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The Law Review Manuscript Glut: The Need for Guidelines

Erik M. Jensen

Professorial irritation with law reviews is not new, of course, but until recently the discipline had learned to live with the stupidities and inefficiencies of the legal publication system. Yes, we are stuck with the effects of student editors' "neophytic judgment,"¹ but we gain a source of free labor. Our footnotes wind up checked, rechecked, and polished to a fine gloss; and students learn skills they will be able to use throughout their professional lives, such as ignoring telephone messages and misplacing documents. Besides, let's be truthful, isn't it wonderful to have so many possible places to publish? With less prestigious publications crying for material, it is hard to imagine any manuscript, no matter how amateurishly done, failing to find a home eventually.²

Although the system has valiantly served the professoriate in the past, it has begun to crumble. As anyone who has recently dealt with the more prestigious law reviews can attest, the selection process, always suspect, has broken down in many cases. The better journals are buried in manuscripts, most of which any particular journal has little or no chance to publish.

My evidence is impressionistic, but it appears that many journals receive three, four, maybe five times as many submissions as their predecessors received a decade ago. Some journals now collect more than 1,000 submissions annually. To be sure, many of the manuscripts can be discarded after a glance at the first paragraph. Nevertheless, even after the chaff has been discarded, disciplined review—whether by neophytes or experts—has become an impossibility. For many journals, merely logging manuscripts in and noting authors' letters of withdrawal appear to have strained capabilities. With serious substantive review impossible, authors' credentials have assumed greater importance than they should in the evaluation process.

Is the submissions glut a real problem that needs attention? Many might not think so. Indeed, it seems perverse to complain about the submission of too many articles in a discipline such as law, which exists at the academic periphery.³ Perhaps the glut is the result of an epidemic of scholarly activity

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1. The term is borrowed from Professor Robert S. Summers of Cornell.
2. But see Michael I. Swygert & Nathaniel E. Gozansky, Senior Law Faculty Publication Study: Comparisons of Law School Productivity, 35 J. Legal Educ. 373 (1985) (suggesting that many senior faculty can, with sufficient effort, fail to find homes for articles).
3. See Paul M. Barrett, To Read This Story, Don't Forget to See the Footnotes, Wall St.

that should be celebrated rather than controlled. One would like to think that law professors are taking their professional obligation to publish more seriously than in the past, and there may be something to that—though I doubt it.

Some have suggested that the glut is a temporary problem, if a problem at all. As law schools expanded to attract the apparently endless stream of would-be lawyers, more faculty members were hired. There are now more untenured law faculty, absolutely and proportionately, than in the past, and that group has no choice but to publish. When the current junior faculty reach tenure, the flood of articles should ebb.⁴ The reascendancy of sloth should take care of part of the problem.

A reduction in the number of faculty who *must* publish will not eliminate the problem, however, for a further factor is responsible for the submissions glut. Authors—particularly those authors whose names, academic affiliations, and choice of subject matter are not apt to appeal to student editors—are now regularly sending out copies of each article to huge numbers of law reviews. If authors routinely mail copies to twenty or more publications, it is easy to see why the journals are buried. The number of *articles* circulated may have increased somewhat over the last decade, but there is little doubt that the number of *submissions* has increased dramatically.

The practice of multiple submissions horrifies practitioners of other scholarly disciplines, whose journals are refereed. A referee undertakes the very important and time-consuming work with the understanding that the manuscripts he examines have been submitted to a single journal and that his evaluation will therefore matter. For a peer review system to work, authors' conformity to disciplinary norms is a necessity, and multiple submissions rarely occur.

In a publication system without referees, the damage done by multiple submissions is only diminished, not eliminated.⁵ The haphazard review that any article gets is a serious enough problem by itself, and there are other costs. If they are conscientious, the editors at the better journals must spend so much time, effort, and expense handling bookkeeping matters and telephone calls that the real work of publishing a scholarly journal receives insufficient attention. An inordinate amount of everyone's time is spent in a complex jockeying process as authors try to place their articles with the most prestigious journals. Unless the first offer to publish happens to come from an author's most preferred place of publication, that offer only begins the placement process. For example, suppose an author sends his piece to

J., May 10, 1988, at 25 (noting law professors' "inferiority complex" in scholarly matters and suggesting that it may be merited).

4. See Swygert & Gozansky, *supra* note 2 (noting lack of productivity of senior faculty at most institutions).

5. Some law schools now require faculty evaluation of submissions before offers of publication can be made, and student editors at those schools know the difficulty of finding enthusiastic faculty readers. Why should a faculty member spend a couple of hours evaluating a manuscript that, because it has been simultaneously submitted to many other journals, almost certainly will be published elsewhere regardless of what is said about it?

thirty reviews and receives an offer of publication from his tenth choice, before the nine more highly regarded journals have responded. He will call the nine journals (or at least some of them) and beg for expedited review. The calls, the messages, the frustration—all will divert authors, as well as law review staffs, from their other tasks. And in some cases the author will get the expedited review he asks for, which will cause the machinery of several journals to creak into action to evaluate a manuscript that only one can publish. As demeaning as this process can be to an author, it results in placement in a higher quality journal—and thus in upgrading the author's reputation—often enough to make the try worthwhile.

The legal publication system is, to put it bluntly, absurd. Nevertheless, the submissions glut is a crime without criminals. Students are not to blame for it, and, under the circumstances, student editors' overreliance on authors' credentials is quite reasonable. To 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.⁶ Student editors can be difficult creatures, but we should limit our condemnation of them to those matters for which they richly deserve it—their excessive desire for sexy topics, for example, and their preference for "dross."⁷

I also do not mean to criticize the authors for overburdening the postal service with manuscripts; they are as much victims as perpetrators. Law has developed no norms to guide publication behavior. When an author is facing a world of overwhelmed law reviews—so that even getting a telephone call returned is a minor miracle—it is only reasonable to send an article to more and more journals, with the hope that someone might read it before publication in the *Journal of Ancient Legal History* becomes appropriate. If everyone else sends out thirty copies, an assistant professor at Obscure U. would be foolish not to participate in the foolishness.

Both editors and authors may be largely blameless, but in no sense does the present system increase the quality of scholarly publication. I can see no justification for preserving the status quo for its own sake. And yet I doubt that any mandatory reform is necessary, possible, or even desirable. Suppose, however, that the Association of American Law Schools were to establish voluntary guidelines and request (politely but firmly) that faculty members of constituent institutions adhere to them.⁸ The primary guide-

6. Nevertheless, it would be interesting to see whether publication decisions would differ if law reviews required that manuscripts must be evaluated without identification of the author. In disciplines with peer review, anonymous submission and evaluation of manuscripts have definite effects. For example, *PMLA*, a publication of the Modern Language Association, began blind review in 1980, with the result that its "pages now house more women, more colleagues from the junior ranks, and authors from a greater variety of institutions." John W. Kronik, Editor's Note, 103 *PMLA* 733, 733 (1988). I would expect the results to be even more striking with student-edited publications.

7. See Roger C. Cramton, President's Message: Scholarship and the AALS, *AALS Newsletter* no. 85-3, at 2 (May 1985) ("Student editors prefer pieces . . . that deal with topics that are safe and standard or that are currently faddish").

8. In the spring of 1987 AALS surveyed member schools to determine whether multiple submissions caused a problem serious enough to warrant a statement of good

line could be something like this: No one should have more than five copies of any manuscript circulating for consideration for publication at one time.

By the standards of other disciplines, that remedial measure would be modest. If adhered to, the guideline would have salutary effects beyond a decline in number of submissions. For example, an author would have an incentive to make a realistic assessment of the type and quality of journal that his article belongs in. Overrating the prospects for a manuscript would mean delay; one would have to wait for rejections from *Harvard* and *Yale* to arrive before submitting to the *Parrot Law Journal*. The current cost-free submission to prestigious journals—cost-free to the author, that is, apart from reproduction and postage costs—would become a thing of the past.⁹

The guideline need not be rigid; there could be some play in the standard. For example, an exception might be provided, either explicitly or implicitly, for younger faculty facing immediate promotion decisions, when a timely acceptance of publication is a must and blanketing the country with manuscripts may be a psychological necessity. If they are to exist at all, however, exceptions should be narrow in their application. In particular, any exception directed at untenured faculty members must be considered with care to insure that it does not subvert the guideline.

In general, the proposed system would work quite well. The guideline is not perfect—some almost certainly would violate it—but perfection is not necessary for a marked improvement in submission practice. In my own case, if I thought that nearly everyone else was following the guideline, I would be delighted to follow it. In the meantime, I plan to crank up the photocopy machine.

practices on the subject. The Association received responses from ninety principal law reviews and twenty-five other journals. After study, the AALS Executive Committee decided not to take any action. About seventy percent of the respondents (including seventy-four percent of those reviews receiving 400 or more manuscripts annually) reported that multiple submissions created no significant problems for them and therefore that no AALS statement was necessary. Letter from Betsy Levin (executive director, AALS) to Erik Jensen (Sept. 6, 1988). Viewing the issue from the authors' side, I am not convinced that the results support inaction. Although the surveys were sent to law school deans, many, perhaps most, of the respondents were student editors, with little sense of the history and the long-term effects of the issue. Moreover, because all-powerful editors are unlikely to admit difficulty in processing manuscripts, it is striking that a substantial minority (more than twenty percent) did report "significant problems" from multiple submissions.

9. Cost-free submissions could be eliminated in other ways. For example, if top law reviews were to impose a charge for evaluating a manuscript, as the refereed *Journal of Political Economy* does, the decline in submissions would be immediate. Charges of \$25 to \$50 could quickly deplete an author's research budget. Implementing such a plan would be difficult, however. One can imagine the reluctance of most law review editors to take such a step without assurances that their competitors will do the same. Only a very few journals can afford to risk losing highly desirable articles because they have unilaterally imposed a fee.