "appreciate" would be a more descriptive term—whole areas beyond the limits of that particular judge's training and experience. Justice Douglas summarized the frustration eloquently:

Who alive can draw from his environment the wisdom to decide the far reaching issues that judges are often called upon to settle? Where is he to get his insight into factory and market conditions to resolve an ambiguity in a statute? How can he judge wisely on mergers or on labor arbitration? He needs constant education and renewal.<sup>32</sup>

At first, it may seem that the briefs in the case ought to perform this task, but it must be remembered that the parties do not always approach a case so as to ensure that the decision-maker will produce an opinion that brings coherence to the law. The brief writer's primary objective is to win the case. As Judge Kaye has put it, "[a]cademic writers therefore become genuine partners in the courts' search for wisdom—for determining when and where to move the law to meet the needs of our rapidly changing society."<sup>33</sup>

Legal scholarship has changed significantly in the last few decades. Today, there is a general consensus that legal scholarship

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30. Hughes, *supra* note 22, at 737.

31. See FRANK M. COFFIN, *THE WAYS OF A JUDGE* 157 (1980); Kaye, *supra* note 19, at 319; see also Dennis Archer, *The Importance of the Law Reviews to the Judiciary and the Bar*, 1 DET. C.L. REV. 229, 237 (1991).

32. Douglas, *supra* note 20, at 228.

33. Kaye, *supra* note 19, at 319.

must encompass entire areas of investigation that, a generation ago, would have provoked little interest within the legal academic community. Many of today's legal scholars are interdisciplinary in their interests and, indeed, in their conception of law. Some are committed to the view that law requires an extensive understanding of the physical sciences, or of the social sciences (especially economics). Others believe that law can only be pursued from a profound appreciation of the many strands of philosophical thought that play, and have played, a major role in the molding of our polity.

As the complexity of legal issues has increased, the question raised when law reviews first appeared on the scene has once again been asked: whether student-run reviews are up to the challenge of today's multifaceted legal scholarship. The view that such reviews are not capable of providing a forum for multidisciplinary inquiries is a position that ought to be approached with a great deal of skepticism. Its proponents do not appreciate fully the intellectual capacity of today's law student and the breadth and depth of the education that a law student receives in today's law school. Nor do they appreciate fully the capacity of the modern law school to be an intellectual community in which the exchange of ideas between faculty member and student is hardly confined to the classroom.

Law reviews therefore ought not to be confined to traditional areas of legal analysis and scholarship. Nor must all published pieces be ones of immediate use to the practicing bench and bar. Speculative scholarship has a very special function in the constant search for theoretical understanding and clarity. Nevertheless, given their obligations to the judicial process, law reviews ought not forsake their role of providing a forum for traditional legal scholarship. As Judge Edwards has stated so pointedly, the law reviews most directly fulfill their time-honored role as the source of significant intellectual stimulation when, in the framework of the common law, they assist the judiciary in feeling its way from established principles to new solutions for new problems.<sup>34</sup>

When the judge relies on the work product of a first-rate university publication, the judge assumes the intellectual integrity of the product. University-sponsored and published scholarship is expected by any reader to be thorough and objective. Indeed, the great respect accorded the academic community in our polity is

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34. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 42-57 (1992); see also Archer, *supra* note 31, at 234 (noting the decline in appellate court citation of law reviews and the suggestion of empirical researchers that the decline is because legal scholarship is becoming less useful to those "who practice and work with the law").

due in no small measure to the university's rigorous protection of these hallmarks. Today, with increasing frequency, members of the academic bar participate actively in the litigation process as counsel. In specialized fields, members of the practicing bar also contribute regularly to the law reviews. As law review editors evaluate contributions for inclusion in their publication, they must remember that the time-honored practice of leaving your client "at the door"<sup>35</sup> when participating in professional academic endeavors is not always honored by those who seek publication of their articles. There is nothing wrong with publishing a piece that takes a particular point of view, but when the author has taken that point of view because of another loyalty, the work product ought not to be held out by the university as a legitimate academic publication in the absence of full disclosure by the author of that loyalty. Members of the practicing bar share the rich intellectual heritage of the profession and have every right to participate in its intellectual discourse. But the integrity of the discussion must be assured, and the law review must ensure those standards are maintained.

This problem is not a new one. It was recognized over thirty years ago by Justice Douglas in his perceptive address to the staff of *University of Washington Law Review*.<sup>36</sup> Drawing from his observations of lawyers participating in various advisory roles in the legislative process, the Justice noted two factors that, in his view, contributed to this danger in the law reviews. First, members of the profession have become more specialized and, therefore, tend to have more pronounced views on public policy questions in their field of practice.<sup>37</sup> Second, given the amount of specialization, more members of the profession represent but one client and have but one source of professional income.<sup>38</sup> These members of the profession, suggested the Justice, see issues of public policy "through glasses of a different tint."<sup>39</sup> The Justice suggested that certain principles ought to guide editorial policy.<sup>40</sup> With some adaptation to suit the nature of current professional activity, they can be summarized as follows:

1. If the author wrote the article for a fee or, in the case of a practitioner, billed a client for the time spent preparing the

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35. AMERICAN LAW INSTITUTE, 77TH ANNUAL MEETING, RULES PERTAINING TO ANNUAL MEETINGS 9.04 (2000).

36. See Douglas, *supra* note 20.

37. See *id.* at 232.

38. See *id.* at 229.

39. *Id.*

40. See *id.* at 232.

article, that fact must be disclosed to the editorial board and, if the board chooses nevertheless to publish the article, the fact that the author received a fee ought to be disclosed to the reader.

2. If the author received no fee for the article but has a client whose interests are discussed in the article, that interest ought to be disclosed.

3. If the author is a freelancer or a member of the academic bar, that author ought to disclose any professional interests “in the direction of certain types of litigation.”<sup>41</sup>

As the Justice also wrote, “[W]hen a special pleader enters the list, [he ought to] show his colors.”<sup>42</sup>

### B. *Law Review as Vehicle for Self-Examination*

Judges also use the reviews as vehicles for self-examination. As disciplined professionals, most judges want to do better work the next time. It is when the reviews are performing this function of critic of the judicial work product that they truly become, in the words of Chief Justice Hughes, the profession’s “fourth estate.”<sup>43</sup> Law review critique of the work product of the judiciary is a role of very special constitutional dignity.<sup>44</sup> In his famous address at Rutgers University, Justice Brennan wrote eloquently of the special relationship of the press and the judiciary:

[T]here exists a fundamental and necessary interdependence of the Court and the press. The press needs the Court, if only for the simple reason that the Court is the ultimate guardian of the constitutional rights that support the press. And the Court has a concomitant need for the press, because through the press the Court receives the tacit and accumulated experience of the nation, and—because the judgments of the Court ought also to instruct and to inspire—the Court needs the medium of the press to fulfill this task.<sup>45</sup>

If the press can be said to play this special role by facilitating informed communication between the judiciary and the political community at large, the law review in its responsible critique of the judiciary also certainly fulfills a role of constitutional dignity. Unlike other public matters, which the citizenry is presumably capable

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41. *Id.* at 232.

42. *Id.*

43. Hughes, *supra* note 22, at 737.

44. See Ripple, *supra* note 14, at 1239-40.

45. William J. Brennan, Jr., *Address by William J. Brennan, Jr.*, 32 RUTGERS L. REV. 173, 174 (1979).

of understanding once the press communicates the facts, the work product of judges requires interpretation to be understood fully. The polity at large, including its non-lawyer leadership, must trust the legal academic author—and the law review—to deal fairly with the topic at hand.

Articles that are primarily doctrinal in content often offer constructive criticism of the judiciary's work and are supportive of the mission of the judiciary because they help to ensure that the judicial work product remains principled and that law remains different from politics. Nevertheless, in the law review's conscientious attempt to fulfill its role of responsible critic of the judiciary, it often will encounter a significant impediment from within the academic community. Those who see the future of legal scholarship to be in more non-traditional areas, often denigrate, openly or indirectly, the value of traditional legal scholarship that focuses on the work of the courts. The law review editor considering an article in this latter category will often find such traditional work criticized as "sterile" or "unimaginative." This denigration of traditional legal scholarship is aided and abetted in no small degree by the tenure and promotion committees of both law schools and universities. The worth of interdisciplinary work and other forms of more theoretical scholarship are a great deal easier for members of the academic community outside the law school to appreciate, and, therefore, scholars with these interests find their work received with a good deal more enthusiasm than the work of the traditional doctrinal scholar. In seeking advice from members of the academic community about the worth of an article, law review editors ought to keep in mind this institutional bias.

The first concern of the law review ought to be development of an intellectual culture that welcomes into its editorial councils both new interdisciplinary scholarship and more traditional forms of legal scholarship. What Judge Posner has called the "belittlement of conventional legal scholarship"<sup>46</sup> is a reality in our profession today. Yet that scholarship plays a vital part in the service that the law reviews render to the courts and to the nation as a whole.

A good deal of doctrinal analysis is found, of course, in the student author contributions to the law reviews. Indeed, a good number of judges no doubt begin their perusal of a new issue with the case comments, anxious to see if one of their cases has been reviewed and if the long hours of crafting an opinion have pro-

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46. Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 *YALE L.J.* 1113, 1129 (1981).

duced a solution that, in the eyes of a careful observer, is adequate to the task. Annual surveys of the law, printed regularly in many journals, afford a special opportunity for self-examination. In the literature on student contributions, one encounters admonitions by distinguished members of the bench about excesses in critical pieces written by student authors. Although many of their admonitions are written in tongue-in-cheek style, the message is nevertheless very clear. One distinguished member of the bench wrote:

If an opinion reaches the wrong result, instead of immortalizing it as myopic or blundering, why not describe it as thought-provoking or interesting? If the result is right but the rationale wrong, forget the rationale. It is the result that counts, and who remembers rationales anyway? If the opinion is turgid or incomprehensible, why not stay focused on the result or the rationale? And if the writing is an unprincipled break from *stare decisis*, a misstep in the mighty path of the law, is it not adequately put down as bold or novel?<sup>47</sup>

Chief Justice Taft is reported to have cautioned an audience of law review members: "Don't be too hard on us, young gentlemen. Remember, if you will, we are the only courts you have."<sup>48</sup> Chief Justice Hughes, speaking to the members of the *Yale Law Journal*, addressed the issue in a more serious vein:

If some members of this "fourth estate" of the law, conscious of their prestige and influence, may seem at times to assume an attitude approaching arrogance, they are at once subject to counter-attack and a balance of sound criticism is attained, with advantage to all concerned. It is idle to expect in legal discussion and judicial opinion, in relation to close questions of high importance, any greater unanimity of view than we find in other domains of human thought—art, science, or theology. And I think we may assume that a bench composed of law school professors or law review editors, impartially chosen, would exhibit views as varying as those of judges whose works they appraise.<sup>49</sup>

Chief Justice Hughes' discussion suggests an important qualification for the position of note or comment editor: judicial temperament. The editor needs to ensure that the notes published in the review will perform the function of responsible critique and constructive suggestion. Additionally, editors in these positions need to

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47. Kaye, *supra* note 19, at 314.

48. Quoted in Stanley H. Fuld, *A Judge Looks at the Law Reviews*, 28 N.Y.U. L. REV. 915, 921 (1953).

49. Hughes, *supra* note 22, at 737-38.

show certain flexibility on the question of determining when a topic is “preempted.” The Chief Justice suggests that the overall quality of the discourse is improved when the bench and bar have access to differing perspectives on a subject.<sup>50</sup> Over-use of the law review’s “preemption doctrine” often stifles fruitful debate among members of different law reviews, a debate that very often would improve immeasurably the overall quality of discourse on important doctrinal issues. Even at the student level, there ought to be responsible discourse among authors.

Perhaps a more frequently encountered problem with some student pieces (and perhaps noted especially by the judicial reader) is the tendency of those in an academic environment who critique judicial writings to expect every judicial writing to mirror the style of academic scholarship. To be sure, every judicial work product ought to contain sufficient elaboration to ensure that the reader understands the principle that has guided the court to its decision. But, oftentimes, especially when the law is clear and the court unanimous, it serves no useful purpose for the court to write a lengthy opinion laced with footnotes. Indeed, such a treatment may well send to the bench and bar a false message that the law is less clear than it is. Judges are, above all else, involved in the judicial governance of the country; their opinions must reflect in substance, tone, and format the actual state of the law.

When engaging in criticism of judicial work product, it is important to attempt to understand the task that was before the court when it wrote the work. Courts, fearful of usurping the traditional role of the political branches, tend to move slowly and to leave for another day questions that need not be answered today. The academic mindset, however, is prone to be—and ought to be—far more aggressive. Traditional legal scholarship is demanding. It requires care, discipline, and vision. It criticizes the cases; it traces the twists and turns of the doctrine; and, perhaps most importantly, it suggests the impact of the decision not only on the parties but also on the jurisprudence.

### C. *Law Review as Forum for Judicial Commentary*

Finally, judges participate in the work of the law reviews as contributing authors. This form of authorship is one of the only permissible outlets for a judge to engage in extrajudicial self-expression. Indeed, the fact that it is permitted emphasizes the special role of the reviews in our professional life. Judges must, of

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50. *See generally id.*

course, exercise circumspection in their choice of topic and manner of expression so as to make clear that they have not prejudged an issue likely to come before them. Even with this limitation, however, judges can and do make a particular contribution to serious academic scholarship.

One of the principal areas in which such a contribution can be made is in demystifying for the bar and, indeed, for the public, the process of judicial decision-making. The works of Judge Robert Keeton on the role of legislative facts in decision-making,<sup>51</sup> and of Justice Breyer<sup>52</sup> and Judge Easterbrook<sup>53</sup> on the issue of legislative interpretation are good contemporary examples. The continuing series entitled *Judges on Judging* in the *Ohio State Law Journal* has provided a significant opportunity for judges to share important insights on how they perform their assigned function in the American legal process.<sup>54</sup>

One area of a judge's participation in the work of a law review raises ethical concerns not dissimilar from the ones described earlier. Given the very special role of the law reviews as watchdogs of the intellectual integrity of the judiciary's work product, a judge ought to be very circumspect in advising a law review about the appropriateness of a particular article for publication. For instance, judges ought to show particular caution when asked by a student about the appropriateness of a particular topic for publication as a note or as a comment. These student pieces often contain the most direct criticism of the judicial work product and thus ought to be free from judicial intrusion from the first day of their conception.

### CONCLUSION

The academic bar, through the law journals, has a very special relationship with the nation's judiciary. It provides the intellectual fuel for the task of judging and it serves as the chief source of responsible criticism for the judicial work product. This special role, indeed one of constitutional dignity, requires that the law journal's independence be ensured by a high degree of sensitivity to conflicts of interest by its editorial boards, its authors, by the broader academic community, and by the judiciary.

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51. See Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1 (1988).

52. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

53. See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).

54. See, e.g., Ripple, *supra* note 14.