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## FIXING LAW REVIEWS

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### ABSTRACT

*Very few people are happy at present with the law review publishing process, from article submission and selection to editing. Complaints are longstanding; similar ones emerge from faculty and students alike. Yet, change has not occurred. We remain locked in a process in which neither faculty nor students are happy.*

*This Article recommends wholesale changes to the submission and editing process. The first part details the dysfunctions of the current system, including everything from lack of student capacity to evaluate faculty scholarship—particularly under the gun of the expedite process—to faculty submitting subpar work in light of rigid submission cycles. It then turns to a perverse defense of the current system. In light of technological change, law reviews play a very different function at present than even twenty years ago. Most faculty publish their work on electronic databases prior to submission to law reviews. Law reviews serve as the final resting place of those articles for archival purposes, while ostensibly providing students with a sound pedagogical*

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<sup>†</sup> Jacob D. Fuchsberg Professor of Law, New York University School of Law. I would like to thank all the faculty and students who rendered assistance. My first thanks go to the many student editors who filled out the survey, or read this piece while it was shopping, and offered a variety of thoughts and advice. Your engagement with this piece has been heartening. Ann Althouse, Will Baude, Scott Dodson, Richard Epstein, James Grimmelman, Elizabeth Janszky, Orin Kerr, Adam Levitan, Kristin Loveland, James Maxeiner, Justin Murray, Deborah Schenk, Todd Wildermuth, and Albert Yoon read a draft and offered comments; for those I am grateful. I got a lot out of a workshop at the University of Washington School of Law. Max Isaacs and Kristin Loveland offered research assistance that went well beyond the call of duty; suffice to say that without them there would be no article, and I can never thank you enough. The Editors at the *Duke Law Journal* took some (but not all) of my advice seriously, and I appreciate their care with the piece. As always, I am appreciative of the support of the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law.

*experience. Even so, the system has huge and unacceptable costs; student editors scramble over one another to accept manuscripts, often wasting time on rejected submissions, while faculty labor with student overediting, all in the service of articles that for the most part are rarely or never cited.*

*It is time to change the present system, to produce better published scholarship, at lower cost to faculty and students. This ought to include blind submission, elimination of submitting articles to one's own school, and some form of peer review. Authors should be required to limit submissions, or to accept the first offer they receive. And the editing process should be simplified, as the present system is far too elaborate, and fails to make scholarship the best it can be.*

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## INTRODUCTION

Do any of the following complaints sound familiar?

There are too many law reviews. So many reviews that just about anything any author writes can get published. Much of what gets published is of dubious value. Student editors are incapable of separating the wheat from the chaff. Faculty should select the articles for publication in law journals, or there should be peer review, or both. The process of selecting articles for publication, and the process of

editing them, are seriously broken. Maybe we could do without most law reviews altogether.

The thing is, this is all old news. Very old news. In 1906 the Illinois Law Review sprang into being, stating “[u]ndoubtedly the field for law reviews . . . is already overcrowded.”<sup>1</sup> From the bench, in 1911, Oliver Wendell Holmes, Jr. derisively called law reviews “the work of boys.”<sup>2</sup> In 1929, Clarence Updegraff “submitted that the criticism and revision of leading articles . . . should be a faculty matter.”<sup>3</sup> In 1955, a professor at Columbia Law School complained that “[s]tudents may not have acquired the knowledge and maturity to handle those trends [in the law] as adequately as independent editors.”<sup>4</sup> Eight years before that, the ABA’s adviser on its Council on Legal Education and Admissions had declared the content of law reviews lacking “of any great value,” and concluded that “[a]t least half of the law school reviews could, in my judgment, be abolished.”<sup>5</sup>

Interestingly, most of this anxious critique—and there is a lot more where that came from—seems to have had little impact. After leveling a broadside at the general lack of value of law reviews in 1955, a Bigelow scholar at the University of Chicago continued, “there has been a remarkable absence of any positive action being taken about a situation which is rapidly getting impossibly out of hand.”<sup>6</sup> Others

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1. *Editorial Notes*, 1 ILL. L. REV. 39, 39 (1906). So why yet another review? Their argument—and don’t new reviews always have one for coming into existence?—was that general reviews were abundant, but there was no review focused on Illinois state law developments. *Id.* Ten years later a student writing in the Illinois review insisted that “the multiplication of law reviews connected with law schools has been due largely to the desire of those schools to advertise themselves as wide awake, but now it would seem to be important to ask if law reviews have not developed to a point where only a blind following of precedent can make law schools overlook the economic and literary waste.” *The Waste of Law Reviews*, 10 ILL. L. REV. 135, 135 (1915).

2. Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 630–31 (1996) [hereinafter Hibbitts, *Last Writes*] (quoting Charles E. Hughes, *Foreword*, 50 YALE L.J. 737, 737 (1941)).

3. Clarence M. Updegraff, *Management of Law School Reviews*, 3 U. CIN. L. REV. 115, 119 (1929).

4. Geoffrey Preckshot, *All Hail Emperor Law Review: Criticism of the Law Review System and Its Success at Provoking Change*, 55 MO. L. REV. 1005, 1007 (1990) (alteration in original) (quoting Arthur Nussbaum, *Some Remarks About the Position of the Student-Editors of the Law Review*, 7 J. LEGAL EDUC. 381, 381 (1955)).

5. John G. Hervey, *There’s Still Room for Improvement*, 9 J. LEGAL EDUC. 149, 151 (1956).

6. Alan W. Mewett, *Reviewing the Law Reviews*, 8 J. LEGAL EDUC. 188, 188 (1955). The scholar had been absolutely scathing:

Virtually all reviews lose money on their publications. Few reviews are read; and although most of them are skimmed over in the hope of finding something worthwhile to read, some, perhaps, do not even have that honor conferred upon them. One would have thought, bearing these facts in mind, that serious consideration would be given to

regularly say the same.<sup>7</sup> (That's not entirely fair: a few authors have noted with enthusiasm such revolutionary innovations as the groundbreaking turn to symposia, the adoption of brightly colored covers, and that dramatic change of the 1980s—word processing.)<sup>8</sup>

For naysayers about law reviews, matters grow worse by the year. There is a continuous growth in the number of new journals.<sup>9</sup> And yet the economics are not much different than they were when the Bigelow scholar wrote in 1955 that “[v]irtually all reviews lose money on their publications.”<sup>10</sup> Without broad subsidies, most journals would be gone.<sup>11</sup> The existence of so many money-losing publications is a wonder in a world in which most every other publishing business has undergone radical transformation, consolidation, and collapse. Only free labor and constant economic support have kept these reviews afloat.

Still, that's not the half of it: a peculiar combination of technological advance and innovative stagnation have made the lives of those who labor in the world of law journals—which is to say most faculty and students—miserable. Just miserable. Electronic submission services like Scholastica and ExpressO have caused submissions to skyrocket. Where once editors labored to evaluate hundreds of submissions, now they fend off well over a thousand, sometimes double

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the possible value of these monumental publications.

*Id.*

7. See, e.g., E. Joshua Rosenkranz, *Law Review's Empire*, 39 HASTINGS L.J. 859, 860 (1988) (“Except possibly for an increase in membership and proliferation, the law review has remained intact and unchanged for a century.” (footnotes omitted) (first citing Roger C. Cramton, “*The Most Remarkable Institution*”: *The American Law Review*, 36 J. LEGAL EDUC. 1, 2, 6 n.24 (1986); then citing Elyce H. Zenoff, *I Have Seen the Enemy and They Are Us*, 36 J. LEGAL EDUC. 21, 21 n.1 (1986); and then citing Josh E. Fidler, *Law-Review Operations and Management: An Empirical Study of the New York University Law Review Alumni Association*, 33 J. LEGAL EDUC. 48, 48 (1983)); John Henry Schlegel, *An Endangered Species?*, 36 J. LEGAL EDUC. 18, 19 n.3 (1986) (“I notice little difference between the reviews today and those of fifty years ago.”).

8. See, e.g., Hibbits, *Last Writes*, *supra* note 2, at 636–37 (noting the trend towards symposia and experimentation in journal formatting and design); Fidler, *supra* note 7, at 62–63 (discussing the advent of word processing in the law review production process).

9. One study found that law schools published seventy-one legal journals in 1960. Michael J. Saks, Howard Larsen & Carol J. Hodne, *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 SUFFOLK U.L. REV. 353, 363 (1996). By 1985, that number had ballooned to 326. *Id.* Today, Washington and Lee's directory of law journals lists no fewer than 563 student-edited law journals in the United States (excluding online supplements). *Law Journals: Submissions and Ranking, 2008 - 2016*, WASH. & LEE U. SCH. L., <http://lawlib.wlu.edu/LJ/index.aspx> [<https://perma.cc/GUM5-9PWV>].

10. Mewett, *supra* note 6, at 188.

11. See *infra* note 87 and accompanying text.

that.<sup>12</sup> Although participants and observers have marveled for over a century that students are the ones who decide what is worthy of publication, once that at least involved a degree of thoughtful reflection. Today we all play the game of Offer-and-Expedite, in which authors who have received one offer to publish a piece engage in a mad scramble to obtain a better offer from a review perceived to be ranked more highly. 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. Once in the editing process, other problems present themselves. Word processing has given way to the redline, on which multiple editors jostle for control over manuscripts and then send an undifferentiated tangle of too many comments, internal signals, and incomprehensible notes to faculty to sort out. Faculty frequently respond with furious indignation, including asking editors to undo the whole lot, leading to a colossal waste of time and effort.

All this at a time when there are serious questions being asked about whether law reviews as we know them serve any valuable purpose. Today, scholarship is posted on Social Science Research Network (SSRN) and other digital storehouses, rendering reviews in many ways altogether obsolete. As Professor Orin Kerr asks, “[W]ho reads paper issues of law reviews anymore?”<sup>13</sup> Faculty increasingly respond to scholarship before it even hits the editing cycle, which calls into question what purposes are served by the byzantine selection and editing processes of student-run journals.

I enter the fray with a deep conviction—despite the long history of fatalism about law review reform, and every reason to be skeptical of the possibility of improvement—that things can in fact be better. I have not come to bury law reviews, though in truth I believe we could all do with somewhat fewer of them. Instead, I have come to suggest

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12. 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, 203–04 (2007) (noting that several law review editors at Top Fifty law schools reported that their journals receive between 1500 and 2000 articles per year).

13. Orin Kerr, *The Relevance and Readership of Student-Edited Law Reviews: Another Response to Liptak*, VOLOKH CONSPIRACY (Oct. 21, 2013) [hereinafter Kerr, *Relevance and Readership*], <http://volokh.com/2013/10/21/relevance-readership-student-edited-law-reviews/> [https://perma.cc/6ATW-HZUT].

that with some thought and some caring, and by utilizing sensibly the very technologies that have exacerbated these age-old problems, headway can be made in improving the situation. Too much of what we are doing at present is wasteful, and even unseemly—we can and should do better. By “we” I mean all the players in the academy: it will take leadership, by students and faculty alike, to put our system of scholarly development and publication on sounder footing.

Although in urging these changes I hope to depart from the biting tone of much of the critique in this area, still there must be candor. We cannot begin to fix things without frank acknowledgment by all involved about what is going on. Some of what follows are my own views, but my primary methodology in diagnosing ills is to rely heavily on previous critiques. I didn’t think this stuff up—many, many people are saying all of this, and have been for a long time. I have delved deeply into the surveys that have been done of the participants in the law journal publishing space. I conducted my own survey of recent law review editors.

In short, I am hardly alone in believing “major changes” are needed, and I’m going to suggest many of them.<sup>14</sup> Some are my own; others I borrow. Some are unbearably simple. As is, for example, (and you may want to sit down before reading this) the idea that authors should be required to accept the first publication offer they are given on an article. I’m sure that sounds radical and crazy, but—bear with me, I accept the burden of proof here—it is pretty much the norm outside of law, and it would change things a whole lot, mostly for the better. Some solutions, such as trying to actually obtain real peer review, and foster better pedagogy and deliberation in the selection process, will be more difficult to implement.

Part I of this Article (to revert to familiar form) is a catalog of the problems surrounding the system of publication of scholarship in the legal academy. These problems are drawn from my review of the literature, from surveys, from conversations with many colleagues and students (whom I consider colleagues) over the years, and from personal experience. These problems detract from the quality of our work and its readership, impose huge burdens of time and other costs, and make us all a little crazy.

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14. Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 52 (2013) (noting that surveyed law professors “were dissatisfied with the current system of law reviews and tended to believe it requires major changes”).

Part II then offers up a perverse defense of the existing system. The ordinary course, after identifying problems, is to offer solutions, but technology has turned our world upside down in ways that suggest a peculiar sense to what is happening at present. So, in this Part, I try to justify the things we do. For example, I offer up for consideration the idea that that the current messy system of expedites and ladder-climbing may indeed move the best scholarship to the top-ranked journals. I echo others in suggesting that in the law publishing world, peer review does occur, only it is *ex post* of publication, not *ex ante*. I accept the word of current and former editors that law review provides a meaningful and important experience for students, and take seriously the notion that the publication process provides a useful means of formalizing a text and making sure it is accurate before it appears “in print.”

But then, in Part III, I argue that even if the rosy elements of this perverse story are true—and, in fairness, I’m skeptical that they are—the system as it exists is nonetheless completely unacceptable. That is because it imposes huge costs on faculty and students alike and gives rise to deeply unseemly conduct. The only conceivable explanation for its continued existence and survival is that we walked into the system we have gradually over time, and collective action problems make it difficult to walk back out.

For that reason, in Part IV I offer up some very tangible suggestions for change. Some could happen very quickly if the technology is put in place to allow them. Others are tougher. Still, I hope to show that with some concerted effort—and exactly what is needed is concerted effort—we could move to a world in which deliberation replaces unnecessary haste; in which students actually engage with faculty, and learn from one another; in which the editing process is simplified and improved; and in which we all treat one another with a great deal more respect. We are, after all, colleagues in the law.

I believe change for the better is possible. The folks who will read this—and unlike what studies suggest about most law review scholarship, I desperately hope some folks do—are smart. At the same time, we are lawyers, and thus are given to arguing over everything. Everything. Every point has a counterpoint. I want to suggest reading what follows in a different spirit altogether. Sure, fight with whatever I say that is evidently incorrect. At the same time, don’t let our taught nature to challenge every assertion detract from the ability to concede what is plainly true. It would say the best about us if, after over a



century of squabbling and little in the way of progress to show for it, we actually did improve things.

## I. THE WOES OF REVIEWS

Description precedes prescription. What follows is a soup-to-nuts critique of the law review system, from the submission and selection of articles, to the reception articles receive upon publication. It is drawn from, and relies heavily upon, surveys of participants, data where we have it, and the many published complaints about law reviews. Not much here will sound unfamiliar, but the depth of the problems is important to register. It is difficult to take it all in and not think that things need changing.

### A. *Submission and Selection*

Dennis Callahan and Neal Devins assert that “[n]o one . . . is happy with the norms governing the submission, selection, and placement of articles in law reviews.”<sup>15</sup> That’s undoubtedly hyperbole. But just by a bit.

1. *A Word on Baseline.* While all is not rosy elsewhere, it nonetheless is useful to start by measuring what we do in law against what happens elsewhere in the academy. Things are notably different in law than elsewhere, in at least four ways.

First, there is the fact that students, rather than faculty, ultimately are responsible for selecting articles for publication.<sup>16</sup>

Second, peer review is common throughout the academy, and relatively rare in law. To be clear, peer review has its problems.<sup>17</sup> Still,

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15. Dennis J. Callahan & Neal Devins, *Law Review Article Placement: Benefit or Beauty Prize?*, 56 J. LEGAL EDUC. 374, 374 (2006). I say “assertion” because their citations hardly bear out the “no one” claim. They cite James Lindgren and Richard Posner, two scholars who are notoriously discontent about law reviews. Still, as the following should make clear, dissatisfaction is widespread, including among many students.

16. Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENV. L. REV. 661, 661 (1998) (stating that scholars “in other fields are astonished” to learn that this is how scholarship is chosen for publication in law).

17. See, e.g., Richard Smith, *Peer Review: A Flawed Process at the Heart of Science and Journals*, 99 J. ROYAL SOC’Y MED. 178, 179 (2006) (“[W]e have little evidence on the effectiveness of peer review, but we have considerable evidence on its defects. In addition to being poor at detecting gross defects and almost useless for detecting fraud it is slow, expensive, profligate of academic time, highly subjective, something of a lottery, prone to bias, and easily abused.”); Christine Wennerås & Agnes Wold, *Nepotism and Sexism in Peer-Review*, 387 NATURE 341, 343 (1997) (finding that the peer review system is subject to nepotism and gender

as one author pointed out, despite recognized difficulties, “for researchers, ‘the most important question with peer review is not whether to abandon it, but how to improve it.’”<sup>18</sup>

Third, although it is not universally the case, the norm elsewhere in the academy is that review of scholarly work is blind. Some believe the gold standard is double-blind: neither author nor reviewer knows the other.<sup>19</sup> This allows the selection of scholarship to be based on the words on the page, not the identity of the author, and it allows reviewers to be honest about quality.<sup>20</sup>

Finally, outside of the legal scholarship market, the rule is almost always single submission. You send your piece to one journal at a time, and if that journal selects it you publish there. In law, though, as is well known, we send our papers off to countless journals, and then there is the madcap “expedite” process for trading offers up the ladder to accept the best one in hand before time runs out.

There’s a common theme here, in case you missed it. Elsewhere, publishing scholarly work is about the quality of that work as scholarship. Experts choose, and the selection system is designed as much as possible to ensure the choices are based on the persuasiveness of the written word. The selection process is slow (perhaps too slow) and quite deliberate.

And then there is law.

2. *Widespread Concern About Student Selection.* Faculty frequently call into question the basic competency of students to perform the task before them.<sup>21</sup> At times this is put tendentiously, but for the most part faculty recognize that students simply are in an impossible position.<sup>22</sup>

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bias).

18. Carole J. Lee, Cassidy R. Sugimoto, Guo Zhang & Blaise Cronin, *Bias in Peer Review*, 64 J. AM. SOC’Y FOR INFO. SCI. & TECH. 2, 10 (2013) (quoting Richard Smith, *supra* note 17, at 180).

19. David Shatz, *Is Peer Review Overrated?*, 79 MONIST 536, 559 (1996) (noting that the scholarly community treats refereed work as “the gold standard of professional approbation”).

20. In practice this may be more complex. In the Google world, it’s pretty easy to figure out who authors are, and the text itself might reveal this.

21. Wise, *supra* note 14, at 42 (finding that surveyed law professors “generally agreed that law reviews do a poor job evaluating an article’s contribution to legal scholarship . . . and assessing how original, creative, and innovative an article is,” and they “believed that law reviews need to do a better job of selecting articles for publication”).

22. Some ninety years ago, Clarence Updegraff said that “[t]he best of law students will scarcely be sufficiently well prepared to decide in a close case whether a submitted article should

The problem is structural. Faculty are quick to concede the talent of many students doing article selection. The difficulty is that they lack the training and background to evaluate scholarship.<sup>23</sup> In addition, given the turnover on student-run law reviews, it is impossible to accumulate the necessary expertise over time.<sup>24</sup> As soon as editors gain a modicum of experience, they depart.<sup>25</sup>

Many student editors agree.<sup>26</sup> Students support faculty

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be published or not.” Updegraff, *supra* note 3, at 119–20; *see also* Bernard J. Hibbitts, *Yesterday Once More: Skeptics, Scribes and the Demise of Law Reviews*, 30 AKRON L. REV. 267, 292 (1996) [hereinafter Hibbitts, *Yesterday Once More*] (“However hard they may work at it, [student editors] have taken on an evaluative task for which they are simply not prepared.”); James Lindgren, *An Author’s Manifesto*, 61 U. CHI. L. REV. 527, 527 (1994) (“In short, student editors are grossly unsuited for the jobs they are faced with.”); Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132 (1995) [hereinafter Posner, *Future of the Student-Edited Law Review*] (“[T]he reviews labor under grave handicaps. The gravest is that their staffs are composed primarily of young and inexperienced persons working part time: inexperienced not only as students of the law but also as editors, writers, supervisors, and managers.”).

23. Richard Fallon, as gracious a person as there is, notes that the editors are “overall really, really smart people who don’t have deep expertise in the subject areas for which they are selecting articles.” Tyler S.B. Olkowski, *Despite Alternatives, Student-Run Law Reviews Here To Stay*, HARV. CRIMSON (Mar. 13, 2014), <http://www.thecrimson.com/article/2014/3/13/law-review-student-editors/?page=single> [https://perma.cc/3837-L3Y8]. Similarly, Richard Epstein, who is generous to student editors generally, notes that “no course of instruction” will be “able to cure” the fact that they take their jobs with but “one or two years of legal education.” Richard A. Epstein, *Faculty-Edited Law Journals*, 70 CHI.-KENT L. REV. 87, 87 (1994); *see also* Wise et al., *supra* note 14, at 49–50 (noting that “student editors’ level of legal knowledge” was the single factor that surveyed law professors said had the most harmful effect on law reviews).

24. Posner, *Future of the Student-Edited Law Review*, *supra* note 22, at 1132 (“[M]embers of law review staffs spend less than two years in the job . . . . They do not have enough time on the job to gain much experience, and their planning horizon is foreshortened.”).

25. Lindgren, *supra* note 22, at 534 (“Unfortunately, just when [student editors] gain a little experience, they move on and another board of novices takes over.”).

26. Concerns about training and expertise have frequently been raised by law review editors, among them Jonathan Mermin, a student editor of the *Boston College Law Review*, who wrote a lengthy and often sensible set of suggestions about how to improve the law review process, and Nathan Saunders, a student editor of the *Duke Law Journal*. Jonathan Mermin, *Remaking Law Review*, 36 RUTGERS U. L. REV. 603, 604 (2004) (“[F]ew law students are qualified to select and edit academic articles for publication.”); Nathan H. Saunders, Note, *Student-Edited Law Reviews: Reflections and Responses of an Inmate*, 49 DUKE L.J. 1663, 1667–68 (2000) (noting the criticism that student editors “often select articles without knowing the subject, without knowing the scholarly literature, [and] without understanding what the manuscript says”); *see also* Preckshot, *supra* note 4, at 1006–07 (“[T]he training or experience in the art of the law, or lack thereof, possessed by such student-writers and editors has been the subject of comment from the first student-published review.”); Phil Nichols, Note, *A Student Defense of Student Edited Journals: In Response to Professor Roger Cramton*, 1987 DUKE L.J. 1122, 1128 (“I think [student article selection] is the weakest aspect of the process. Student editors are inexperienced and are bound to be somewhat cautious.”); John P. Zimmer & Jason P. Luther, *Peer Review as an Aid to Article Selection in Student-Edited Legal Journals*, 60 S.C. L. REV. 960, 961 (2009) (“It is not reasonable

involvement were that an option without taking control away from them.<sup>27</sup> And in a comprehensive survey by Wise et al. (the Wise survey) of some two thousand faculty, students, and practitioners, all groups agreed that “[s]tudent editors’ level of legal knowledge hurts the ability of law reviews to select the best articles.”<sup>28</sup>

Concerns about student article selection have only increased in recent years, given the changing nature of legal scholarship. Authors such as Richard Posner, Roger Cramton, and Arthur Austin argue that even if student editors generally were competent to evaluate traditional legal, or “doctrinal,” scholarship, that ability collapsed in the face of the increasingly interdisciplinary nature of legal scholarship.<sup>29</sup> Absent special training, law students are unable to evaluate claims based in empirical work, or grounded in other

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to expect students, no matter how smart, to discriminate accurately among submissions for their scholarly merit, timeliness, and contribution to their respective fields. At least it is not reasonable to expect students to do so based solely on their own legal training and experience.”). Students, as it turns out, are far from oblivious to the criticisms levelled at them within academic circles. Duke student Phil Nichols writes that “[s]tudents . . . hear the debate, . . . and it is a little like having your parents talk about you in front of you.” Nichols, *supra*, at 1123.

27. Saunders makes the point that given the centrality of this problem to student-edited journals, and the wide discussion of it, students themselves are well aware of the problem “and conscientious editors strive to improve the system.” Saunders, *supra* note 26, at 1668. At Duke, he says, “a conscious effort” was made to pick a group of editors with “diverse scholarly interests and expertise,” and to “seek the opinion of faculty members when we [were] uncertain.” *Id.* This latter point—that students seek faculty input when they can and when they can get it—only serves to underscore the problem. See also Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 408 (1989) (noting that “[m]ost journals seek consultation with faculty members when an article is technical or the topic is obscure,” but that some journals “reported a spotty response with some professors’ desks described as ‘black holes’ from which nothing ever emerged”); Nichols, *supra* note 26, at 1128 (“I, for one, would welcome more faculty advice.”).

28. Wise et al., *supra* note 14, at 48–49. Interestingly, another survey found resounding support for student selection. See Max Stier, Kelly M. Klaus, Dan L. Bagatell & Jeffrey J. Rachlinski, *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467, 1503 (1992) (noting that 71.7 percent of attorneys, 75 percent of professors, and 63.7 percent of judges surveyed supported student article selection). Even here, though, many qualified this by preferring some faculty participation, and the main reason given in support of student selection was pedagogical, a point returned to shortly. *Id.* at 1502–03.

29. Arthur Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009, 1028–29 (1990) (“There is considerably more doubt [about student editors’ competence] when experts in other disciplines, or law professors with extra backgrounds in economics, psychology, or philosophy, submit articles dealing with the law.”); Cramton, *supra* note 7, at 7 (“[T]his myth of [student editors’] omniscience clearly has no validity today . . . . Law today is too complex and specialized: and legal scholarship is too theoretical and interdisciplinary.”); Posner, *Future of the Student-Edited Law Review*, *supra* note 22, at 1133 (“Few student editors, certainly not enough to go around, are competent to evaluate non-doctrinal scholarship.”).

disciplines. My own survey indicates that students also perceive the difficulty with their evaluation of interdisciplinary scholarship, even to the point of possibly eschewing doing so.<sup>30</sup>

There are defenders of the status quo. The respected jurist Roger Traynor tried his hand at one of these defenses almost fifty years ago. Wrote Traynor:

[T]he average apprentice in an American law school has long since reached the age of discretion and he is no ordinary student. He has behind him at least one undergraduate degree and very likely a substantial work record and a period of military service; moreover, he may be not only married but a parent.<sup>31</sup>

Indeed. Present-day defenses are often little better.

Many defenses are factually incorrect or dubious in their logic. Student selection is touted as sensible because student editors “are generally the top students in their class,” and “have been exposed to many different legal subjects.”<sup>32</sup> “Consequently,” so the logic goes, “they are very good legal writers and researchers, and are thus able to discern the difference between a well-written article and a poorly written article.”<sup>33</sup> Similarly, “[t]he editorial board ‘as a whole’ has ‘probably taken many of the elective courses available to them, and the individual students are likely to know all they will ever know about substantive law of areas they will not pursue.’”<sup>34</sup>

Most articles are selected in the spring of students’ 2L year—often quite early in that spring, when the students have barely taken more than the required first year curriculum. Given the vast number of extant law reviews—often multiple reviews at any given school—to the extent “top of the class” means students with the highest grades, that can’t possibly be correct. In any event, it is unclear why folks think that the correct qualification for choosing scholarship is having studied as

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30. Said one student editor: “I think, in the future, we will not publish many more data-heavy articles. There is not enough time for the Articles Team to verify the accuracy of the data, nor are they usually equipped to do so.”

31. Roger J. Traynor, *To the Right Honorable Law Reviews*, 10 UCLA L. REV. 3, 8 (1962).

32. Bradley J. Martineau, Essay, *The Future of Law Reviews and Legal Journals From a Student Editor’s Perspective*, PITT. J. TECH. L. & POL’Y, Fall 2001, at 1, 7.

33. *Id.*; see also Howard A. Denemark, *The Death of Law Reviews Has Been Predicted: What Might Be Lost When the Last Law Review Shuts Down?*, 27 SETON HALL L. REV. 1, 20 (1996) (“[Student editors] have distinguished themselves at law school either by superior class performance or superior writing. By definition they show an interest in legal scholarship and publication.”).

34. Denemark, *supra* note 33, at 21.

much law as one will ever know on a particular subject, even if it is not much law at all. Or that being able to evaluate the quality of writing is the same as evaluating the substance of a paper.

One frequently encounters the “generalist” argument. Because law review articles are written for a generalist audience<sup>35</sup> (so the argument goes) students—being a form of lowest common denominator, apparently—are best able to make the selection.<sup>36</sup> If anything, this does give one pause about “generalist” scholarship. Scholarship, by its nature, is “specialist.” Authors build on a body of preexisting work, and those evaluating an article ought to understand, or at least have passing knowledge of, that work. That is what is necessary to determine if an idea is truly novel. Similarly, some novel ideas are half-cocked. Here too, familiarity with the field provides a basis for telling the difference. The fact that law journals take on every field of law from tax to cybersecurity, from securitization to family law, is as much an historical hangover as it is the product of *ex ante* consideration. Who starts a “generalist” journal these days? And if the reference is solely to who reads law review articles, rather than the journal’s content, it is factually off base. As we will see in a moment, law reviews are primarily consumed by faculty—and most articles don’t get read, or even cited, at all. A failure of candor on this score, and the fact that work is evaluated by students with little experience in the field, undoubtedly plays some part in the fact that legal scholarship is so longwinded, with endless first “Parts” telling scholars in the field at great length what we already know.

3. *Further Structural Impediments.* Even if students were the right ones to be selecting scholarship, they face substantial obstacles to being able to do the job well. Again, most of the problems are structural, and they are substantial. As the authors of the Wise survey put it, “the current system makes it very difficult, if not impossible, for them to do a good job of selecting articles.”<sup>37</sup>

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35. Leibman & White, *supra* note 27, at 387 (“As a rule, the oldest journal at each school is a general interest publication that invites manuscripts from all areas of law . . .”). In my survey of law review editors, 96.9 percent of respondents described their journal as generalist. *See* Appendix, fig.1.

36. *See* Martineau, *supra* note 32, at 7 (“Students are in the best position to decide which articles get selected because they are generalists in the true sense.”).

37. Wise et al., *supra* note 14, at 69–70.

a. *The Volume of Submissions.* First, students would have to be superhuman to keep up with the flood of submissions that flow across their desks. Journals can get as many as a couple thousand submissions a year.<sup>38</sup> Students themselves say they are “overwhelmed” by these numbers.<sup>39</sup>

Think about what these numbers mean to any sane selection system. If a journal specializes its tasks, and only the articles editors do most of the screening, they have an unfathomable task. Suppose a journal gets two thousand articles submitted to it a year, and suppose the journal has five articles editors screening those articles. That is four hundred articles a student, and that is just for an initial read—it doesn’t count the presumably extra work that goes into others reading the article to forge a consensus to publish. It seems impossible to handle that load. Alternatively, the journal farms the work out to its entire staff, meaning there is little quality control.

b. *The Submission Cycle.* Of course, the four hundred articles per editor figure also misleadingly suggests this workload is spread out over a long period of time, when it is not. Rather, articles generally are submitted in two waves, one in the early spring and one in the late summer to early fall as school starts.<sup>40</sup> If you want an article accepted, you submit on cycle, preferably in the spring.<sup>41</sup> The cycle is readily

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38. Christensen & Oseid, *supra* note 12, at 204 (noting that several student editors reported receiving between 1500 and 2000 articles per year); *see also* *YLJ Submission Policy Revealed*, PRAWFSBLAWG (May 20, 2008), <http://prawfsblawg.blogs.com/prawfsblawg/2008/05/developments-in.html> [<https://perma.cc/ZJ69-QPYR>] (stating that the *Yale Law Journal* received 2500 submissions for its 2007–08 volume).

39. Christensen & Oseid, *supra* note 12, at 202. Respondents in the Wise survey listed the “number of articles submitted to law reviews” as one of the chief problems with the system. Wise et al., *supra* note 14, at 48. Similarly, among the student editors I surveyed, the second-most common concern about the article selection process was that there were too many submissions for the articles team to properly screen. *See* Appendix, fig.10. Saunders writes that when he first arrived at journal orientation he was “amazed at the sheer volume of articles stacked on our shelves, to be read and evaluated by the four article editors.” Saunders, *supra* note 26, at 1665–66. He wondered, “[h]ow . . . could they possibly review them all?” *Id.* at 1666. When he asked, he got an “uncomfortable snicker” in response. *Id.* He later learned why: they don’t. *Id.*

40. No less than 80 percent of articles submitted through Scholastica are sent either in the six weeks following February 1 or the six weeks following August 1. *Law Review Article Submissions Insights*, SCHOLASTICA, <http://scholasticahq.com/law-review-submissions-insights> [<https://perma.cc/FL6J-JG3P>]. Indeed, Scholastica sent an email to authors in mid-January declaring that “‘Submission Season’ is back” and offering “advice for a successful spring submission.” Email from Scholastica (Jan. 17, 2017, 15:31 EST).

41. When asked whether there was a particular time during the year a piece is more likely to be accepted, 21.3 percent of editors in my survey said the spring cycle, 9.6 percent said the summer to fall cycle, and 36.2 percent said both. *See* Appendix, fig.2.

apparent in Table 1 below, a log one student editor provided for the Christensen and Oseid study.<sup>42</sup>

*Table 1. Submissions at One Law Review in 2006*

Dates of Submission	Number of Submissions
2/20-2/26	105
2/27-3/5	186
3/6-3/12	235
3/13-3/19	104
3/20-3/26	181
3/27-4/2	130
4/3-4/9	50
4/10-4/16	49
4/17-4/23	28
4/24-4/30	30
5/1-5/7	17
5/8-5/14	16
5/15-5/21	11
5/22-5/28	22
5/29-6/4	19
6/5-6/11	12
6/12-6/18	7
6/19-6/25	11
6/26-7/2	14
7/3-7/9	6
7/10-7/16	10
7/17-7/23	17
7/24-7/30	25
7/31-8/6	55

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42. Christensen & Oseid, *supra* note 12, at 204-05.



8/7-8/13	101
8/14-8/20	154
8/21-8/27	129
8/28-9/3	153
9/4-9/10	103
9/11-9/17	77
9/18-9/24	63
9/25-10/1	27
10/2-10/8	32
10/9-10/15	26
10/16-10/22	14

Notice the consequences of these cycles. The least experienced students—students with all of three semesters of legal education—are picking the most scholarship.<sup>43</sup> And they are doing it under inordinate time pressure. Even if only half of our hypothetical two thousand articles come in over a two-month period, and are selected on roughly that schedule, that means the five articles editors are now evaluating two hundred articles each a month. One survey indicated “[m]ost respondents spent between five and thirty minutes reading an article before making a publication decision.”<sup>44</sup> Even recognizing some articles may be so very poor it doesn’t take long to reject them, still these numbers mean any chance of serious consideration for most articles is very low.<sup>45</sup>

*c. Expedites.* And then, of course, there is the game of Offer-and-Expedite. As one parody puts it:

When you receive the initial offer, you should tell the editor who calls you how wonderful and important you consider his/her/its journal.

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43. This incongruity is not lost on students. One commentator observed: “Upon taking office in early spring, most new articles editors approach their role with considerable diffidence: Who are they to pass judgment on the scholarship of learned professors?” Leibman & White, *supra* note 27, at 411.

44. Christensen & Oseid, *supra* note 12, at 198.

45. Perhaps it is not surprising, then, that at some journals the initial screening of articles is known as “triaging.” See Rachel J. Anderson, *From Imperial Scholar to Imperial Student: Minimizing Bias in Article Evaluation by Law Reviews*, 20 HASTINGS WOMEN’S L.J. 197, 213 (2009).

The editor will respond by telling you how wonderful and important he/she/it considers your article. Once this ridiculously false cross-flattery is concluded and you've hung up the phone, you should begin desperately searching for a journal higher on your list so you're not stuck with the poor-quality journal that called you first. Pull out your list of 250 reviews, strike all those which already rejected you, strike all those worse than the one which made the offer, and begin calling the articles editors at every other review on your list. The key here is to bluff: make them think that the offer you have in hand is from a top-ten law review which is desperate to have you, and theirs is the only other review you would possibly consider. This bluffing is easy because you will invariably be speaking to an answering machine.<sup>46</sup>

The thing about parodies is that they are supposed to be slightly off from reality, casting that reality in a humorous light—but this one is not. This is precisely what we all do.

The expedite system makes it impossible for editors to do a good job of selecting articles based on quality.<sup>47</sup> 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 input.<sup>48</sup> And what's really unfortunate is that for a journal that plays the game, expedites make it impossible for editors to set their own agenda. They will abandon or delay review of articles that initially grabbed their attention to keep up with the expedite queue. (If anything, this seems like a good argument for journals to stop allowing authors to play Offer-and-Expedite altogether, and just carry on with their selection process.)

4. *Selection Criteria.* Student editors are both rational and bright. They find themselves in an impossible situation: they have to pick articles, they lack sufficient knowledge, and they are severely pressed for time. So students do the logical thing. They rely on proxies.<sup>49</sup>

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46. C. Steven Bradford, *As I Lay Writing: How To Write Law Review Articles for Fun and Profit*, 44 J. LEGAL EDUC. 13, 30 (1994) (footnotes omitted).

47. In the Wise survey, "pressure to quickly accept an article" was ranked as one of the top three factors having a harmful effect on law reviews. Wise et al., *supra* note 14, at 48.

48. See Leibman & White, *supra* note 27, at 408 ("Advice from nonresident experts is rarely solicited because of the time lag involved. Legal topics often have a short shelf life, and lost time can mean losing a good manuscript to a competitor.")

49. Randy Kozel—a former *Harvard Law Review* editor now teaching at Notre Dame Law School—writes that the system of simultaneous submissions puts "pressure on student editors to

*a. Credentials as Proxies.* Survey after survey makes clear that student editors pick articles based on the credentials of the authors.<sup>50</sup> This includes the school at which the author teaches<sup>51</sup> and the author's prior publication record.<sup>52</sup> Ample anecdotal evidence backs up this survey data.<sup>53</sup>

There's a seeming logic to this reliance on credentials. As Jensen says, "[t]o get the stack of manuscripts to a manageable level, editors need some winnowing criterion; credentials, which bear some relationship to the quality of authors' past work, serve that function."<sup>54</sup>

Proxies are just that, and reliance on them is deeply troubling. Articles are what journals should be accepting, not authors. There is plenty of room for skepticism that what any author published elsewhere at another time—let alone where they teach—is a very reliable measure of the quality of a given piece. Worse yet, reliance on credentials creates a feedback loop or self-fulfilling prophecy, in which those at the top simply reinforce their positions.<sup>55</sup> If you have published

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make ill-informed, snap decisions about articles . . . and to give excessive consideration to proxies like the author's prominence, school, and prior publications." Richard A. Posner & Randy Kozel, *Are Law Reviews Really Rubbish?*, LEGAL AFF. (Nov. 15, 2004), [http://www.legalaffairs.org/webexclusive/debateclub\\_posner1104.msp](http://www.legalaffairs.org/webexclusive/debateclub_posner1104.msp) [<https://perma.cc/J5TK-BY48>].

50. See, e.g., Christensen & Oseid, *supra* note 12, at 191 (noting that "where an author graduated plays a significant role in [students'] publication decisions"); Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 ALB. L. REV. 565, 583 (2008) (finding that "[an] author [being] highly influential in her respective field" was the strongest positive factor in publication decisions among surveyed editors); Wise et al., *supra* note 14, at 43 (observing that both professors and students agreed that journals "place too much emphasis on an author's reputation and institutional affiliation"). In my survey, 82.4 percent of student editors said that an author's "high profile" is a factor in publication decisions, and 70.6 percent consider an author's status as a "[s]enior [s]cholar" in the field. See Appendix, fig. 4.

51. Christensen & Oseid, *supra* note 12, at 189 (finding that students consider where an author teaches in making publication decisions); Nance & Steinberg, *supra* note 50, at 583 (same).

52. Christensen & Oseid, *supra* note 12, at 192 (finding that students consider an author's publication record in making publication decisions); Nance & Steinberg, *supra* note 50, at 583 (same).

53. See, e.g., Lindgren, *supra* note 22, at 530–31 (describing journal editors sorting their piles according to the "prestige" of the author, and editors conceding that the school an author teaches at matters); Dan Subotnik & Glen Lazar, *Deconstructing the Rejection Letter: A Look at Elitism in Article Selection*, 49 J. LEGAL EDUC. 601, 610 (1999) (detailing experiments in which authors submit the same article using different letterhead, and receive "better" offers when using the more prestigious letterhead).

54. Erik M. Jensen, *The Law Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL EDUC. 383, 385 (1989); see also Leibman & White, *supra* note 27, at 404 ("[W]ell-known authors are held more likely to produce publishable manuscripts than new ones.").

55. As Zimmer and Luther, two students at South Carolina who were instrumental in

with or teach at a prestigious school, it may be easy to get your work published; on the other hand, plenty of excellent work may be relegated to less notice on the basis of nothing but the author's law school.

*b. Other, Scarier Stuff.* Other factors editors rely upon get yet more tenuous. Some refer to the vanity footnote, in which authors list their present school and perhaps their alma mater, but also thank the people that have read their article or the schools that hosted workshops.<sup>56</sup> Another is editors curating their journals to favor groups they worry are excluded otherwise from the publishing process, be it junior scholars, or scholars of color, or any other group they deem important.<sup>57</sup> Advancing the scholarship of these groups may well be a worthy end unto itself. For example, it is entirely rational to have an issue devoted to the work of one of these groups, or to announce to the world that this is the pool from which articles are selected. But that should be advertised as the case if those are the selection criteria being used. Indeed, journals should be transparent as to what criteria they use in choosing articles.<sup>58</sup>

*c. Nepotism.* There's one final factor that plainly matters to selection, and shouldn't: does the author teach at the school where the article was submitted?<sup>59</sup> A study by Albert Yoon, relying on citation

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creating a peer reviewed system, point out: “[o]ne can hardly imagine that the only people capable of writing intelligent, insightful, and ground-breaking legal scholarship teach at the top 100 law schools, much less the top 25.” Zimmer & Luther, *supra* note 26, at 964. Then again, it is not clear those at the top would agree. Although the Wise survey found law professors agreeing that “law reviews place too much emphasis on an author’s reputation and law school affiliation,” it turns out that “[p]rofessors at the Top 15 law schools gave a significantly lower rating to this statement.” Wise et al., *supra* note 14, at 40.

56. Christensen & Oseid, *supra* note 12, at 200 (“Slightly more than half of the respondents from the top two school segments combined—the Top 15 and Top 25—indicated they were influenced by the author’s attribution footnote.”).

57. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 298 (1999) (stating that students’ selection decisions are influenced by “a desire for ‘equitable’ representation of minorities and other protected or favored groups”). In my survey, 17.6 percent of student editors said they consider whether the author is a member of an underrepresented minority group in making selection decisions; 18.4 percent said they consider the author’s gender. See Appendix, fig.4.

58. Christensen & Oseid, *supra* note 12, at 196 (noting that many editors were influenced by the title of an article). But don’t be too “catchy” apparently. Like Goldilocks, the title must be just right. See *id.* at 197 (noting that many editors viewed catchy titles negatively).

59. See, e.g., Ira Mark Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. LEGAL EDUC. 681, 692 (1983) (finding that “the major law reviews publish the work of their own faculty disproportionately often”); Leibman & White, *supra* note 27, at 405

rates, found that the in-school bias both exists and lowers the quality of scholarship that a school publishes.<sup>60</sup> Yoon concludes that “law reviews appear to be acting against their self-interest, and law faculty in advance of theirs. If citation counts are a credible measure for quality, law review editors, when selecting articles from their own professors, act to the detriment of the law review.”<sup>61</sup> Similarly, “law faculty, by publishing in their own law reviews, appear to be acting opportunistically rather than altruistically.”<sup>62</sup>

5. *Rewriting After Acceptance.* Finally, there is the very odd phenomenon that many articles get rewritten—often in fundamental ways—after acceptance, raising a question about what it means to say that an “article” was selected for publication in the first place. It is commonplace for authors, at workshops or otherwise, to seek comments on a draft that has been accepted at a journal, with the explanation that they are in the process of rewriting it. What does it even mean to say an article is accepted for publication, if it is being rewritten? What exactly got “accepted”? Several students in my survey complained that authors have too much leeway to make changes to articles after their acceptance. This sort of conduct is strictly verboten in the world of peer review. Because peer reviewers are reviewing a specific text, not a rough concept or a stand-in for what might follow, authors aren’t permitted to change their text in any substantive way from what was itself reviewed and accepted.

### B. *Editing*

The consensus seems to be that as between selecting articles and editing them, the students do a better job of the latter than the former.<sup>63</sup>

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(“When authors are resident faculty members, however, the pressures on students to say ‘yes’ do exist, and most of the editors acknowledged them.”); Olkowski, *supra* note 23 (“Do we favor insiders? Absolutely,” reports a Harvard editor. “We tried to do an anonymous selection process, but with varying success.”). Of the students in my survey, 16.3 percent indicated that their journal publishes in-school faculty “frequently,” and several students reported “pressure to publish articles by faculty.” See Appendix, fig.7.

60. Albert H. Yoon, *Editorial Bias in Legal Academia*, 5 J. LEGAL ANALYSIS 309, 336 (2013). Yoon concluded that 187 out of 199 law reviews published home school faculty more often than faculty from other law schools. *Id.* at 321. Yet, home school-published work had consistently lower citation rates. *Id.* at 323.

61. *Id.* at 330.

62. *Id.*

63. See Stier et al., *supra* note 28, at 1502 (“Support for student editing was higher across all profession groups than it was for student selection of articles.”); Wise et al., *supra* note 14, at 45 (“The attorneys, judges, law professors, and even the student editors all believed that law reviews

Still, there is widespread agreement that the editing process is broken.<sup>64</sup>

1. *Garbage In, Garbage Out.* Before turning to criticisms of the editing process, fairness requires acknowledging that what students have to work with may often be far less than ideal. Students regularly complain that the work that gets submitted is of “poor quality” and often in a state of “obvious incompleteness.”<sup>65</sup> One would think the evident solution—discussed at length below—is not accepting work in this state. Still, poor submission quality likely is a contributor to student editing habits.

2. *Training, Incentives, and Process.* In further fairness to the students, editing is a tough job—much, much more difficult than it looks. Law reviews suffer from a combination of training problems and skewed incentives.

a. *Training.* Student editors come to the job with almost no training or background, little different than if the average postcollege graduate had been asked to edit an article.<sup>66</sup> In my own survey, the top complaint of students was the “lack of proper training provided to

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do a better job editing than selecting articles.” (footnotes omitted)).

64. See, e.g., Hibbits, *Last Writes*, *supra* note 2, at 642 (“[Professors] have expressed concern that their manuscripts are not just reviewed for oversights but are substantively rewritten, often by rule-obsessed editors having a less-than-perfect sense of either literary style or the legal subject at hand.”); Carol Sanger, *Editing*, 82 GEO. L.J. 513, 517 (1993) (“[A]rticles are too frequently transformed from something written by an author with a distinct voice, point of view, and line of argument to something closer to a composition by student committee.”); Richard A. Posner, *Against the Law Reviews*, LEGAL AFF. (Nov.–Dec. 2004), [https://www.legalaffairs.org/issues/November-December-2004/review\\_posner\\_novdec04.msp](https://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp) [perma.cc/QH45-C2YV] (“Welcome to a world where inexperienced editors make articles about the wrong topics worse.”).

65. Christensen & Oseid, *supra* note 12, at 202; Articles Editors, *A Response*, 61 U. CHI. L. REV. 553, 556 (1994) (responding to Lindgren, *supra* note 22); see also Zimmer & Luther, *supra* note 26, at 962–63 (“Authors’ awareness that their manuscripts will receive a significant ‘make-over’ before their first public appearance reinforces any propensity to submit rough drafts rather than finished work products.”). My survey found similar results—the fourth-most common concern about the selection process was that articles submitted were “on average low quality.” See Appendix, fig.10.

66. Sanger, *supra* note 64, at 517 (“Most student editors have likely had no editorial experience before sitting down to *your* paper other than having had their own work hacked to bits by students who experienced the same thing the year before.”); Posner, *supra* note 64 (“Because the students are not trained or experienced editors,” says Richard Posner, no doubt capturing the views of those on the receiving end of editing, “the average quality of their suggested revisions is low.”).

editors.”<sup>67</sup> (“Poor quality of edits” was a close second.)<sup>68</sup> This is defended again with a sort of lowest common denominator argument: “[s]tudents are less specialized than they will ever be again” and so as a product of their editing “[a]n 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.”<sup>69</sup> But even if this made sense—and it is not clear that scholarship benefits by being written so that the chief goal is comprehensibility to complete outsiders—it also is not evident that total novices are the ones to get the job done. Editing for clarity is a hard-learned skill.<sup>70</sup>

*b. Incentives.* Students are of terrific value in substantively cite-checking articles, but as student editors themselves recognize, the incentive is for them to do much more—too much more in fact. The editors of the *University of Chicago Law Review* note that “[t]he structure and incentives of law review editing virtually guarantee over-editing,” because each editor has “an incentive to prove his or her ability to edit.”<sup>71</sup> Often, one’s importance appears to be assessed (at least in an individual editor’s mind) by the number of marks on a manuscript. But this incentive can motivate more than five separate editors, each of whom engages in substantive editing, often in repeated editing rounds—what one author refers to as “serial editing.”<sup>72</sup> Little wonder that respondents in my survey said that the second-most

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67. See Appendix, fig. 23.

68. *Id.*

69. Nichols, *supra* note 26, at 1130. This same defender writes, “[l]aw school students are all college graduates and in general have high verbal skills,” as if what else could there be? *Id.* at 1129.

70. New York Law School’s student journal advisor Cameron Stracher says that critiques of student editing “ignore the fact that many of the greatest editors were not as talented as the writers they edited.” Cameron Stracher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52 N.Y. L. SCH. L. REV. 349, 358 (2007–2008). He gives as his example Maxwell Perkins, F. Scott Fitzgerald’s editor. “What gave him the right to edit Fitzgerald’s prose,” Stacher asks, implicitly drawing an analogy to student law review editors. *Id.* One is tempted to respond that Perkins gave years of his life to his craft, editing not only Fitzgerald but Hemmingway, Thomas Wolfe, and Ring Lardner, among many others. See MATTHEW J. BRUCCOLI, *THE SONS OF MAXWELL PERKINS*, at xix (2004) (listing authors that Perkins edited). He was a journalist before being an editor, and an editor for almost a decade before finding Fitzgerald. *Id.* at xxi–xxii. He is recognized as one of the greats of all time; lauded for his craft, grace, and ability to help authors make the most of their work. *Id.* at xvii. He not only edited writers, he created them in some sense.

71. Articles Editors, *supra* note 65, at 556.

72. Saunders, *supra* note 26, at 1669.

common complaint they get from authors is “the volume of above-the-line edits.”<sup>73</sup>

### 3. *The Resultant Quality of Law Review Writing.*

*a. Machine Language.* A common complaint about law reviews is that they all sound the same, a sort of comforting law machine language in which any authorial voice is squeezed out and the entire discussion takes on a sort of flat somnambulant tone.<sup>74</sup> Little surprise here that in the Wise survey, faculty see this as a serious problem, and students just don't.<sup>75</sup> Richard Epstein, whose voice is so distinctive I can hear it echoing in my ear as I write this, makes the point that even if “craggy,” an author's voice is valuable.<sup>76</sup> Faculty are to blame here also, though: Ann Althouse advises “[d]on't make your work look like a parody of a Law Review Article and you won't give the editor the idea of whipping it into a more perfect parody of a Law Review Article.”<sup>77</sup>

*b. Overdone Footnotes.* Then there are the footnotes: law is famous for the endless below-the-line featured in its scholarly work. (Just look at this piece!) And there are, no doubt, reasons for this. Unlike other disciplines, law has no clear methodology but argument. Thus, law review editors require support for almost any assertion, no matter how common. (Deborah Rhode tells the tale of Grant Gilmore, once pressed for authority, who responded “I AM the authority.”<sup>78</sup>) In

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73. In my survey, 51.1 percent of respondents reported that more than five editors play a substantive role in the editing of each piece. See Appendix, fig.12. The mean number of editing rounds approached three. Carol Sanger calls this “whittling.” Sanger, *supra* note 64, at 523. “Too often,” she notes, “law review articles are not so much improved as simply changed, sometimes hundreds of times within a single manuscript.” *Id.* at 513; see also Posner, *supra* note 64 (“To student editors, the cost of an author's time is zero, and the author is usually subjected not to one, but to two or three rounds of editing.”).

74. Nichols, *supra* note 26, at 1131 (stating that “a surprising amount of stylistic differences between authors is levelled when the same rules of grammar are used for each piece”).

75. Wise et al., *supra* note 14, at 45 (noting that professors indicated significantly greater dissatisfaction with journals' efforts to “improv[e] the writing quality of articles” than students).

76. Epstein, *supra* note 23, at 92.

77. Ann Althouse, *Who's to Blame for Law Reviews?*, 70 CHI.-KENT L. REV. 81, 84 (1994).

78. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1335–36 (2002). Judge Harry Edwards recounts how he wrote this sentence: “After considering the applicable case law and relevant arguments on each side of the issue, it is my view that the Supreme Court should resolve this matter by [X].” Harry T. Edwards, *Another Look at Professor Rodell's Goodbye to Law Reviews*, 100 VA. L. REV. 1483, 1500 (2014). When asked for authority he pointed out that it was his “*personal opinion*” and should require none, to which the editor, who “seemed perplexed,” said he would confer with the managing editor. *Id.*



addition, as Nance and Steinberg point out, this is “one of the few aspects of the editing process that nearly everyone agrees students are qualified to take on.”<sup>79</sup> As a result, that is what gets the attention. Faculty contribute: having been weaned in this tradition, we repeat it, engaging in what has been referred to as “footnote padding.”<sup>80</sup>

As if the footnotes were not enough, there’s the Bluebooking of them. What was once an attempt to bring some uniformity to legal citation has gotten completely out of control. The first edition, in 1926, was twenty-six pages.<sup>81</sup> Today it approaches six hundred. Six hundred pages of instructions about citations? Have we lost our collective minds? “Form,” writes Richard Posner, “is prescribed for the sake of form, not of function; a large structure is built up, all unconsciously, by accretion; the superficial dominates the substantive.”<sup>82</sup>

### C. Market Failure

During the 1995 law review conference at Stanford Law School, Judge John Noonan published a modest defense of the institution, likening law reviews to the “cathedrals” one finds in “every good-sized medieval French town.”<sup>83</sup> While he had many fine things to say, my own snap reaction to his metaphor was that the cathedrals are, for the most part, overly grandiose, ill attended, and going broke. Much the same could be said for law reviews. Indeed, the only reason they are not broke is because they are subsidized. That simple fact suggests that in some senses law reviews represent a tremendous market failure.

1. *The Flood of Publication.* By common consensus, the volume of scholarship is both huge and too much. In the Wise survey, even without being asked “many respondents indicated that there are too many law reviews.”<sup>84</sup> Nobody can say how many; in 1998, estimates

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79. Nance & Steinberg, *supra* note 50, at 569.

80. Austin, *supra* note 29, at 1017.

81. *Id.* at 1030 n.157.

82. Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1344 (1986). In my survey, 53.9 percent of students reported that their journal’s editing process includes a round of edits by a specialized team of Bluebookers. See Appendix, fig.13. One former editor explains that “[a]lthough it is hard for a student editor to become an expert on legal scholarship, it is not hard to become an expert on the *Bluebook*.” Mermin, *supra* note 26, at 613. And so, students hold on to the thing with which they can lord over faculty authors. Still, Mermin says, he later learned it was pointless. See *id.* (“In two years of litigation practice, I could count on one hand the number of times I have so much as laid eyes on a copy of the *Bluebook*, let alone opened one.”).

83. John T. Noonan, Jr., *Law Reviews*, 47 STAN. L. REV. 1117, 1117 (1995).

84. Wise et al., *supra* note 14, at 74.

varied from four hundred to eight hundred, and more are coming online all the time.<sup>85</sup> In the mid-1980s the estimates were that law reviews filled some 160,000 pages a year;<sup>86</sup> in 1990, the guesstimate was that some five thousand articles were published annually.<sup>87</sup>

2. *Law Review Subsidization.* Much if not most (if not almost all) of this would not be printed were it not for enormous subsidization.<sup>88</sup> “[M]ost law reviews and legal journals operate at a loss.”<sup>89</sup> Law reviews are subsidized in two ways—free student labor and financial subsidies. Even looking only at the latter, the situation still is pretty bleak. A 1983 study indicated that half of the reviews that responded received over half of their annual budgets from a school subsidy.<sup>90</sup> At that time, up to 50 percent of the budget was provided by subscriptions, something that surely has plummeted everywhere given electronic publishing.<sup>91</sup> It is not at all clear online royalties come close to making this up.<sup>92</sup> By one account, the only student law review that is self-supporting, without school or bar association subsidies, is the *Harvard Law Review*.<sup>93</sup> And if this is true of the *Harvard Law Review*, most likely it is because of a large endowment: Walter Olson reports that the *Harvard Law Review*’s subscriptions dropped from almost eleven thousand in the 1960s to under two thousand in 2010–11.<sup>94</sup>

3. *The Costs of Production.* There is also concern about what it costs to produce this mountain of scholarship. Looking at salaries and estimating from lower teaching loads required to produce scholarship,

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85. Friedman, *supra* note 16, at 662; James W. Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261, 1265 (1998).

86. Fidler, *supra* note 7, at 48.

87. Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 928 (1990).

88. Of the student editors in my survey, 91.1 percent reported that their journal receives law school funding. See Appendix, fig.24. Several respondents also reported that their journal receives funding from law firms or bar associations. See *id.*

89. Martineau, *supra* note 32, at 13.

90. Fidler, *supra* note 7, at 63.

91. *Id.*

92. See Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 785–86 (2006) (estimating that a typical law review earns roughly \$8000 annually in online royalties).

93. Lasson, *supra* note 87, at 929 n.12.

94. Walter Olson, *Abolish the Law Reviews!*, ATLANTIC (July 5, 2012), <http://www.theatlantic.com/national/archive/2012/07/abolish-the-law-reviews/259389> [https://perma.cc/LZM8-AABY].

Harrison and Mashburn put the number at \$240 million per year.<sup>95</sup> Richard Neumann did his own study, concluding that at a top law school a journal article can cost \$100,000, and at lower-tier schools can run from \$25,000 to \$42,000.<sup>96</sup> Harrison uses his numbers to conclude that the average law student, who graduates with \$140,000 in debt, pays for some 4.5 articles.<sup>97</sup>

Bear in mind, this is just faculty time. These figures do not include budgets for student research assistants, or the finances of the journals themselves.

4. *The Value of Law Reviews.* But is it worth it? There are famous naysayers. If you want a good chuckle, read Kenneth Lasson's *Scholarship Amok*. "Scholarship could be valuable," he writes, but "most of it isn't."<sup>98</sup> Walter Olson, in a blog post urging the abolition of law reviews, said "[w]hat we do know is that the page volume of law reviews has proliferated beyond reason with no corresponding rise in compelling content."<sup>99</sup> These sorts of assessments are inherently subjective, however, and may not be shared by most of the scholars writing and reading the work.

What's far more troubling are citation studies that suggest the vast majority of scholarship gets virtually no attention. One study indicates that 43 percent of the law review articles published are never cited at all.<sup>100</sup> There is a sharp falloff as one moves down the law review rankings.<sup>101</sup> The chance of a top ten journal article being cited was seven times higher than an article in a journal ranked eighty-fifth.<sup>102</sup>

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95. Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 53 (2015).

96. John G. Browning, *Fixing Law Reviews*, INSIDE HIGHER ED (Nov. 19, 2012), <https://www.insidehighered.com/views/2012/11/19/essay-criticizing-law-reviews-and-offering-some-reform-ideas> [<https://perma.cc/284S-6EXR>].

97. Joe Hodnicki, *How Much Does a Law Review Article Cost?*, LAW LIBR. BLOG (Mar. 29, 2016), <https://llb2.com/2016/03/29/how-much-does-a-law-review-article-cost/> [<https://perma.cc/NPD3-TYHY>].

98. Lasson, *supra* note 87, at 928.

99. Olson, *supra* note 94. A majority of student editors in my survey reported that their journal publishes over three hundred pages per issue. See Appendix, fig.16. Indeed, journals struggle to maintain standards given this volume; 28.9 percent of respondents said that their journal has accepted an article to fill its pages, even though they otherwise might not have published it. See Appendix, fig.18.

100. Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309, 336 (2007).

101. See Harrison & Mashburn, *supra* note 95, at 69 (finding a statistically significant correlation between law review rank and total cites).

102. *Id.* at 65. The authors state: "[a]rticles published in reviews that are not highly ranked,

That's pretty dismal if you publish in a lower-tier journal. Judicial citations to scholarship are declining.<sup>103</sup> And the citation that occurs—by courts or other scholars—may count for very little. Harrison and Mashburn coded citations to determine whether they were “substantive” (mentioned in text in a way “responding to or building on the prior work”), or simply served as some sort of support (sometimes quite loose for a particular assertion).<sup>104</sup> Very, very few were substantive citations.<sup>105</sup> They conclude “many articles in a ten-year span are not cited by any court or author, and many that are cited serve no useful function in helping the citing author advance or articulate a new idea, theory, or insight.”<sup>106</sup>

In short, there are grounds for worry, at a deep level, about whether the exercise is worth the candle.<sup>107</sup>

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Still, to be clear, I'm hardly an abolitionist. I've lived my entire professional life with at least one foot in the scholarly world, and I believe in it. We simply have an obligation to make that world the best it can be, including minimizing unnecessary costs. Which leads to where we are headed next: a perverse defense of the current system, and then a scathing condemnation. Because the critique to this point

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or in specialty reviews, are cited so infrequently that it requires one to question whether those works, regardless of quality, are worth their costs.” *Id.* at 49–50.

103. Brent Newton shows a drop in Supreme Court citation to law reviews over the course of the twenty-first century, with a high point around the 1970s and 1980s. Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 404 (2012). And, interestingly, roughly 40 percent of what they do cite is not by law professors. *Id.* at 408. Harrison and Mashburn show that judicial cites are a small fraction compared to the citations by secondary authors, and that less than half of the articles in a sample of 198 law review articles accounted for all the judicial cites. Harrison & Mashburn, *supra* note 95, at 63–64. However, judicial citation was more often substantive than secondary citation. *Id.* at 71–74.

104. *Id.* at 74.

105. *Id.* They ran a smaller test and replicated these results. *Id.* at 76; *see also* Ronen Perry, *The Relative Value of American Law Reviews: A Critical Appraisal of Ranking Methods*, 11 VA. J.L. & TECH. 1, 26 (2006) (stating that the various uses of citations by authors suggests that citation frequency does not reflect genuine impact).

106. Harrison & Mashburn, *supra* note 95, at 79.

107. *See* Randy E. Barnett, *Beyond the Moot Law Reviews: A Short Story with a Happy Ending*, 70 CHI.-KENT L. REV. 123, 123 (1994) (referring to “moot law reviews”); Harold C. Havighurst, *Law Reviews and Legal Education*, 51 NW. U. L. REV. 22, 24 (1956) (“Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written.”).

has been gentle compared to what really needs to be said about this system.

## II. A PERVERSE DEFENSE OF LAW REVIEWS

Despite the glaring set of difficulties with student-edited law reviews—difficulties students and faculty often agree upon—there is a unique sort of defense available. This differs from the various and occasional defenses of particular practices, such as article selection. Rather, this is a holistic defense that rests in part on the possibilities opened up by new technologies.

### A. *The Changes Technology Hath Wrought*

It is difficult to understand the role law reviews play today without understanding the changes that technology has occasioned. Technology has been far from an unalloyed good. It has created difficulties and opened up possibilities. Both deserve attention.

1. *Two Technological Difficulties.* There are at least two ways in which technology is the cause of some of the difficulties around the law review article submission process and the editing of law reviews.

The first is electronic submissions. Back in the day, multiple submissions of an article were at least a bit of a hassle. There was lots of paper to collate and manage, and packets had to be sent off to reviews. Even in the age of email, still one had to find and locate all the email addresses. Just tracking progress to manage an expedite request could be a real bother.

No more. Now, with services like ExpressO and Scholastica, a few clicks of the mouse and you can flood the market with your pearls of wisdom. And when the first fish bites at your bait, it is easy to let all the other schools know that there's something tempting and superficially attractive to be had. These services have minimized the hassle, but they've also facilitated a change in the norms of submission. The result: more submissions than law reviews can accommodate, and a constant scurry of expedite requests.

The second technological troublemaker also at first seems a boon—the ability to track changes and redline electronically. It is true that in the past multiple editors could and did edit manuscripts on paper, often resulting in a trashy mess. But there was something about the ugly messiness of the inked manuscript that ultimately was embarrassing to anyone putting it back in the mail to an author. It had

a sort of self-discipline built in. It had to be clean enough for authors to work with. And authors often then worked from a clean draft to decide what to accept.

Change-tracking software has—as with the submission systems—lowered the cost of making changes in a way that bids fare to drive authors out of their minds. It apparently has become second nature to editors to add, delete, and comment, only to have the next editor do the same, and then at some point pass that document on to authors instructing them to “accept or reject as you please.” That creates the illusion of ease, and yet it is a total nightmare to an author on the receiving end. Changes are so common it is often unclear to what the comment bubbles refer. There are so many redline changes that moving through the document is like playing a particularly challenging version of Where’s Waldo.

2. *Technology’s Promise.* But just as new technologies have exacerbated old problems, they also have opened up remarkable possibilities. People are making suggestions about how the editing and peer review processes should look that would not have been fathomable even a short while ago. And technology has transformed the role that law reviews play.

a. *Open publication.* In 1996, Bernard Hibbitts published an article entitled *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, in which he argued that given the online revolution, we should all turn to self-publishing.<sup>108</sup> Hibbitts exhaustively reviewed all the complaints about student journals, and then suggested that cyberspace allowed us to do away with student-edited journals altogether.<sup>109</sup> We could put our work online ourselves, update the articles continually, have hyperlinks instead of footnotes, and eliminate the broker in the middle.<sup>110</sup> How cool!

Hibbitts was way ahead of his time; a fair amount of what he wrote undoubtedly sounded absolutely nutty to readers—and some of it still does. (I, for one, am skeptical of scholarship that is never stable, that is continually being rewritten.)<sup>111</sup>

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108. See Hibbitts, *Last Writes*, *supra* note 2, at 617. If that sounds a bit quaint, how about the 1983 article that talked about the wonders of the word processor. See Fidler, *supra* note 7, at 62–63.

109. See Hibbitts, *Last Writes*, *supra* note 2, at 628–50, 667.

110. See *id.* at 668, 674.

111. Maybe I’m not imaginative enough. I think the nature of scholarly dialogue requires

Still, in some ways Hibbitts' vision proved absolutely correct. Using Berkeley Electronic Press (BEP) and SSRN, most of us do self-publish today. We publish our work in "draft" at any stage we wish. Indeed, judging from SSRN downloads, many have read this piece in draft in just this way.<sup>112</sup>

Not only do we self-publish, but many of us do our research on SSRN or BEP as well, making the posting of articles in manuscript all the more important.<sup>113</sup> These services alert us to the latest scholarship in our area, which we download instantly and read. That's the point of Kerr's quote in the introduction: many scholars don't read law review articles in the published journals anymore.<sup>114</sup>

*b. Open Peer Review.* Back before services like TripAdvisor, travel was risky and perplexing. Travelers consulted friends, read guide books, made anxious calls to the hotels themselves, and prayed. Often the last was the only real option: until you got there, you just didn't know. By the time you go these days—whether it is to Peru or Timbuktu—you have seen pictures of your room and read exactly what breakfast was going to be like. Crowdsourcing knowledge, or at least information, is the order of the day.

What happened with travel is happening with peer review. Rather than that old stodginess of three wise blind mice reviewing the work, there have been a variety of experiments with tossing early work up on the web and letting the community have at it. *Nature* did a famous study in 2006, in which it combined open review with traditional review.<sup>115</sup>

The verdict on the crowdsourcing of peer review has been distinctly mixed. The *Nature* experiment largely was deemed a failure.<sup>116</sup> The comments were too few and too sparse to offer much

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being able to say "here now, it's done, have at it," and then letting the have-at-it-ers have their say. If you don't like what they have to say, write something else saying so. Otherwise, it is like trying to write a dissent to a constantly changing majority opinion.

112. I've abstained from doing this until publication was imminent because of fears of plagiarism. And I've had or seen a few very real examples of this. Still, I've become convinced I was wrong to hold work back, and that the plagiarism problem needs to be dealt with some other way.

113. See, e.g., Mark Herrmann, *Inside Straight: The Coming Death of Law Reviews*, ABOVE THE LAW (Dec. 10, 2012), <http://abovethelaw.com/2012/12/inside-straight-the-coming-death-of-law-reviews/> [<https://perma.cc/9TQC-4ARW>] (discussing professors' use of SSRN to follow new developments in the field); Kerr, *Relevance and Readership*, *supra* note 13 (same).

114. Kerr, *Relevance and Readership*, *supra* note 13.

115. See KATHLEEN FITZPATRICK, PLANNED OBSOLESCENCE: PUBLISHING, TECHNOLOGY, AND THE FUTURE OF THE ACADEMY 25 (2011).

116. *Id.* at 26 (noting issues with the open review system implemented, including the

guidance or hope that these were generalizable or particularly apt views.<sup>117</sup> But *Shakespeare Quarterly* did it in 2010, and achieved something more akin to success: four essays yielded 350 comments by forty-one people, including dialogue with the authors themselves.<sup>118</sup> Other scholarly fields are trying similar experiments, with increasing satisfaction.<sup>119</sup>

There's room for skepticism but also potential value. One can wonder if the comments are ever going to be in-depth enough to allow an assessment of whether something is worthy of ultimate publication, let alone guide what a revision should look like. But one could conceptualize the endeavor in an entirely different light, not as "gatekeeping," but as "filtering, or determining what of the vast amount of material that has been published is of interest or value to a particular scholar."<sup>120</sup> That's precisely what Will Baude argues in dismissing traditional peer review as a concept. He's skeptical, despite its value, that law faculty ever would incur the costs of reviewing all that work.<sup>121</sup> But no matter, he says: "[t]he law review system is one in which a lot of chaff gets published, arguments get aired, and then readers and experts sort the wheat from the chaff ex post."<sup>122</sup>

### B. *The Perverse Defense*

Think what you will of either of these ideas. The fact is they have opened up a new way of understanding the law review process. And in this new way of thinking, what looked problematic and crazy not long ago may start to make some sense. So here it is, a perverse defense of our law review practices that tries to see the current system in its best

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reluctance of authors to having their papers opened to public comment and the subpar quality of the comments received).

117. *See id.*

118. Patricia Cohen, *Scholars Test Web Alternative to Peer Review*, N.Y. TIMES (Aug. 23, 2010), <http://www.nytimes.com/2010/08/24/arts/24peer.html> [<https://perma.cc/X9EX-UXA6>].

119. *See Lee, supra* note 18, at 11–12 (listing journals that have implemented or experimented with open peer review).

120. FITZPATRICK, *supra* note 115, at 38; *see also* Cynthia L. Selfe & Gail E. Hawisher, *Methodologies of Peer and Editorial Review: Changing Practices*, 63 C. COMPOSITION & COMM. 672, 685 (2012) (noting that "[o]pen peer review and postpublication review have been combined with some success in the sciences").

121. *See* Will Baude, *In Defense of Law Reviews*, VOLOKH CONSPIRACY (Oct. 21, 2013, 1:59 PM), <http://volokh.com/2013/10/21/in-defense-law-reviews/> [<https://perma.cc/3WZN-MATS>] ("Peer review and training take faculty time. Are enough faculty willing to spend time doing that rather than writing, consulting, teaching (or leisure)?").

122. *Id.* Continues Dr. Pangloss—and maybe he is right—"this is the flipside of the fact that much scholarship is never cited." *Id.*



light.

1. *The Selection System Is Just Fine.* Start with concerns of students and faculty alike about student editors' ability to select the right articles for publication. Maybe we just don't need to worry so much about this.

a. *A Pot for Every Chicken.* What many commentators—including folks like Jim Lindgren and Richard Epstein—point out is that one charm of the current system is that every article finds a home.<sup>123</sup> Given the large number of journals, “it [is] possible for any ‘meritorious’ article to be published somewhere.”<sup>124</sup> Editors need not pick the very best articles, so long as they “creat[e] a portfolio of valid articles for dissemination to the legal community.”<sup>125</sup> Indeed, one benefit of all these outlets is that “there is often one that will take a chance on a piece that its peer journals find ‘off the wall.’”<sup>126</sup>

This may sound a bit depressing. Note the scare quotes around “meritorious.” But be patient.

b. *A Sorting Hat.* On reflection, the system of shopping offers to higher-ranked journals may ensure—roughly at least—that the “best” pieces end up in the highest-ranked (which is not necessarily the same as “best,” to be clear) journals. Plenty of folks complain about this system, but if the goal is getting the better work in higher-ranked journals, it may do its job.

What the system does is serve to sort the stew of scholarship so that the choice bits can find their way to the appropriate homes. Journals up the food chain piggyback off the work of those in the lower cohort. Lower-tier journals screen articles and make offers on the plausible ones. The fact of an offer sends a signal to the next tier up, and the game repeats.<sup>127</sup> By the time the top journals get pieces, there

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123. See Lindgren, *supra* note 22, at 535 (stating that, due to the abundance of law reviews, faculty have many outlets in which they can publish their work); Epstein, *supra* note 23, at 91 (same). Indeed, several student editors in my survey reported that their journal has trouble filling their pages. See Appendix, fig.17.

124. Wise et al., *supra* note 14, at 30.

125. Natalie C. Cotton, Comment, *The Competence of Students as Editors of Law Reviews: A Response to Judge Posner*, 154 U. PA. L. REV. 951, 959 (2006).

126. Leibman & White, *supra* note 27, at 416.

127. Nearly a third of the students in my survey said that they consider whether another journal has made an offer on a piece in their selection decisions. See Appendix, fig.4. Similarly, the Nance and Steinberg survey found that students considered an offer from a highly ranked journal to be a positive factor. Nance & Steinberg, *supra* note 50, at 583.

has been a lot of prior review.<sup>128</sup>

There are going to be Type I and Type II errors in any system like this, but perhaps they are not significant. There are so many journals that it would be unusual for a piece of any quality that had been distributed widely not to get an offer somewhere, allowing the sorting process to begin. And then, there are enough journals up the chain that some journal will keep a piece moving upward if it is worthwhile. It is possible that some real gem will go unnoticed by any journal, but that seems unlikely. Indeed, Type II errors seem more likely: articles that faculty would think are of dubious merit might appear intriguing enough to ill-informed student editors that they get published anyway.

Seen from this perspective, the real problem here is not the process of trading up, but the time deadlines, in which exploding offers may keep a piece from moving up the chain prematurely.<sup>129</sup> An author with a piece that would, if there were infinite time, ultimately find its way to the very top, may be pressured to accept the bird in the hand several levels down. To the extent this is seen as a systemic “error,” then the problem is one of not letting every piece sort till the end. (I’ll address this sort of problem in “Solutions.”)

*c. A Trip to the Vet.* People worry about the lack of peer review of scholarly work in the legal academy, but it turns out there is review aplenty. First, there is presubmission review: one look at the “vanity” footnote in most law review articles makes clear how many people, all heartily thanked, had a look at the work and offered their feedback.<sup>130</sup> This is the very best in the scholarly tradition; colleagues helping colleagues make their work better. And, apparently, some reviews do their judging based on who vetted what.<sup>131</sup> Second, as we have seen, a

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128. See generally Stephen R. Heifetz, *Efficient Matching: Reforming the Market for Law Review Articles*, 5 GEO. MASON L. REV. 629, 636–37 (1997) (describing the expedite-and-trade-up system).

129. See *id.* at 637–38 (arguing that exploding offers “prevent[] the matching process from unfolding in its ordinary manner,” thus “pressur[ing] authors to place their articles in reviews lower on their preference lists” and precluding higher-ranked journals from publishing some of the best articles).

130. Arthur D. Austin, *The “Custom of Vetting” as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1, 6–7 (1990) (noting the common practice of listing in the vanity footnote all those who “vetted” a piece, whether such vetting “is probing, irrelevant garbage, or a perfunctory pat on the head by an old friend”); Bradford, *supra* note 46, at 26 (“Vetting is a relatively recent practice of acknowledging everyone who read your article before its publication, no matter how ridiculous their suggestions.”).

131. Christensen & Oseid, *supra* note 12, at 200 (noting that several respondents reported that they were influenced by the author’s vanity footnote in making selection decisions).

wider vetting process begins once articles are posted online. Finally, that vetting process can continue after publication. There are citation counts, peer letters to faculty committees, and general commentary: all this and more serves as our *post hoc* vetting process.

*d. The Virtues of Democratization.* “Once it mattered where an article was published because journals had widely differing distributions.”<sup>132</sup> But today anyone easily can gain access to the scholarship online, so the journal publishing it may be irrelevant. There is even some evidence that law review publication decisions are being driven to some extent by the preacceptance downloading record.<sup>133</sup> In any event, as Baude pointed out, the good work gets read and cited.<sup>134</sup>

Indeed, online posting may be increasing the utility of law reviews. Although it is hard to know for sure, Kerr suggests that the “readership of law reviews is vastly greater today, now that you can get most scholarship online for free.”<sup>135</sup> One study shows that online posting of journal articles serves to increase citation rates. The estimate is that on average “[a]rticles available in open access formats enjoy an advantage in citation by subsequent law review works of 53%.”<sup>136</sup> Publish online and you get one more citation for every two you get otherwise.

It may still be the case that in terms of attracting readership, the particular journal is significant, but some evidence suggests online publication is democratizing readership. It turns out that the citation bump for online publication is higher for articles published in lower-tier journals, serving to underscore that the online market serves a leveling function such that it is less important where the piece ultimately is published.<sup>137</sup>

*e. The Final Resting Place.* In light of the above, all that remains is for us to reconceptualize what function is served by the ultimate

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132. Alfred L. Brophy, *Law [Review]’s Empire: The Assessment of Law Reviews and Trends in Legal Scholarship*, 39 CONN. L. REV. 101, 106 (2006).

133. Nance & Steinberg, *supra* note 50, at 583 (noting that frequent downloads of a draft article on SSRN is considered a positive factor in article selection).

134. Baude, *supra* note 121.

135. Kerr, *Relevance and Readership*, *supra* note 13.

136. James M. Donovan, Carol A. Watson & Caroline Osborne, *The Open Access Advantage for American Law Reviews*, 97 J. PAT. & TRADEMARK OFF. SOC’Y 4, 4 (2015).

137. *Id.*; see also Callahan & Devins, *supra* note 15, at 385 (stating that there is “reason to think that the availability of on-line databases is among the factors that has caused a shift in emphasis away from article placement and toward the article’s merit as a contribution to the literature, and consequently to the declining influence of high-tier reviews”).

publication of articles in actual journals. Perhaps we are wrong in today's online world to think of publication decisions as the arbiters of excellence and the ticket to others reading the work. Rather, law review periodicals have become the final resting place of law review articles. The real work gets done online, and online everyone is (sort of) equal. Law review publication simply provides the citation to the final version of the piece, the headstone marking where all can find it.

2. *The Editing Is Alright.* That's the publication decision: What about the editing? A similar sort of argument can be made that here too all is just fine.

A survey by the *Harvard Law Review* indicated that almost 70 percent of law faculty were "at least somewhat satisfied" with the job student editors do in preparing work for publication.<sup>138</sup> Even if that doesn't sound quite like an Olympian level of performance, it is not bad either. Given the huge volume of work that is produced, the editing may be fine enough.

Despite widespread complaints about the overfocus on footnotes and citations, this may be all to the better. For one thing, students' focus on accuracy can often save authors from themselves.<sup>139</sup> There seems to be agreement that many authors are sending out work that is unfinished or not checked carefully for accuracy.<sup>140</sup> That's fine: careful student attention to the accuracy of statements in articles and citation of sources keeps us honest. As Posner points out, "cite-checking is 'a useful service rarely offered by faculty-edited journals and never by publishers of books.'"<sup>141</sup> Michael Dorf agrees and adds his own encomium: the careful review by students can help ferret out plagiarism that would go undiscovered in other disciplines.<sup>142</sup>

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138. HARVARD LAW REVIEW, LAW REVIEW USAGE SURVEY RESULTS 5 (2005).

139. See Richard Delgado, *Eliminate the "Middle Man"?*, 30 AKRON L. REV. 233, 233 (1996) ("[Student editors] do catch errors in our work. I personally shudder to think of the many mistakes student editors have saved me from over the years.").

140. Among the students in my survey, the fourth-highest concern about the article selection process was the low quality of articles submitted. See Appendix, fig.10. As one student complained, "[t]here is a definite subset of well-established academics that know they can turn in substandard work and get away with it because law review students must fix it for them for free."

141. Mermin, *supra* note 26, at 611 (quoting Posner, *Future of the Student-Edited Law Review*, *supra* note 22, at 1134); see also *id.* at 610 ("The performance of cite checks is by far the major service that law reviews provide for their authors." (quoting William G. Ross, *Scholarly Legal Monographs: Advantages of the Road Less Taken*, 30 AKRON L. REV. 259, 264 (1996))).

142. Mike Dorf, *Piling on in Defense of Law Reviews*, DORF ON L. (Oct. 28, 2013), <http://www.dorfonlaw.org/2013/10/piling-on-in-defense-of-law-reviews.html> [https://perma.cc/9KV5-9C5U] (discussing Michael Bellisles, a historian who faked important data cited in one of

More importantly, student editors' focus below-the-line plays to comparative advantages. Citations are "one of the few aspects of the editing process that nearly everyone agrees students are qualified to take on."<sup>143</sup> Even students recognize that above-the-line editing may not be their forte.<sup>144</sup> But they are fully capable of checking sources, and making sure all is in Bluebook order.<sup>145</sup> To the extent this is true, authors should be happy more attention is on cite-checking, rather than on above-the-line editing.

3. "*A Machine That Would Go of Itself.*" Not only does the system manage to produce an enormous body of scholarship available for all to judge, but it does it in a way that is relatively self-sustaining. But for our heavily subsidized journals, and in particular all the free student labor, we would not have this body of scholarship to draw upon.

Putting out a journal is difficult, backbreaking, often tedious work. As many point out, students provide "an enormous quantity of unpaid labor to faculty authors."<sup>146</sup> Student editing of journals frees up faculty to do things they prefer.<sup>147</sup> There is even some logic to the short stint law review editors serve before moving on to their professional careers. No one would want to do this for long, but "[t]his quick turnover guarantees an endless supply" of new "talented and devoted free labor."<sup>148</sup>

Free labor also enables the multiple submissions of which authors seem so fond. It is, as Wise points out, "[s]tudents" who "make possible the multiple, simultaneous, submission of articles to law reviews and the 'trading up' of articles to more prestigious law reviews."<sup>149</sup> Without all this free labor, there is no way the multiple submission system would work.

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his books).

143. Nance & Steinberg, *supra* note 50, at 569.

144. Eleven students in my survey said their fellow editors make too many above-the-line edits, compared to only six who said they make too few. See Appendix, fig.23.

145. See Martineau, *supra* note 32, at 2 ("[S]tudents help to research, locate, edit complex footnotes, and verify sources for the authors."); Olkowski, *supra* note 23 ("Students are generally more in tune with citation requirements than practitioners and academics, who tend to lose interest in those requirements shortly after leaving law school.").

146. Mermin, *supra* note 26, at 609; see also Martineau, *supra* note 32, at 7 (noting that the services of law review editors "are free and [students] have time to devote to the publication").

147. See Wise et al., *supra* note 14, at 26 ("[Student-edited law reviews] give law professors more time to publish, teach, do *pro bono* work, and spend time with their families.").

148. Martineau, *supra* note 32, at 8.

149. Wise et al., *supra* note 14, at 26.

Of course, no one would want to perform this thankless job without payback; students see control over publication decisions as the quid pro quo for the work that they do. Commentators rightfully “question whether many students would be willing to endure the tedium without a promise of some autonomy in decision making as editors.”<sup>150</sup> In the Wise survey, the largest gap between professors and students was over the issue of limiting student control.<sup>151</sup> As one student editor has put it, “[i]f students were stripped of the power to select and edit articles, they might start to resent the long hours required to double-check research, put citations in *Bluebook* form, and orchestrate the system of simultaneous multiple submission.”<sup>152</sup>

Besides, law schools get more than free editing; law review students have been enlisted to teach legal writing as well. Writing is at the heart of what lawyers do, yet it is expensive to teach. That is why the job is shipped off to various writing instructor programs in the 1L year. What about thereafter? Schools typically require some sort of upper-class requirement to be met, and faculty often supervise these projects. But there is another source of labor to do the same. At journals, 3L editors often run writing programs for their 2L cohorts, providing yet another enormous source of free labor.<sup>153</sup>

4. *Fair Labor.* We might worry about whether it is fair to take advantage of all this student labor, but the students themselves (and many others) see real advantages in it for them.

The consensus from defenders and critics of the student law review system alike is that law review’s greatest value is to student education. Frankly, I was surprised to see this, but apparently it is the prevailing sentiment. The Wise survey authors state that “[m]ost defenders of law reviews believe that the most important benefit of student-run law reviews is the educational experience that they provide

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150. David S. Friedman et al., *Editors’ Forum*, 47 STAN. L. REV. 1157, 1160 (1995). The Chicago Editors explain that “some measure of authority and responsibility is an important incentive to do better work.” Articles Editors, *supra* note 66, at 555.

151. See Wise et al., *supra* note 14, at 63–65 (detailing support among surveyed students and professors for various proposed reforms to law reviews).

152. Mermin, *supra* note 26, at 618; see also Henry H. Perritt, Jr., *Reassessing Professor Hibbits’s Requiem for Law Reviews*, 30 AKRON L. REV. 255, 257 (1996) (“[L]aw student editors are likely to work much more cheaply than law faculty editors, and there is no such thing as a free lunch.”).

153. See Mermin, *supra* note 26, at 609 (noting that 3L editors are tasked with teaching legal writing to 2L editors).

to students.”<sup>154</sup> Lasson’s scathing challenge to the quality of law review scholarship nonetheless acknowledges that students “no doubt receive exceptionally good training in logical thought and formal exposition, not to mention source-checking.”<sup>155</sup> Judges John Noonan and Delores Sloviter praise the peer education of law reviews. Judge Noonan calls it the “best . . . kind of education,” reminiscing about a time he watched his Trusts and Estates professor walk to class and thinking “I wish I had time to listen to him.”<sup>156</sup> Judge Sloviter calls her time on the review “the most influential in my career,” pointing to the need to learn to work with and be criticized with peers, a common aspect of law practice.<sup>157</sup>

The benefits from law review run from learning the substance of the law, to improving legal writing and editing, to the very minutiae of citation and cite-checking. A former Duke editor said that discussions around article selection were among “the more intense and rigorous academic debates I have engaged in during law school.”<sup>158</sup> A former PhD student lauded how law review service taught him to be careful and write well in a way his prior disciplinary training had not.<sup>159</sup> Many point to the writing skills they attained while on review.<sup>160</sup> And even the sort of close work on Bluebooking apparently teaches someone to be a careful and rigorous lawyer.<sup>161</sup>

Finally, don’t forget the career benefits from simply having served on a law review. Such service is understood to serve as a signal to future

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154. Wise et al., *supra* note 14, at 24.

155. Lasson, *supra* note 87, at 931.

156. Noonan, *supra* note 83, at 1118.

157. Dolores K. Sloviter, *In Praise of Law Reviews*, 75 TEMP. L. REV. 7, 7, 11 (2002); *see also* Stier, *supra* note 28, at 1492 (noting that former law review editors felt their journal service was somewhat helpful in improving their ability to work with others).

158. Saunders, *supra* note 26, at 1671.

159. *In Defense of Student-Edited Journals*, CONTRACTSPROF BLOG (Oct. 22, 2013), [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/10/in-defense-of-student-edited-journals.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/10/in-defense-of-student-edited-journals.html) [<https://perma.cc/K4DX-HHZN>]. As the student explained:

[M]y skills as a researcher skyrocketed in my third year as a law student when I was responsible for overseeing a team of cite and substance editors on a number of review essays that we published in our *Review of Law and Social Change*. The *evidentiary* standards for legal scholarship are far more exacting than they are in the humanities and the non-quantitative social sciences.

*Id.*

160. *See, e.g.*, Stier, *supra* note 28, at 1491 (“Former law review members enthusiastically endorsed law reviews for their improvement of writing and editing skills.”).

161. *See* Wise et al., *supra* note 14, at 25 n.99 (noting commentator’s suggestion that journal requirements to strictly conform to style and citation manuals develops students’ ability to “focus on accuracy and attention to detail”).

employers, especially judges and law firms, of the quality of the applicant.<sup>162</sup> Firms are said to value the law review training—or even if not true, its supposed value.<sup>163</sup> And in any event, firms are looking for lawyers who will work long hours, and if nothing else, law review service suggests just that.

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So there you have it. It doesn't matter if student editors are relatively untutored in scholarly virtues, the substance of the law, or editing. Nor does it matter that there are so many law reviews, produced at so high a cost. As things stand, everything can get published, which no doubt brings utility to someone. The best work finds a happy home, and in any event all law faculty have and can take a hand in evaluating quality. Scholarship is widely available so where something ultimately is published matters less than it once did. Students may mangle our texts, but they do real work on the cite-checking side of things. And all this student labor is sensible, as they are getting a good education while they donate it. Happiness throughout the kingdom!

### III. THE COSTS OF THE SYSTEM

If the perverse defense struck you as persuasive, there still is reason to consider reform. (If it did not, the need for reform should be obvious.) That is because even taking the perverse story as truth, it imposes extraordinary costs—completely inappropriate costs, imposed on far too many people. The only reason we tolerate them now is because, like boiling a frog slowly, we have become accustomed to them.

Although one could identify many costs in the current system, I've chosen four in particular. Each of these costs seems substantial. And all told they capture costs imposed on the major players in the law review system: the students, the faculty, the students at reviews not one's own, and law schools in general.

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162. See Saunders, *supra* note 26, at 1673 (“[P]ositions on law review—particularly on the third-year executive board—assist employers in determining who are the most desirable candidates in a particular class.”).

163. See *id.* at 1671 (stating that Bluebooking, “along with the general attention to detail that training in citechecking and line-editing develops, will no doubt be highly valued by future employers and clients”).



### A. *Externalizing Article Selection*

Even if the article selection process serves to sort out the best articles and move them into the hands of the higher-ranked reviews, it still suffers from an enormous problem: it is just not fair to all the students who do so much screening work, only to lose a huge percentage of the articles they accept. Students spend “countless hours” “winnowing enormous stacks of manuscripts for the tiny percentage they can offer to publish, only to lose most of those pieces to law reviews viewed as more prestigious.”<sup>164</sup> Students express endless exasperation with the conduct of faculty authors who will do anything to crawl (or clamber) up the rankings. In my survey of law review editors, the number one concern expressed about the current selection system was “[a]uthors’ use of acceptances from some journals to leverage review and acceptance at other journals.”<sup>165</sup>

The fact that otherwise-unacceptable behavior has become normalized should not blind us to how incredibly embarrassing and disrespectful it all is. Although faculty for the most part only are making the most of a system that preexisted their participation, playing by the rules laid down for them, students are right to be exasperated. As one student wrote, using offers to trade up “shows a disregard for the time and attention given by the reviewing editors.” We all play the game, but most of us don’t feel good about it. (And if you do, you shouldn’t.) Is this the behavior we want to model for our students? Are we really comfortable with the amount of wasted effort that goes into allowing authors and top-tier reviews to find matches with one another?

Higher-ranked journals also are far too cavalier about all the work that lower-tier journals are doing for them, and what they are doing to the student editors of those journals in turn.<sup>166</sup> Students at lower-ranked journals indicate how hard their task is to garner acceptances, citing acceptance rates that run from one out of ten to as high as one out of twenty offers.<sup>167</sup> The Golden Rule has some application here. Is

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164. Callahan & Devins, *supra* note 15, at 374.

165. See Appendix, fig.10.

166. Saunders, *supra* note 26, at 1666 (“Finally, and most importantly, let the editors of other law journals do your work for you; that is, concentrate your effort on expedited reviews . . .”).

167. Indeed, one student in my survey reported that her journal had yet to receive a single acceptance in that submission cycle, despite having sent out between fifteen and twenty offers. Nearly a quarter of respondents reported that their journal had made over thirty offers in the most recent submission cycle.

what is happening above you in the journal rankings what you really want to be doing below you? (And if you are sitting at the very top, are you not just a little embarrassed?)

### B. *Editing Despair*

The editing system is equally problematic—this time with entirely unwarranted costs imposed on the faculty who must deal with it. And because those faculty view the costs as unacceptable, they often find a way to push them back on students. Yet again, we have a broken system.

Faculty actually despair at getting their manuscripts back from student editors. Althouse, writing in 1994, described how “the mere sight of a FedEx envelope causes a pang of anxiety.”<sup>168</sup> Now it is that dreaded email, with one’s work marked up by numerous editors, in varying colors of track changes. Richard Posner explains that authors “suffer” because student editors—“having a great deal of time and manpower to devote to each article”—“often torment the author with stylistic revisions.”<sup>169</sup> In the Wise survey, there is wide agreement among faculty that students “do a poor job improving the writing quality of articles,”<sup>170</sup> and in my own survey the top two complaints from faculty (as reported by students) were the “volume of above-the-line edits” and the “[l]ack of deference to an author’s voice and/or stylistic choices.”<sup>171</sup>

In response, faculty who have the muscle to do so often respond by forcing the student editors to toss the entire editing round into the trash. On far too many occasions I have reluctantly concluded—after suffering over a manuscript that is barely recognizable in troubling ways—that I had to ask student editors to start over. I’m not alone. Epstein—who makes clear that often the editing he gets is just fine—describes how on other occasions it is “so poor, [the] prose so deathless” that he has had to deliver “an ultimatum between starting over or having me pull the piece.”<sup>172</sup> Carol Sanger describes “colleagues in high places” who “condition acceptance of their work on a review’s promise that their article will be published exactly as

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168. Althouse, *supra* note 77, at 82; *see also* Sanger, *supra* note 65, at 523 (talking about “[t]he debilitating effect upon the author of receiving a rewritten manuscript”).

169. Posner, *supra* note 64.

170. Wise et al., *supra* note 14, at 45.

171. *See* Appendix, fig.21.

172. Epstein, *supra* note 23, at 88.

submitted.”<sup>173</sup> But, she says, this is “*not* even the deal most of us want” as our work “benefits tremendously from editing.”<sup>174</sup>

Although editors may deem faculty prima dons and donnas in this regard—and some clearly do—Epstein describes being “greeted with words of thanks from worried student co-editors who feared that I might meekly submit to the changes made.”<sup>175</sup> Students who run reviews are for the most part bright and talented, even if inexperienced. They know some of their counterparts simply are not up to the task. On the occasions when I have felt I had to go over my editor’s head to the editor-in-chief, pointing out the many mistakes and confusions that have been introduced, the editor-in-chief was appalled. Indeed, in my survey of student editors, their first two concerns about the editing process are the lack of training and that the edits are of poor quality.<sup>176</sup>

All this is deadweight loss. No one gets anything out of a pile of edits that are overdone and subpar, just as there is no benefit in tossing hours of editing work in the trash. These are enormous costs, and if something can be done about them, it should be.

### C. *Dubious Pedagogy*

Much of the law review labor is justified on the basis of pedagogy, but there are probing questions that need to be asked about whether this is the right pedagogy, about whether we are teaching what we think should be taught, and whether we can do better.

Amid the glowing reports regarding the value of law review service, there emerges a counterstory, a great skepticism that the year or two of servitude makes real sense. And there is, I am afraid, something to be said for these anxious concerns.

On the one hand, what exactly is it that law reviews teach? Students as well as faculty speak of hours spent on “*minutiae*,” of work “devoid of significant pedagogical value,” or of the “excessive waste of student time.”<sup>177</sup> Wendy Gordon has worried in print about the “marginal benefit” to yet one more “spading assignment.”<sup>178</sup> Jamie

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173. Sanger, *supra* note 64, at 524.

174. *Id.*

175. Epstein, *supra* note 23, at 88.

176. See Appendix, fig.23.

177. John Doyle, *The Law Reviews: Do Their Paths of Glory Lead but to the Grave?*, 10 J. APP. PRAC. & PROCESS 179, 207 (2009); Leo P. Martinez, *Babies, Bathwater, and Law Reviews*, 47 STAN. L. REV. 1139, 1140 (1995); Mermin, *supra* note 26, at 604.

178. Wendy J. Gordon, *Counter-Manifesto: Student-Edited Reviews and the Intellectual Properties of Scholarship*, 61 U. CHI. L. REV. 541, 543 (1994).

Boyle puts the questions sharply: “Where else is the time of so many skilled, intelligent, and potentially creative people expended to produce so little useful effect?”<sup>179</sup>

Although there undoubtedly is real value in training students to be careful and detail oriented, the question is one of opportunity costs. What else could students be doing with their time, and would it be more valuable? Students, commentators suggest, could be engaging in “clinical work,” “attend[ing] classes,” (god forbid), or even “studying, socializing, or earning money.”<sup>180</sup>

Although questions such as these have been asked for a long time, they are all the more pressing as legal education and the legal market have changed. One cannot help but notice that some of the most full-throated support for law review comes from somewhat older judges. Their image of law reviews may be something they recall from their youth, rather than the reality in today’s world.<sup>181</sup> I personally have gone from being an unabashed fan of law review service, strongly urging that students compete for board positions, to being more dubious about the value of the editorial board and pushing students to do it out of loyalty to the journal, to just not being sure about any of it anymore. I worry that I have been pushing students in the wrong direction. And the reason is opportunity costs.

Legal education now offers up many more opportunities than it once did. In my day, we attended large lectures; clinical education was somewhat of a sidelight, and seminars were comparatively few. Just how many hours does a person need in a large lecture hall listening to professors ask, with varying degrees of competence, “what is the rule,” to a body of students that is more . . . or less . . . prepared. Sometimes those classes were invigorating, often they were drudgery, but that was the sum of it. Law review, warts and all, provided a situs for intellectual effort, friendship, and an opportunity to make something one’s own.

Now, there are so many more educational opportunities, any number of which might have a larger payoff. Clinical offerings not only have exploded, but they have moved from a somewhat single-minded focus on live client representation in adjudicative-like situations—

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179. Rosenkranz, *supra* note 7, at 860 n.7.

180. Doyle, *supra* note 177, at 201; Gordon, *supra* note 178, at 543; J.C. Oleson, *You Make Me [Sic]: Confessions of a Sadistic Law Review Editor*, 37 U.C. DAVIS L. REV. 1135, 1139 (2004).

181. See Thomas R. Bruce, *Swift, Modest Proposals, Babies, and Bathwater: Are Hibbitts’s Writes Right?*, 30 AKRON L. REV. 243, 245 (1996) (noting that the present-day law review experience may differ from what former law review editors recall).

which are great, but limiting if they must occur in a single semester, and are not the work many students will do once they graduate—to all sorts of opportunities, from transactional work to social change, both domestic and abroad. Externships of many sorts are the order of the day. At my own institution, at least, we have expanded seminar offerings greatly, providing the chance to dig into something meatier. Don't get me wrong. I have more than my own share of concern about the direction of legal education and where some of the leaders in the bar are driving it. But the point remains: When considering the value of law review, it is important to ask, compared to what?

In asking the opportunity cost question, it pays to understand that the legal world has shifted, and that career paths might dictate other choices. It is not so clear to me that law firms care nearly as much about journal service as once they did, though concededly this may vary depending on the schools students attend.<sup>182</sup> They certainly can't care only about the flagship review, as firm size has exploded and there are only so many students on that review. Even in the current troubled market, feeding the beast means looking further down the class roster. But for students who want academic jobs, government jobs, jobs in public interest, it is not at all clear to me that law review service necessarily trumps the value of clinics or other experiences such as faculty-led writing projects.

The point here is not to argue that students should avoid law review. Rather, it is to insist that the market for student time is competitive, and thus if we want students working on law reviews, it is the obligation of all of us to improve the quality of the time spent. To question, as with the other points here, whether there are changes that can be made to ensure that law review service takes less time and offers greater reward.

#### *D. Institutional Costs*

In an article estimating the cost of a law review article, Harrison and Mashburn ask a provocative question: If law review is so great, so

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182. In Stier's 1992 study, surveyed attorneys, professors, and judges considered law review service an "important factor in hiring." Stier, *supra* note 28, at 1487–88. But commentators have since cast doubt on the importance of the law review credential. See, e.g., Harper, *supra* note 85, at 1274 (detailing "[r]ecent developments" which have "probably reduced the power of law review participation as an indicator of academic superiority"); Hibbitts, *Yesterday Once More*, *supra* note 22, at 302 n.138 (noting that "[t]here is . . . evidence to suggest that some employers do not value law review membership as much as they used to").

essential, why don't we make it available to everyone?<sup>183</sup> The answer is not as elusive as it seems. At many schools, there has been an effort to do so, or at least to make it available to as many students as crave it. Which explains the galloping growth in legal periodicals, one that no rational market could conceivably sustain.

And so it pays to ask the next logical question: Whether this is a good thing? Whether the seemingly relentless expansion of new journals makes any sense at all. Because, as we have seen, the costs of law reviews—in student time, in subsidizing faculty scholarship, in subsidizing the journals themselves—is enormous.

The Wise survey asked a lot of questions, but what is interesting is the answer they got to a question they did not even ask. Many of their respondents volunteered that there are too many law reviews.<sup>184</sup> And that seems inescapably true: there simply are too many periodicals full of articles that barely anyone will read and no one will cite, being produced at too great a cost.

This is not to argue we should eliminate law reviews, and certainly not legal scholarship. It is only to ask, gingerly, whether at some point enough is enough, and whether we did not exceed that point a while ago. The question is whether—because it is now time to turn to solutions—there are ways to structure things so that, if there are too many journals, some can wither on the vine.

#### IV. SOLUTIONS

When so many agree on a set of common problems, and those problems impose undeniable and substantial costs, it is simply irresponsible not to try to do something to address the problems. There are fatalists who demur, calling any attempt to do so “meaningless,” or “pointless” on the theory that the law review system is entrenched and unchangeable.<sup>185</sup> But this gives in too quickly: to the extent that fixes can be identified—and particularly in light of the fact that some of these fixes themselves obtain wide consensus—it would seem requisite to try to do “something constructive.”<sup>186</sup>

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183. Harrison & Mashburn, *supra* note 95, at 58.

184. Wise et al., *supra* note 14, at 74 (“[M]any respondents indicated that there are too many law reviews, an issue we did not directly address in the survey.”).

185. See, e.g., Martinez, *supra* note 177, at 1145 (“We have come too far and there is simply too much inertia to overcome. . . . It was too late in Rodell’s day to change the system. It is certainly too late today.”).

186. Sanger, *supra* note 64, at 514; see also Rhode, *supra* note 78, at 1357 (“Our profession

Undoubtedly, change will require leadership. When it comes to changing some law review practices, there are significant collective action problems. The journals operate competitively.<sup>187</sup> Journals may quickly break ranks if they perceive an advantage in doing so. Yet, a great deal could be accomplished if some of the top reviews agreed on what needed to be done and motivated change, as they did in recent years regarding capping article length.<sup>188</sup> And some of the practices described here will make journals very attractive to faculty authors; if those journals publicize their intention to follow these practices, there is a decent chance that others will follow. Finally, to the extent there are obvious fixes, just making them clear might serve as a focal point for reform.

The simple fact is that things could be better. For authors, for editors, and for the quality of the work we jointly produce. There are submission practices that would lower the burden on us all, and make for a fairer and more legitimate selection process. There are editing practices that would mean less work for journals and a better overall result for authors and readers. Many of these practices would make journal service more attractive and the pedagogy of the experience sounder. Editing a law review will always be work, but it is possible to scale back the tedium and enhance the intellectual experience.

#### A. *Front-End Fixes*

Before turning to specific items for change, I want to set out what seem to me to be obvious overarching principles that editors should adhere to when publishing their journals. So obvious, in fact, that it is difficult to understand why these are not exactly how things operate. To the extent there is an answer, it is “culture”—a set of practices that evolved historically with no clear thought behind them, which then became ingrained. Changing this sort of culture is never easy.

The beauty of these overarching principles is there is no collective action problem surrounding them. Each journal on its own could implement them, and each journal would—quite quickly—be better off

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has played a pivotal role in almost every major social reform movement of the past century. Why should we now despair of attempting to put our own house in better order? In that spirit, a few modest proposals are in order.”).

187. See Leibman & White, *supra* note 27, at 404 (noting that interviewed student editors were “sensitive to competition with peer journals”).

188. See Doyle, *supra* note 177, at 190–91 (noting that after twelve prominent law reviews issued a statement advocating for shorter articles in 2005, there was a reduction in article length across all U.S. law reviews).

for it. Journals just need to get their acts together to do what—to me at least—it seems they already should be doing.

1. *Don't Accept for Publication Work That Is Not Nearly Ready To Be Published.* Journals should only make offers to publish work that they are able to deem nearly publishable when the editors review it.<sup>189</sup> The work need not be perfect; that's what editing is for. But it is time to stop accepting partially written or seriously troubled manuscripts and then hoping something dramatically different will come back in a round of edits after the article is accepted.

This is the most important of principles, and it would seem utterly obvious.

But it is not nearly the practice. The editors of the *University of Chicago Law Review* have said “we publish what we get, and in more or less the same proportions in which we get it.”<sup>190</sup> (Translation: It's mostly crap, but we dig out what we can and send it on its way.)<sup>191</sup> Aiming for generosity, other students say, “[s]ome exciting thinkers are, unfortunately, not equally capable writers.”<sup>192</sup> Editors complain endlessly about having to serve as research assistants and free laborers for faculty.<sup>193</sup>

This is all perfectly ridiculous. It is time to sit in editorial meetings and just say no. No to any article that the editors are not willing, with relatively minor editing and polishing, to put into the publication process at that very moment. No to any article that requires the editors to rewrite it, do the Bluebooking for it, draft footnotes—i.e., to fix it.

This is about basic integrity and leadership. Editors of journals have it in their hands to change the culture here. They should announce, as does the *University of Chicago Law Review*, that “articles must be both well written and completely argued at the time of

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189. As Carol Sanger puts the principle: “[e]ditors should accept only those pieces that, on the whole, meet that board’s standards for publication at the time of submission.” Sanger, *supra* note 64, at 524.

190. Articles Editors, *supra* note 65, at 554.

191. See Christensen & Oseid, *supra* note 12, at 203 (quoting a student editor: “So many of [the articles] are so poorly written. Authors should honestly evaluate their work and not waste our time with articles we could never accept.”).

192. Articles Editors, *supra* note 65, at 556.

193. See, e.g., *id.* (noting that some authors “submit their articles in a state of obvious incompleteness, expecting student editors to fill in the blanks”); Christensen & Oseid, *supra* note 12, at 203 (citing complaints from students about authors who “foist off their research and editing responsibilities” on law review editors); Mermin, *supra* note 26, at 604 (arguing that some law professors treat law review editors as unpaid research assistants).



submission.”<sup>194</sup> And then follow that rule. If not, just reject the article. Don’t waste your time.

2. *Publish Less*. Of course, this first principle has its consequences: a journal that adopts it may end up publishing less. At the least, there will be transition costs, as authors learn that they can’t just toss any half-done manuscript at a journal and expect it to get accepted, then nudged and cajoled along until it is presentable. But it may be worse than that, because—as the Chicago editors suggested, and many seem to confirm—what comes over the transom can be pretty bad.<sup>195</sup> Which means journals may struggle to find pieces that the editors really want to publish.

So what? What on earth would be wrong with publishing less? There is no law of the universe that says journals must publish eight issues, or six, or even four. One estimate from 1989 was that there were over two hundred thousand pages available for authorial work; the number must be much higher now.<sup>196</sup> Yet, by common consensus much of what is published is neither notable nor particularly good, and many articles never garner a citation. No one is going to punish journals or think less well of them if they cut the number of published pages by one-third, or even one-half.<sup>197</sup> To the contrary, journals may attract notice for being discriminating, for having judgment, for taking the time to do the job right. There are going to be disgruntled faculty who can’t get their work published, but then they will just have to work harder. My guess is most of the legal world will applaud.

Imagine the immediate payoff to journal staff. To the extent the editors and staff feel rushed and pushed to do the job too quickly, that discomfort can be eliminated. To the extent editors and staff are working late into the night to the detriment of much else in their lives, from school to friendships, things could be better. To the extent authors are unhappy because journal work product is not sufficiently careful, the situation could improve. The world will only get better if journals start publishing less and publishing material of a higher quality.

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194. Articles Editors, *supra* note 65, at 558.

195. See, e.g., Christensen & Oseid, *supra* note 12, at 202 (“Editors noted that many articles were poorly written or poorly researched, and expressed frustration at poor proofreading, improper citation form, incorrect grammar, and incorrect spellings in the submitted articles.”).

196. Leibman & White, *supra* note 27, at 394.

197. In my survey, the majority of respondents reported that their journal has over three hundred pages per issue. See Appendix, fig.16.

3. *The End of Law Review Submission “Cycles.”* Refusing to publish work that is not ready for publication is going to have an impact on the current practice of submission “cycles” that occur in the early spring and early fall. It may even mean the end of these cycles. This too would be a benefit.

One reason—I suspect an important reason—journals get crappy work over the transom is because authors live in fear of losing a window. At present it seems to be the case that if you want to have high confidence that your work will be published, you need to get it out during the cycles, preferably early in the spring. In my survey, two-thirds of the journal respondents said pieces are more likely to be published if received during the cycles, and 80 percent said being early in the cycle mattered.<sup>198</sup>

Yet, if you stop and think about it, it stands to reason that one cause of journals accepting crappy work is because that is when the new editors have been told they must make decisions. The attitude seems to be: it is article selection season and by god we are going to select some articles. Enough to “fill” the book. Because filling the book seems to be paramount. (But see Principles 1 and 2.)

It’s a vicious cycle. Authors submit their work before it is ready, and journals accept it knowing it is not ready, for no reason other than those two arbitrary points in time. Adhering to Principle 1 might make authors do a better job of getting work ready before the selection cycle, or even cause them to wait out a cycle. But it is hardly certain this will happen. At present, authors are better off tossing a Hail Mary pass and hoping it gets caught. If not, they can just go again later.

In an ideal world, authors should submit work when it is ready, and that is when journals should consider it. Much of what follows is aimed at making this work. To get there, though, it is important for journals to stop thinking about cycles and start thinking about accepting publishable work when it comes in the door. Only then.

Admittedly, student schedules necessarily affect the timing of article consideration.<sup>199</sup> No one is going to be accepting articles in the run up to, or during, exams. And summer may be a bit slow—though if the whole process slows down as it should, articles editors could still

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198. See Appendix, figs.2 & 3.

199. See Leibman & White, *supra* note 27, at 402 (“Manuscript review procedures for almost all the student-edited journals are subject to severe seasonal pressures. Exams, vacations, and clerkships are common events that often lead to suspension of process and bending of rules.”).

read work during the summer.<sup>200</sup> (Indeed, articles editors should be freed up from reading the papers from writing competitions to ensure that they can continue reading and accepting articles.)

The real driver here will be to take Principle 1 seriously. Cycles survive because article selection at present is about competition, not quality.<sup>201</sup> It is a rush to beat other journals to the best articles. Journal editors are quite candid about this.<sup>202</sup> It is time to recognize that the world would not end if your editorial board didn't read that piece that is being dangled in front of you on expedite, and kept focusing on the one you picked up beforehand and really liked.<sup>203</sup> If journals slowed down and were more deliberate, the cycle would start to crack by itself. And once the cycle cracks, there would be a variety of pieces to read at different times of the year.

It is time to stop thinking about cycles, and start thinking about publishing work when it is ready to be published. If editors focused on that, things would change.

4. *Own the Journal, Not the Volume.* Things would be better yet if progress could be made on one additional aspect of law review culture: the need for students to own “their” volume. Cycles exist in part because editorial boards feel the need to fill “their” book. Boards switch over and then begin to hunt frantically for articles. They then start publishing them, trying to get done the publishing work that is assigned them during their single-year tenure.

This an insane way to run an institution, and a sad one from a pedagogical perspective. Journals ought to have some continuity, some personality, some quality that is handed down generation to

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200. Indeed, the common practice of suspending article selection during the summer is perhaps a vestige from the pre-internet era—Leibman and White noted in 1989 that while journals located in large cities were able to maintain a skeleton crew during the summer to carry on the journal's business, this was less feasible at journals located in small towns where board members dispersed widely. *Id.* at 411 n.80.

201. Friedman et al., *supra* note 150, at 1158 (noting that “the articles selection process is shaped by interauthor and interjournal competition”).

202. See Leibman & White, *supra* note 27, at 404 (“All interviewees were sensitive to competition with peer journals.”); Nance & Steinberg, *supra* note 50, at 589 (“Because legal journals, unlike scholarly journals in other disciplines, allow authors to submit to multiple publications simultaneously, an inevitable competition for the most desirable articles develops.”). In my own survey many respondents indicate there is too much focus on whether another journal has made an offer. See Appendix, fig.10.

203. Zimmer & Luther, *supra* note 26, at 963–64 (noting that “faster publication decisions are not necessarily better decisions, especially when made by student editors already hampered by inexperience” and “student editors have very little time to make informed decisions”).

generation. There is no earthly reason why one set of editors should not be able to accept a piece that another board would edit, or would resent editing a piece that another board accepted.

Students need to take stewardship of their journal, not just own one volume. Much would be improved if students could adopt a mindset of joint and generational ownership.

First, it would do much to break the back on the cycle, which in turn could generate better work to consider and accept. As Leibman and White say:

The chances of publication should not vary with the time of year. Incumbent boards should have authority to commit forward slots. We see no compelling reason for a board to insist on placing its unique stamp on an entire volume. As we have argued, a periodical should be characterized by a set of values to which current and future boards subscribe.<sup>204</sup>

Second, in this world students actually could generate the articles they want through a realistic system of revise and resubmit. This practice, common in faculty-edited journals, is virtually nonexistent in the law review world. Peer-edited journals often tell authors that if a certain set of changes are made, they are likely to accept a piece. Authors make the changes and journals take seriously those precommitments. Yet, this sort of interactive process is impossible when students do not see their editorial “board” as a continuing entity. That is unfortunate, because if journal editors could work from generation to generation, they could also work with authors to shape the pieces they think are best.<sup>205</sup> This addresses the problem of accepting premature or subpar work. If editors like a piece but think that it is not quite ready, they could suggest changes—and if they are made the next board should take the piece.

Finally, improvements could take hold on the editing side as well. At present, new editors get very little training.<sup>206</sup> In a true peer

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204. Leibman & White, *supra* note 27, at 421.

205. *Id.* at 412 (stating that “the lack of substantive feedback from article reviewers is a serious deficiency in the law review model”); Mermin, *supra* note 26, at 619 (“If an interesting manuscript were deemed to require substantial changes, the author would receive instructions as to what changes were desired, and . . . would perform the revisions herself. This is the practice in other fields, for the simple reason that the author herself is in the best position to revise her own work.”); Sanger, *supra* note 64, at 524 (“Any piece that student editors think needs to be substantially rewritten should be rejected or, in the tradition of journals elsewhere in the academy, editors might invite a resubmission after various suggested changes are made.”).

206. As discussed, the number one concern students in my survey had about the editing

operation, experienced editors should work with new editors, helping them through their first pieces. Departing editors should not be hell bent on escaping, quickly dumping the work into novice hands.<sup>207</sup> Board transitions should be better threaded and editors should feel responsibility for the endeavor, not just the volume.

*B. Changing the Selection Process (Peer Review Aside)*

Things get tougher here, in part because of collective action problems. Still, given agreement about the underlying problems, it is plainly time for change. I'll begin with article selection, and move from there.

By common consensus, the process for submitting articles to be published and selecting them for publication is seriously broken. It is too hurried and too frantic to allow deliberate choices to be made. The expedite system has journals and authors crawling over one another to make decisions, at the expense of deliberation and thoughtful consideration. No one is happy.

Surely there is a better world, in which article selection is a real intellectual experience for students. One in which the editors consider the merits of an article based on the words in print, not whether the author was at the right school, or another journal wanted the article so they must decide fast whether to jump into the game.

There are two parts to the suggestions that follow. First, there are suggestions for change that are not dependent on peer review. Peer review is important, but trickier to fix, so I address that difficulty independently.

1. *Move to Blind Review.* Review of articles ought to be blind.<sup>208</sup> Any information that identifies the author or her credentials—including the vanity footnote—needs to be stripped away before an article is reviewed. This ensures that the article is considered on its

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process was the “lack of proper training provided to editors.” See Appendix, fig.23. Similarly, Wise found that surveyed professors and students agreed that there should be more training of law review editors. Wise et al., *supra* note 14, at 67.

207. As one student in my survey put it: “As an incoming board member, there are many questions I do not have enough knowledge to answer. Good luck with getting a prior board member to answer this survey!”

208. In my survey, 86 percent of students said that their journal does not conduct blind review at any stage of the selection process. See Appendix, fig.9. A small number of respondents reported that their journal conducts blind review for the initial screening of articles (4.7 percent), the editorial read (5.8 percent), and/or the committee read (8.1 percent). See *id.*

merits, and not on the basis of various other considerations or proxies. Among other things, this will reinforce Principle 1 by eliminating any temptation to take an article just because the author is prominent. And it will eliminate any bias, perceived or real, against various categories of authors, including juniors, outsiders, minorities, or authors at less prominent schools.<sup>209</sup>

There is wide, indeed overwhelming, consensus that blind review ought to be the norm.<sup>210</sup> In the Wise survey, everyone felt so, with law professors overwhelmingly favoring blind review and students (perhaps not surprisingly) bringing up the rear—but still favoring the practice.<sup>211</sup> Student authors who defend much else of current practice still favor making this change.<sup>212</sup> Faculty authors, even those who disagree about other aspects of the law review process, agree that blind review is imperative.<sup>213</sup> So why are we not doing it? Why don't all journals require authors to submit drafts stripped of all identifying information?

Technology makes blind review extremely simple. Law reviews need not do any additional work. Most journals accept submissions through Scholastica or ExpressO. These systems could be set up so that all submissions are blind and the author's information is available only when an offer to publish is made. If these systems don't want to help—and as will become clear, some help is needed with online submission processes—surely another vendor will step forward to fill the gap.

Some argue that even in a blind system a careful reader can “decode” who the author is, perhaps by focusing closely on the

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209. See Jonathan Gingerich, *A Call for Blind Review: Student Edited Law Reviews and Bias*, 59 J. LEGAL EDUC. 269, 270–71 (2009) (noting that nonblind review may disadvantage certain groups such as women, non-U.S. scholars, and younger scholars).

210. See, e.g., Doyle, *supra* note 177, at 193 (“The ideal method of selection—at any level of the hierarchy—is one blind to the author’s identity.”); Gingerich, *supra* note 209, at 278 (“In order to reduce bias, increase authors’ confidence in the fairness of the law review system, and improve relations with the law professors who write for them, student-edited law reviews would be well advised to adopt policies of blind review.”); Baude, *supra* note 121 (“Blind screening is probably a good idea, but it also probably puts more pressure on journals to resist massively simultaneous submission, which authors may not enjoy giving up.”).

211. See Wise et al., *supra* note 14, at 55, 64.

212. See, e.g., Martineau, *supra* note 32, at 8 (“Nevertheless, one major change does need to occur in law reviews and legal journals, and that is the selection of the articles should be ‘blind.’”).

213. Gordon, *supra* note 178, at 541 (“[A]uthors’ names and affiliations should be physically removed from articles before selection begins . . . .”); Lindgren, *supra* note 22, at 538 (“Reviews should . . . [c]onceal the author’s identity, gender, and institutional affiliation from those selecting the articles.”).

footnotes.<sup>214</sup> Just because people can shoplift and get away with it doesn't mean that people should, or even that most do. As Harrison and Mashburn say, at the least it would "sensitize" editors to the problem.<sup>215</sup> Besides, for this sort of cheating to affect publication decisions, entire articles committees would have to be complicit. One hopes someone would have the good sense to point out that what is occurring is not appropriate.<sup>216</sup> And if authors are the problem, subtly striving to give themselves away, boards should consider this in making publication decisions.

This reform should just happen. Now. It is long overdue. If it is institutionalized through a system like Scholastica or ExpressO, then collective action problems largely can be eliminated. Journals should be required to check an online box before they decode the author's name, thereby making public the intention to make an offer (which also will be valuable in other ways, as I will explain shortly). No matter the mechanism, there is no excuse for not making this obvious change, on which there is wide agreement.

2. *Put An End to In-School Nepotism.* It is also the time to stop authors from submitting articles to journals at their home schools—and certainly to the flagship journal. (There may be a slight case for in-school nepotism for a unique specialty journal.) The risks of bias—real and perceived—are overwhelming, and citation studies suggest the practice is doing no one any good.<sup>217</sup> There are a sufficient number of journals at every tier that any faculty member who feels disadvantaged

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214. See, e.g., Hibbitts, *Last Writes*, *supra* note 2, at 652 (“[T]he ‘blind read’ selection strategy is time consuming and hardly foolproof insofar as authors can reveal themselves and their schools in multiple ways . . . .”); Saunders, *supra* note 26, at 1681 (“[T]here are many clues to an author’s identity in her submission . . . acknowledgement notes, textual references to earlier articles by the same author, and even the simple contents of the article may frustrate blind review by revealing the author’s identity.”).

215. Harrison & Mashburn, *supra* note 95, at 86 (“[A]dopting a policy of blind submission and review . . . would sensitize reviewers to the need to assess articles based on their substance.”).

216. One author suggested that authors, now blind, could simply rework old scholarship and get it accepted. Gingerich, *supra* note 209, at 277–78. But if editorial boards are doing the work they should, this should be discovered either way, and if not it won’t be caught. In any event, that sort of preemption check simply could be run immediately after an offer is extended, and contingent on the work being original. *Id.*

217. See Leibman & White, *supra* note 27, at 405 (“When authors are resident faculty members, however, the pressures on students to say yes do exist, and most of the editors acknowledged them.”); Nance & Steinberg, *supra* note 50, at 583 (finding that an author being a resident faculty member is a positive factor in selection decisions). For a discussion of the Yoon study which found that law review articles published by home-school faculty have lower citation rates on average, see *supra* notes 60–62 and accompanying text.

by such a rule ought seriously to question their scholarly worth. The failure to end this practice long ago is disappointing. Journals should start to adopt this policy immediately, and make public that they are doing so.<sup>218</sup> One hopes a cascade will follow.

3. *Limit Submissions; Require Acceptance of Offers.* We now come to a couple of suggestions that are going to be more controversial, but nonetheless are critical to achieving real reform. These are: limiting the number of simultaneous submissions, and—ultimately—requiring authors to accept the first offer that is extended. Together these would ease the burden on journals to read so many submissions, allowing editors to do a better job of selection. And it would end the silly expedite system, which imposes so many costs. This would be a huge change to the culture, to be sure, but it is an appropriate one.

a. *The Basic Idea.* The editors of some group of reviews (or many of them) ought to reach consensus on how many submissions can be live at a time. Say the number is ten, or fifteen. Once this number is set, the online submissions system should be altered so that authors cannot submit to more than this number of journals at a time. As a journal rejects an article, the author should be notified of the ability to replace it with another submission. Or, one can set a preference ranking on the front end so that the process is automatic.

Once an offer is extended, the author and the outstanding offer are indicated online. The author should then have a limited time to accept the offer.

Student editors ought to be strongly supportive of this system. In almost everything else I have seen, students' largest complaint is the expedite system.<sup>219</sup> In my own survey the leading result was concern

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218. Although blind submission could help the situation here, it is not enough. Faculty authors typically have students, often on journals, who are research assistants. Faculty discuss their works in progress in class. The chance of blind review obscuring local authors is insufficiently robust to do the trick.

219. Indeed, so troublesome is the current system that, in 2011, several law reviews, including the flagship journals of Yale, Harvard, and Stanford, released a joint letter decrying the “highly corrosive effect” of the current system of article selection. Letter from the *Boston University Law Review* (Apr. 19, 2011), <http://www.bu.edu/law/journals-archive/bulr/documents/2011-04-19-jointletter.pdf> [<https://perma.cc/VK29-AQST>]. According to the journals, “expedited review has inevitably favored established authors, popular topics, and broad claims at the expense of originality and merit,” and “has unduly compelled authors to undertake complicated workarounds and endure strong-arming and stress.” *Id.* Thus, the journals committed to giving authors at least seven days to decide whether to accept offers. *Id.* But some were skeptical—Orin Kerr asked: “[W]ill this policy signal a real shift? Or are the journals mostly going to align with



about the expedite system and losing articles to other journals after acceptance.<sup>220</sup> The Christensen and Oseid survey suggested the same.<sup>221</sup> Former editors decry the system.<sup>222</sup>

Faculty authors, who benefit from the current craziness, may be more resistant. But just because authors like the flexibility of papering the law review world with their latest article, does not mean it is right. It is unfair to impose all the redundant work of reviewing a single piece on so many journals. Rather, authors should exercise some discipline. As Michael Jensen points out, under a system such as this an “author would have an incentive to make a realistic assessment of the type and quality of journal that his article belongs in.”<sup>223</sup> In any event, if student

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their perceived self-interest?” Orin Kerr, *Group of Law Reviews Adopts Position Against Exploding Offers: Will Other Journals Follow?*, VOLOKH CONSPIRACY (Apr. 19, 2011), <http://volokh.com/2011/04/19/important-group-of-journals-agree-to-end-exploding-offers-will-other-journals-follow/> [<https://perma.cc/F7NX-CLUK>]. Six years later we have our answer: Policies against exploding offers remain the exception, not the rule.

The only exception to this is the Wise survey, in which student editors indicated they were okay with the status quo. But this may be an artifact of how the question was asked or when the survey occurred. In the Wise survey, students were generally neutral regarding a proposal to limit the number of simultaneous submissions. Wise et al., *supra* note 14, at 63. Though surprising at first glance, it is perhaps less so in view of my survey’s finding that many journals struggle to fill their pages—these journals would likely disfavor reforms tending to decrease submissions. But those concerns may be allayed through implementation of other reforms like reducing page count, which would make it easier for journals to slot a volume and increase demand for those slots. Students in the Wise survey also generally did not support eliminating expedited review. *Id.* at 64. But by asking about “expedited review” as opposed to the “expedite and trade up system,” the survey question may have minimized the ills of the status quo. After all, most editors’ experience with “expedited review” involves being pursued by a solicitous author, and not the flip side—the author’s using an acceptance as leverage to trade up to a higher-ranked journal.

220. Tellingly, the first- and third-most common concerns about the selection process among students in my survey related to the expedite system (“Authors’ use of acceptances from some journals to leverage review and acceptance at other journals” (eighty-two respondents) and “The structure of the current submission and selection system causes your journal to lose desired articles to other schools’ journals” (sixty-one respondents)). See Appendix, fig.10. Said one frustrated editor: “Using one offer to get a better offer demonstrates to us that the author is not confident the work can stand on its own without the support of a more prominent brand and shows a disregard for the time and attention given by the reviewing editors.”

221. One student in the Christensen and Oseid study remarked: “I’ve also been surprised at how often authors are willing to trade up in order to achieve minor increases in prestige. Once this year we took an article away from the journal ranked one spot below us, only to lose it to the journal one spot above us that same day.” Christensen & Oseid, *supra* note 12, at 206. Said another: “Professors have made commitments to me and then backed out two weeks later, after receiving a ‘better’ offer . . . I have found the experience disheartening and an unfortunate commentary on lawyers.” *Id.* at 207.

222. *E.g.*, Zimmer & Luther, *supra* note 26, at 963 n.9 (noting that the expedite system results in students making “quick decisions based on factors . . . that arguably have little bearing on scholarly merit”).

223. Jensen, *supra* note 54, at 386.

editors adopt a system like this, faculty will have no choice but to go along.

The primary argument in favor of multiple submissions—that it helps to reduce the time before an article sees publication—has evaporated with online publication services. In other disciplines with single submission, authors may bemoan how long it takes to get an article reviewed, learn of a rejection, and then move on to the next journal. But precisely because most of us publish our work on SSRN or the like, it is readily available as early as we want it to be. As we have seen, ultimate publication in a journal is a formality of sorts.

Some authors have suggested that in a system such as this, lower-ranked journals might get few or no articles.<sup>224</sup> I am not sure this is right at all. There will be a transition period, but eventually plenty of work will make its way down the chain. Where else would all the submissions go? And, frankly, there may not even be a transition, as one hopes that some authors will honestly evaluate their publication chances, and be happy to know they are sending out articles to a relatively uncluttered part of the playing field. If this set of rules ultimately causes some journals to fold, though, the consensus seems to be that there are too many journals as it is. The more likely result is some journals will just publish less. No harm in that.

One thing this may do is create more competition among journals for submissions. That is not a bad thing either. Journals should publish their average time to acceptance or rejection of an article. They should publish their basic editing policies. Some journals now have marketing strategies, which, if executed could be a plus to some authors. Authors can make decisions on factors other than a vague sense of relative prestige, a computation that become quite difficult if not impossible to make as one moves down the rankings ladder.

*b. Bells and Whistles.* There are options here that could be considered. For example, an online indicator could be set once a journal is considering an article, or has moved it to an advanced stage in the selection process, warning off other journals from doing any unnecessary work at that moment. On the other hand, if an indicator is set and afterwards a piece is rejected, that might influence the market, so this information perhaps should not be released.

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224. *E.g.*, Harrison & Mashburn, *supra* note 95, at 85 (noting that under an exclusive submission system it is possible that “lower ranked reviews would have very few or no articles to review as authors worked their way down the review ranking”).

If the expedite game itself is so precious that it must be retained (and one wonders why), it could be triggered within the limited group of submissions once there is an offer, with an open period to collect more offers. During that open period, no offer could explode. Then, the author could choose from among the offers she gets. This would at least allow other journals to exercise some modicum of sensible evaluation and consideration rather than engaging in a madcap scramble.

*c. Eliminate Shopping Altogether.* Of course, all this could be simplified entirely if journals would just put an end to authors shopping their offers. If an offer is made, it must be accepted. That's not a popular idea in our world right now, but it is the right answer.<sup>225</sup>

If authors were required to accept the first offer, there would not even need to be a limit on the number of submissions. Authors could self-limit the number of submissions in their best interest. Especially if submission cycles were eliminated, authors could submit their work in waves, starting at what they perceive to be the most likely entry point at which their work might be accepted. Of course, if every author submitted first to the top journals, a lot of authors are going to have to devote a very long period of time until they actually obtain an offer. Thus, authors would have to have some realism about their publication chances.

Some journals effectively are imposing no-shop policies by extending exploding one-hour offers. The problem with this is that it is a game higher-ranked journals can more readily play. Unless many journals collectively agreed to do this, faculty could avoid lower-ranked journals with an exploding policy. In any event, the policies of journals should be posted online, including with online submission systems. This should be part of a basic set of available statistics, such as time to publication.

Cheating should be deterred, if not punished altogether. The system can be arranged to only allow one offer to be extended. Journals should be able to blacklist authors who fail to accept offers and publish elsewhere. Ideally it will never happen.

Adopting a system like this would be a game changer. It would lower the flow of articles to journals so that editors could deliberate

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225. In the Wise survey, both students and professors generally opposed a proposal requiring authors to accept offers once they are made. Wise et al., *supra* note 14, at 64.

sensibly over what sits in their pile. It might take a bit longer to get articles considered, but hopefully the cycles of submission would disappear, flattening things out. This one, single (albeit) dramatic change would be a big step toward sanity.

C. *Adding in Peer Review*

The system would be better yet if there were peer review. There is wide support for this; the devil is in the details. But given the breadth of support, we ought to figure those details out.

1. *Editors (and Faculty) Want More Faculty Input.* It is both gratifying, and not that surprising, to learn the extent of student interest in having greater faculty involvement in the article selection process. Students don't want to be told what to do, but as students who created the University of South Carolina School of Law's Peer Reviewed Scholarship Marketplace (PRSM) point out, input simply "empowers" the students to make better decisions themselves.<sup>226</sup> It also likely increases the pedagogical value of law review. And it will make law review more of a collaborative faculty-student enterprise. It is difficult to see how this could be anything but a plus.

All evidence suggests this sort of faculty input is welcome. Current and former editors point out that they do (or did) seek out faculty advice whenever they felt it would be useful.<sup>227</sup> "[C]apable editors know when they reach the limits of their substantive knowledge, and then seek faculty advice," point out the Chicago Editors sagely.<sup>228</sup> In the Wise survey, every group polled preferred that students choose articles after peer review, and large majorities wanted peer review.<sup>229</sup>

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226. Zimmer & Luther, *supra* note 26, at 961.

227. John Kester, recalling his service on the *Harvard Law Review*, wrote that "law reviews . . . used to be peer-review journals of a sort, through faculty osmosis." John G. Kester, *Faculty Participation in the Student-Edited Law Review*, 36 J. LEGAL EDUC. 14, 16 (1986). Professors would "comment on manuscripts received . . . critique final drafts of student notes, and . . . suggest worthwhile topics for student writing. . . . Accepted or not, however, faculty advice was weighed." *Id.* at 14–15. Other editors have expressed similar attitudes on faculty involvement. See, e.g., Nichols, *supra* note 26, at 1128 ("[F]aculty advice would be an invaluable, and in many instances a predominant factor in the equation leading to publication."); Saunders, *supra* note 26, at 1668 ("[A]t the *Duke Law Journal*, editors frequently seek the opinion of faculty members when we are uncertain about the merits of a particular article or its place in the context of prior scholarship."). In my survey, 70.6 percent of editors said that a faculty recommendation of an article would play a role in their selection decision. See Appendix, fig.4.

228. Articles Editors, *supra* note 65, at 554.

229. See Wise et al., *supra* note 14, at 57–58.

Indeed, peer review was the second most frequently chosen reform.<sup>230</sup>

The only reason there was not peer review, commentators noted, was logistical. Two problems played prominently. The system of multiple submissions was thought to be a significant if not prohibitive obstacle.<sup>231</sup> And there was great skepticism that faculty would be willing to do the necessary work.<sup>232</sup> But if these could be conquered, then students seemed as game as anyone to move to a system of peer review.<sup>233</sup>

2. *Peer Review Is Possible.* There's no doubt about it, achieving peer review in the law journal world is going to be difficult. But this is a profession that, as Rhode pointed out in her own piece on law review reform, has made headway on many social issues.<sup>234</sup> Surely progress can be made on this one.

What's needed is some out-of-the-box thinking about what peer review means, and how to pull it off. Jonathan Zittrain once suggested that the *Harvard Law Review* editors convene something like a hackathon in the library and have faculty plow through a pile of submissions at one time.<sup>235</sup> But there is no reason this could not happen online.

There has been one mighty effort at peer review in the law journal world, and though it has not attracted great attention and has its difficulties, it is a model of what can be achieved. In 2008 the editors of the *South Carolina Law Review* decided to experiment with peer

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230. *Id.* at 67.

231. *E.g.*, Harrison & Mashburn, *supra* note 95, at 85 (“Thirty or more law reviews may be asking to have the very same article reviewed. It is not an exaggeration to expect scores of peer reviewers to all be examining the same article.”).

232. *E.g.*, Leibman & White, *supra* note 27, at 408 (“[F]aculty members are perceived as too busy to review any but the more promising manuscripts . . . . [Some editors] reported a spotty response with some professors’ desks described as ‘black holes’ from which nothing ever emerged.”); Baude, *supra* note 121 (“Peer review and training take faculty time. Are enough faculty willing to spend time doing that rather than writing, consulting, teaching (or leisure)?”). In my survey, several students reported that they had “difficulty in obtaining faculty review of articles.”

233. *E.g.*, Leibman & White, *supra* note 27, at 424 (“When we presented [a peer review] proposal to our interviewees, we were surprised to find a large majority in favor of its implementation. . . . [M]ost felt the work of the journals would be aided, the quality of manuscripts would improve substantially, and the autonomy of the student journals would not be seriously compromised.”).

234. *See* Rhode, *supra* note 78, at 1357.

235. *See* Olkowski, *supra* note 23.

editing.<sup>236</sup> That experiment was successful enough that they created a network, called PRSM, for journals to share reviews.<sup>237</sup> The process included reviews by judges and lawyers.<sup>238</sup>

The discussion that follows has two parts. First, there is a look at what peer review, understood capaciously, might mean. Then, I tackle the logistics of how to integrate peer review into the article selection processes. I won't claim to have solved the problem, nor do I think there is one single solution. This is going to require journals and the electronic services that handle submissions to come to some agreement to make some form of implementation work.

*a. What Is Peer Review?* The first thing we might want to consider in thinking about peer review is that it is “peer” not “professor.” There are many articles for which an appropriate reviewer may well be a practicing lawyer or judge. There are plenty of academic-leaning professionals in law. There also are constant complaints that academic scholarship is not sufficiently germane to the bench and bar. Although I tend to believe these latter complaints are often quite misplaced, widening the peer-review circle may bring folks together. I, for one, would be curious to see some of my own work reviewed by those outside academic circles. At the very least, work that plainly is written for practitioners or the bench could be reviewed by those audiences. The PRSM system uses both practitioners and academics.<sup>239</sup>

The next thing we should think about is how peer review responsibilities could be shared throughout the law review system. Zittrain's idea no doubt was constrained by the assumption that Harvard faculty would be reviewing articles for their law school's review. But why should the work that goes into these peer reviews be shared so sparsely? In the PRSM system, participating journals share reviews with one another.<sup>240</sup> If reviews are obtained on a piece, those reviews should travel with the piece so other editors—who could of course seek additional reviews—can see what has been said.

It also is wrong to assume that legal academics will be resistant to conducting peer reviews. We do them already. The fat vanity footnotes of current submissions reflect the fact that law faculty spend a lot of

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236. Zimmer & Luther, *supra* note 26, at 966–67.

237. *Id.* at 972–73.

238. *See id.* at 968, 973.

239. *See id.* at 969.

240. *See id.* at 972–73.

time reading one another's work. If we move to a system of peer review, it is possible that faculty simply can reallocate some of our time from the peer-to-peer reviews we see reflected in vanity footnotes, to reviewing works for law review editors. Indeed, we could fend off the many requests we get by pointing out our peer-review work.

Finally, we should be realistic about what peer reviews necessarily entail. Anyone who has peer reviewed or been peer reviewed is familiar with lengthy letters about methodology and substance. These can be great—and sometimes also can be frighteningly off base—but it is not clear that reviews need to be so elaborate, or even take that form. Recognizing that the goal is in part faculty input on what gets published, and in part pedagogy for law review editors, it would be a great service if peers gave their impressions, but also referred editors to other works they should read in making their decisions. The goal here is in part to start a dialogue with the students doing the selecting, guiding them to better choices (not necessarily making those choices for them).

*b. Pulling It Off.* Now, to logistics.

To begin with, there is the question of whether reviews should be blind or not. Double blind review often is felt to be the gold standard.<sup>241</sup> Although the author should be blind to the reviewer, it is less clear that the reviewing author should be blind. The theory is that reviewers will be more candid if their identities are obscured. Perhaps this is right, and maybe it is necessary anyway in order that law review editors aren't unduly swayed by the identity of the reviewer. But if a particular journal requested the review, it will know who the author is. And reviewer identity may help judge the value of the review.

There are other ways to go about this entirely. One way to do peer review is to set up an online system in which pieces are posted when it is time to review them, and then reviewers sign up to review articles

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241. See, e.g., Jo Ann Carland, James W. Carland & Carroll D. Aby, Jr., *Proposed Codification of Ethicacy in the Publication Process*, 11 J. BUS. ETHICS 95, 98 (1992) (describing the double blind review process as “highly lauded”); Lee et al., *supra* note 18, at 11 (“It is widely believed that double-blind review ensures greater fairness for authors while continuing to protect reviewer identities to promote frank commentary.”); Gaell Mainguy, Mohammad R. Motamedi & Daniel Mietchen, *Peer Review—The Newcomers’ Perspective*, 3 PLOS BIOLOGY 1534, 1534–35 (2005) (“[T]he inescapable conclusion is that [double blind peer review] performs at least as well as the traditional peer-review process. We propose here that [double blind peer review] is a better system because, in addition to being a reasonably fair process, it also bears symbolic power that will go a long way to quell fears and frustrations, thereby generating a better perception of fairness and equality in global scientific funding and publishing.”).

they wish. This sort of open review is increasingly common.<sup>242</sup> There are plusses and minuses here, from worries about friends helping friends (or rivals trashing rivals), to the fair distribution of the reviewing task. But even if a system like this is not used, once a journal obtains a review, if that journal decides not to publish the article, there ought to be a way to make the review so other journals can consult it.

There are ways to make peer review happen. The journals can team up with the Scholasticas and ExpressOs of the world to arrange for reviews to be posted along with articles, and to have the reviews travel with the article. There could be an online scoresheet that shows how many reviews any given faculty member has done, to make sure we do our fair share. Whatever form it takes, it feels incumbent upon the leading law journals to organize themselves to start getting and obtaining faculty reviews on a regular basis, at least for any piece they seriously consider publishing. And for reviews down the ladder to do the same as pieces come to them.

To be clear, this would be a large cultural change that is unlikely to happen easily and has its own pitfalls. There are worries about peer reviewers advantaging friends, or other sorts of gaming. Still, if the status quo is unacceptable—and I believe it to be—then it is time to look for alternatives and experiment with implementing them.

#### *D. Editing Can Be Win-Win*

Moving from selection to editing, there is also room for much improvement. At present, the editing process has its deep frustrations for authors and journals alike. Journals go through elaborate many-layered processes of editing pieces, with an enormous amount of the effort directed at cite checking and Bluebooking.<sup>243</sup> Authors are

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242. See Lee et al., *supra* note 18, at 11–12 (listing journals that have implemented or experimented with open review).

243. In my survey, 82.3 percent of editors reported that their journal's production process includes three or more discrete rounds of review. See Appendix, fig.11. Most editors reported that their journal's production process includes one or more rounds of edits by the articles editor and/or senior editors after the cite and substance check, and most said there was a round of below-the-line edits by a specialized team of Bluebookers. See Appendix, fig.13. Reported one student:

[A]fter substantive suggestions by article editors and senior articles editor, there's a staff citecheck which includes above and below the line nonsubstantive edits and bluebooking. There are then two more rounds of nonsubstantive edits by two executive editors. There is then a staff proof, a senior board proof, a managing editor proof, and an EIC proof.

*Id.* Said another:

Each article is edited by a member of our Final Editing Team (which includes 5 Seniors Articles Editors, EIC, Managing Editor, & Chief Articles Editor) 6 times. In addition,



confronted with a barrage of changes, many of which they may well reject—and are invited to reject.<sup>244</sup> Not infrequently, the editing process results in conflict between the journals and their authors. Indeed, in my survey, some two-thirds of the journals reported conflicts with authors during the current cycle.<sup>245</sup>

Improvement can be had, and relatively easily.

1. *The Goal.* It's worth pausing to recall what the goal is here, because if anything seems clear it is that the journal editing process has become entirely too elaborate. Journal editors are constantly refining their systems, though change often seems to be for change's sake.<sup>246</sup> The result is a confusion of “first line” and “second line” editing, of cite and substance review too remote from the editing of the text, of countless editing rounds.

The goal is a simple and delicate one: to take an author's work, and make sure it is clear and to the point. In this regard, Principle 1 reigns supreme: journals must stop accepting pieces the editors cannot follow and understand. Once a piece is accepted, the editors should flag rough spots for the author and give the author a chance to smooth them over before editing commences. From that point, the goal is to edit ever so gently. It is not about imposing the editor's voice or views. It is about not obscuring the author's. Editing is an art, the gentleness of which should be evident from the nature of the redline that is passed to the author. This need for gentle attention is particularly true when it comes to editing above the line.

2. *Deference Means Not Changing Things in the First Place.* Journals often say they “defer” to authors.<sup>247</sup> This deferential stance is the result of longstanding struggles between authors and journals, and appears to be motivated in particular by many concerns and complaints

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a cite-checker performs an edit, as well as an Articles Editor. During this process, the author has 2 rounds of author edits, at which point we provide the author with a redline and ask the author any questions that have come up. At the end, the EIC individually reviews each article.

*Id.*

244. It is little surprise, then, that the students in my survey reported that the most common nonschedule related author complaints were “the volume of above-the-line edits” and “lack of deference to author's voice and/or stylistic choices.” See Appendix, fig.21.

245. See Appendix, fig.20.

246. Indeed, most students in my survey reported that their journal had attempted to reform its editing process in the prior three years. See Appendix, fig.15.

247. Note, for example, the Chicago Editors' policy of “substantial deference.” Articles Editors, *supra* note 65, at 558.

leveled by authors in the 1990s.<sup>248</sup> The notion is that tensions will be minimized by allowing the author final say.

Unfortunately, what has developed is an utterly misguided view of “deference,” in which journals change everything they wish, and authors are invited to reject the changes and put it all back if they don’t like it.<sup>249</sup>

Deference doesn’t mean a game of switch and switch back again; it means not changing anything in the first place that is not absolutely necessary. Recall the anguish expressed by faculty authors who confront convoluted redlines. That is exactly the problem. Authors from Sanger to Althouse to Epstein urge letting go of the felt need to change everything that is not exactly right to the editor’s ear.<sup>250</sup> It is the author’s ear that matters. It is telling that in surveys, professors regularly point to student editing as a problem, and student editors express the view that they are improving pieces.<sup>251</sup> If the authors don’t think so, it’s not certain it is an improvement. For the umpteenth time, if the journals don’t like the author’s writing, don’t accept the piece.

Law review editors should strive to change as little as possible, not the opposite. In my experience, peer-reviewed journals and book publishers edit far more gently than law review editors. Given the relative experience of the editors, this is telling.

The job of the journal is primarily to save an author from his or

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248. Hibbitts, *Last Writes*, *supra* note 2, at 650 (noting the advent of editorial deference policies in the mid-1990s).

249. See Saunders, *supra* note 26, at 1685–86 (stating that it is “absolutely improper” for an editorial board to “override the author’s control of the final draft,” and that edits should be treated as “suggestions”). Similarly, Martineau notes that “[o]ne of the major criticisms of law reviews and legal journals has been that the student editors make too many substantive and stylistic changes to the author’s article.” Martineau, *supra* note 32, at 9. He insists that journals must “defer to the wishes of academic authors.” *Id.* at 6. But then he says “student editors should still make suggested changes to the style, wording and substance of an article.” *Id.* at 9. It is just that “the author should have the last say” on incorporating those changes. *Id.*

250. Althouse, *supra* note 77, at 81 (“Chances are high that sentences assume an ungainly form when the writer needs to express a complex idea. An editor oriented toward smoothing out the prose can easily and unwittingly jar the meaning of a precariously balanced sentence.”); Epstein, *supra* note 23, at 92 (“[T]he important task of editing a journal is to preserve the distinctive craggy voice of each author for the benefit of readers who quickly tire of homogenized articles written in standard corporate style.”); Sanger, *supra* note 64, at 524 (“When disputes arise on matters of felicity, law review editors should defer to the author’s judgment.”).

251. Although the second-most common author complaint as reported by students was “lack of deference to author’s voice and/or stylistic choices,” more students said there was *too much* deference to authors than said there was not enough. See Appendix, fig.21 & 23. The Wise survey found similar results. Students generally felt that law reviews do a good job of editing articles; professors believed the opposite. See Wise et al., *supra* note 14, at 46.

her errors, not to rewrite pieces in the way the editors think best. It cannot be said enough times: if the original work is that flawed, reject it.

3. *Fewer Chefs in the Kitchen; Only One Lead Editor Throughout the Process.* A primary cause for the stew that comes back to authors is the number of hands that touch a manuscript. We've seen above why this occurs, which is that every player on the team feels like he or she must spend some time on the field.

Articles should have one lead editor for the entire editing process. That person should be the article's primary editor and the author's primary contact. Ideally an author would not deal with anyone else. As one Yale editor makes clear, involving several editors can "result in mixed signals" and give rise to "unnecessary author-journal tensions."<sup>252</sup> So too did many respondents in my survey. Yale recommends a "lead editor" who is the "journal's sole contact."<sup>253</sup> The primary editor should check and approve every single change at all stages, with the goal of changing only what is necessary (if not absolutely necessary, which should be redundant).<sup>254</sup>

Indeed—and this is important—the single editor policy not only should, but must, include cite and substance checking. There seems to be the view that editing above the line and editing below the line are different endeavors, properly assigned to different people. But what's below the line is support for what is above it; the two should be edited in tandem. How can one edit the text without knowing whether it is carefully matched to support? As Christian Day points out, when it comes to checking citations, "having someone know the whole article accomplishes this best."<sup>255</sup> (Copyediting, to get citation form right, is a different matter; this can be done separately at the end.)

4. *Fewer Trips Back to the Kitchen; Fewer Editing Rounds.* Commentators often note the difficulties created by the number of editing cycles each piece endures. I sometimes see pieces come back

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252. Friedman et al., *supra* note 150, at 1160.

253. *Id.*

254. *See id.* ("The lead editor can incorporate the opinions of the article's edit team and discuss additional changes with the executive editor and the editor-in-chief."); Saunders, *supra* note 26, at 1684 ("[A]rticle editors should review all author queries and all editorial changes made by other editors in the law review hierarchy before the suggested changes are sent to the author.").

255. Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U. L. REV. 563, 578 (2007).

four and five times. In my survey, editors indicate that the norm is three times.<sup>256</sup> And too often these are editing rounds with new editors doing their thing.

What authors want is one serious editing round in which the text and citations are all edited at one time. Then, they can sit down with the piece and read it carefully. To be clear, of course there is buffing and polishing following this. There will be typos and mistakes that get caught in a careful second round of reading. But that second round should be only about the little mistakes. About smoothing. And then there should be one final read of a nearly clean manuscript.

### *E. Some Final Notes*

That's largely it, but there are a couple of final things, both of which relate to technological change and ways to save resources. One need not feel strongly about these, but they are the future.

1. *Using Dropbox or Its ilk for Cite-Checking.* Bradley Martineau complains about the laboriousness of the "book pull."<sup>257</sup> Book pulls occur when review members gather all the cited sources in one place to cite check the article. It's work, it's annoying, and it removes all these books from the library where others may want them.

The question is why are we doing this at all, when more and more authors are working with pdfs, and simply could grant access to our Dropbox folders, which contain most of the sources. Annotated, perhaps, so it is easy to find what is needed. Using Dropbox folders could eliminate most of the work of the book pull.

Indeed, the relevant question is why more authors are not working without paper. I use a simple work flow in which my assistant or research assistants gather articles I want and place them in Dropbox; I download them to my iPad and mark them up in iAnnotate (but there are other apps available); and then I upload them back to Dropbox. It makes writing super easy; I can put the source up on my big monitor right next to the text I'm writing. This not only has proven comparable to working with paper; it is better. My only regret is that it is not easier

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256. Specifically, 47 percent of students said their journal returns pieces to authors three times; 20.5 percent said their journal returns pieces to authors four or more times. See Appendix, fig.14. The Wise survey found that students generally believed that "[l]aw reviews do a good job of limiting the amount of time authors spend in making revisions to articles." Wise et al., *supra* note 14, at 46. Professors disagreed. *Id.*

257. Martineau, *supra* note 32, at 2-3.

doing this with books.

2. *Why We Are Printing Books*. Which brings me to the last recommendation, really a question: Why are we still printing bound volumes of law reviews? Sure, they are attractive; it may be we want copies for editors to display proudly on their shelves. But most people are not working out of bound volumes, and even if they want hard copy it is easier to just print a pdf off the journal's website.

A blog post on the issue suggested going one step further. Just as the revolution in music publishing has made the concept of an "album" somewhat obsolete, as most people buy and listen to songs, so too in law reviews.<sup>258</sup> Volumes and issues, the blog post suggests, are relics.<sup>259</sup> I'm not entirely sure; if nothing else they are nice ways to organize and find articles. But the broader point persists: if most people are not buying or reading on paper, then reviews could actually "publish" articles when they are ready and not all at one time. Among other things, this could help with the point, made above, that journal editorial boards should look beyond the horizon of "their" volume and view themselves as part of a continuing exercise.

There is no denying that moving away from paper is going to change the culture, one part of which is (was?) the exchange of reprints among scholars. Sending off your reprints became a sort of calling card, letting the world know what you were doing. (I used to send off my stack with an annual letter, not unlike the holiday letters we share with friends.) In truth, though, the whole thing got out of hand, at great expense, including to trees. I started to get reprints in fields far from my own, from people I did not know at all. (Either variant on this makes sense; this one did not). It is not at all clear that sending pdfs is likely to get the same reception, which is unfortunate. With paper copies I suspect many people thumbed through very briefly, and I'm not at all sure that is what will happen.

But things change; that's sort of the point here. Inertia has carried us into some very bad places. It's true we are a conservative profession. Still, bad habits are just that and there are plainly opportunities here for improvements.

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258. Kevin O'Keefe, *WordPress Operated by Law Schools Should Replace Today's Law Reviews*, ABOVE THE LAW (Aug. 9, 2017, 5:17 PM), <https://abovethelaw.com/2017/08/kim-jong-un-has-much-to-teach-pentagon-about-speed-gen-hyten/> [<https://perma.cc/Z87N-S7Q9>].

259. *Id.*

## CONCLUSION

I hate the conclusions on law review articles, and now I finally get to say so. They usually are regurgitations of what came before, and cryptic ones at that. Sure, if you want an extensive conclusion that is part of the article, by all means use that literary form. It's the author's prerogative. But I've never seen the point of restating in two paragraphs what I've said in thirty or more pages.

That's the problem: on the editing end and thus too often on the writing end, we've become more about form than substance, more about footnotes than ideas, more about long exegesis instead of thinking aloud in a polished way.

This process really could be much better for all concerned. I won't claim writing law review articles will be fun, or editing them either. There are formats and styles I enjoy more. But this is where we come to trade ideas, and that's why I continue to write law review articles. I just wish we'd all shake off the woolly nonsense and focus as much as possible on the idea part.

## APPENDIX

The objective of the study was to gain insight into the selection, editing, and administrative practices of U.S. flagship law reviews and to identify students' thoughts and concerns about the current system. The survey questions focused both on journal-specific issues (*e.g.*, source of journal funding, number of offers extended per cycle) and on the preferences and practices of individual editors (*e.g.*, concerns about the editing process, what factors influence selection decisions). Editors were also able to supplement their answers to certain questions with written comments, and at the end of the survey editors were given an additional opportunity to discuss any other journal-related issues.

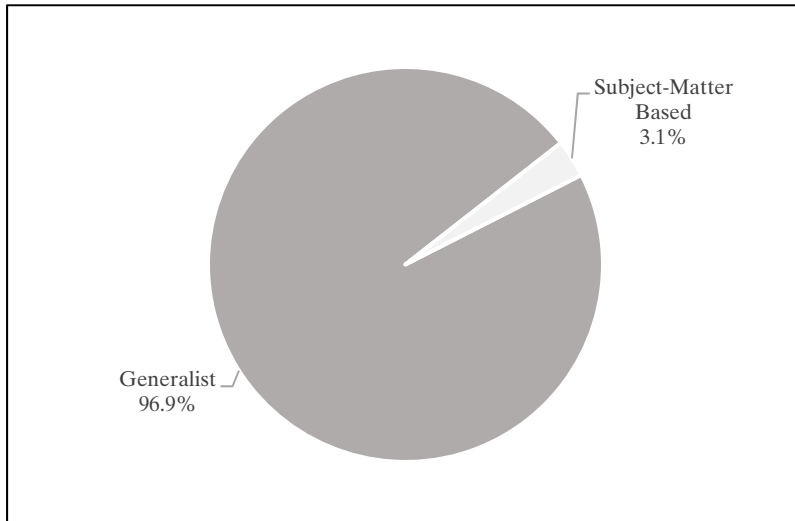
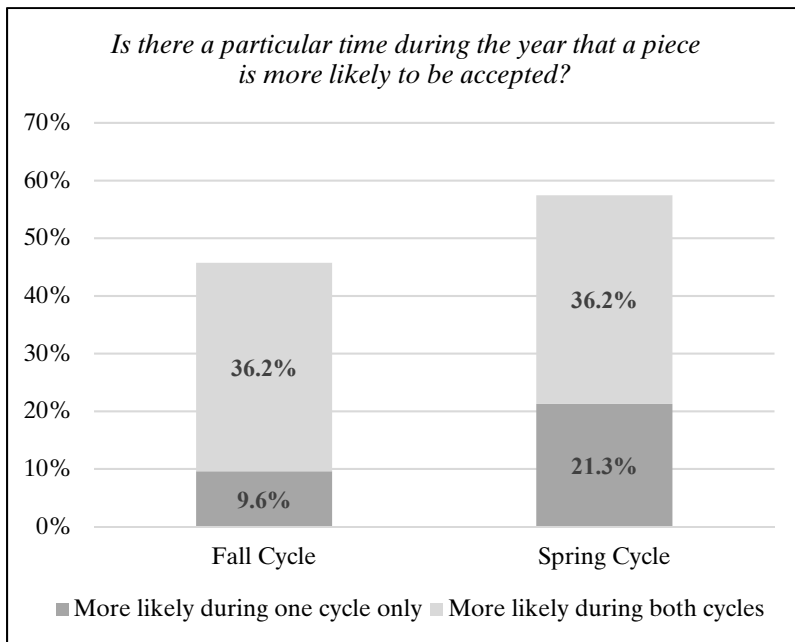
The population for the survey was current- or previous-year board members of U.S. flagship law reviews. An email was sent to the flagship law review of each ABA-accredited law school explaining the purpose of the study and asking for two editors to complete an online survey. The survey was active for several weeks and was accessible through a link contained in the email. In total, 165 surveys from ninety-eight journals were submitted. After removing twenty-three surveys that exceeded the two-survey-per-journal limit, 142 surveys were used in the study.<sup>260</sup>

For questions regarding the individual preferences of journal editors, all 142 surveys were included in the results. For journal-specific questions, only one submission per journal was included.<sup>261</sup> In calculating percentages, nonresponsive or blank submissions were removed from the denominator.

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260. Where a journal exceeded the two-survey-per-journal limit, incomplete surveys were removed in reverse chronological order until only two surveys remained. If a journal still had more than two surveys after incomplete surveys were removed, complete surveys were removed in reverse chronological order until only two surveys remained.

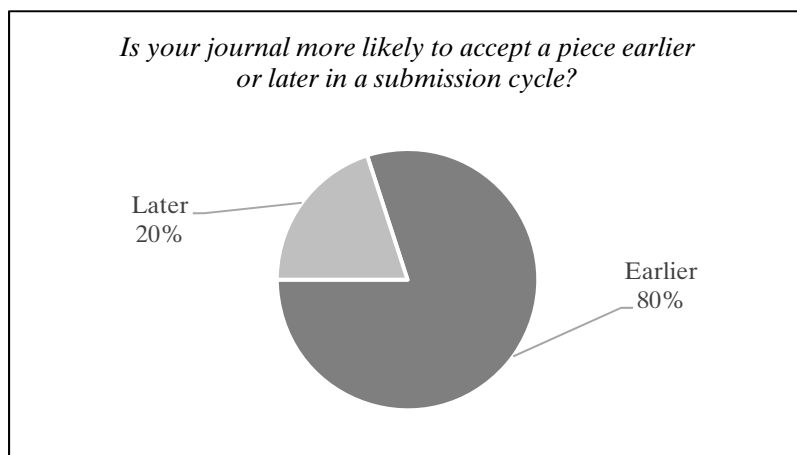
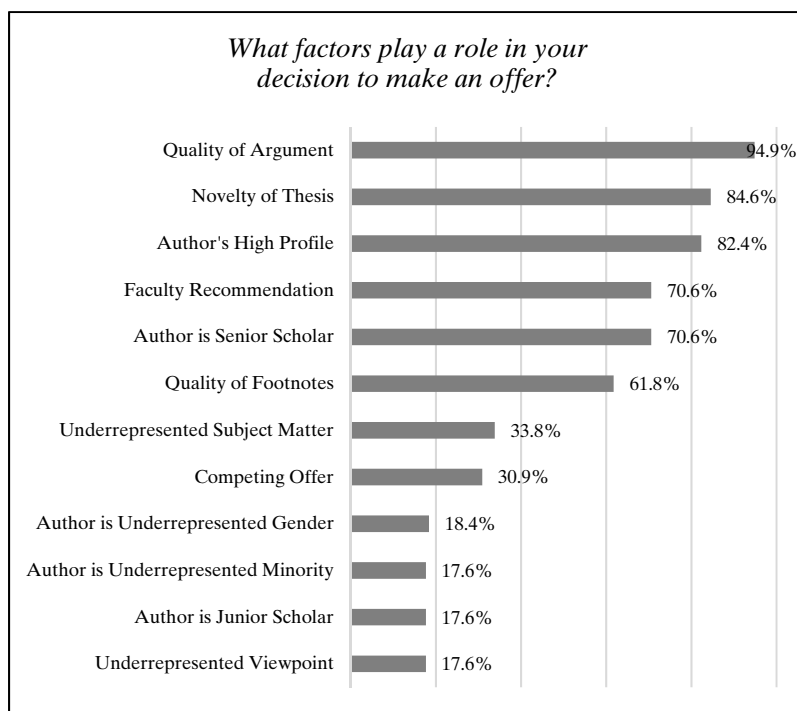
261. For journal-specific questions, the first chronological survey was used, unless the first chronological survey was incomplete and the second chronological survey was complete, in which case the second chronological survey was used.

FIGURE 1: JOURNAL TYPE<sup>262</sup>FIGURE 2: SUBMISSION CYCLES<sup>263</sup>

262. Ninety-eight responses.

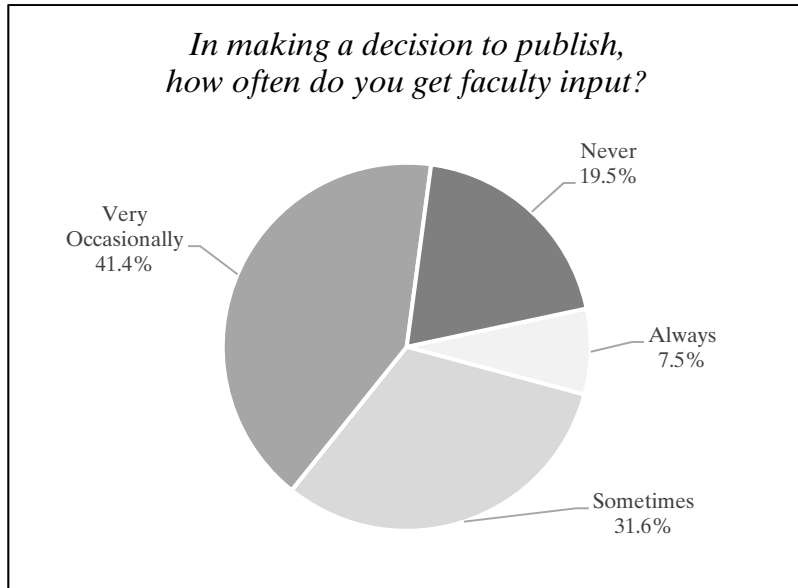
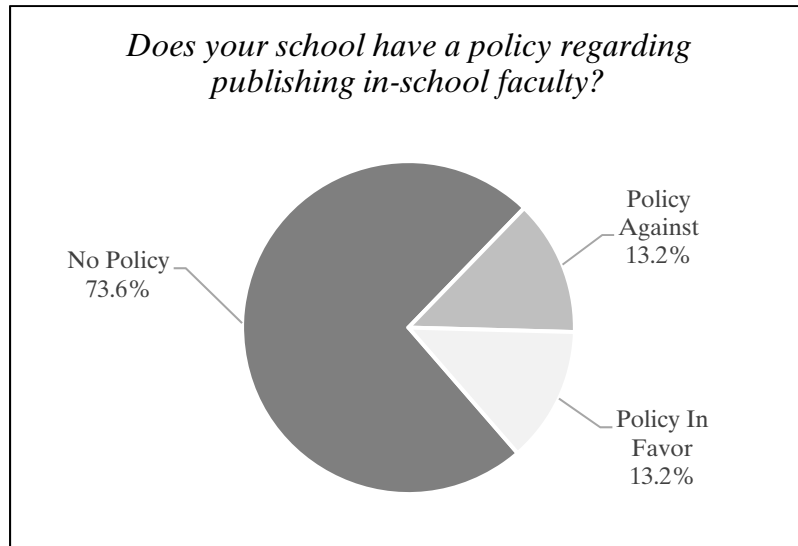
263. Ninety-four responses.



FIGURE 3: TIME OF SUBMISSION<sup>264</sup>FIGURE 4: PUBLICATION CRITERIA<sup>265</sup>

264. Eighty-five responses.

265. One hundred thirty-six responses.

FIGURE 5: FACULTY INPUT<sup>266</sup>FIGURE 6: IN-SCHOOL FACULTY POLICY<sup>267</sup>


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266. One hundred thirty-three responses.

267. Ninety-one responses.

FIGURE 7: PUBLICATION OF IN-SCHOOL FACULTY—  
FREQUENCY<sup>268</sup>

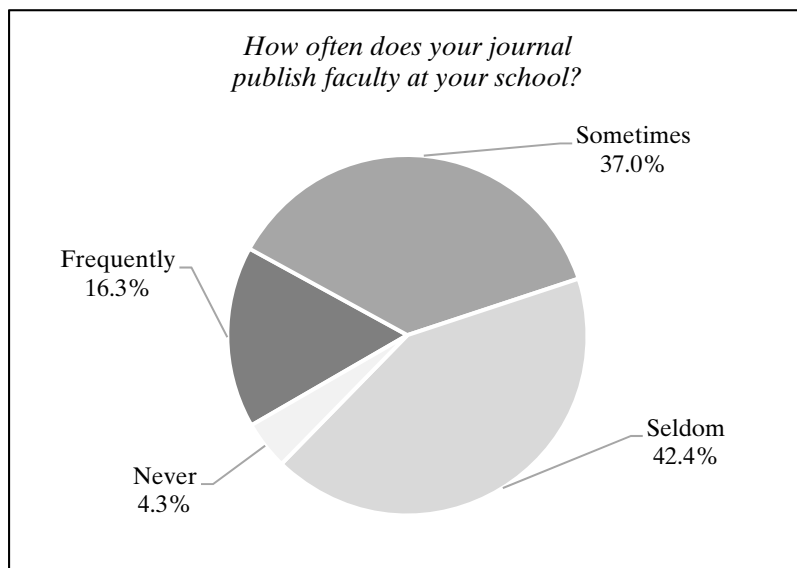
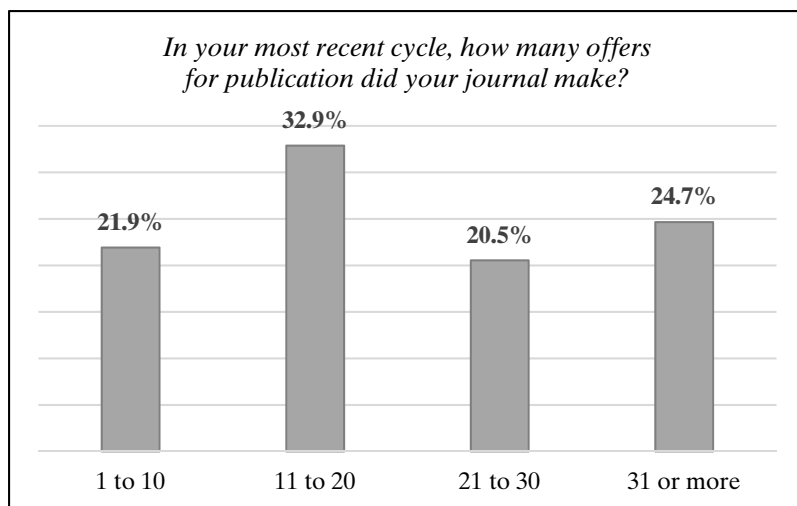
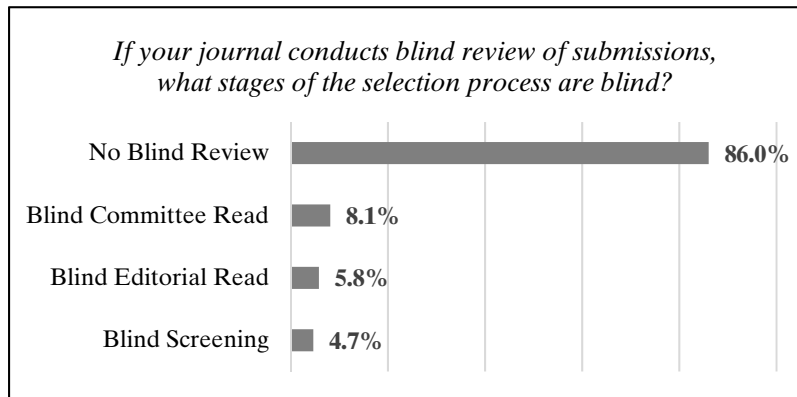
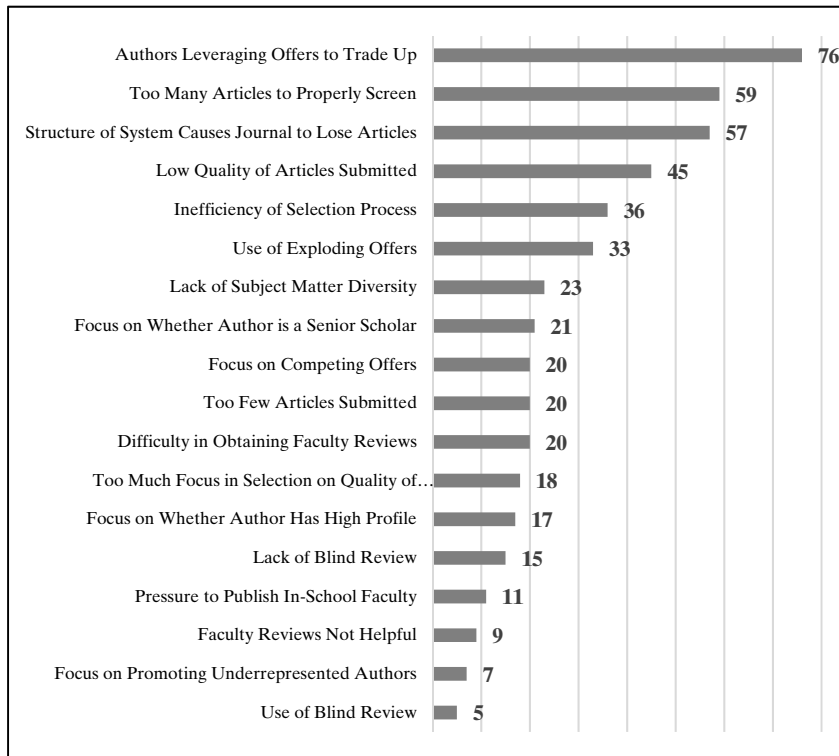


FIGURE 8: NUMBER OF OFFERS<sup>269</sup>



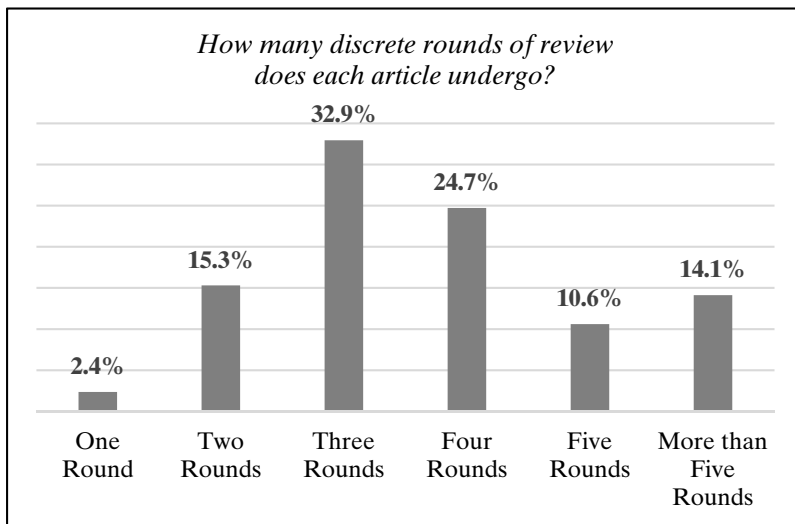
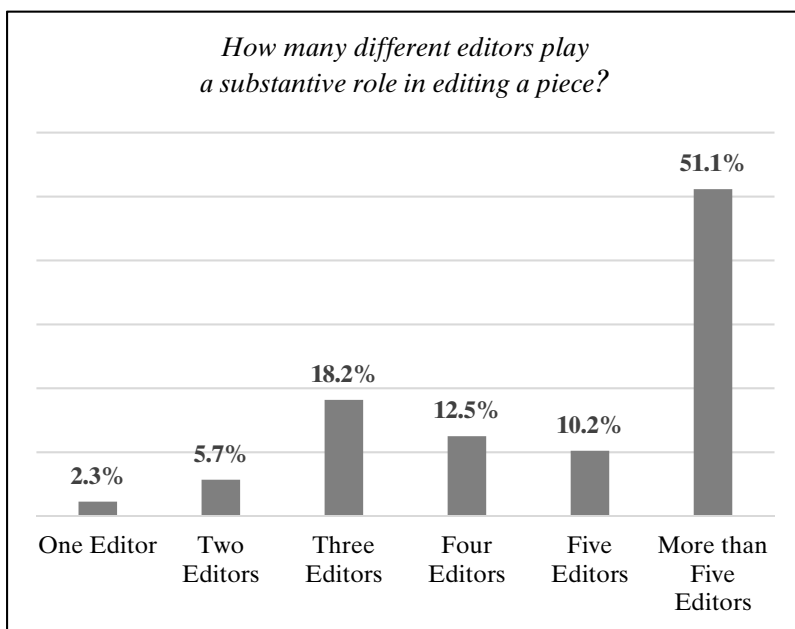
268. Ninety-two responses.

269. Seventy-three responses. Some editors responded to this question with a range; in these cases, the mean average was included in the survey results.

FIGURE 9: BLIND REVIEW<sup>270</sup>FIGURE 10: CONCERNS ABOUT SUBMISSION AND SELECTION PROCESS<sup>271</sup>

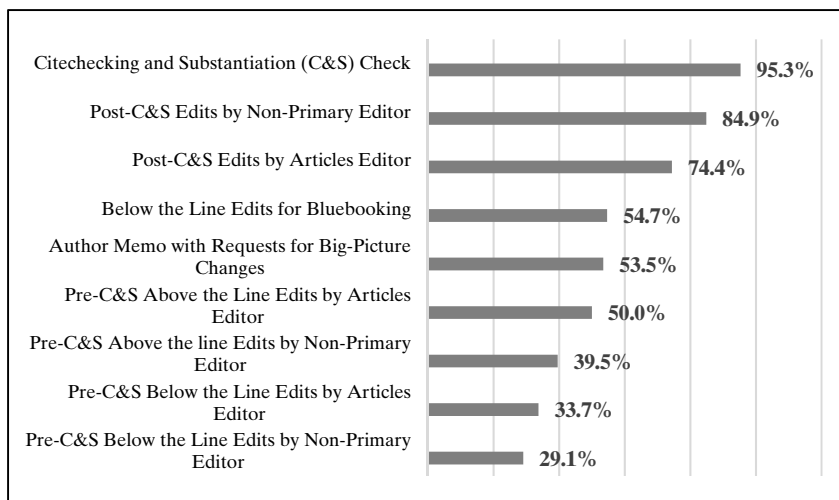
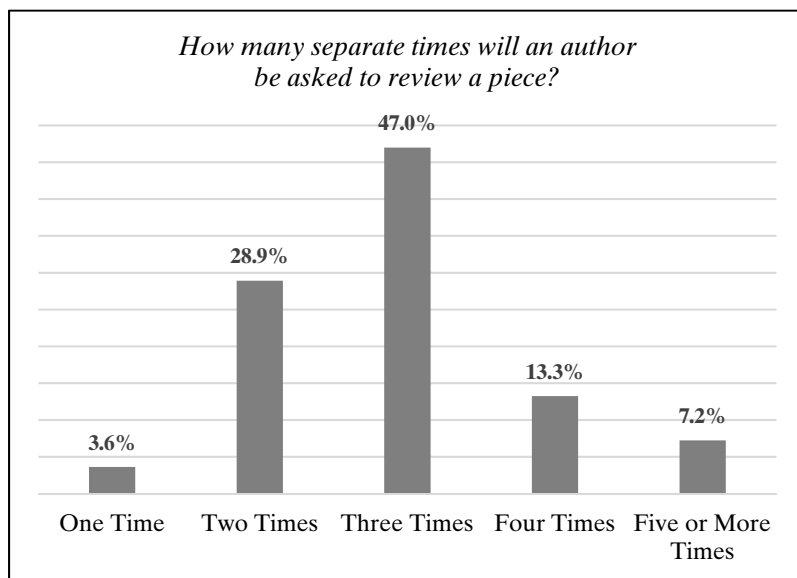
270. Eighty-six responses.

271. One hundred eighteen responses.

FIGURE 11: DISCRETE ROUNDS OF REVIEW<sup>272</sup>FIGURE 12: NUMBER OF EDITORS<sup>273</sup>

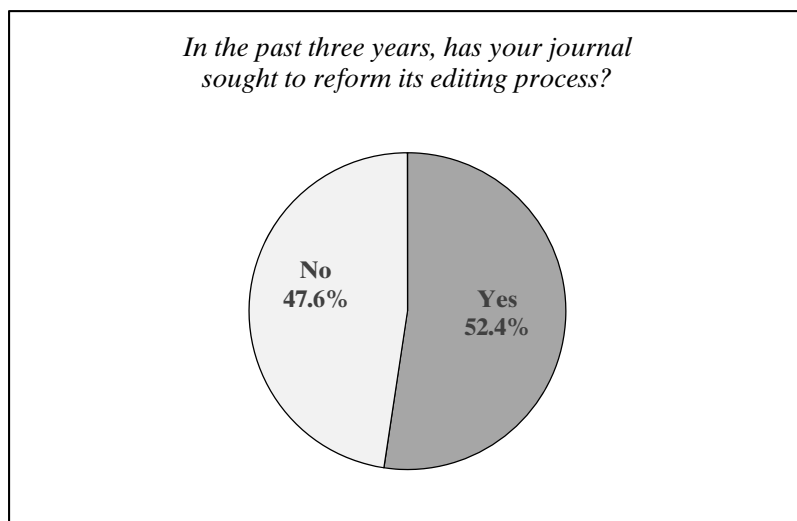
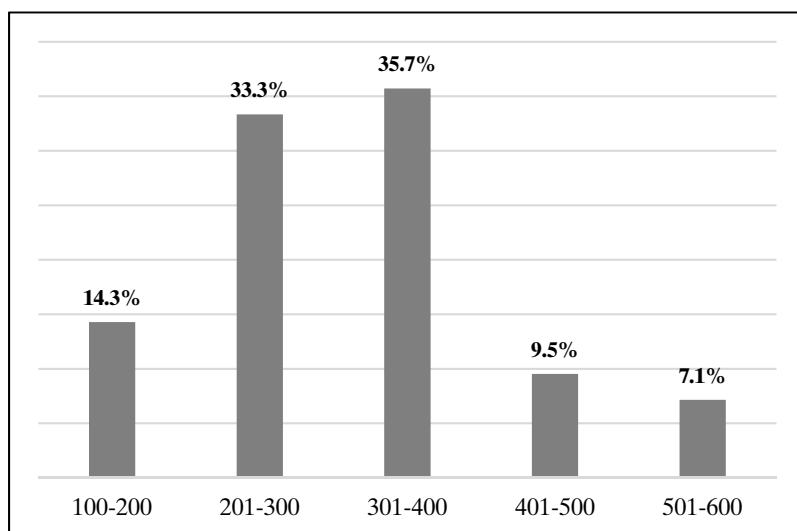
272. Eighty-five responses.

273. Eighty-eight responses.

FIGURE 13: STAGES IN ARTICLE EDITING PROCESS<sup>274</sup>FIGURE 14: AUTHOR REVIEW<sup>275</sup>

274. Eighty-six responses.

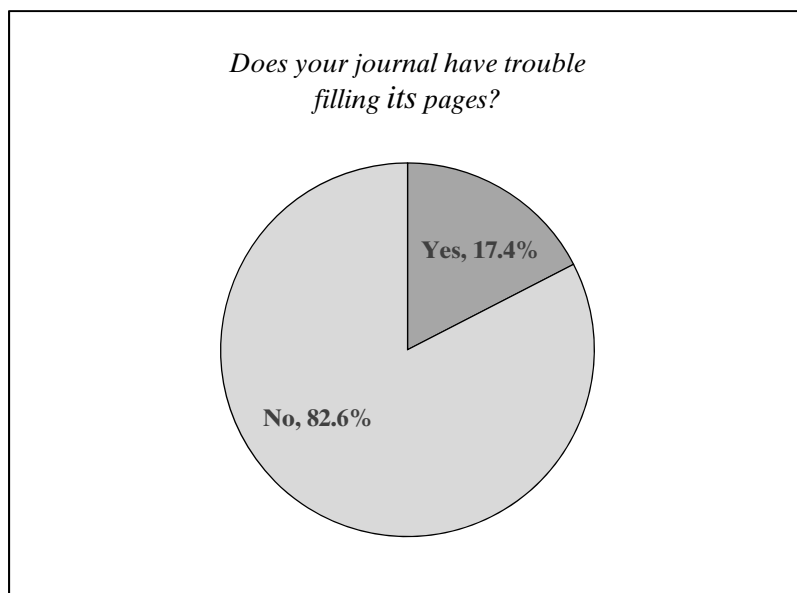
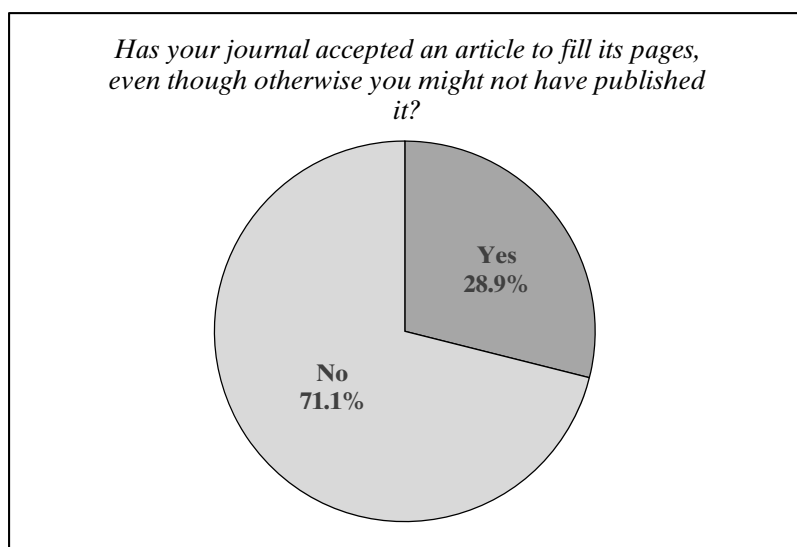
275. Eighty-three responses.

FIGURE 15: JOURNAL REFORM<sup>276</sup>FIGURE 16: PAGES PER ISSUE<sup>277</sup>

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276. Eighty-four responses.

277. Eighty-four responses.

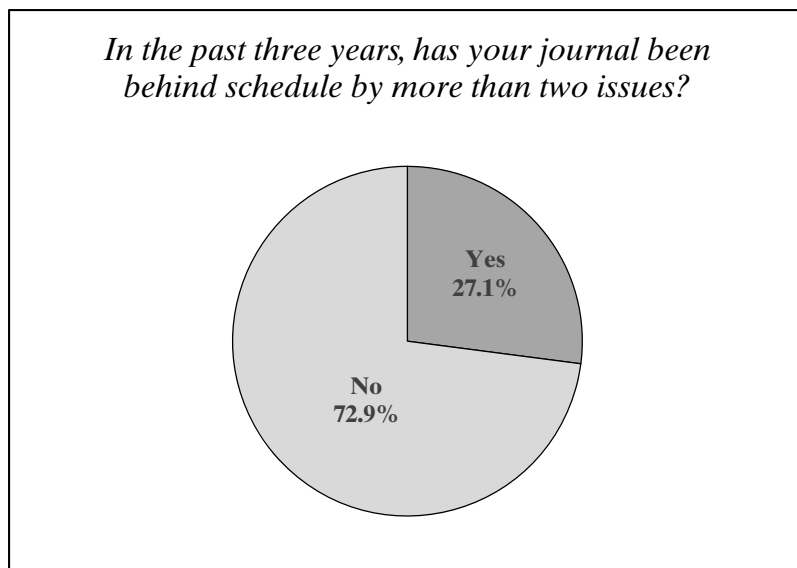
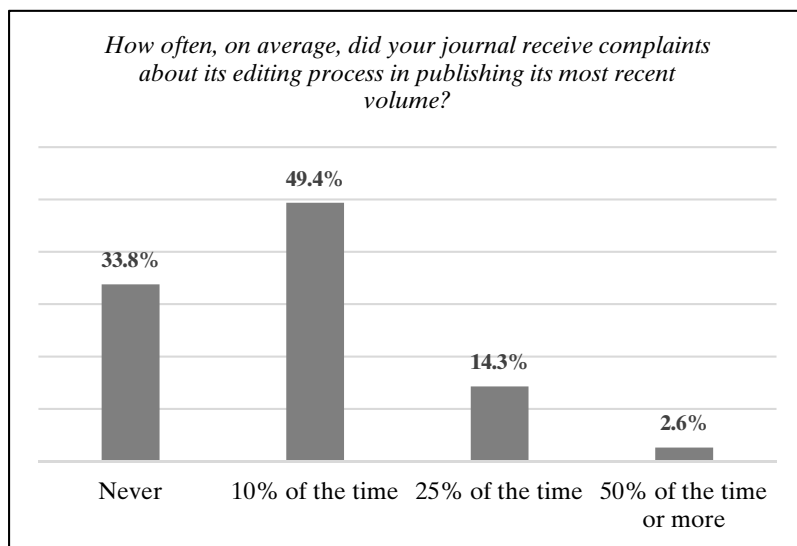
FIGURE 17: DIFFICULTY IN SLOTTING BOOKS<sup>278</sup>FIGURE 18: ACCEPTANCE OF ARTICLES TO FILL PAGES<sup>279</sup>

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278. Eighty-six responses.

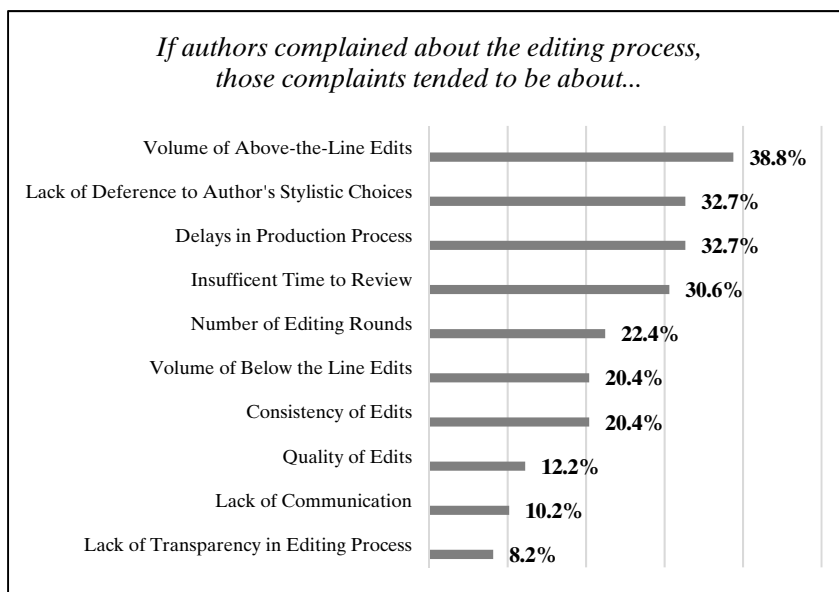
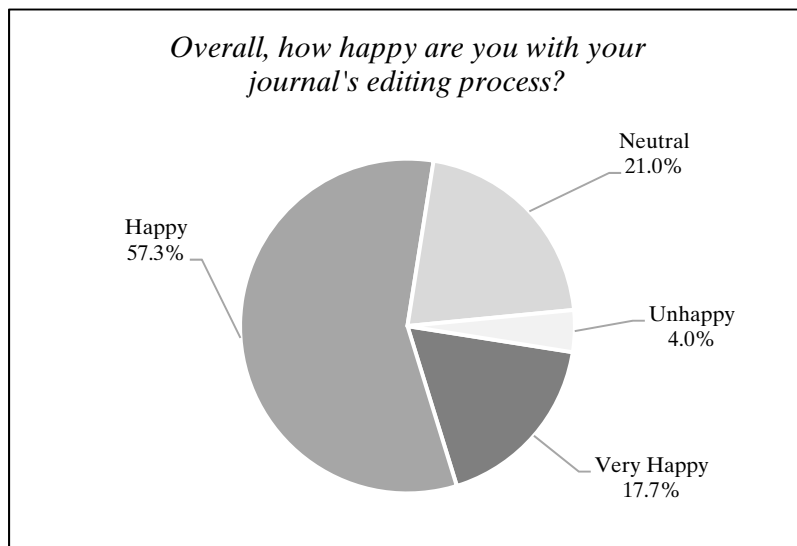
279. Eighty-three responses.



FIGURE 19: SCHEDULE<sup>280</sup>FIGURE 20: RATE OF AUTHOR COMPLAINTS<sup>281</sup>

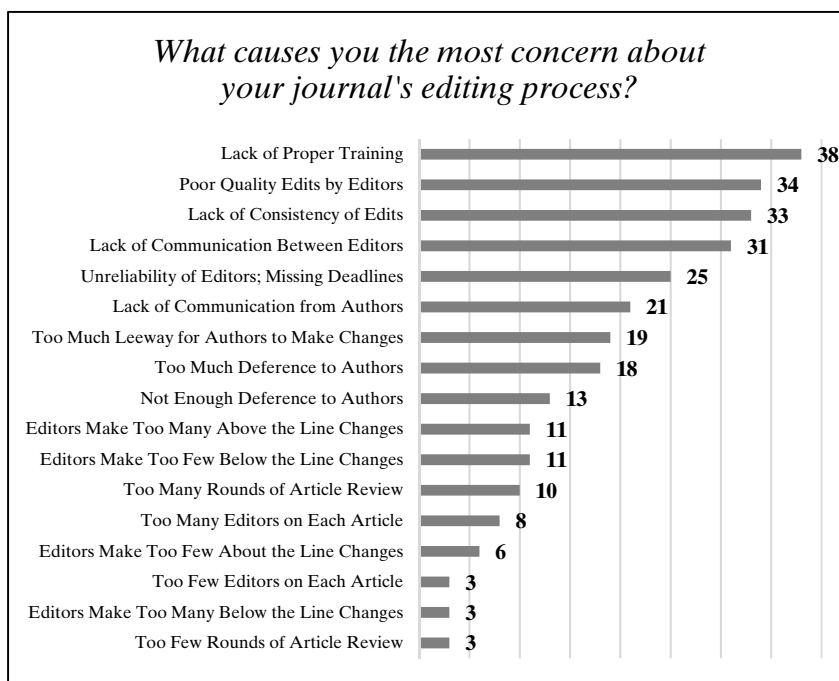
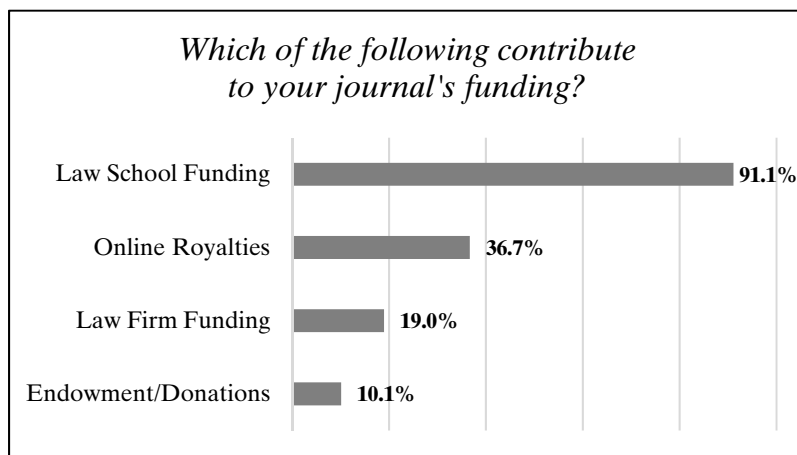
280. Eighty-five responses.

281. Seventy-seven responses.

FIGURE 21: NATURE OF AUTHOR COMPLAINTS<sup>282</sup>FIGURE 22: SATISFACTION WITH EDITING PROCESS<sup>283</sup>

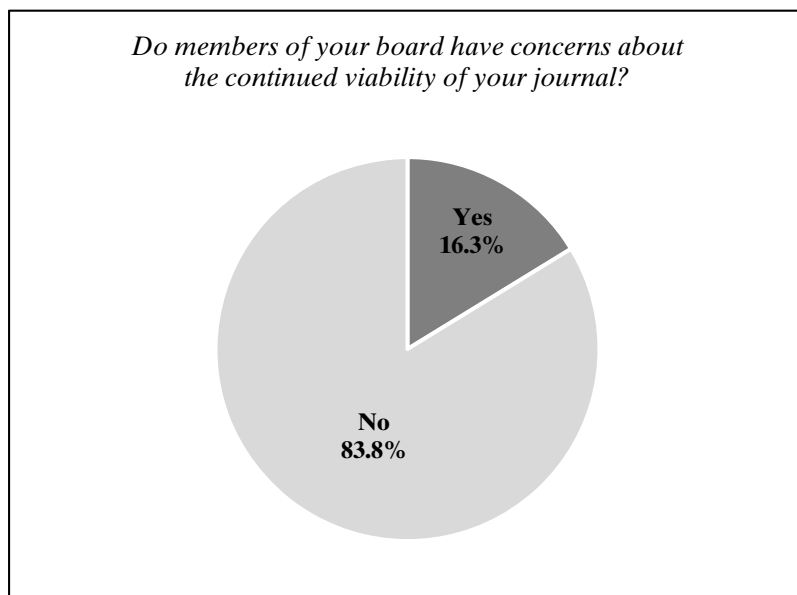
282. Forty-nine responses.

283. One hundred twenty-four responses.

FIGURE 23: CONCERNS ABOUT EDITING PROCESS<sup>284</sup>FIGURE 24: JOURNAL FUNDING<sup>285</sup>

284. Eighty-four responses.

285. Seventy-nine responses.

FIGURE 25: JOURNAL VIABILITY<sup>286</sup>

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286. Eighty responses.