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99 PROBLEMS AND THE BITCHIN' IS ONE: A PRAGMATIST'S GUIDE TO STUDENT-EDITED LAW REVIEWS

Joëlle Anne Moreno[*]

I. INTRODUCTION

Chief Justice John Roberts,[1] Judge Richard Posner,[2] Judge Harry T. Edwards,[3] and Adam Liptak of the New York Times[4] appear

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[*]Associate Dean for Faculty and Professor of Law, Florida International University College of Law, Miami, FL. I would like to thank Professor Fabio Arcila for inviting me to contribute my thoughts to Touro Law School's 2016 symposium, *The Past, Present, and Future Role of Student Edited Law Reviews in Legal Scholarship*. I would also like to thank my boys, Ken, Adam, and Nathan for nearly everything else.

[1] *See* John Roberts, *A Conversation with Chief Justice Roberts*, C-SPAN (June 25, 2011), https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts ("Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."); Adam Liptak, *Keep the Briefs Brief, Literary Justices Advise*, N.Y. TIMES (May 20, 2011), http://www.nytimes.com/2011/05/21/us/politics/21court.html?_r=0 (quoting Chief Justice John Roberts, "[w]hat the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law"); *see also* Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES (Mar. 19, 2007), http://www.nytimes.com/2007/03/19/us/19bar.html [hereinafter *When Rendering Decisions*] (quoting Judge Dennis G. Jacobs of the Second Cicuit Court of Appeals in New York, who said "I haven't opened up a law review in years. No one speaks of them. No one relies on them").

[2] Judge Richard A. Posner, U.S. Court of Appeals for the Seventh Circuit, is a Senior Lecturer in Law at the University of Chicago Law School and has long criticized traditional student-run law reviews. *See* Richard A. Posner, *Against the Law Reviews: Welcome to a World Where Inexperienced Editors Make Articles About the Wrong Topics Worse*, LEGAL AFF. (Nov.-Dec. 2004); *see* Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132 (1995).

[3] *See generally* Ronald K.L. Collins, *On Legal Scholaship: Questions for Judge Harry T. Edwards*, 65 J. LEGAL EDUC. 637 (2016).

[4] *See* Liptak, *When Rendering Decisions*, *supra* note 1; Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES (Oct. 21, 2013), http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html [hereinafter *Lackluster Reviews*].

to enjoy mocking student-run law reviews. To be fair, law reviews are easy targets. When I started teaching, my husband was incredulous that law students review, select, and edit high-prestige academic work. In medicine, mainstream academic publication follows very different rules, with concise single-journal submissions, multi-author collaborations, mandatory inclusion of research methods, empirical data checks, and blind expert peer review, intended to ensure quality and quality control.[5] By comparison, legal publishing looked upside down -- with the inmates running the asylum.

But even doctors might reluctantly admit that scholarly publication practices in medical and scientific fields are also less than perfect.[6] Dr. Marcia Angell, former Editor-in-Chief of *The New England Journal of Medicine*, has worked tirelessly for decades to expose general problems in medical journal publishing.[7] More specifically, scratch the surface of the current media frenzy over "false convictions" in Shaken Baby Syndrome and other infant homicide cases,[8] and you will find defense arguments built on debunked medical articles and experts,[9] outlier courtroom opinions inconsistent with the medical judgment of over 90% of pediatric physicians,[10] and a growing medical publication-for-profit industry that makes the fact of publication a sham indication of scientific validity.[11] And for the non-lawyers and non-scientists, there is the infamous Sokal article, a publishing hoax designed to investigate the

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[5] Sandra E. Carr et al., *Relationships Between Academic Performance of Medical Students and Their Workplace Performance as Junior Doctors*, BMC MEDICAL EDUC. (July 30, 2014), http://bmcmededuc.biomedcentral.com/articles/10.1186/1472-6920-14-157.

[6] Marcia Angell, *Drug Companies & Doctors: A Story of Corruption*, THE N.Y. REV. OF BOOKS (Jan. 15, 2009), http://www.nybooks.com/articles/2009/01/15/drug-companies-doctorsa-story-of-corruption/.

[7] *Id.*; Carolyn Thomas, *NEJM editor: "No Longer Possible to Believe much of Clinical Research Published,"* THE ETHICAL NAG (Nov. 9, 2009), https://ethicalnag.org/2009/11/09/nejm-editor/.

[8] *See* Debbie Cenziper, *Prosecutors Build Murder Cases on Disputed Shaken Baby Syndrome Diagnosis*, THE WASHINGTON POST (Mar. 20, 2015), https://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/.

[9] *See* Dr. Peter J. Strouse, *Child Abuse: We Have Problems*, 46 PED. RAD. 587 (2016).

[10] Sandeep K. Narang, MD, JD et al., *Acceptance of Shaken Baby Syndrome and Abusive Head Trauma as Medical Diagnoses*, 177 J. PED. 273 (2016), http://www.jpeds.com/article/S0022-3476(16)30402-4/abstract

[11] Dr. Christopher Greeley, *Demystifying the Medical Literature*, 6 ACAD. FORENSIC. PATHOL. 556 (2016).

rigor of social science academic publishing.[12] In 1996, Professor Alan Sokal, a New York University physicist, tested the waters by writing and publishing *Transgressing the Boundaries: Towards a Transformative Hermeneutics of Quantum Gravity*, a self-decribed "parody thick with gibberish"[13] that concluded by exposing gravity as a socio-linguist concept.[14] Legal academics are vulnerable to valid critique from outside and within the academy, that law professors are out of touch with the practice of law. According to Professor Mark Tushnet, "legal scholarship lies at the edges of serious intellectual activity."[15] More recently, empiricists have joined the fray raising methodological concerns about the suspect quality of published legal research.[16]

To be fair, some of this critique could be envious prattle. Many law professors work hard and produce sound, interesting, and even useful scholarship. But we arouse envy because we enjoy near boundless freedom to pursue our intellectual passions, considerable professional status, day-to-day professional autonomy, and (post-tenure) a level of job security that practicing lawyers and even some judges will never attain. But because many concerns about academic legal writing are legitimate, law schools (as institutional publishers and home to faculty authors, student editors, and student authors) should strive to maintain and increase the vitality of law reviews. Self-reflection, of the type encouraged by this symposium on *The Past, Present, and Future Role of Student Edited Law Reviews in Legal Scholarship*[17] might help — but only if the messages escape their troubled medium.

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[12] Janny Scott, *Postmodern Gravity Deconstructed Slyly*, N.Y. TIMES (May 18, 1996), http://www.nytimes.com/1996/05/18/nyregion/postmodern-gravity-deconstructed-slyly.html.

[13] *Id.*

[14] *Id.* (noting that in a follow-up article Professor Sokal commented that "what concerns me is the proliferation, not just of nonsense and sloppy thinking per se, but of a particular kind of nonsense and sloppy thinking: one that denies the existence of objective realities").

[15] Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1205 (1981).

[16] *See, e.g.*, 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 (2015); 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 (2013).

[17] Touro College Jacob D. Fuchsberg Law Center Law Review Symposium: *The Past, Present, and Future Role of Student Edited Law Reviews in Legal Scholarship* (2016).

Law schools, which experience regular market adjustments, appear to be undergoing a period of unusual turmoil.[18] There are no obvious or easy solutions. Many proposed innovations would dramatically transform traditional legal education.[19] If some or all of these changes occur, and like winter in *Game of Thrones* they are coming, law schools and student-edited law reviews will need to adapt to survive.[20] The best case scenario is that changes will embody a realistic vision of both educational objectives and practice challenges and that schools will seek measurable outcomes using valid assessment protocols. The worst case scenario is that schools will make abrupt reactive changes by rushing to contort themselves to fit perceived market demands or glittery but untested new structures and models.

My thoughts on legal education and scholarship have been percolating over the past two decades of writing, teaching, and mentoring faculty and students at law schools in every tier of the U.S. News rankings. With credit to Jay-Z for the title and for his suggestion that "standing back from situations gives you the perfect view,"[21] we must think strategically about the future. Outside the legal academy, practitioners, judges, and journalists may like to bitch about tradition-bound law schools and prolix and obscure law review articles.[22] Inside the ivory tower, law professors add to the chorus of complaints with faculty debates on to navigate the uncertain divide between doctrine (Who will teach our students how lawyers think?)

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[18] Professor Tamanaha's widely-read and discussed critique of legal education incuded his general concern that law professors regard themselves as outside (above) the legal sytem with no obligation to provide useful services to those who work with law. *See* BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 56-58 (2012); *see also* Natalie Kitroeff, *The Best Law Schools Are Attracting Fewer Students*, BLOOMBERG (Jan. 26, 2016), www.bloomberg.com/news/articles/2016-01-26/the-best-law-schools-are-attracting-fewer-students; Michele Pistone & Michael Horn, *Canary in the Coal Mine*, INSIDE HIGHER ED (Aug. 1, 2016), https://www.insidehighered.com/views/2016/08/01/essay-how-nonelite-law-schools-can-survive-existential-market-threat.

[19] *Report and Recommendations American Bar Association Task Force on the Future of Legal Education*, A.B.A. 2 (Jan., 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

[20] *See generally* Wise et al., *supra* note 16 (providing an overview of the deficiencies facing law review papers).

[21] JAY-Z, *99 Problems*, *on* THE BLACK ALBUM (Roc-A-Fella, Def Jam 2003); JAY-Z, *Anything*, *on* THE TRUTH (Roc-A-Fella, Def Jam 2000).

[22] Harry T. Edwards, *Another Look at Professor Rodell's Goodbye to Law Reviews*, 100 VA. L. REV. 1483, 1484 (2014).

and practice (Who will teach our students what lawyers do?).[23] But eventually the bitchin' becomes just one more problem. When we stop complaining and start creating, law schools will need pragmatic reality-based approaches that abjure politics, dogma, and ideology.

Perhaps we are standing at a legal education crossroads. Such grandeous pronouncements are easy to make, but hard to verify. Traditional law reviews, which have been around for nearly 150 years,[24] have proved extremely resilient in the face of constant change including the advent of electronic search tools, the proliferation of peer-reviewed and specialty legal journals,[25] and the growing prominence of online publishing in e-journals and academic blogs.[26] Recently, I have heard rumblings from students and colleagues that traditional law review participation has lost some of its lustre. If accurate, this could reflect reduced desire for general interest writing and editing, mixed messages about the law review student editor experience, increased pressure to find paying work during law school, concerns about current or future employment, or increased competition for talented students from specialized journals or other law school activities. Despite these concerns, the traditional general interest student-edited law review will continue to survive. But it will only thrive if schools take seriously Judge Edwards's admonition that "law schools have responsibilities to society that exceed current practices in the legal academy."[27]

Tradition is a poor excuse for a lack of self-scrutiny. Most law professors were once law review editors themselves and believe their experience had value. Law reviews may continue to publish long(ish) student-edited articles, but they should also seek to publish non-traditional work and to innovate in ways that could improve how

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[23] Wise et al., *supra* note 16, at 21 (providing alternative uses of students' time other than law review).

[24] Michael C. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution,* 30 AKRON L. REV. 15, 15 (1996).

[25] Wise et al., *supra* note 16, at 12 (providing a description of Law Reviews ongoing problem of only being able to publish a small number or articles, as well as a newly created database that is enhancing the problem).

[26] Bridget J. Crawford, *A Blueprint for Blogger Involvement in Academic Legal Symposia,* 2012 MICH. ST. L. REV. 1829, 1831-32 (2012).

[27] Edwards, *supra* note 22, at 1508-09 (opining that "law schools have responsibilities to society that exceed current practices in the legal academy," that theory "should be incorporated in writing that appeals to broader audiences of practitioners," and that there will be "no significant change in the content of what is published in the law reviews unless the law schools change their ways.").

we understand and practice law. If a 2005 study of law review articles is accurate, 43% of all law review articles have never been cited.[28] Under these circumstances, law reviews seeking to gain authority and relevance should begin by honestly assessing their shortcomings,[29] learning from competitors, and embracing more creative solutions. If law review articles are rarely cited and, when they are cited there is scant proof of actual influence, changing the way traditional law reviews operate cannot plausibly be viewed as a sacrifice of prestige—because prestige without power is meaningless. Student-edited law reviews should solicit and publish more work that matters to more people who make, interpret, and practice law. As a first step towards this goal, law reviews should begin to incorporate a wider range of authors who write on law-related topics of public interest including judges, practitioners, journalists and non-legal academics.

This Article proceeds by disussing 99 problems and solutions. The unusual format is an intentional counterpoise to traditional legal scholarship. A traditional law review article proceeds in three to five parts to address a handful of issues. But that format can misconstrue the nature and scope of critique and provides authors little room for multi-factor outside-the-box problem solving. Here, each of the nine thematically-organized sections identifies nine problems and offers a springboard response. Many of these suggestions are original and somewhat unorthodox, others are frequently proposed but rarely implemented. The Article and its unique format serve three goals. First, to aggregate and assess the spectrum of outsider and insider critique of traditional student-edited law reviews. Second, to serve as a tool for law review members, law school faculties, and university administrators to identify and anticipate problems. Third, as a guide for law school and law review stakeholders seeking realistic, pragmatic, and effective solutions.

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[28] Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309 (2007).

[29] Wise et al., *supra* note 16, at 66-67 ("Moreover, there was unanimity among the four different groups of respondents about which three reforms were the most important, and they also had similar views on which three reforms were the least important. All four groups of respondents listed blind reviews, peer review, and more training of student editors as the three most important reforms for law reviews. All four groups of respondents also listed no expedited reviews and no reforms needed for law reviews among the three least desirable reforms.").

II. NINE REASONS TO BLAME TRADITION AND A RESPONSE:

1. Traditional legal writing is pedantic, obtuse, and overwrought.[30]

2. Law reviews traditionally favor theory over practice.[31]

3. Law reviews rarely publish articles by or about those who make or use the law (e.g., judges, legislators, executive branch members).

4. Law reviews rarely publish articles by or about lawyers, even lawyers whose legal and strategic insights shaped groundbreaking cases.

5. Law reviews rarely publish articles by academics in law-related but non-legal fields (e.g., economists, political scientists, historians, psychologists).[32]

6. Law professors, who traditionally lack much (if any) work experience outside academia, have few insights useful to those who practice law and rarely seek substantive guidance from practitioners.[33]

7. Law reviews traditionally prioritize articles by law professors at high-prestige institutions, which may not correlate with article merit or influence.[34]

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[30] It is ironic that, in a recent article on the topic of improving the current state of legal scholarship, I came upon the following sentence:

> In the odd alchemy of the politics of legal education, being concerned about the practicalities of any aspect of legal education—classroom pedagogy, skills instruction, the students' preparedness to practice law, whether public money is being spent responsibly, or the reasonableness of the investment in legal scholarship—is something to be avoided.

I have no desire to call out the author of the sentence, so I will leave the quote uncited (article on hand with the *Touro Law Review*). If you look it up, know that my goal is not to disparage the overall work, which I found quite helpful. Instead, it serves as a reminder that, even academics genuinely seeking solutions, can unwittingly confirm some of the assumptions about cumbersome academic prose.

[31] *See* Edwards, *supra* note 22, at 1484 (providing statements regarding how law review articles are too theoretical and abstract).

[32] Wise et al., *supra* note 16, at 13.

[33] Harrison & Mashburn, *supra* note 16, at 56.

[34] Wise et al., *supra* note 16, at 21.

8. These traditional law review priorities are disseminated to law school graduates considering academia and to entry-level hires, which discourages new authors from exploring innovative practice-relevant research ideas because they (realistically) fear rejection or poor article placement.[35]

9. Law reviews traditionally reserve dedicated or symposium issues for hot topics that students find superficially interesting, regardless of potential value to those who use law.[36]

Response – Student-edited law reviews should adopt a fully blind submission process to ensure that a selection focuses on merits of each draft article. Editors should evaluate the quality, timeliness, and originality of the undisclosed author's ideas, the clarity and organization of the writing, and the article's usefulness in academia and beyond. To assist in achieving these goals, law reviews should occasionally break with tradition and seek outsider participation. This could include submissions review and consultation by related non-legal experts and outsiders should always by included in live and print law review symposia. This shift would require symposia organizers to find people who actually use the law and include their perspectives on the topic at hand. Outsider participants could also include non-academics or academics from relevant non-legal fields. Outsider participants would not be sidelined, as they are today, but would be central to the aggregation, organization, and presentation of ideas. This would help law reviews achieve four objectives: (1) ensuring that the collective work of the symposium has practical value; (2) expanding audience base; (3) encouraging effective oral and written presentations comprehensible to non-academics; and (4) creating greater synergy and balance between theory and practice.

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[35] Harrison & Mashburn, *supra* note 16, at 50.

[36] *See* Wise et al., *supra* note 16, at 6, 13 (stating that former Hofstra University School of Law Dean Aaron Twerski said that "law review articles are increasingly irrelevant to attorneys and judges because new professors are discouraged from publishing traditional doctrinal articles," and pointing out critics' claim that student-run law review editors "favor articles about 'hot, trendy, or cute topics,' or topics that personally interest them").

III. NINE REASONS TO BLAME RANKINGS AND CITATION/DOWNLOAD COUNTS AND A RESPONSE:

10. Law schools over rely on rankings and citation/download counts to select new faculty.[37]

11. Law schools over rely on rankings and citation/download counts to make tenure, promotion, bonus, course-release, and sabbatical decisions affecting current faculty.[38]

12. Rankings and citation/download counts serve as a common but highly imperfect surrogate for article quality.[39]

13. Rankings and citation/download counts provide a false sense of quantitative certainty to complex qualitative analyses.[40]

14. Law schools ignore mounting evidence that overall journal quality is extremely difficult to measure.

15. Rankings based on article *impact* rely on citation counts, which are highly suspect because the convention of excessive footnoting means that most citations by courts and academics are non-substantive.[41]

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[37] *See* Harrison & Mashburn, *supra* note 16, at 50-52; Jim Patterson, *Vanderbilt Study: Hiring Practices Preventing Change in Law School Faculties*, VANDERBILT UNIVERSITY (Nov. 12, 2013), https://news.vanderbilt.edu/2013/11/12/hiring-change-law-school/..

[38] *See* Harrison & Mashburn, *supra* note 16, at 50-52; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 20, 2011), http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html ("[T]here are few incentives for law professors to excel at teaching. It might earn them the admiration of students, but it won't win them any professional goodies, like tenure, a higher salary, prestige or competing offers from better schools. For those, a professor must publish law review articles, the ticket to punch for any upwardly mobile scholar.").

[39] Albert H. Yoon, *Editorial Bias in Legal Academia*, 5 J. LEGAL ANALYSIS 309, 309, 314 (2013) (stating that an article placed in a highly ranked journal is "presumed to be of higher quality than one placed in those of lesser rank" and associating, for the purposes of a study, lesser citations with lower quality).

[40] Harrison & Mashburn, *supra* note 16, at 70 ("As noted at the outset, we are deeply suspicious of citation counts as measures of impact.").

[41] Harrison & Mashburn, *supra* note 16, at 76.

16. Rankings falsely correlate publication in top-tier law reviews with quality and impact, despite empirical evidence demonstrating that highly-placed articles are not cited with any greater frequency.[42]

17. Rankings and selection biases suggest that the prestige of an author's home institution correlates to article quality and impact, despite empirical evidence demonstrating that articles written by authors from highly-ranked law schools are not cited with any greater frequency.[43]

18. Rankings and citation/download counts are irrelevant to scholars, judges, or lawyers who find a particular article (or idea discovered within an article) useful.[44]

Response – Rankings and citation/download counts provide law school administrators and faculties with a convenient surrogate for scholarly quality and impact. While U.S. News & World Report may have started the problem, the market has spawned an industrial rankings complex that garners attention with an appearance of objectivity and statistical accuracy. The basic problem is that journal (or law school publisher) rankings and citation/download counts reveal nothing about the quality of the author's ideas and almost nothing about their real impact. As the empirical fallacies are exposed, law schools should reconsider the weight accorded to flawed impact measurement tools. The current weight of these tools will also be diluted by the adoption of newer and more sophisticated modeling methodologies.

IV. NINE REASONS TO BLAME THE (LACK OF) MARKET FORCES AND A RESPONSE:

19. Law reviews do not respond to market shifts because (unlike other print media) they do not need to generate profits to stay in business.

20. Insulation from market forces can lead to uncertain decision-making (e.g., allocation of funds to an ever-increasing number of new

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[42] Harrison & Mashburn, *supra* note 16, at 76.

[43] Harrison & Mashburn, *supra* note 16, at 76; Yoon, *supra* note 35, at 309-10.

[44] Harrison & Mashburn, *supra* note 16, at 77.

journals by cash-strapped law schools).

21. To cite just one example, law reviews have virtually eliminated the publication of book reviews despite the fact that book reviews are potentially useful to a wider audience, student editors are generally well-equipped to review legal books (as compared to their other assignments), and student editors are likely to find this task more rewarding than many other editorial assignments.[45]

22. Law reviews ignore the fact that the potential market for practice-oriented legal scholarship (judges, lawyers, policy makers, journalists, law students, pre-law students) is significantly larger than the market for abstract or theoretical work (legal academics).

23. Law reviews ignore the lessons they should learn from the success nimble short-format e-publishing and academic blogging which now compete for academic, public, and media attention.[46]

24. Law reviews fail to effectively market themselves to courts with articles or symposia of interest to judges.[47]

25. Even state and federal judges who do not criticize law reviews are disinterested in the works published therein and in improvement efforts. In fact, the high level of judicial disinterest was recently revealed by online survey efforts seeking tips on how to improve the quality of law reviews disseminated in nine states (Alabama, California, Colorado, Indiana, Montana, New York, South Carolina, Tennessee, and Washington) and yielded just six responses from all federal judges and just 146 responses from their (significantly more numerous) state counterparts.[48]

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[45] *See* Sanford Levinson, *The Vanishing Book Review in Student-Edited Law Reviews and Potential Responses*, 87 TEX. L. REV. 1205, 1207-08 (2009); Ruthann Robson, *Law Students As Legal Scholars: An Essay/Review of Scholarly Writing for Law Students and Academic Legal Writing*, 7 N.Y. CITY L. REV. 195, 202-03 (2004).

[46] To the extent that some law reviews have created a short form online presence, this is a step in the right direction.

[47] *See* Liptak, *When Rendering Decisions*, *supra* note 1 (" 'I haven't opened up a law review in years,' said Chief Judge Dennis G. Jacobs of the federal appeals court in New York. 'No one speaks of them. No one relies on them.' ").

[48] Wise et al., *supra* note 16, at 35-37.

26. Law reviews fail to market themselves effectively to attorneys who report that law reviews are rarely relevant to their work.[49]

27. Overall academic market impact and judicial market impact cannot be accurately measured using current tools.[50]

Response – Student-edited law reviews should reconsider their role and their target markets. Who reads and uses law review articles? More accurate information about scholarly impact should be solicited from target audiences including casebook authors and editors. After all live symposia, this information should be solicited from the audience. Surveying is a routine component of all professional association meetings, but notably missing from most academic gatherings.[51] Law reviews should use this data to assess effectiveness across different audience members (e.g., law faculty, university faculty, law students, university students, pre-law students, judges, or practitioners) and to implement improvements (e.g., more or less visual aids, more or less non-law faculty, more or less practitioners).

V. NINE REASONS TO BLAME THE BLUE BOOK/MAROONBOOK/ALWD MANUAL AND A RESPONSE:

28. Overreliance on heavily-footnoted work discourages authors from exploring untraditional, unorthodox, or outside-the-box questions and problems.[52]

29. Overreliance on heavily-footnoted work conforming to elaborate citation conventions discourages the presentation of ideas in more creative formats.[53]

30. Overreliance on heavily-cited work encourages redundancy.

31. The exclusive selection and publication of heavily-footnoted law review articles discourages authors from deviating from the

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[49] Wise et al., *supra* note 16, at 70-71.

[50] *See* Harrison & Mashburn, *supra* note 16, at 59, 70.

[51] David McMillin, *4 Common Problems With Post-Meeting Surverys – And How To Fix Them*, PROF. CONVENTION MGMT. ASS'N (Feb. 9, 2015), http://www.pcma.org/news/news-landing/2015/02/09/4-common-problems-with-post-meeting-surveys-and-how-to-fix-them#.WJUUBPLRt01.

[52] Wise et al., *supra* note 16, at 17.

[53] Wise et al., *supra* note 16, at 17.

traditional structure and format.

32. The piling on of footnotes requires faculty and student authors and student editors to waste time seeking excessive and redundant citation support for every author assertion including original and common sense arguments.

33. Elaborate citation rules and conventions principally serve the financial interests of a small but presumably lucrative segment of the legal publishing market.

34. Elaborate citation rules and conventions force authors and student research assistants to waste time better spent on new or better research, other articles, or improving writing organization and clarity.

35. Elaborate citation rules and conventions preoccupy legal writing teachers and students and waste time that could be better spent improving the quality of students' research, writing, and editing skills.

36. Once an article has been selected for publication, elaborate citation rules and conventions continue to create inefficiencies for authors and student editors.

Response – Traditional law review faculty/student authors and student editors have become acculturated to heavily-footnoted long-format work. These norms incentivize redundant, unwieldy, and copycat scholarship and discourage bold new ideas expressed with concision, force and clarity. In 2017, those of us old enough to remember life before the internet should be concerned that law students who rarely read for pleasure will not know the joys of good writing. These students may not easily recognize writing and structure problems and will struggle to envision alternatives.[54] Students who did not grow up reading will find editing a challenge and, when the same students become law professors, the overall quality of the legal academic is not likely to improve. One solution would be for law review boards to experiment with outsourcing some

[54] Charolette Alter, *Study: The Number of Teens Reading for Fun Keeps Declining*, TIME MAG. (May 12, 2014), http://time.com/94794/common-sense-media-reading-report-never-read/.

of the writing and editing tasks to non-law student writing experts. Other than tradition, there is no reason that a university-based law review could not reserve a spot on its editorial board for a graduate student in writing or communications. Including these students as readers and editors would help law reviews ensure that the content of an author's ideas are readily accessible – even to those without expertise. There would also be no problem finding potential candidates in fields where job competition is fierce and the distinction of such editorial service would be coveted. Law review board membership could be especially appealing to graduate students seeking future employment as authors or editors in a range of technical fields.

VI. NINE REASONS TO BLAME THE FACULTY HIRING PROCESS AND A RESPONSE:

37. Hiring committees prefer theoretical or esoteric articles unrelated to how courts, lawyers, or legislatures use law.[55]

38. Faculty applicants inculcated by mentors and the blogosphere replicate these preferences in their own research and scholarship.[56]

39. Hiring committees and faculties, arguably capable of judging how a candidate might perform in the classroom, must speculate about future academic potential.

40. Hiring committee members, like student editors, are generally ill equipped to accurately evaluate scholarship outside their own field of expertise.

41. Hiring committees, like student-edited law reviews, are often inundated with candidates' published and draft work which typically must be read and digested quickly.

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[55] David Hricik & Victoria S. Salzmann, *Why There Should be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761, 767 (2005).

[56] *See* Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1321-22 (2001).

42. Hiring committees may over rely on the opinion of a single faculty member with seemingly overlapping subject-matter expertise.

43. Hiring committees that overvalue highly placed scholarship may inappropriately devalue a candidate's teaching potential or evidence that a candidate will provide significant institutional service.[57]

44. Promotion and tenure committees, which include all tenured members of the faculty and therefore some or all members of the hiring committee, make the same mistakes.

45. Hiring committees and promotion and tenure committees prefer authors of highly-ranked student-edited general law review articles and have been slow to recognize the value of many alternative formats and publications.

Response – Hiring committees, especially committees that operate outside the time pressure created by the traditional AALS "meat market,"[58] have latitude to engage in a meaningful evaluation of existing and potential candidate scholarship. To enhance accuracy and expand participation, candidates' scholarship should be circulated to the entire faculty for review and comment. Where appropriate, candidates' work could also be blindly submitted for review and comment by experts in related fields. Faculty overreliance on rankings or download/citation counts should be discouraged. Consideration of practice-oriented work that informs teaching and includes sound legal analysis should be encouraged. These quality surrogates should be supplemented with more detailed feedback on the quality of a faculty candidate's work, solicited by the candidate or the law school faculty, from selected non-law professor experts including academics in other fields, judges, legislators, and practitioners. This would provide potential employers with more accurate and complete information about a candidate's effort and ability to meaningfully contribute to legal developments.

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[57] *See* Hricik & Salzmann, *supra* note 55, at 769-70.

[58] David W. Case, *The Pedagogical Don Quixote de la Mississippi*, 33 U. MEM. L. REV. 529, 546 (2003).

VII. NINE REASONS TO BLAME THE SELECTION PROCESS A ND A RESPONSE:

46. Student editors prefer superficially trendy topics.

47. Quality articles that lack an appealing student-oriented hook are overlooked.

48. Student editors relying on their own judgment fail to recognize critical research omissions or poor methodological approaches.

49. There are few real paradigm shifts, yet student editors relying on their own judgment accept authors' exaggerated claims of relevance and importance at face value.

50. Law reviews are currently bound by a rigid submissions calendar that precludes rolling submissions and more deliberative decisions.[59]

51. The selection process suffers when authors make expedited review requests, a near-ubiquitous practice following the advent of online submissions, because these expedited requests force inexpert and overtaxed student editors to make near-instantaneous decisions.

52. Student editorial boards are generally small, enabling a single student editor to advance only submissions on favorite topics regardless of quality.[60]

53. Online submission tools, which encourage or require the inclusion of the author's C.V., create favorable and unfavorable biases that distract student-editors from the task at hand – evaluating the quality of the submission.[61]

54. Student editors over rely on preemption screening that, even when performed correctly, has no real predictive value. Preemption screening is over-sensitive and under-specific. A long list of possibly related work reveals only that the topic seems *hot*, but not whether

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[59] Wise et al., *supra* note 16, at 16-17.

[60] *See* Nathan H. Saunders, *Student-Edited Law Reviews: Reflections and Responses of an Inmate*, 49 DUKE L.J. 1663, 1666 (2000).

[61] *Id.* at 1667.

the submission is redundant or will genuinely advance the discussion. A short list of possibly related work reveals only that the topic seems *cold*, but not whether the submission is groundbreaking or the entire inquiry useless, out-of-date, or unimportant.

Response – Law reviews should innovate by borrowing from the college admissions processes and offer a binding early decision equivalent. This would improve the selection process by enabling student editors to devote more time and energy to evaluating individual submissions outside the crunch of the normal fall and spring publication cycle. Authors seeking early decision acceptance could be required to limit submission to a single law review or to cap their early decision submissions at a reasonable number (e.g., fewer than 10 law reviews). Law review boards could also cap early decision submissions (a limited number on a first-come first-served basis) to a manageable number. Law review boards would guarantee a timely turnaround (e.g., 5-7 days). There would be no expedited review process and authors would agree in writing to accept the first offer of publication. This would encourage authors to think realistically about article placement. It would provide more time for student board members to engage in quality control. It would also prevent student editors from wasting considerable time reviewing articles that authors, as they *trade up* through a series of expedited requests, ultimately place in another journal.

VIII. NINE REASONS TO BLAME LAW REVIEW EXCEPTIONALISM AND A RESPONSE:

55. Law schools cannot retain their vitality as legal publishers if they fail to adapt to legitimate critique or learn from publishing practices and protocols used in other academic fields.[62]

56. Unlike scientific and other academic journals, law student editors rarely seek selection assistance from experts in the field (beyond occasional non-blind assistance from members of their own faculty).[63]

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[62] *See* Posner, *supra* note 56, at 1138.

[63] Wise et al., *supra* note 16, at 9.

57. Unlike scientific and other academic journals, law student editors rarely seek peer-review assistance from experts in the field.[64]

58. Unlike scientific and other academic journals, law review article authors rarely include information about research methods.

59. Law reviews have lost sight of their potential utility to disputes that arise in court.

60. Law reviews have lost sight of their potential utility to those who make law.

61. Law reviews have lost sight of their potential utility to the development of litigation skills.

62. Law reviews respond to critique by citing the fact that the Supreme Court cites to law review articles.[65]

63. Law reviews, however, cannot point to any empirical evidence that illuminates how law review articles have been used by the Court or by individual justices.[66]

Response – Law reviews could address criticism about exceptionalism by thoughtfully and realistically reconsidering their potential utility. Student-edited law reviews traditionally publish articles on a range of general legal interest topics.[67] Recently, and especially over the past 10-15 years, the number of student and peer-edited special interest law reviews has grown dramatically. Despite these changes, the legal article selection process remains fundamentally tradition-bound. Board members typically do not take a long view, which reduces incentives for student editors to search for important and timely topics that have received little or encourage specific submissions on neglected topics. Occasionally these needs

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[64] Wise et al., *supra* note 16, at 9.

[65] 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).

[66] *See* Collins, *supra* note 3, at 648; Newton, *supra* note 65, at 415-16.

[67] Jason P. Nance et al., *The Law Review Article Selection Process: Results from a National Study*, 71 ALB. L. REV. 565, 568 (2008).

are met in the form of a symposium or dedicated issue, but these goals could be achieved through other underutilized means. For example, law reviews could simply note online that articles on evidence would receive immediate review. This would benefit the law review by increasing the range, quantity, and even the quality of submissions relating to a topic of interest. It would also benefit authors working on the selected topic by enabling them to better target their submissions.

IX. NINE REASONS TO BLAME THE STUDENTS AND A RESPONSE:

64. Students lack substantive legal expertise.[68]

65. Students who have some doctrinal expertise (i.e., a third-year student editor with focused course work) overestimate the depth of their field knowledge.

66. Students lack expertise in non-legal disciplines, which increases the challenges of assessing interdisciplinary approaches.

67. Students lack empirical training, which increases the challenge of assessing empirical analyses.[69]

68. Once an article has been selected, student editors who may be competent at citation formatting and more familiar with the article and topic still lack the skills necessary for line-by-line editing and critique.

69. Students may not recognize or advance good writing, a problem likely to increase as reading continues to lose popularity to other forms of entertainment.[70]

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[68] Michael Roster, *Facing up to the Challenge: It's Time to Prepare Law Students for their Profession*, A.B.A. J. (Jan. 29, 2015, 8:45 AM), http://www.abajournal.com/legalrebels/article/facing_up_to_the_challenge_time_to_prepare_law_students_for_their_profession.

[69] *See* Kathryn Zeiler, *The Future of Empirical Legal Scholarship: Where Might We Go from Here?*, 66 J. LEGAL EDUC. 78, 78-79 (2016).

[70] Tess Saperstein, *The Future of Print: Newspapers Struggle to Survive in the Age of Technology*, HARV. POL. REV. (Dec. 6, 2014, 12:13 AM), http://harvardpolitics.com/covers/future-print-newspapers-struggle-survive-age-technology/.

70. Students, once inculcated into the elite club of legal scholarship as members of the law review, mistake prolix opacity for erudition.

71. Part-time student editors, who must attend classes, perform in clinics, commute, and meet work and/or family obligations, lack the time and energy to develop requisite skills.

72. Student law review members, who feel pressured to *do their job*, make unnecessary, unhelpful, or incorrect editorial changes that waste authors' time.

Response – Despite many valid concerns, student–edited law reviews are not uniformly terrible. This suggests that student editors (like all human agents) make mistakes, but that it is not that hard to find quality legal academic work. Profit-driven legal search engines marketed to academia may engage in constant technological tinkering.[71] But the goals and techniques of legal research remains relatively constant, especially as compared to the logistical and economic challenges that confront academics in most other disciplines (e.g., just imagine working as an archeologist or anthropologist from your home office). Online search tools enable users to identify relevant scholarship even when the work has been published in an obscure, foreign, or low–ranked journal.[72] But separating the submissions wheat from chaff still requires human editors. An overworked law review staff during submissions season might be grateful for assistance from a more expansive board of editors. At some schools, an expanded board might include jobs reserved for students based, not on first-year grades, but on editing and writing skills (as demonstrated through prior experience as writers, more meaty law review competitions, and/or recommendations from legal writing instructors). Although over-expansion risks diluting the prestige of law review board membership, controlled growth could increase the efficiency and accuracy of the submission review process, especially for articles subjected to expedited review. A larger and more diverse group of

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[71] *See generally* James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1 (2007).

[72] *See* Katrina June Lee et al., *A New Era: Integrating Today's "Next Gen" Reasearch Tools Ravel and Casetext in the Law School Class Room*, 41 RUTGERS COMPUTER & TECH. L.J. 31, 46 (2015).

students may also avoid the type of groupthink that likely perpetuates existing problems. Of course, expansion would not be desirable or feasible at schools where general interest student-edited law reviews struggle to attract members.

X. NINE REASONS TO BLAME QUASI-ETHICAL ACADEMIC PRACTICES AND A RESPONSE:

73. There is nothing unethical about advancing draft work of demonstrated quality. But some increasingly common practices raise new ethical questions.

74. Some law schools force student-editors to publish articles written by their own faculty members.[73]

75. Some law reviews claim to be student-edited, but faculty members actually select submissions and/or create and organize law review symposia.

76. Some law professors place their own articles by asking faculty friends at other schools to 'walk the article down to the law review office' and urge student editors to accept the submission.[74]

77. Law professors, who acquiesce to a *friendly* request for assistance, may feel pressured to comply regardless of the merit of the submission.

78. Law professors, who acquiesce to a *friendly* request for assistance may, in turn, pressure student editors (including their own students) to bypass the normal submissions review process to publish an article regardless of merit.

79. Law professors seeking this type of placement assistance may offer an exchange of favors (e.g., an invitation to speak at a symposium), which places the author's own placement objectives over institutional interests in attracting the highest quality speakers.

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[73] *See* James W. Harper, *Why Student-Run Law Reviews?* 82 MINN L. REV. 1261, 1275-76 (1998).

[74] *Id.*

80. Law professors, who fail to disclose that a publication offer bypassed the normal review process, may gain an unfair advantage over colleagues whose work was selected following normal practices.

90. Law professors, who fail to disclose that a publication offer bypassed the normal review process, may also gain additional unfair advantages in hiring, promotion, bonus, sabbatical, and tenure decisions.

Response – The pressure on faculty authors to publish in high prestige student-edited law reviews would diminish if some or all of the previously described innovations were implemented. Some of the traditional practices should be emphatically discouraged, especially those that wrest power from student editors. But the best short-term solution for quasi-ethical placement practices is improved disclosure. Internal disclosure could include faculty members' acknowledging during review and promotion where articles were solicited, sent blind, or sponsored. External disclosure could include, in the first biolgraphical footnote, recognition and thanks to the sponsoring (home team) professor for her help alerting the editorial board to the author's work.

XI. CONCLUSION AND THE BACK NINE

Like *Fashion Doll Quarterly*[75] (a trade journal for serious collectors of children's toys), *Private Islands*[76] (a seasonal glossy for those who lust after ultra-luxury real estate), and *PRO*[77] (a monthly aimed at the very special interests of portable restroom operators),[78] student-edited law reviews have an increasingly narrow target audience.[79] While some law professors hope to impact the

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[75] Chris Rio, *Top 10 Weird (Niche) Magazines That Shouldn't Exist*, TOPTENZ (June 25, 2013), http://www.toptenz.net/top-10-magazines-that-shouldnt-exist.php.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *See* Liptak, *Lackluster Reviews*, *supra* note 4, at 2 (citing a study showing that 43% of all law review articles have never been cited once); *see also* Wise et al., *supra* note 16, at 68 (describing the results of a study of who actually reads law review articles as follows: "We used a 5-point Likert-type scale with labels of 1 = very frequently, 2 = frequently, 3 = moderately, 4 = seldom, 5 = almost never. There was a significant difference in how frequently the different legal professionals read law reviews. A follow-up test showed that the judges (M = 3.51, SD = .96) read law articles significantly less often than the attorneys

interpretation, development, and application of law, what we publish in law reviews is principally read by indulgent spouses, overworked and underpaid research assistants, promotion and hiring committees, and (if we are lucky) legal academics.

So far, student-edited law reviews have been slow to adapt to criticism.[80] This may be attributable to faculty over-valuation of their own law review experience or perhaps by our self-interest in maintaining a large market of potential publishers for our own work. Traditions are hard to break and, as a general matter, law professors and law schools are wary of change. Traditional law review exceptionalism and isolationism is bolstered by tyranny of rankings and citation/download counts. These tools provide an apparent, if often inaccurate, measure of scholarly impact that reinforces old habits. The truth, as always, is more complicated. There is little, if any, valid empirical evidence that law review articles have a meaningful impact on the vast potential market of people who must use the law. There will always be room for research on theoretical or esoteric questions, but perhaps it is time to reconsider the value of practice-oriented scholarly work. And these questions for reconsideration, from your faculty for your school are the fill-in-the-blank back nine. What are the nine problems that you see as critical for traditional legal scholarship? Start talking about them with your colleagues. As Sam Cooke said, "It's been a long, a long time coming, [b]ut I know a change gonna come, oh yes it will."[81]

(M = 3.22, SD = 1.3) ($p < .05$) and the law professors (M = 2.20, SD = 1.07) ($p < .001$). The attorneys read law review articles significantly less than the law professors ($p < .001$). In sum, it appears that attorneys and especially judges only occasionally read law review articles.").

[80] *See, e.g.*, Walter Olson, *Abolish the Law Reviews!*, THE ATLANTIC (July 5, 2012), http://www.theatlantic.com/national/archive/2012/07/abolish-the-law-reviews/259389/.

[81] SAM COOKE, *A Change is Gonna Come*, *on* AIN'T THAT GOOD NEWS (RCA Victor 1964).