Stop the Blind from Leading the Sighted: A Proposal to Improve the Quality of U.S. Law Reviews

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I remember the horror as if it were yesterday. Yet it was September 1994, on the train from New Haven to New York City. I had just received the edited manuscript of my first article accepted by a U.S. law review. I opened it expecting to feel a warm inner glow of accomplishment. Instead, disappointment flooded me, followed by a rising anger. The editors had rewritten much of it to "improve the readability and clarity of expression." It was perhaps a tad easier to read. It was also wildly inaccurate. The topic was documentary-credit law — an intricate and arcane field full of fine distinctions, which the editors had trampled underfoot in their quest for clarity.

I had to revise the manuscript extensively to restore its accuracy. This creature to which I had given birth, lovingly, over 12 months had been butchered, and now I had to stitch it back together. (Today, I would give the editors the choice of limiting themselves to essential substantive amendments or returning the piece. As a junior academic, I did not have, or did not feel I had, that power.)

The cause of the butchery was simple. Most law-review editors in the U.S. system do not know how to edit and, in many cases, do not fully understand what they are editing.

Most U.S. law-review editors are second- and third-year law students. They are typically highly intelligent and highly driven. Serving on law review is a role that falls to the best students and,

although very time-consuming, is usually accepted by them as a prestigious marker of achievement.

These student editors decide which articles to publish, typically without the benefit of referees' reports. As students, they have little to base their selection of articles on, and one suspects that the status of the author's school may count heavily.

The editors usually edit the articles extensively, seeking to improve the written expression, and they check every citation for substantive and formal accuracy. Both functions are questionably performed.

Editing for Readability

On the issue of editing for style and readability, two examples will suffice.

One of my sentences read, "The global economy has changed profoundly in the past 30 years." The editors recast it as, "Over the past 30 years, the global economy has changed dramatically." The test for editing should be whether the change improves clarity, not whether it suits the editors' personal taste.

In another instance, I had written of a "non-remunerated" reserve requirement. The editors suggested "unremunerated." Either way, no one gets paid, so does it matter?

In all, the editors made 405 changes to my manuscript of some 19,000 words of text. Fifteen of these changes, by my assessment, improved readability or clarity and were worth making. The other 390 changes added nothing substantial. Of these, 81 had to be reversed because the editors had distorted the meaning. This article was on a topic beyond most law students' knowledge. Excluding the small number of changes to the footnotes, the editors on average made one change for every 50 words. They changed

every third sentence of the article — a massive waste of their time and energy, and mine.

I don't mean to question the value of good editing. Not in the least. All writers — even the best — can benefit from good editing. I just wonder how much student editing is good.

Checking Citations

The other preoccupation of student editors of U.S. law reviews is checking citations. This is a curious practice because it seems based on the premise that law professors are sloppy in their research or make things up.*

The list of sins that can plausibly be laid at the feet of law professors is conceivably quite long: laziness, insecurity, egotism, competitiveness, obsessiveness about details, and a tendency to be self-indulgent loners, not team players. Catch any law professor on a bad day and ask about the flaws of colleagues, and you may get a longer list. But you almost certainly won't be told, even on a very bad day, that those colleagues are sloppy or make up sources. The idea is plain silly. We have almost no incentive, financial or otherwise, to be sloppy or overcreative and every incentive to be careful, because our professional reputation rides on it.

Yet my research assistant last week assembled copies of 28 sources for one of my manuscripts so that we can mail them to the student editors of a leading U.S. law review who have been unable to locate them. She couldn't find every source in my office — perhaps for some I worked straight from the books, or perhaps they have been mislaid. But each was before me when I wrote the article.

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* Editors' note: But professors do make mistakes in providing names and numbers, and a self-respecting law journal aims for a consistent citation form.

A law professor's mere assertions of accuracy, though, are insufficient to dampen the zeal of student editors. This morning they have told me that the references to the sources I cannot produce will be deleted and replaced with sources that they will find. Good luck, folks! If you cannot find sources about international finance law with accurate citations when your law school is in Manhattan, good luck with finding your own.

What a waste of time and intellectual effort.

A Potential Solution: Peer Review

One solution would be to move to a peer-review process for law reviews in the U.S. This is the most common system in Australia and the U.K. Law journals are typically edited by scholars. Law students are often involved, but the editorial decisions are made by faculty members, sometimes in conjunction with students, but based on reports from referees.[1]

The faculty editors weed out unsuitable or unpublishable articles. Surviving submissions are then sent to one referee (or more commonly two). It is a blind refereeing process: the referees do not know the author's identity or institutional affiliation. And this is taken quite seriously. Beyond removing the author's name and institution from the cover page, considerable care is usually taken to ensure that nothing in the text or footnotes suggests the author's identity. Referees are selected for their specialist expertise in the

[1] For an interesting and robust analysis of the state of play of law journals in Australia, compare John Gava, *Law Reviews: Good for Judges, Bad for Law Schools?* 26 Melb. U. L. Rev. 560 (2002) (generally condemning law reviews, presumably even those that are peer-reviewed), with Michael Kirby, *Foreword: Welcome to Law Reviews*, 26 Melb. U. L. Rev. 1, 4 (2002) (generally defending the value of law reviews, especially those that are peer-reviewed — as an "increasing number" are in Australia); for a view of the situation in Canada, see Kathryn Feldman, *Remarks About the Value of Student-Run Law Journals*, 17 Windsor Rev. Legal & Soc. Issues 1 (2004).

manuscript's subject and are routinely sought beyond the institution with which the journal is affiliated, and often abroad.

The process can be slow because referees are often slow to respond. This is a weakness, but it is fair. It neither advantages eminent scholars or those from leading law schools nor disadvantages young scholars or those from less prestigious schools.

The editing is also largely limited to content. In my experience, referees' reports usually suggest some changes to the argument and occasionally identify a few infelicities of style. In stark contrast, the comments by student editors of U.S. law reviews tend to focus almost exclusively on form, not substance. And their editing usually does not, in my experience, improve the writing.

These tendencies are to be expected.

Content is what matters. No sane person reads law reviews for the limpid clarity of the writing or the illumination offered by the footnotes. Content is what matters, and content is what expert referees' reports focus on.

Yet when one is unqualified to assess or comment on the content of a piece, all that's left to do is to inexpertly change its written expression and agonize over its references.

Interestingly, law journals in Australia and the U.K. tend to prefer shorter articles over longer ones — 6,000 to 10,000 words is considered ideal — and do not share the obsession of their U.S. cousins with abundant footnotes. Sophisticated arguments can be readily developed in under 10,000 words, and longer articles, in my view, often communicate less effectively.

I'm tempted to speculate that the excessive length and footnote density of most U.S. law-review articles are products of the feelings of safety engendered in student editors by long and heavily referenced pieces. After all, such pieces offer the illusion of substance and thus appear to be safe bets for editors with little or

no expertise in the article's subject. Perhaps these pieces offer the same illusion to their authors, especially those seeking tenure at their faculties.[2]

In any event, the height of footnote absurdity in the U.S. is illustrated by one of my articles that was accepted subject to my adding another 40 footnotes to it. The editors were troubled that it had only 30. I was older by now, and refused, but said the student editors were welcome to add some if they wished, and they did. All 40 extra references!

A move to peer review would definitely improve the quality of U.S. law-review articles. It would also, I believe, tend to counter the love of length that these journals exhibit. Size is all well and good, in its place, but it rarely promotes clear communication. An expert is qualified to assess the worth of an argument and will not substitute length and the number of footnotes as measures of quality. An expert would also typically object to having to read a 25,000-word piece.

Admittedly, a move to peer review is unlikely today in most U.S. law schools. Some faculty members may serve as editors of journals, but I suspect that far fewer would be willing to serve as referees.

Serving as a journal editor is a tremendous amount of work, but it at least confers status and exposes one to the latest writing in one's field, especially if it is a specialist journal.

Refereeing, on the other hand, is just plain hard work. Legal scholars in Australia, the U.K., and elsewhere undertake it out of a sense of obligation and a belief that it's an essential part of our shared scholarly enterprise. We outside the U.S. are used to doing this unpaid work, and we accept it as essential quality control for

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[2] James C. Raymond, *Editing Law Reviews: Some Practical Suggestions and a Moderately Revolutionary Proposal*, 12 Pepp. L. Rev. 371, 375–77 (1985).

journals. We also typically think that writing referees' reports is important scholarly work. So our résumés usually reflect prominently any journal that we are the editor of or that regularly invites us to serve as a referee.

In short, serving as editors of journals and as referees is part of our scholarly culture — and cultures can be slow and difficult to change.

Conclusion

The solution to "the editors don't know how to edit" part of the problem is conceptually simple — teach them. You might expect this to be fairly obvious to law schools, but apparently it's not. While the lamentations about student-edited law reviews are legion,[3] very few law schools formally teach their student editors how to do their job.[4]

It's true that editing is a subtle task requiring considerable judgment and is therefore difficult to teach. But it's equally true that it

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[3] *See* Richard A. Epstein, *Faculty-Edited Law Journals*, 70 Chi.-Kent L. Rev. 87 (1994); The Executive Board of the Chicago-Kent Law Review, *The Symposium Format as a Solution to Problems Inherent in Student-Edited Law Journals*, 70 Chi.-Kent L. Rev. 141 (1994); Wendy J. Gordon, *Counter-Manifesto: Student-Edited Reviews and the Intellectual Properties of Scholarship*, 61 U. Chi. L. Rev. 541 (1994); James Lindgren, *An Author's Manifesto*, 61 U. Chi. L. Rev. 527 (1994); Alan W. Mewett, *Reviewing the Law Reviews*, 8 J. Leg. Educ. 188 (1955); Richard A. Posner, *Against the Law Reviews: Welcome to a World Where Inexperienced Editors Make Articles About the Wrong Topics Worse*, Legal Affairs 57 (Nov.–Dec. 2004); Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 Stan. L. Rev. 1131 (1995).

[4] James Lindgren, *Student Editing: Using Education to Move Beyond Struggle*, 70 Chi.-Kent L. Rev. 95, 99 (1994) (encouraging "increased faculty help, oversight, and training" that includes "editing seminars for student editors").

can be broken down into sequential steps and taught.[5] And training would at least improve an editor's efforts.

Training would not, though, address the other part of the problem: that student editors are not qualified to choose between potential articles by assessing their substantive quality. It is difficult to see anything short of peer review as properly addressing this problem, so the challenge is how to shift U.S. law-faculty culture so that faculty members willingly bear the burdens of a peer-review system.

The answer may well be leadership, by a leading journal. It's unlikely to come from the journals ranked one, two, and three in the nation, because they will probably feel they have more to lose than gain from change. But leadership may well come from journals that rank a bit lower and want to ascend the ladder.

All it would take is for one or two highly regarded journals to provide the lead. If one or two such journals were to announce that they were now faculty-edited and that credible submissions would be peer-reviewed, and if this were to lead to a rise in the rankings, then others would likely follow. For the first-movers, finding potential referees might be easier than you would think, since the prestige of serving as a referee for a highly ranked journal should hold some appeal, and the novelty of being asked would count for much.

If these cutting-edge journals were to go a step further and announce that the preferred manuscript length was between 6,000 and 10,000 words, this would provide even further impetus to their ascension. Does anyone really want to write 30,000 words on an incredibly narrow topic; that is, does anyone enjoy writing tenure pieces? Surely a safer and more enjoyable road to tenure is four or

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[5] Anne Enquist, *Substantive Editing Versus Technical Editing: How Law Review Editors Do Their Job*, 30 Stetson L. Rev. 451 (2000).

five 10,000-word articles rather than two articles of 30,000 and 20,000 words. The traditional route is a stressful one — it makes a lot ride on two articles, especially when some articles, early in one's career, just don't seem to want to come together. The evidence is that as scholars become more senior, their articles become shorter and their footnotes fewer.[6] So those cutting-edge journals would, presumably, have considerable appeal to more senior scholars.

The worlds of legal practice, law schools, and law reviews are intensely competitive. It's time for some good law reviews to become great ones by harnessing this competition to improve their quality and to lead U.S. law reviews into the peer-reviewed world that's the norm in law outside the U.S. — and the norm in most disciplines everywhere.

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[6] *See* Ira Mark Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. Leg. Educ. 681, 683 (1983).