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It's Time to Stop the Blind Leading the Sighted: A Proposal to Improve the Editing of U.S. Law Reviews

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Abstract

Most U.S. law review editors don't know how to edit, many do not really understand what they are editing. This is because they are students and untrained in editing. Nonetheless they often edit heavily seeking to improve written expression, and typically check every citation for substantive and formal accuracy. Each function is of questionable importance, and is questionably performed. This article considers ways to improve this situation.

It's Time to Stop the Blind Leading the Sighted: A Proposal to Improve the Editing of U.S. Law Reviews

by

Ross P Buckley[*]

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. 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 twelve months, had been butchered and now I had to stitch it back together.[1]

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[1] Today I would give the editors the choice of limiting themselves to essential amendments of substance, or of returning the piece. As a junior academic I did not have, or did not feel I had, this choice.

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 within law school.

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

The editors usually edit the articles extensively seeking to improve their written expression, and check each and every citation for substantive and formal accuracy. Each function is of questionable importance, and is 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 is essential, not 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. Three hundred and ninety 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.

Citation Checking

The other preoccupation of student editors of US law reviews is checking citations. This is a curious practice as 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 teacher on a bad day and ask them about the flaws of their colleagues and you may get a longer list. But you almost certainly won't be told, even on a very bad day, that their colleagues are sloppy or make up sources. The idea is plain silly. We have almost no incentive, financial or otherwise, to be sloppy or overly creative and every incentive to be careful, as 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 US 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, perhaps they have been mislaid. But each was before me when I wrote the article.

But mere assertions of accuracy by a law professor 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 on about international finance law with accurate citations when your law school is in Manhattan, good luck with finding your own.

What a massive waste of time and intellectual effort.

Peer Review, a Potential Solution

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 United Kingdom. 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.[2]

The faculty editors weed out unsuitable or unpublishable articles. Surviving submissions are then sent to one, or more commonly two, referees. It is a blind refereeing process -- the referees do not know the identity of the author or their institutional affiliation. This is taken quite seriously -- beyond removing the author's name and institution from the cover page, considerable care is usually brought to bear to ensure that nothing in the text or footnotes suggests the author's identity. Referees are selected for their specialist expertise in the subject of the manuscript and are routinely sought beyond the institution with which the journal is affiliated, and often abroad.

The process is often slow, because referees are often slow to respond. This is a weakness. But it is fair. It does not advantage eminent scholars or those from leading law schools nor disadvantage 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

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[2] For an interesting and robust analysis of the state of play of law journals in Australia, see Michael Kirby, 'Foreword: Welcome to Law Reviews,' *26 Melb. U. L. Rev.* 1 (2002); John Gava, 'Law Reviews: Good for Judges, Bad for Law Schools?,' 26 *Melb. U. L. Rev.* 560 (2002). For a consideration of their situation in Canada, see Kathryn Feldman, 'Remarks About the Value of Student-Run Law Journals,' (2004) 17 *Windsor Rev. Legal & Soc. Issues* 1.

style. In stark contrast, the comments of the student editors of US law reviews tend to focus almost exclusively on form, not substance.

Both factors are to be expected.

Content is what matters. No sane person reads law reviews for the limpid clarity of the written expression or the illumination on offer from the footnotes. Content is what matters and content is what expert referees' reports focus upon.

Yet when one is unqualified to assess or comment upon the content of a piece, all that is left to do is to critique its written expression and 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 an ideal length, 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 am tempted to speculate that the excessive length and footnote density of most US law review articles is a product 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 field the subject of the article. Perhaps they offer the same illusion to their authors, particularly those seeking tenure at their faculties, which may well be the other reason for their proliferation.[3]

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 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 contend, tend to counter the love of length these journals exhibit. Size is all well and good, in its place, but clear communication is rarely promoted by it. An expert is qualified to assess the worth of an argument, and not substitute length and number of footnotes as measures of quality. An expert would also typically object to having to read a 25,000 word piece.

A move to peer review is today unlikely in most U.S. law schools. The effort of serving as editors and referees would prove a burden on law faculty members and, remember, laziness was listed earlier as one of their credible character failings.

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

Refereeing 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 it is an essential part of our shared scholarly enterprise. But a tendency to being self-indulgent loners and not team players was identified as another credible law professor failing. We outside America may be no less lazy or self-indulgent (although we are certainly less pampered) than our American brethren but we are used to doing this unpaid work, and we accept it as essential quality control for journals. We also typically think that writing referee's reports is important scholarly work. Our resumes would usually reflect prominently any journals of which we are the editor, and would mention the journals that regularly invite us to serve as referees.

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.

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[3] James C Raymond, "Editing Law Reviews: Some Practical Suggestions and a Moderately Revolutionary Proposal", 12 *Pepperdine Law Review* 372 (1984-1985).

Conclusion

The solution to 'the editors don't know how to edit' part of the problem is conceptually simple – teach them. If one would expect this to be fairly obvious to universities, one would be wrong. While the lamentations regarding student-edited law reviews are legion,[4] very few law schools teach their student editors formally how to do their job.[5]

It is true that editing is a subtle task requiring considerable judgement and it is therefore difficult to teach. However, it is equally true that it can be broken down into sequential steps and taught,[6] and training in editing would improve an editor's efforts.

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

The answer may well be leadership, by a leading journal. It is unlikely to come from the journals ranked one, two or three in the nation, as they will probably feel they have more to lose than gain from change. However, it may well come from journals ranked perhaps between four and ten and wanting to ascend the ladder.

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

[5] James Lindgren, 'Student Editing: Using Education to Move Beyond Struggle,' (1994) 70 *Chi.-Kent L. Rev.* 95.

All it would take is one of two highly regarded journals to provide the lead. If one or two such journals were to announce they were now faculty-edited and credible submissions would be peer-reviewed, and this was to lead to a rise in the rankings, then others would likely follow. For the first-movers, finding potential referees should be quite easy as the prestige of serving as a referee for a highly ranked journal should hold some appeal (remember insecurity), the novelty of being asked will count for much, and law professors are perhaps less lazy than this piece has intimated.

If these cutting-edge journals were to go a step further and announce that the preferred length of manuscripts 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, ie. does anyone enjoy writing tenure pieces? Surely a safer and more enjoyable road to tenure is four or five 10,000 word articles rather than two articles of 30,000 and 20,000 words respectively? The traditional route is a stressful one – it makes a lot ride on two articles, especially when some articles, especially early in one's career, just don't seem to want to come together, for whatever reason. Certainly the evidence is that as scholars become more senior their articles become shorter and their footnotes fewer.[7] These 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 is time for some good law reviews to become great ones by harnessing this competition to improve their quality, and to thereby lead U.S. law reviews into the peer-reviewed world which is the norm in law outside the U.S. and the norm in most disciplines everywhere.

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[6] Anne Enquist, "Substantive Editing Versus Technical Editing: How Law Review Editors Do Their Job", 30 *Stetson Law Review* 451 (2000-2001).

[7] Ira Mark Ellman, 'A Comparison of Law Faculty Production in Leading Law Reviews,' (1983) 33 *Journal of Legal Education*. 681, 683.