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An Editorial Note

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In the course of his annual orientation lectures at Columbia Law School, Professor Karl Llewellyn once turned upon the assembled second-year class with particular vehemence as he discussed the place of the law review within the law school:

I go into these aspects of education on the law review in such detail because I am sick to nausea of the gutlessness that second year classes have displayed these many years. Some, who had hoped election, peevied, sneering, childishly aloof from law review and school and work and all—to comfort an injured vanity by scorn of the work their own careers will need. More, many more, the most, lined up and bowing. Stooping a supple back to slide onto the review men all leadership in class discussion. Supine, assuming that since theirs is not the Greatness, neither is it theirs to break in upon the close monopoly of better education. Taking as a sign of greatness, as a stamp of leadership, the accident of opportunity.*

While this diagnosis of student performance may not apply today with the same force as it did when first uttered, it does suggest a cause incidental to but inherent in the traditional law review system: the early and conclusive removal of law review participation from the access of the student at large. Relatively early in the law school experience, the traditional system removes a segment of the class from the whole and holds it absorbed in review work for the remainder of the school career. The separation occurs of necessity. An established review has accumulated the reliance of its readers on a certain quality, quantity and timeliness of work. These obligations demand a steady flow of manpower and manhours. Traditionally, exceptional performance on first-year examinations has served as the necessary main source of personnel.

Once the initial division is made, centripetal forces tend to reinforce the segregation of the review member from the class member. A strong institutional allegiance attaches to the publication as a product of considerable time and effort. A steady personal association arises from shared responsibility. And the sense of shared responsibility easily becomes a sense of shared hardship when review work exacts a toll in course performance, recreation and simple rest. Predictably, the sense of hardship and the pride in product have dictated that subsequent participation in the enterprise remain a fairly difficult

* K. Llewellyn, *The Bramble Bush* 137 (3rd ed. 1960)

privilege. Those left free for course work, recreation and rest have borne a heavy burden of proof to gain entry after the initial deployment by first-year grades.

From another perspective, the student at large may justifiably feel himself victimized. On the ground of necessity the traditional system has prematurely foreclosed his opportunity for participation in the review experience. In addition, the profession has made law review membership a term of the art and tends to reward it with benefits easily commensurate to its temporary burdens. Again the reason is necessity. Like the law review, the profession has work to do and quickly seeks people qualified by whatever indicia are available. Consequently, the results of first-year examinations have been inordinately predeterminative, notwithstanding the fact that they are equally so for all members of the class. In the examinations the student is often asked to demonstrate nine months of work in three hours of writing. The results determine his participation in the law review; and the law review experience greatly influences at least his initial opportunities in the profession.

The second half of this process is far more rational than the first. For, while a student may enter the law review by accident or chance, he stays there only by work. And the profession can be somewhat assured that a graduating member does carry the benefit of that work experience. To this extent, then, judgment of students on the basis of publication experience is not entirely arbitrary and rewards are not fortuitous.

However, the first half of the process remains subject to criticism. The mechanism of entry into the law review constitutes what Professor Llewellyn termed "the accident of opportunity." Concededly the process of entry by first-year examination results rests on the genuine needs of the publication and the probable merits of the student. But Llewellyn vigorously describes the damage done to the student at large when he accepts the artificial finality of these results as real. The question arises, then, whether the "opportunity" of participation can be made less accidental and more rational; whether the needs of the law school's publication can be more effectively reconciled with the interests of its students at large. After lengthy consideration, the editors of this *Review* have introduced the following proposals as worthy of trial.

1. *Contribution by Third Year Students.* A third-year student may submit to the Board of Editors a paper on a relevant topic. The paper may be one done (1) independently or (2) in fulfillment of a

course requirement. If the Board considers the paper to be of *acceptable quality*, it will assist the writer toward completion of a paper of *publishable quality*. If the paper is published, the *Review* will acknowledge the author as a student contributor. A student contributor is to be distinguished from a full or regular *Review* member who must publish a required number of times and perform other essential publication duties throughout the year.

It is suggested that a student undertaking a paper independently determine that his topic has not been preempted by previous publication in another journal; or that he describe his topic to the Board before beginning to write.

Several considerations underlie the scheme of third-year contribution. The law review should not overlook exceptional work done by the third-year student in a formal writing program; nor should it disregard the submitted work of a third-year student willing to undertake a paper independently. Both are entitled to a presumption of interest and skill in the chosen topic. However, contribution remains less than full membership for several reasons. Where the paper is done as a course requirement it does not represent the extracurricular effort, *in addition to* course work, which full members must perform. Also, a contributor does not perform considerable housekeeping duties, including scanning, indexing, footnote checking, proofreading and general emergency services as the needs of the book require. Nor does the contributor undergo, over a full year or two years, the concomitant strain on course work exacted by extracurricular writing assignments and simultaneous housekeeping duties.

For these same reasons the notion of second-year contribution is rejected. The second-year student may or may not be entitled to the presumption of skill or interest afforded the third-year contributor. At any rate, it is felt that a student interested in participation in the second year should be required to participate as a full member subject to multiple writing assignments and full housekeeping responsibilities. Writing is merely the most visible function of a review; the routine tasks are equally essential to a publication. Conceivably, a second-year contributor could publish several times in his career without having performed the routine tasks required of the regular members.

This distribution of benefits and burdens is too inequitable. Consequently, the second-year student is remanded to the following means of full membership only.

2. *Membership by Written Achievement.* Second-year students whose first-year grades have not brought an invitation to *Law Re-*

view membership may apply for regular *Review* membership by submitting to the Board of Editors a paper of a relevant topic. The topic may be one from a list promulgated by the Board or it may be one proposed and described to the Board by the student. The deadline for submission should be set to fall during the first semester of the second year. Both the suggested topics and the deadline could be announced at the end of the preceding academic year. The submitted paper must be one done independently of any course requirement. If the paper is of acceptable quality the author will be invited to become a regular second-year member of the *Review*. He will then be asked to complete the required number of publishable assignments and to perform all routine publication chores.

Again, certain practical considerations are underlying. The requirement of an independent paper is seen as a guarantee of a certain level of motivation in the applicant. Submission during the first semester of the second year enables a successful applicant to undertake an additional writing assignment and to be considered for a third-year editorship. The term "acceptable quality" is calculated to provide a certain degree of flexibility. The term denotes less than "publishable quality." It is felt that a successful applicant should not be required to submit a paper fully prepared for publication. The submitted paper may merely be potentially publishable and require editorial assistance for completion; or it may not be publishable merely for reasons beyond the control of the writer, as in cases where a topic is preempted by full treatment in another review. Even though not publishable, it may simply demonstrate outstanding ability on the part of the writer. Finally, the announcement of topics and deadlines might precede the final first-year examinations to diminish the traumatic finality associated with first-year grades.

Several general caveats should be announced with any second-year written achievement program. First, the second-year plan might be explicitly established on a one-year trial basis only. The administrative burden might prove impracticable. At any rate, the experience of the first year could be evaluated without prior commitment to its continuance. Second, students should be warned generally that publishable standards or the standard of "acceptable quality" are high. Very few students may be chosen. A great deal of work may go unrewarded. And editorial assistance will not be available until after a paper has been submitted and evaluated. However, there will be no quotas, maximum of minimum. Quality alone will control. Nor will there be any distinction in the status of members on the basis of

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written achievement or grades. Finally, it is to be remembered that the new means of membership are supplementary to, and not in place of, the traditional system. Of necessity the publication will continue to draw its initial work force from students of ability demonstrated on first-year examinations.

Generally, these measures suggest an answer to the customary critique of the relationship between the law review and the remainder of the law school. First, they offer to keep the review open to some possible participation for the entire three-year period of the student's law school career. Without sacrifice of merit as a criterion for participation, the review becomes a more accessible institution in a mutually beneficial relationship with the entire student body.

Second, the suggested reforms make maximum use of the law school's human resources. If students within the school are producing work of publishable quality or can be encouraged to produce such work, that work-product merits publication for the benefit of the review, its readers, and the author, regardless of the author's coincidental standing under the examination system.

Third, these proposals broaden the traditional criteria for membership. Skill in the art of examination should not preclude the use of skill in the art of research and writing, which is, after all, the business of a legal journal. While it may be suspected that these skills are related in common reflection of an individual's aptitude, motivation, or effort, the criterion of written achievement need no longer be completely overlooked. While performance on first-year examinations remains *one* valid criterion, the student's ability and opportunity should not be decided so conclusively so early. He should be afforded the chance to display competence, first, over a wider range of achievement including written as well as examination results; and, second, over a longer span of time reflecting any sudden or gradual rise in motivation or skill during his second and third years of study.

Fourth, both the publication and the student are potential beneficiaries of the proposed measures. The volume and quality of the review's product might be improved; and the professional enthusiasm and credentials of the individual student might be promoted by publication of a deserving paper in the review. These mutual advantages merely restate the possibility of maximum use of a law school's human resources.

Certain broad difficulties must, of course, be recognized. The first is the possibility of a prohibitive administrative burden. The editors

and staff of the review may simply lack the time or resources to evaluate and edit submitted work. This possibility remains real in the absence of any past experience. But at least a one-year trial period would seem in order.

Second, expanded review participation and writing programs may have an undermining impact on other law school activities, such as alternate publications, legal aid bureaus, moot court participation, workshop seminars and other intramural projects. Again, no answer can be suggested in the absence of even a trial experience. It may be pointed out that the choice of activity is the prerogative of the individual student accurately apprised of all the risks, burdens and benefits involved. The role of the school is merely the maximization of the range of productive opportunity and choice.

THE BOARD OF EDITORS