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Picking Spinach

Anthony Michael Kreis*

Student-edited law reviews are the currency of the legal academy. Publishing scholarship in respected law journals is a central factor in the decision-making process to hire, promote, and tenure law professors. However, the way editors choose manuscripts for publication is too susceptible to bias and too dependent on irrelevant signals, which exploit the labor of editors. This essay examines some of those troubling features and a few low-cost reforms to improve the system.

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INTRODUCTION

Law journals are the spinach of academic life—a healthy part of the legal academic’s diet but too often insufferably boring to consume.¹ Despite being ridiculed as too lengthy, too footnote heavy, and too arcane,² the production of these traditional academic articles remains the primary vehicle for law professors to expand human knowledge. In more practical terms, law review articles are key in hiring, promotion, and

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1. Professor Fred Rodell’s article, which was among the earliest pieces critiquing law reviews, inspired this colorful description. See Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 45 (1936) (describing law reviews as “spinach”).

2. Karen Sloan, *Law Review Articles Need a Makeover, Study Finds*, NAT’L L.J. (Oct. 10, 2013, 4:37 PM), <https://www.law.com/nationallawjournal/almID/1202623107242&back=law/>.

tenure decisions.³ Given the importance of the law review article to legal academics, scholars from outside disciplines are often shocked to learn that law journal editors are students, that articles are not blind or peer reviewed, that publication offers from “lower ranked” journals can be used as leverage for placement in “better” journals, and that there is no discipline-wide accepted metric for journal quality.⁴ Legal academics understand law journals’ deficiencies all too well,⁵ but down the hatch they go.

Law professors often use journal mastheads as a proxy for article quality. Yet, law professors have no agreed upon ranking of journals.⁶ And in our universe, that heuristic requires a large degree of faith in student law review editors at highly regarded institutions—editors who may have no substantively neutral theory of what constitutes good scholarship.⁷ Without that, are students then relying on authors’ educational pedigrees or letterhead as indicia of quality?

If my fears are true that an author’s curriculum vitae colors the evaluation of an article’s worth, then whether a person can successfully break into the legal academy may be baked in the cake years before they consider teaching. The results of one admission exam or the decision to attend a particular school for family or financial reasons are then dispositive of what legal scholarship looks like. That result is at odds with some of the noblest themes in our profession, which focus on remedying economic inequality, eradicating the ill effects of bias, and opening up avenues for second chances. An ill-timed harvest makes for a bitter crop.

3. YALE LAW SCH. CAREER DEV. OFFICE, ENTERING THE LAW TEACHING MARKET 10 (2018–2019), https://law.yale.edu/system/files/area/department/cdo/document/cdo_law_teaching_public.pdf (“Publications, and your demonstrated writing and research abilities, are probably the single most important factor in securing an entry-level job.”).

4. See Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENV. L. REV. 661, 661 (1998) (noting that scholars “in other fields are astonished” when they learn about the law review submission process).

5. See, e.g., Dennis J. Callahan & Neal Devins, *Law Review Article Placement: Benefit or Beauty Prize?*, 56 J. LEGAL EDUC. 374, 374 (2006) (describing how many legal academics are not “happy with the norms governing the submission, selection, and placement of articles in law reviews”).

6. See Ronen Perry, *The Relative Value of American Law Reviews: A Critical Appraisal of Ranking Methods*, 11 VA. J.L. & TECH. 1, 3 (2006) (examining American law review rankings); see also Colin Miller, *Old Question: How Do You “Rank” a Specialty Journal? New Question: How Do You Rank an Online Law Review?*, PRAWFSBLAWG (Sept. 8, 2011, 9:57 AM), prawfsblawg.blogs.com/prawfsblawg/2011/09/a-frequent-question-that-gets-asked-on-the-blogosphere-and-in-law-school-offices-is-the-value-of-publishing-in-a-specialty-jo.html (discussing how to rank specialty journals and online journals).

7. The use of student editors is often cited as a problematic feature of law reviews. See, e.g., Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES (Oct. 21, 2013), <https://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html> (collecting negative views of student-run law reviews).

Though by no means an unmitigated disaster, the law journal submission process is seriously flawed. This essay briefly examines the law review submission process's strengths and weaknesses. I will then offer a few reforms that are the most easily implemented and do not require overhauling the system but could reshape it to reflect better the commonly held conventions about journal quality while minimizing artificial barriers to entry.

I. THE FORM AND FUNCTION OF LAW REVIEWS

The law review submission process kicks into high gear February and August each year, but there is no standardized timeline for journals to begin reviewing articles or make publication decisions. During these months, law professors submit their work to dozens, or even hundreds, of journals. Soon thereafter, second-year law students review submissions, often with an accompanying cover letter, which includes the professor's name and letterhead, and the author's curriculum vitae. A handful of journals, however, have implemented a blind review or an added layer of peer review into the process.

Decisions can sometimes come in just a number of hours or they can take weeks.⁸ Once an author has a publication offer, the author will then notify journals they perceive as more prestigious about the pending offer. This practice, called expediting, is how authors leapfrog from journal to journal and climb up the rankings. Barring a handful of elite publications, an author's ultimate publication choice will be received with varying degrees of enthusiasm because no two professors hold the same viewpoint on what journals outrank the rest.

A. *Student Editors Versus Peer Review*

Having second-year law students select articles, which will impact the career path of law professors in turn, is both a curse and a blessing.⁹ It is strange to confer such awesome power to green law students who have no particularized expertise to consider whether an article is worth publishing. As a consequence, professors may find themselves at the mercy of the subjective interests of the editors. An article that explores a

8. Most respondents to one study of law reviews showed that student editors took between five and thirty minutes to read an article before making a publication decision, which helps explain how some decisions can take a matter of hours between submission and rejection. Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those with All the Power—Student Editors*, 59 S.C. L. REV. 175, 198 (2007).

9. In my personal experience, student editors have tended to add significant value to my work and have been thoughtful editors, a view shared by Richard Epstein: "In general, however, my impression of student editors is that they do a good and conscientious job. They are diligent, often to a fault on footnotes, and they catch the elementary grammatical mistakes that I continue to make." Richard A. Epstein, *Faculty-Edited Law Journals*, 70 CHI.-KENT L. REV. 87, 88 (1994).

mundane topic, though exceedingly important to the profession, may fail to rise to the top of the pile in the way an article covering a salient, hotly contested argument may gain traction in the article selection process. That, of course, has no bearing on the scholarship's worth. It reflects the interests and worldviews of the students.

I am, however, not convinced this would not also be true if legal scholarship was peer-reviewed. Indeed, political scientists, for example, have criticized the top political science journal for issuing desk rejections (rejections made by journal editors without blind, peer review) because of editorial bias.¹⁰ An article's currency will always matter.

Despite the limitations of student editors' expertise, peer review is not a clear-cut answer to improving the law review system for a simple reason: law is an art. Our debates are overwhelmingly normative. As a consequence, peer review might do little for the quality of scholarship and could introduce more bias into the system. We should continue to debate the value of having students at the helm versus moving toward a peer review system. If it ever materializes, that kind of reform is years away from coming to fruition. In the interim, we should focus on ways to improve student-edited journals that correct the process rather than upend it.

B. The Blind Review Question

I am a strong proponent of journals using blind review. Admittedly, this is in large part due to personal experience—an anecdote I will offer for context. When I submitted my first manuscript for publication, I had only graduated from law school six months before and was a doctoral student. My resume was thin. I had no shiny accomplishments and lacked an Ivy League pedigree. I did, however, spend a considerable amount of time on my piece exploring the constitutionality of sexual orientation-based defamation claims.

I first submitted it to approximately 80 to 100 print journals. It was rejected by every journal outright, but the article advanced to final board review at one top-fifty print journal before it was rejected. Dejected but undeterred, I shortened the piece and submitted it to a handful of journals (approximately fifteen) for publication in a journal's online companion. All but one publication rejected my piece—*Yale Law Journal* published it. It was, perhaps unsurprisingly, the only journal I submitted my article to that instituted a blind review policy for its online companion at the time.

10. See Laura Seay (@texasinfrica), TWITTER (Apr. 24, 2018, 9:22 AM), <https://perma.cc/V2EY-YGND> (discussing bias impacting rejection decisions and political science journals).

I was elated about the placement, of course, but I could not help but reflect on the experience. If *Yale Law Journal* is one of the premier venues for legal scholarship, why did I stack up nearly 100 rejections from publications that convention dictates publish lesser quality work? Did blind review allow my scholarship to be selected on merit where the lack of anonymity left me empty-handed? The experience ran counter to the expectations set by the legal academy's commonly held metrics for quality and success.

The most significant single flaw in the law review submissions process is the lack of blind review as a standard practice among all journals. Blind review reduces problematic barriers to entry that emphasize pedigree over scholarly aptitude, a problem compounded by our reliance on student editors. Student editors are constrained by (1) time because they are competing against other journals for articles and (2) a lack of expertise.¹¹ As a consequence, editors rely on abstracts, introductions, and academic profiles to cull manuscripts from the pile. The result is a sorting effect more indicative of article currency and editor interest than it is quality.

Will an editor take a second look at a piece that they would otherwise pass over if the author is a well-known academic? Do students presume a link between manuscript quality and the ranking of the author's home institution or the author's education?¹² There is no purpose in making the author's identity known by submitting a cover letter on letterhead or submitting a resume except to use it as a proxy for the author's ability to

11. Judge Posner argued that the combination of student inexperience and the diversity of approaches to legal scholarship have amplified the problem of student editors using affiliation cues to make publication decisions.

How baffling must seem the task of choosing among articles belonging to disparate genres—a doctrinal article on election of remedies under the Uniform Commercial Code, a narrative of slave revolts in the antebellum South, a Bayesian analysis of proof beyond a reasonable doubt, an angry polemic against pornography, a mathematical model of out-of-court settlement, an application of Wittgenstein to Article 2 of the UCC, an essay on normativity, a comparison of me to Kafka, and so on without end. Few student editors, certainly not enough to go around, are competent to evaluate non-doctrinal scholarship. So they do what other consumers do when faced with uncertainty about product quality; they look for signals of quality or other merit.

Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1133 (1995).

12. James Lindgren wrote of one such incident:

A former editor of one journal admitted that during her year as an editor, the journal received an article that the editors very much liked from a professor at a nonelite law school. After much debate, they decided that they couldn't "take a chance" on that professor's law school. Later that year, they received an article in the same field from a professor at an elite law school, an article that they thought inferior. But they accepted it anyway.

James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 530 (1994).

produce an article of high value.¹³

It is imperative that journals follow the lead of *Harvard Law Review*, *Stanford Law Review*, and *Yale Law Journal*, and adopt blind review policies.¹⁴ If students are to retain their role as gatekeepers into the legal academy, they should not use heuristic shortcuts to select articles that distract from assessing scholarly merit and amplify the structural advantages enjoyed by some authors because of their pedigree or letterhead.

C. *The Logic and Ethics of Expediting*

The expediting process used to climb rankings is illogical and unethical. If an author has a publication offer from a top seventy-five journal, the author may flag their manuscript for immediate review by sending an expedite request to journals ranked between the top fifty and top seventy-five. The author is using a journal that allegedly publishes lesser quality work to communicate to “better” publications that they are offering something of quality. Upside down signaling is a poor mechanism to sort scholarship—and it creates a time pressure that hampers editors from making well-reasoned decisions.¹⁵

13. Blind review can also minimize other known forms of discrimination including race, sex, and sexual orientation bias. Relative to law review submissions, studies have shown that forms of resume bias can impact job applicants' ability to secure interviews and employment. See, e.g., András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 605–06 (2011); Sonia K. Kang et al., *Whitened Résumés: Race and Self-Presentation in the Labor Market*, 61 ADMIN. SCI. Q. 469, 496 (2016).

14. *How to Submit*, HARV. L. REV., <https://harvardlawreview.org/submissions/> (“To facilitate our anonymous review process, please confine your name, affiliation, biographical information, and acknowledgments to a separate cover page. Please include the manuscript’s title on the first text page.”); *Our Submissions Review Process*, STAN. L. REV., <https://www.stanfordlawreview.org/submissions/article-submissions/> (“It is our policy to apply the same standards of review to all submissions, and to judge pieces based solely on their content. To that end, our review process is fully blind until the Committee’s final vote. All voting Articles Editors complete their reads without knowledge of the author’s identity, institutional affiliation, or any other biographical information. Only the Senior Articles Editor knows the identity of the author; he or she handles all communication with the author.”); *Volume 128 Submission Guidelines*, YALE L.J., https://www.yalelawjournal.org/files/V128SubmissionsGuidelines_x44agkkm.pdf (“We review manuscripts anonymously, without regard to the author’s name, prior publications, or pending publication offers. We therefore ask that you remove all identifying information (including your name, affiliation, and acknowledgments) from the manuscript and the file name. Please also redact any identifying information in headers and footnotes. Do ensure, however, that the title of the manuscript appears on the first page.” (emphasis omitted)).

15. See Barry Friedman, *Fixing Law Reviews*, 67 DUKE L.J. 1297, 1314 (2018) (“The expedite system makes it impossible for editors to do a good job of selecting articles based on quality. The average editor is juggling hundreds of articles, but also is doing much of it on an emergency basis. Journals are forced to make decisions in a matter of days and sometimes in one day or less. Reasoned decisions become an impossibility, and there certainly is no real chance to get faculty

Worse yet is the ethical quagmire of the expediting process that takes advantage of students at schools and journals at the bottom of the food chain. Barry Friedman astutely summed up the expedite dilemma:

Offer-and-Expedite is an ugly game, in which faculty abuse student editors in breathless haste to climb the law review ladder, while student participants stomp on the heads of journals “below” them to snap up the hot manuscript of the moment. This process makes serious consideration of the worth of any article for publication practically impossible.¹⁶

A system that uses the labor of students who staff journals that authors either have no intention to publish with or use primarily to leverage better deals from more elite publications is unconscionable. But, it also engenders an environment where articles are selected more fortuitously than they should, undermining the premise that there is a stable hierarchy of journal quality. In short, the law review system perpetuates inequalities by burdening less elite students with the tasks of flagging scholarship and then denying them the fruits of their labor—labor which is exploited to drive rushed decision-making by students whom convention dictates are more thoughtful consumers of scholarship quality.

II. RETHINKING THE SUBMISSIONS PROCESS

Certainly, wholesale reform of the law review submissions process is warranted. It is unlikely that weighty changes are forthcoming in the immediate future. Instituting peer review or removing student editors from the process, whether wise or desirable, are massive institutional changes that require commitments from all stakeholders. There are, however, a number of limited reforms that law reviews can take up that would better align our expectations for what constitutes a “good placement” with reality and minimize irrelevant bias from the submissions process with minimal disruption to the system.

- 1) Journals should adopt a policy of anonymous manuscript submissions review.
- 2) The expedite process should end.
- 3) A system-wide standardized timeframe should be adopted for submissions cycles. Authors should be required to send articles to journals within a two-week window, followed by an extended five-week review process.
- 4) After the review process ends, journals will send authors publication offers. Authors will have a short time frame to accept the best offer.

input.” (footnote omitted).

16. *Id.* at 1302.

- 5) After the initial acceptance deadline passes, articles that have not received a publication offer will remain on the submissions market for an additional time period of two weeks. Authors in the remaining pool will be bound to accept the first offer given during this period. Together with the elimination of the expedite process, the mandatory acceptance rule will deter authors from submitting to journals unless they sincerely want to publish work in that journal.

CONCLUSION

For all its debated flaws, legal scholarship can introduce novel legal theories, preserve history, influence litigation strategies, shape doctrine, and call into question our basic assumptions about the law. At the same time, law reviews play a crucial role in the trajectory of legal academics' careers—the quality of placement in hiring, promotion, and tenure decisions matters.

Yet, despite this, there is no common rule of thumb for measuring journal quality, all the while the submissions process itself nonsensically creates inequalities, produces random outcomes, and disproportionately relies on “less elite” publications to drive the decision-making calculus at top-tier journals. Process-based reforms are direly needed to open opportunities for scholars to advance their work free from selection biases and without the taint of stepping on students to get ahead.

All of this reminds me of a Danish idiom for making a mistake, *at træde i spinaten*, which translates literally to “stepping in the spinach.” They are words of wisdom for legal scholars. If we must eat our spinach, the least we can do is avoid trampling it during harvest.