

2017

## A Law and Economics Critique of the Law Review System

Timothy T. Lau

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### Recommended Citation

Timothy T. Lau, *A Law and Economics Critique of the Law Review System*, 55 Duq. L. Rev. 369 (2017).  
Available at: <https://dsc.duq.edu/dlr/vol55/iss2/4>

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# A Law and Economics Critique of the Law Review System

Timothy T. Lau\*

## ABSTRACT

*The law review system prizes placement of articles in highly-ranked journals, and the optimum method to ensure the best placement, which many scholars have intuited, is a saturation submission strategy of submitting articles to as many journals as possible. However, there has neither been an explanation as to what incentivizes this submission strategy nor any analysis as to what happens to scholars who cannot afford this strategy. This article uses a law and economics approach to study the incentive structures of the law review system, and identifies two features of the system that encourage saturation submission and punishes the poorly-resourced: (a) journals have no availability to accept all articles of equal quality; and (b) there is an insufficient match between acceptance and journal ranking. It demonstrates that the law review system behaves as a market, and is meritocratic only for those scholars who can afford to practice saturation submission. This article concludes with some thoughts about reforming the system.*

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\* The author is a member of the Research Division of the Federal Judicial Center. The views expressed in this article are of the author alone and do not represent the views of the Federal Judicial Center. The author thanks Jan Levine of Duquesne University School of Law, Mark Lemley of Stanford Law School, Brian Galle of Georgetown University Law Center, and Michael Cicchini for their helpful comments and suggestions. Email: tlau@fjc.gov.

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## I. INTRODUCTION

The law review system is central to the enterprise of legal scholarship. Faculty hiring,<sup>1</sup> tenure decisions,<sup>2</sup> and even salaries<sup>3</sup> are dependent on the number of publications placed in highly-ranked journals. To that end, the quality of law faculties and, by extension,

1. See, e.g., anonprof, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 3, 2017, 8:49 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/14/#comments> (“I have chaired my school’s appointments committee several times, and I talk quite a bit with chairs at other schools. Here’s my opinion—we are impressed by publications that we immediately know are ‘good.’ What determines good can be the prestige of the journal, but more often, it’s the perceived prestige of the school. Thus, a publication in the flagship journal in any school in the T30 of U.S. News will get our attention—probably true of the T50 as well (although the closer you get to 50, the less that’s the case).”).

2. See, e.g., AnonProf, *Submission Angsting Spring 2016*, PRAWFSBLAWG (Feb. 2, 2016 10:11 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/4/#comments> (“Look, the sad truth is rarely will people read your work, but many in your career will read your CV. They’ll look over your publications and they will absolutely use your placements as a proxy for how good a scholar you are. When it’s tenure time, you’re [sic] faculty (whether they admit it or not) will be considering your placements . . . Thus, nobody is saying any journals are unworthy, but it’s foolish to not try and get the highest placement you can—especially if you’re a relatively new prof[essor] with unfulfilled career aspirations.”).

3. See, e.g., Anonymouse, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 28, 2017, 9:57 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/11/#comments> (“for many of us our annual compensation is impacted by article placement.”); Furball, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 8, 2017, 11:17 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/17/#comments> (“I am curious. For how many of you does summer research funding depend on publishing above a certain point, e.g., top 50[?] I will go first. Mine does.”); Westie, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 12, 2017, 10:51 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/19/#comments> (“at my school (and a number of others) our summer compensation and merit based pay raises turn on prestige of journal placement—low enough placement and you essentially forfeit a month of salary.”).

the research they produce, rely on the integrity of the system. It is therefore of critical importance to identify elements of the system that are not meritocratic or unfair so that the system can be remedied to properly reward the best scholarship.

Although the system has been characterized as a black box,<sup>4</sup> participants within it have by experience converged upon certain strategies to deal with its peculiarities. For example, it is generally agreed that the best way to guarantee the best placement of an article is to submit to as many journals as possible, that is, saturation submission.<sup>5</sup> But what makes saturation submission the best strategy? And what happens to those who cannot afford to execute saturation submission?

The law review system is actually quite amenable to analysis. The rules, such as how the submission system operates, are clear, and it is therefore possible to examine the incentive structure that results. And although data is hard to come by, there are some statistics and clues about demonstrated preferences, for example, on PrawfsBlawg, which serves in part as a gossip site for legal scholars.<sup>6</sup>

This article utilizes the law and economics approach to study the law review system itself. It begins by outlining the “law” that governs the system, namely, the peculiarities of articles submission as well as the ranking of the journals. It then analyzes the strategies and outcomes using an idealized system, and, by adding realistic constraints to the system, shows how the system creates a market structure that encourages saturation submission and disadvantages the scholars who cannot afford to do so. It concludes with some proposals about reforming the system.

From a broader perspective, the ills of the law review system are simply too deep and too numerous to be addressed in any single article.<sup>7</sup> To that end, the reader is highly encouraged to refer to the

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4. See Brian Galle, *The Law Review Submission Process: A Guide for (and by) The Perplexed 1* (Aug. 12, 2016) (Georgetown University Law Center), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2822501](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2822501) (“No one really understands the law review publication process. I certainly don’t.”).

5. *Id.* at 5 (“The game is that one first submits to a very large number of journals.”).

6. For example, PrawfsBlawg has an “angsting” thread for every submission season, where legal scholars discuss which journals have accepted their articles and how journal acceptances should be weighed. See, e.g., *Law Review Submission Angsting Thread: Fall 2017*, PRAWFSBLAWG (Aug. 4, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/2017/08/law-review-submission-angsting-thread-fall-2017.html>. The information posted on these threads provide a glimpse into the behavior of actual legal scholars.

7. For other problems with the law review system that have been noted by scholars, see Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those With All the Power—Student Editors*, 59 S.C. L. REV. 175 (2007) (analyzing some of the problematic factors, such as a reviewer’s ability to recognize the school

forthcoming essay, “Law Review Publishing: Thoughts on Mass Submissions, Expedited Reviews, and Potential Reforms,” by Michael Cicchini.<sup>8</sup> Unlike this article, which examines the law review system from a systematic point of view, Cicchini’s essay takes a more granular look at the morally questionable practices used by individual legal scholars to enhance their article placement. This article and Cicchini’s article are independently written; however, the reader may consider the two articles as companion pieces in their criticisms of the entire law review system.

## II. HOW THE LAW REVIEW SYSTEM OPERATES

In order to analyze the law review system using the law and economics approach, it is important to first identify the underlying “laws.” Readers who are regular users of the system will be well familiar with these “laws,” but it is useful to briefly set forth the essentials as a basis for discussion.

### A. Peculiarities of Law Journal Submissions

As in all fields of academia, authors submit their research articles to journals, which decide whether or not to publish the articles. However, there are a few distinguishing features with regard to law journals, as compared to, for example, scientific journals.<sup>9</sup>

First, legal scholars generally do not submit articles to journals on an exclusive basis. Authors may submit to any number of journals and pick the most desirable among the offers. Desirability will be addressed in a subsequent discussion; for now, it is sufficient to note that it is not unheard of for authors to simultaneously submit a single article to 100 journals.<sup>10</sup>

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at which the author teaches, used in article publication decisions), Richard A. Posner, *Against the Law Reviews*, LEGAL AFFAIRS (2004), [https://www.legalaffairs.org/issues/November-December-2004/review\\_posner\\_novdec04.msp](https://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp) (noting that the background of law review editors may not equip them to review papers on interdisciplinary work), and 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, 8–24 (2013) (summarizing common criticisms of the law review system).

8. Michael D. Cicchini, *Law Review Publishing: Thoughts on Mass Submissions, Expedited Reviews, and Potential Reforms*, 16 U. N.H. L. REV. (forthcoming 2017).

9. For a brief description of the typical journal submission process in an area of study outside of law, see Posner, *supra* note 7. For an example of the policy of a scientific journal, see Science: *Editorial Policies*, SCIENCE, <http://www.sciencemag.org/authors/science-editorial-policies> (last visited Sept. 1, 2017).

10. See, e.g., Anotheranon, *Submission Angsting Spring 2016*, PRAWFSBLAWG (Feb. 29, 2016, 11:11 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/7/#comments> (“My suggestion would be to submit much more broadly (think at least 100 journals, not 30).”).

Second, authors are generally required to pay a submission fee. While some journals have allowed submission through emails for free,<sup>11</sup> as of this writing, a large number of law journals accept articles exclusively through Scholastica, which charges authors a \$5 “management charge” for each submission to each journal.<sup>12</sup> This can easily lead to expenditures of hundreds of dollars to have an article published.<sup>13</sup> It should be noted that Scholastica increased the price for submissions to \$6.50 in early 2017, a 30% price hike.<sup>14</sup>

Third, law articles are generally selected by student editors of journals, not by peer review.<sup>15</sup> Some of the most prestigious journals may incorporate some element of review by scholars into their review process,<sup>16</sup> but the ultimate decisions about publishing reside with student editors. Purely peer-reviewed journals, such as the *Journal of Legal Education*, are rare.

Fourth, because authors may submit to multiple journals at once, the expedite mechanism exists so that an author can alert more desirable journals about acceptance from a less desirable journal.<sup>17</sup> That way, the more desirable journals can be prompted to decide whether to accept the article before the offer for acceptance from the less desirable journal expires.

## B. Ranking of Law Journals

To understand how journals are ranked, it is important to note that each school generally produces a “flagship” journal, such as *Stanford Law Review*. Some may have “niche” journals focused on

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11. For a summary of the submission policies of 203 law journals, see Allen Rostron & Nancy Levit, Information for Submitting Articles to Law Reviews & Journals (July 2017) (University of Missouri at Kansas City School of Law), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1019029](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019029).

12. *The Top Choice Among Law Reviews for Article Selection*, SCHOLASTICA, <https://scholasticahq.com/law-reviews> (last visited Oct. 17, 2016).

13. See, e.g., Anonymous, *Submission Angsting Fall 2016*, PRAWFSBLAWG (Aug. 7, 2016, 6:17 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/07/submission-angsting-fall-2016/comments/page/2/#comments> (“I have spent about \$300 for my current submission.”); Anonymouse, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 28, 2017, 9:57 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/11/#comments> (“I think I have racked up about \$650 in submission fees which fortunately my school pays for.”).

14. *January 2017 Law Review Submission Price Update*, SCHOLASTICA, <http://blog.scholasticahq.com/post/law-review-submission-price-update/> (last visited Oct. 17, 2016).

15. Posner, *supra* note 7.

16. Galle, *supra* note 4, at 13.

17. A complete description of the expedite practice is beyond the scope of this article. For more, see Cicchini, *supra* note 8, at 7.

specific topics, such as *Stanford Technology Law Review*. Publication in the “flagship” journal commands more respect than publication in a “niche” journal of the same school.

What is more complicated is how scholars compare journals published by different schools. The consensus is that legal academics rank journals by the *U.S. News & World Report* ranking of the law school publishing the law review.<sup>18</sup> That is, if William & Mary ranks as 33 according to the magazine, then *William & Mary Law Review* ranks as 33 among the “flagship” journals.

There exists a seemingly never-ending dispute among legal scholars about how the “niche” journals published by higher-ranked schools should be ranked against the “flagship” journals of lower-ranked schools. Brian Galle, a tax scholar, provides this perspective:

I have heard international law scholars say that placing with Harvard's international-law journal [i.e., *Harvard International Law Journal*] is almost as good as placing in the *Harvard Law Review*. Let me be blunt. That is absurd. For most purposes, specialty placements are not as valuable as general-interest journal placements, and a 40- or 50-place discount seems closer to my sense of the difference than 20. Certainly, I would never take a [*Virginia Tax Review*] placement over, say, the *Emory Law Journal*. But this can vary by field and by journal. . . .

There is probably a premium for the very top specialty journals. I might put outlets such as the *Yale Journal on Regulation* in or close to the top 20, while some Columbia or Virginia journals, say, are probably best measured by adding 50 or more.<sup>19</sup>

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18. *Id.* at 4. It should be noted that, for purposes of ranking journals, some scholars prefer the use of the peer assessment score, one of the factors used by the *U.S. News & World Report* to determine its overall rankings, instead of the overall rankings themselves. See, e.g., anon, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 8, 2017, 11:11 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/7/#comments> (“[T]he general USNWS rankings are unhelpf [sic] for gauging the quality of law reviews. Use the peer assessment scores instead, they are typically consistent year-to-year: [http://taxprof.typepad.com/taxprof\\_blog/2016/03/2017-us-news-peer-reputation-rankings-v-overall-rankings.html](http://taxprof.typepad.com/taxprof_blog/2016/03/2017-us-news-peer-reputation-rankings-v-overall-rankings.html)”). The peer assessment score is determined by surveys of “law school deans, deans of academic affairs, chairs of faculty appointments and the most recently tenured faculty members,” who are asked to “rate programs [of peer schools] on a scale from marginal (1) to outstanding (5).” Robert Morse, *Methodology: 2017 Best Law Schools Rankings*, U.S. NEWS & WORLD REPORT (Mar. 16, 2016, 9:30 PM), <http://www.us-news.com/education/best-graduate-schools/articles/law-schools-methodology>.

19. Galle, *supra* note 4, at 9.

Here is a slightly different take, from an exchange between scholars on PrawfsBlawg:

I received two offers in the past day. One from a T50–60 general law review, and one from one of the top 3 specialty law journals. Thoughts on which is better?<sup>20</sup>

Posted by: Anon

There are different ways to think about it. For me, the most important is to decide who I hope will read the article. If I am really hoping to reach colleagues in my field, and not much beyond, then I would take the offer from the top 5 specialty journal, which has a good chance of being read regularly by lots of scholars in the field (who might not see the piece if published in a main-line law rev[iew])[.] If the piece contains important themes that transcend the specialty categories, then I might go for the main-line law journal.

Another way to look at it is from the perspective of the Dean's/faculty's review criteria at your school. Will one type of publication "count" more than another in terms of future research grants etc.?

Posted by: crimprof<sup>21</sup>

Some scholars treat publication in a specialty journal as a mark of failure:

Generally, I think placing in a specialty journal is a bad idea. Unless it's a super well-regarded specialty, I view such placements as a signal that the author failed to get a decent offer from a general journal.

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20. Anon, *Submission Angsting Fall 2016*, PRAWFSBLAWG (Aug. 2, 2016, 8:02 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/07/submission-angsting-fall-2016/comments/page/1/#comments>.

21. crimprof, *Submission Angsting Fall 2016*, PRAWFSBLAWG (Aug. 2, 2016, 8:55 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/07/submission-angsting-fall-2016/comments/page/1/#comments>.



Posted by: AnonHiringChair<sup>22</sup>

There are a number of practical problems with using the *U.S. News & World Report* rankings of law schools to rank the journals they publish.<sup>23</sup> First, the method simply cannot account for journals that are not affiliated with a law school. Examples of such journals include the *Journal of Legal Education*, a publication of the Association of American Law Schools, and the *Federal Courts Law Review*, a publication of the Federal Magistrate Judges Association.

Second, the law school rankings of *U.S. News & World Report* do not take into account the quality of the journals that the law schools publish. Rather, the magazine ranks law schools based on factors such as peer assessments, selectivity, and success in job placement of graduating students.<sup>24</sup> That the *U.S. News & World Report* ranks schools without a consideration of journal quality is well understandable; after all, the magazine is publishing the rankings for prospective students to decide which school to attend.<sup>25</sup> However, by using the *U.S. News & World Report* rankings of law schools to rank journals, legal academics are taking the rankings far beyond their intended use and essentially are ranking journals based on factors that have little to do with the journals themselves.

Legal scholars are virtually unique in ranking journals in such a way. Scientists, for example, have their own disagreements about how to rank journals; the predominant method of using journal impact factors published by Thomson Reuters is particularly controversial.<sup>26</sup> Nonetheless, journal impact factors are still based on counts of citations to articles within the journals.<sup>27</sup> Whether or not

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22. AnonHiringChair, *Submission Angsting Fall 2016*, PRAWFSBLAWG (Aug. 23, 2016, 9:39 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/07/submission-angsting-fall-2016/comments/page/4/#comments>.

23. *Best Law Schools Ranked in 2017*, U.S. NEWS & WORLD REPORT, <https://www.us-news.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Sept. 6, 2017).

24. Morse, *supra* note 18.

25. U.S. NEWS & WORLD REPORT, *supra* note 23 (introducing the rankings with these two sentences: "A career in law starts with finding the school that fits you best. With the U.S. News rankings of the top law schools, narrow your search by location, tuition, school size and test scores.").

26. Ewen Callaway, *Beat It, Impact Factor! Publishing Elite Turns Against Controversial Metric*, NATURE (July 12, 2016), <http://www.nature.com/news/beat-it-impact-factor-publishing-elite-turns-against-controversial-metric-1.20224>. The journal impact factors are made available at present by Thomson Reuters through a service called the Journal Citation Reports. While the reader would not be able to access the rankings without a subscription, the reader can get a sense of what the service is about by browsing through its website at <http://about.jcr.incites.thomsonreuters.com/>.

27. Eugene Garfield, *The Clarivate Analytics Impact Factor*, CLARIVATE ANALYTICS, <http://wokinfo.com/essays/impact-factor/> (last visited Sept. 6, 2017) ("The impact factor is one

citation count is a fair reflection of the journal's quality is certainly debatable, but the count is undoubtedly an attribute of the journals themselves. The same could not be said of ranking law journals based on the *U.S. News & World Report* law school rankings.

There do exist journal ranking systems within the law review system that take into account the attributes of the journals. For example, the law library of Washington and Lee University School of Law maintains a system that ranks law journals by citation counts and impact factor.<sup>28</sup> Likewise, Google Scholar produces a ranking of journals based on the number of citations.<sup>29</sup> However, these systems have not gained the popularity of the method of using the *U.S. News & World Report* rankings of law schools to rank the journals they publish.<sup>30</sup>

The best and most convincing explanation for this behavior of legal scholars is laziness. As a scholar noted on PrawfsBlawg:

Here's my thoughts—always go with U.S. News. The reason is that people reviewing your CV tend to have an idea of where that journal's school is ranked; nobody walks around with encyclopedic knowledge of W&L rankings, nor will most take the time to look it up. For instance, W&L ranks Lewis and Clark as #40 (USNEWS ranking = 92) and Alabama as #41 (USNEWS ranking = 28). NOBODY would consider a L&C placement as even comparable to an Alabama placement, much less superior.<sup>31</sup>

If you're someone who is publishing in hopes of getting hired into a tenure track position, please don't fool yourself into thinking that those who will be evaluating your candidacy will spend the time asking themselves, of the journals you've published in, how widely read they are and whether

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of these; it is a measure of the frequency with which the 'average article' in a journal has been cited in a particular year or period.”)

28. *Law Journals: Submissions and Ranking Explained*, WASHINGTON AND LEE UNIV. LAW SCH. OF LAW LAW LIBRARY, <http://lawlib.wlu.edu/LJ/method.asp> (last visited Dec. 7, 2016).

29. Robert Anderson, *Google Law Review Rankings 2015*, WITNESSETH: LAW, DEALS, & DATA (Feb. 15, 2016), <http://witnesseth.typepad.com/blog/2016/02/google-law-review-rankings-2015.html>.

30. Galle, *supra* note 4, at 8 (“Q: U.S. News rankings or Washington & Lee rankings? A: U.S. News peer reputation score. Q: Really? People don't care about Washington & Lee? A: I mean, W&L itself has several different rankings systems. Who could possibly keep track of which journal is ranked where in which ranking?”).

31. AnonProf, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 18, 2017, 1:55 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/6/#comments>.

that journal typically publishes “good” articles. Instead, it’ll be a relatively snap judgement of 1) have I heard of this journal before and 2) how well regarded is the school to which it is attached.<sup>32</sup>

Legal scholars are already well-versed in the law school rankings of the *U.S. News & World Report*. To use alternative rankings to judge the quality of the journals, they would need to take the actual effort to look up these alternative rankings. In contrast, it is a trivial exercise to discern from the name of a law journal which law school published the journal and then to apply the *U.S. News & World Report* ranking of the law school to rank the journal.

### C. *Player Strategy within the Law Review System*

Legal scholars have converged on a strategy to deal with the law review system: submission by saturation, and then work up the rankings using the expedite system. Here is a description provided by Galle:

The game is that one first submits to a very large number of journals. After receiving an initial offer, one then send[s] requests for expedited review to journals that you prefer to the offering journal, but which are not far, far, higher ranked than the offering journal. A typical heuristic is to expedite to the next 50 or so higher-ranked journals. One then hopes for another offer from that grouping, and then sends news of the two offers to the next 50. And so on, potentially.<sup>33</sup>

As far as this author can tell, players have arrived at this strategy by experience and not by actual analysis. It is one aim of this article to explain why saturation submission exists.

That each submission costs \$5 or \$6.50 means that saturation submission can be costly to implement, particularly for junior scholars unaffiliated with an institution who cannot rely on an institutional account and have to pay out of their own pockets. Some authors simply cannot afford this strategy at all. It is another aim of

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32. AnonProf, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 18, 2017, 2:36 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/6/#comments>.

33. Galle, *supra* note 4, at 5.

this article to broadly explain the negative impact of authors' financial constraints on their article placements.

### III. THE IDEALIZED LAW REVIEW SYSTEM

To understand which part of the real-world law review system results in the strategies and outcomes we empirically observe, we begin by analyzing an idealized law review system.

#### A. *Properties of the Idealized System*

To simplify our analysis, we will assume a universe of 100 journals. All will be assumed to be “flagship” journals; we will ignore the complexity of “niche” journals. Of these 100, we will assume that the *U.S. News & World Report* rankings govern preferences for publication offers. To make the numbers easier to interpret, we will assume that the submission fee is the old, round figure of \$5 instead of the new, increased cost of \$6.50.

As in real life, the top 3 journals will be assumed not to charge a submission fee.<sup>34</sup> Of the other 97, 10 others will be assumed to be willing to accept articles by email; that is, they have an avenue for submission without fees. These 13 journals will be collectively referred to as the “free journals” and their ranks are assumed to be evenly distributed throughout the ranking spectrum.<sup>35</sup> All others are assumed to accept articles exclusively through Scholastica.

We will further assume that there actually exists an objective grading of articles as deserving of a journal of a particular rank. In other words, we will assume that it is possible to say, “this article is worthy of *The University of Chicago Law Review*.” In the real world, it is difficult to assign such grades or even to ascertain what factors should govern the grading. But we intuitively do know that some articles deserve to be placed in journals of higher rank than others, so this assumption is not overly unrealistic. We will also

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34. *Yale Law Journal*, *Harvard Law Review*, and *Stanford Law Review* have their proprietary submissions systems that do not require a charge.

35. We make the assumption that the free journals are evenly distributed throughout the ranking spectrum because it preserves a translational symmetry. In other words, the handicap to an article resulting from the author's financial constraints is the same whether the article merits to be published in the journal ranked 34 or the journal ranked 72. But in reality, as of spring of 2017, there are 40 journals that accept articles exclusively through Scholastica. Of these, 35 are in the top 50, based on the *U.S. News & World Report* rankings. This concentration of journals that demand submission fees on the higher end of the ranking scale implies that, the better an article, the greater the disadvantage resulting from financial constraints.

assume that authors will accept the highest-ranked journal that accepts their articles.<sup>36</sup>

Finally, we will assume that journals have perfect judgment about article merit relative to their ranks and have an infinite capacity to accept articles worthy of their ranks. We will return to these last two assumptions in a subsequent discussion.

### *B. Scholars with Infinite Resources*

At one extreme are the scholars with an infinite amount of resources. These could include, for example, well-entrenched professors who can call upon secretaries to manage article submissions and cover letter preparations as well as charge the Scholastica fees to research accounts. They would also include law firm partners who can impose the drudge work on associates and bill the costs to “business development.”

For these individuals, the marginal cost of an article submission is basically zero.<sup>37</sup> However, for them, there is always a positive marginal benefit to article submission because they stand a better chance at a higher journal placement with another submission.<sup>38</sup>

These incentives govern their submission strategy. Because the marginal benefits to an article submission always exceed the marginal costs, in practical terms, these individuals will submit their articles to every journal in existence. When they receive offers for publication, they will use the offers to expedite review at higher-ranked journals.

In our idealized system, the net amount these individuals spend would be \$5 for each of the 87 journals that requires a submission fee, totaling \$435. In real life, these individuals would hardly bother themselves with the more troublesome avenue of submitting to the free journals by emails rather than through Scholastica, which would result in a net amount spent closer to \$500.<sup>39</sup>

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36. This assumption may not hold true in real-life. For more, see *infra* note 58 and accompanying text and Cicchini, *supra* note 8.

37. In layman’s terms, the marginal cost is the value of what one would have to give up in order to obtain an additional unit. Because the law firm partners and professors have some other entity to pay for their submissions, they do not really give up any value in submitting one more article and so the marginal cost of an article submission for them is basically zero. Of course, the marginal cost to the entity actually paying for the submission is not zero.

38. The marginal benefit is the value of what one would give up to acquire an additional unit. The point at which people would stop acquiring units would be the point at which marginal cost is equal to the marginal benefit.

39. Scholastica essentially allows authors to select a number of journals into a “shopping cart” and mass submit one article to all the journals in the cart at once. This is, obviously, more convenient than submitting articles to journals one-by-one. The interactive system of

These individuals can be assured that their articles will receive the placement they deserve. Situations may arise where, by overplaying their hand, they spoil their article placement. For example, an author can face the problem where a higher-ranked journal refuses to consider her article before the deadline of a publication offer extended by a lower-ranked journal, and the author, being overconfident, turns down the lower-ranked journal only to find the work rejected by the higher-ranked journal. But in general, no one is in a better position to claim the rightful placement for his or her work than these well-resourced scholars.

### *C. Scholars with Very Limited Resources*

At the other extreme are the scholars with very few resources. Examples of such individuals include those who are in the faculty job market or in government employment who have to pay the submission fees out of their own pockets.

As a simplification, we will first consider those who are completely cash-strapped. The strategy of these poorly-resourced scholars is easy enough to predict. They will submit their articles to all the free journals.<sup>40</sup> Because they have no money to spend, they will stop at this step and accept the best offer they have.

The placement of the articles these individuals produce relative to the intrinsic merit of the articles is heavily dependent on the distribution of free journals in the journal hierarchy. Let us assume, for example, that a completely cash-strapped individual has an article worthy of placement in the journal ranked 34. In an even distribution of free journals across the hierarchy, say, the journals ranked 30 and 40 are free, the individual may be able to place her article in a journal ranked 40. It is a slight dent, not entirely damaging, to the placement. However, if there is a big gap in the rankings between the free journals, say, the journals ranked 30 and 60 are the two free journals closest in rank, then this author would be

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Scholastica is best appreciated by directly testing it out, but a written description can be found at <https://blog.scholasticahq.com/post/announcing-improved-law-review-article-submission-on-scholastica/>.

40. This analysis ignores the transaction costs associated with free submissions which further complicate the problem for poorly-resourced scholars. First, submission by email relative to Scholastica entails a much larger investment of time. Second, the journals that accept submissions by email often openly state their preference for submissions through Scholastica. See, e.g., *Submissions*, PEPPERDINE LAW REVIEW, <http://pepperdinelawreview.com/submit/> (last visited Feb. 6, 2017) (“Although submission via email or U.S. mail to the addresses below is acceptable, we strongly prefer submissions via Scholastica.”). All of the uncertainty and effort associated with free submissions constitute transaction costs. Still, we would have to imagine that most poorly-resourced scholars would not opt for Scholastica over email; after all, a \$5 submission fee per journal adds up very, very quickly.

forced to publish in the journal ranked 60. That is a massive drop in placement.

#### *D. Scholars in Between the Two Extremes*

Most scholars, we would think, will likely fall somewhere in between the two extremes of the infinitely-resourced and the completely cash-strapped. For example, these authors may have a \$100 budget to spend as opposed to \$435 at one extreme and \$0 at the other. And this is where the considerations for article placement become most complex and interesting.

A simple analysis would suggest that these authors would adopt a strategy between those used by persons at the two extremes. That is, these authors should try to use the \$100 to submit to 20 journals, which, added to the 13 free journals, tallies to submissions to 33 journals within the entire pool of 100. They would attempt to evenly spread out the distribution of these 33 submissions, that is, one submission for every 3 ranks, so as to best approximate the spectrum of the 100 journals.

To that end, with \$100, they can cover roughly one-third of the journals considered in the idealized system. That would seem like a fair amount of coverage and will seem to guarantee that the article will not be published in a journal significantly lower than where it deserves to be.<sup>41</sup>

As we can see, even this idealized system rewards the saturation submission strategy, although the benefits are not significant. The situation changes completely when we consider other realities of the law review system.

### IV. ADDING REALISTIC CONSTRAINTS TO THE IDEALIZED SYSTEM

#### *A. No Journal Accepts All Articles Deserving of Its Rank*

In reality, no journal accepts all articles that deserve to be published in it. A large number of reasons, many of which are legitimate, govern these considerations. For example, a journal may not be interested in the subject matter of a well-deserving article at a particular time. A journal may also have already accepted all of the articles it could accept for a particular submission season.

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41. Because they submit to one journal in every three ranks, these authors would place their articles in journals at most two ranks below where their articles deserve to be.

The key effect of this resource constraint is to turn the idealized system from deterministic to probabilistic.<sup>42</sup> An author has some chance of being published in a higher-ranked journal than his article merits, for example, if there were not enough better articles to fill the higher-ranked journal. Alternatively, in the more likely case, the abundance of higher-quality articles may create an overflow of articles in higher-ranked journals and push his article to a lower placement than where it actually deserves to be placed.

The precise effect of the resource constraint is dependent on the number of articles in the system, the distribution in the quality of these articles, and the specific submission strategies of each author. But still, even with the resource constraint, the probability of having an article accepted in a lower-ranked journal is never lower than that of having an article accepted in a higher-ranked journal. In other words:

$$Probability_{acceptance}(lower-ranked) \geq Probability_{acceptance}(higher-ranked)$$

This insight allows us to construct a simple test. Let us assume there were multiple authors who produced articles worthy of placement in the journal ranked 34. Let us assume also that all the journals ranked in the 30's are full, but one journal ranked in the 40's, two journals ranked in the 50's, three journals ranked in the 60's, etc., will accept these articles.

In this situation, the author who could submit to all 100 journals may not be able to place her article in the journal ranked 34, even though that is where her article deserves to be published. However, because she submits her article to all the journals, she will be able to publish in that one journal ranked in the 40's that would accept her article.

As stated above, the author with a \$100 budget can submit to only one-third of the available journals. This essentially means that he can submit to every third journal according to the rankings. As a simplification, this author can submit to three journals in each decile. To be published in the journal ranked in the 40's that will accept his article, it becomes a question of probability whether he picked the correct journal with his three submissions within that decile.

Without a full explanation of the mathematics, we have tabulated the probabilities of acceptance at every decile for authors who can

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42. A deterministic system, unlike a probabilistic system, is one in which there is no randomness involved in determining the outcome.



only afford: (A) three submissions for every decile; (B) two submissions for every decile; and (C) one submission for every decile. Example calculations are provided in the footnotes.

Journal Rank	Number of Journals Accepting Article	3 Submissions Every Decile			2 Submissions Every Decile			1 Submission Every Decile		
		Probability of Not Getting Any Acceptance at This Decile	Probability of Getting an Acceptance at This Decile	Probability of Article Acceptance at This Decile and Above	Probability of Not Getting Any Acceptance at This Decile	Probability of Getting an Acceptance at This Decile	Probability of Article Acceptance at This Decile and Above	Probability of Not Getting Any Acceptance at This Decile	Probability of Getting an Acceptance at This Decile	Probability of Article Acceptance at This Decile and Above
41-50	1	0.70	0.30	0.30	0.80	0.20	0.20	0.90	0.10	0.10
51-60	2	0.47	0.53	0.67	0.62	0.38	0.50	0.80	0.20	0.28
61-70	3	0.29 <sup>43</sup>	0.71 <sup>44</sup>	0.90 <sup>45</sup>	0.47	0.53	0.77	0.70	0.30	0.50
71-80	4	0.17	0.83	0.98	0.33	0.67	0.92	0.60	0.40	0.70
81-90	5	0.08	0.92	1.00	0.22	0.78	0.98	0.50	0.50	0.85
91-100	6	0.03	0.97	1.00	0.13	0.87	1.00	0.40	0.60	0.94

Table 1: Probabilities of Acceptances for Different Submission Frequencies

The expected rank of the placement is a probability-weighted average,<sup>46</sup> which we can tabulate as follows:

43. There are three journals in this decile willing to accept the article, and the author has three submissions within this decile. There are seven journals within this decile which will not accept the article, so the probability of the first of these three submissions not being accepted is 7/10. For the second of these three submissions, there are only six out of nine journals which will not accept the article. Accordingly, the probability of rejection decreases to 6/9. The overall probability of no journal within this decile accepting the article is:  $\frac{7}{10} \times \frac{6}{9} \times \frac{5}{8} = 0.29$ .

44. This is simply 1 minus the probability of no journal accepting the article in this decile, so:  $1 - 0.29 = 0.71$ .

45. The probability of the article being accepted in the 60's without being accepted in any journal ranked above is:  $0.70 \times 0.47 \times 0.71 = 0.23$ . The probability of the article being accepted in any journal ranked in the 60's and above is therefore:  $0.23 + 0.67 = 0.90$ .

46. The precise formula is:

$$Expected Rank = 100 - \sum (Probability_{placement}(rank) \times (100 - rank))$$

	Saturation Submission	3 Submissions Every Decile	2 Submissions Every Decile	1 Submission Every Decile
Expected Journal Rank of Article	45	56 <sup>47</sup>	61	71

Table 2: Expected Placement for Different Submission Frequencies

Even in this simple system, the penalty in journal rank is steep for those who cannot afford saturation submission. The author who spends \$100 versus \$435 places 11 ranks lower. If the acceptance statistics are more stringent, say, 0.5 acceptances in the 40's, 1 in the 50's, 1.5 in the 60's, etc., the penalty would be even harsher.<sup>48</sup>

However, there is a bigger problem still for the poorly-resourced authors.

### B. Acceptance Statistics Lack a Good Match with Journal Rank

As stated, even with the resource constraint:

$$Probability_{acceptance}(lower-ranked) \geq Probability_{acceptance}(higher-ranked)$$

Intuitively, we would think that it should be easier to place in a lower-ranked journal than in a higher-ranked journal and that the probabilities should so reflect. But is that true?

Available data on how articles placed in high-ranked journals fared in lower-ranked journals is rare,<sup>49</sup> but some can be found on the "Submission Angsting Spring 2016" thread of PrawfsBlawg.<sup>50</sup> A small number of scholars have reported acceptance and rejection

It is necessary to subtract the rank from 100 and then subtract the ultimate sum from 100 because the ranking system is inverted from actual preference. For example, it is more preferable to be published in a journal ranked 40 rather than a journal ranked 90. The subtraction corrects for this artificial inversion.

47. This figure is tabulated using the formula stated in footnote 46 and using the numbers in Table 1 as follows:  $100 - (45 \times 0.30 + 55 \times (0.67 - 0.30) + 65 \times (0.90 - 0.67) + 75 \times (0.98 - 0.90) + 85 \times (1.00 - 0.98) + 95 \times (1.00 - 1.00)) = 56.34 \cong 56$ .

48. The reader can calculate the penalty using the example calculations provided in Table 1 and Table 2. Under this new distribution, the expected journal rank for the author who spends \$100 versus \$435 is 65, that is, 20 ranks lower.

49. Authors generally withdraw submissions to lower-ranked journals after receiving offers for publication from higher-ranked journals. Accordingly, there will always be little data on whether lower-ranked journals would have accepted articles placed in higher-ranked journals.

50. *Submission Angsting Spring 2016*, PRAWFSBLAWG (Feb. 2, 2016), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016.html>.

statistics, which, although probably incomplete, is sufficient for our analysis here.

The data from four of the most prolific reporters is presented below:

Journal Rank	"Taking Care of Business"		"Magnolia"		"Bartok"		"Abominable Snowman in the Market"	
	Acceptances	Rejections	Acceptances	Rejections	Acceptances	Rejections	Acceptances	Rejections
1-10		****		*****		*****		*****
11-20		**		*****	*	***		*****
21-30		***		****	*		*	
31-40		*****		***		***		***
41-50		***	*			*		*
51-60		**		*				
61-70	*	**		**				
71-80	*	*	*					
81-90		*						
91-100		**		*				

Table 3: Statistics from "Submission Angsting Spring 2016" Thread of PrawfsBlawg

There appears to be very little correlation between journal ranking and acceptance. The highest-ranked journal that accepted "Taking Care of Business"'s article was ranked 65. The same article was also accepted by the journal ranked 74. However, the article was also rejected by journals ranked 65 (x2),<sup>51</sup> 72, 82, 97, and 100.

51. There were 7 law schools ranked 65. Michael Spivey, *USNWR Schools Ranked 1-100*, SPIVEY CONSULTING (Mar. 9, 2016), <http://blog.spiveyconsulting.com/usnwr-schools-ranked-1-50-now-with-from-last-year/>. "Taking Care of Business" reported submitting to 3 journals from these 7 schools.

“Magnolia” had his or her article accepted at the journal ranked 45. The article was also accepted at the journal ranked 72. However, the article was rejected at journals ranked 55, 65 (x2), and 100.

“Bartok” and “Abominable Snowman in the Market” are particularly worth comparing. Both reported acceptance at the same journal ranked 22. “Bartok” also reported acceptance at the journal ranked 20; however, he or she reported rejections at journals ranked 33 (x2), 37, and 55 and no other acceptances from journals ranked below 22. “Abominable Snowman in the Market” apparently only had one acceptance; his or her article was rejected at journals ranked 33, 38, 48, and 55.

Accordingly, these data, incomplete though they are, suggest that this equation may not hold true in the real world:

$$Probability_{acceptance}(lower-ranked) \geq Probability_{acceptance}(higher-ranked)$$

There are two possible causes. First, journals may not be very good at judging the merit of articles relative to their ranks, or they simply may not judge articles based on their ranks at all. Second, journal acceptances may be clustered around particular deciles or, in other words, journals ranked below where the articles deserve to be published have a tendency to reject the articles. For example, we can observe that “Taking Care of Business” received acceptances from journals ranked in the 61–80 range but found rejections in the journals ranked below 80.

There are simply not enough data to support either one conclusion or the other, although we have reason to be skeptical of the second. For lower-ranked journals to reject articles that are, for all intents and purposes, “too good” for them to publish essentially requires journals to have an extremely good grasp of the quality of articles they can realistically hope to publish. However, law journals have a yearly turnover of staff, so it is difficult for them to retain an institutional knowledge about which of their offers to publish will be accepted.<sup>52</sup> Also, while we are not privy to the discussion in the editorial offices of lower-ranked journals, it seems implausible that student editors would vote to reject articles on the ground

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52. The policy of *Duquesne Law Review* about how the journal takes on members every year can be found at <http://www.duqlawblogs.org/lawreview/membership/>. The process utilized by *Duquesne Law Review* is typical.

that articles were “too good.”<sup>53</sup> Moreover, lower-ranked journals can always count on higher-ranked journals not to accept all of the best articles; rejecting articles “too good” for them would mean publishing inferior articles overall.

Regardless, either possibility is bad news for poorly-resourced authors. If journals do not accept articles in accordance with their ranks, then the system approaches randomness. The best strategy for obtaining a good placement for any particular article will be complete and total saturation submission.

The best strategy for dealing with clustered acceptances is also saturation submission. After all, authors do not know which journals their articles would qualify for.<sup>54</sup> It is only after they have received acceptances that they know generally where their articles could place. Because of this lack of knowledge, the authors have to treat the law review system as completely random even if it is not.

Without more data allowing for some characterization of the distribution of acceptances across the journal hierarchy, it is not possible to estimate the harm to the poorly-resourced. What can be said is that the harm from the lack of correlation between article merit and acceptance is even greater than the harm from the inability of journals to publish all meritorious articles.<sup>55</sup>

### *C. Implications of the Real-World Law Review System*

The definition of marketization is the exposure of a system to market forces.<sup>56</sup> The above discussion demonstrates that the addition of the two realistic constraints results in the marketization of the idealized law review system because they magnify the reward in article placement for those who can pay more.

To that end, it must be noted that the idealized law review system, even with the two realistic constraints, is still not fully marketized. The system naturally imposes a ceiling in spending; there are only 100 journals in the system. There is therefore a maximum number of submissions and a maximum amount of submission fees.

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53. It should be noted that there is some indication that lower-ranked law journals do reject articles from authors affiliated with higher-ranked schools. The question of how author credentials and article quality relate to one another is a controversy that is beyond the scope of this article.

54. If authors knew how their articles would place ahead of time, they would be able to work to improve their articles to achieve a higher placement.

55. The reader is invited to try the tabulation of Table 1 and Table 2 using the example calculations but with different probability assumptions, for example, one acceptance in the 40's, zero in the 50's, two in the 60's, etc.

56. *Marketization*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/marketization> (last visited Sept. 6, 2017).

Once a particular legal scholar pays for saturation submission, he or she joins an elite group that is immune from market forces. This upper limit preserves a meritocracy, but only for scholars who participate in saturation submission.

Do these market dynamics apply in the real-world law review system? In the real-world, there are far more than 100 journals. In theory, given the many hundreds of journals to submit to, there is complete and total marketization. Nonetheless, from a practical point of view, there is a limited number of journals that “matter” to legal scholars. It is worthwhile to consider this dialogue on PrawfsBlawg:

I’ve got an offer that expires today from a journal which is just . . . ok. . . . I can’t decide whether it is madness at this point in the cycle to turn down the only firm offer I have in favor of hopefully placing somewhere better. As background, I’m in a good—but temporary—teaching job now, and plan to go on the market this fall. I’m already published, but nowhere particularly impressive. Any thoughts or advice would be greatly appreciated. (And any more insight into AnonProf’s list of journals that are “going to hurt you,” would be welcome, too!)

Posted by: ALurkerNoLonger<sup>57</sup>

What will “hurt you” is entirely relative. If you are already published, the question I would ask is whether the current offer is from a journal appreciably higher ranked than your previous placement(s). If no, I would let the offer lapse (after attempting to negotiate an extension, of course). Adding yet another publication at a similar rank will not add much to your candidacy (in part because the expected placement of a listed “work in progress” will be roughly that).

Posted by: anon<sup>58</sup>

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57. ALurkerNoLonger, *Submission Angsting Spring 2016*, PRAWFSBLAWG (Feb. 25, 2016, 9:26 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/5/#comments>. For more on this subject, see Cicchini, *supra* note 8.

58. anon, *Submission Angsting Spring 2016*, PRAWFSBLAWG (Feb. 25, 2016, 9:35 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/5/#comments>. For more on this subject, see Cicchini, *supra* note 8.

In terms of what will “hurt you,” I would stay away from any journal whose school is unaccredited or ranked in the fourth tier. I also wouldn’t publish in a specialty at any school not in the top 10 (unless that journal just happens to have a particularly great reputation . . .), and I also wouldn’t publish in a specialty [sic] journal that’s less than five years in existence. In short, I would aim for at least a top 100 general placement.

Posted by: AnonProf<sup>59</sup>

At the outset, it is a horrendous distortion of academic values that publication in lowly-ranked journals is considered *harmful* to scholarly careers. It also runs contrary to any pedagogic principle to have lowly-ranked journals discussed as if they were pornographic publications, to have real-world, good faith student editors at lowly-ranked schools treated as the *dalit* of law students. There are many reasons why students end up in law schools ranked below 100 on the *U.S. News & World Report*, but their inability to pick good articles for publication and to “*Bluebook*” and cite-check law review articles are unlikely to be among the top reasons.

But however distasteful it is, the dialogue reflects the belief and practice within the legal academia, which we must accept in any empirical discussion about the matter. And we can infer that, in practice, there is a limited number of journals that scholars want to publish in; the total number of journals in the entire real-life law review system may be irrelevant. The assumption of 100 journals in the idealized system may be a bit restrictive, but, based on the above-cited comments from PrawfsBlawg, the number is not an unreasonable estimate of the number of journals that “matter.”

Accordingly, we can conclude that the dual-track market dynamics predicted in the idealized system may exist in real-life. And, to that end, legal scholars must wrestle with the idea that, unlike any other academic discipline, their publication system is a market which rewards the maximum payment of submission fees. In the United States, we generally accept the idea that those with more money can buy and get more. But when is this advantage too much? Perhaps we may find it acceptable that authors with only \$100 to spend on submissions be published in journals 10 ranks below where they could have published had they \$300 to spend. But what

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59. AnonProf, *Submission Angsting Spring 2016*, PRAWFSBLAWG (Feb. 25, 2016, 9:44 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/5/#comments>. For more on this subject, see Cicchini, *supra* note 8.

if the disadvantage results in a 50 rank drop? At what point does the correlation between the size of budgets for article submission and the resulting placement of articles interfere with the overall aims of the academic community, which, presumably, are not related to the amount of money an author can spend?

It is also important to consider the identity of the players in the real-world law review system. As stated above, those who can best afford saturation submission are professors or law firm partners who can expense the submission fees. These are, for lack of a better word, the “insiders” among the legal scholars.<sup>60</sup> Those who are least likely to afford saturation submission, in contrast, are those who are on the faculty job market or in government employment and have to pay the fees out of their own pockets. These “outsiders” are the ones subjected to the marketization of the law review system while the “insiders” are not.

The disparate impact of marketization on “outsiders” and “insiders” has very serious practical implications for legal scholarship. First, the quality of the population of “insiders” relies on the success of “outsiders” in the law review system. After all, it is the “outsiders” who join the “insiders” through the faculty job market. To the extent that the “outsiders” who succeed in the job market are those who have more publications in the higher-ranked journals, we must be troubled by the idea that success in the law review system is at least in part a factor of the ability and willingness to spend on submission fees.

We must also note that purchasing success in the law journals is not cheap. The recent tightening of the faculty job market has resulted in the need for applicants to have longer publication records to succeed in their job search. It is difficult to ascertain exactly how

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60. As extensively documented by Cicchini, some of these “insiders” have the practice of submitting to lower-ranked journals even when they have no intention of ever accepting any offer of publication from these journals. Cicchini, *supra* note 8. These scholars merely use acceptances by lower-ranked journals as a basis for expedites to higher-ranked journals or as a way to experiment with placement. If they end up with a placement they do not like, they revise and submit the article again the next submission season. See, e.g., Magnolia, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 26, 2017, 4:12 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/10/#comments> (“If you hope to go on the market soon, do not chop off 1–39. I would actually recommend chopping off dozens at the lower end of things, and if the article isnt picked up thats [sic] a sign you should get more comments and revise the piece. . . . In terms of timing, I submitted 3/1 last year and received two offers in top 60 and top 35 range. I decided to revise the piece, and I resubmitted 8/29 and received a top 20 offer 6 days later with no other offers, thus no expedites.”). It is obvious that this submission practice can easily multiply the costs of submissions. It is unclear how widespread and successful this practice of resubmission is, but, if such methods were broadly and successfully used by those whose submissions are subsidized, the impact of article placement would be even more highly affected by the size of the budgets for submissions.



many articles are needed to secure a job, but it is not too difficult to imagine that applicants may need to risk several thousand dollars on submission fees to have a chance at success in their job search. What kind of person can risk this type of money in such a manner? And what would happen to legal scholarship as a whole if such persons predominate in the faculty job market?

Second, that the law review system would punish “outsiders” is effectively a statement that “outsiders” do not provide valuable contributions to legal scholarship. But that certainly cannot be true with respect to the applicants for faculty jobs.<sup>61</sup> After all, these “outsiders” are specifically evaluated based on their potential for contribution to legal scholarship, which is judged from their existing contribution. It would be a contradiction of the premise of the faculty job market to treat these “outsiders” as incapable of good legal scholarship.

But even outside of the subset of legal scholars who are in academia or who seek to be in academia, judges as well as lawyers working in government, in public interest organizations, and in law firms can benefit and advance the state of legal scholarship.<sup>62</sup> By being in practice, they are best placed to comment about the practice. It should be a matter of concern that the real-life law review system is systematically biased against the better placement of articles from practitioners by the imposition of significant, personal financial barriers to article submission.<sup>63</sup>

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61. The phenomenon known as “letterhead bias” further disadvantages the “outsiders.” Letterhead bias is the preference among student editors for articles written by law professors, who are, of course, among the “insiders.” It is unclear how widespread and how strong this bias is among the editors of the various law reviews. It certainly exists to the extent that some law journals make their bias explicit within their submissions policy. See, e.g., *Submissions*, U. LOUISVILLE L. REV., <http://www.louisvillelawreview.org/submissions> (last visited Feb. 6, 2017) (“Except under unusual circumstances, it also is the policy of the [*University of Louisville*] *Law Review* not to publish articles . . . that have been authored by someone other than a full-time law faculty member at an American Bar Association accredited law school.”).

62. Presumably, those who work in law firms are better paid and can better afford the fees required for saturation submission, even if they were not law firm partners who could expense the fees altogether.

63. See YesterdayIKilledAMammoth, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 17, 2017, 12:27 PM), <http://prawfsblawg.blogspot.com/2017/02/submission-angsting-spring-2017/comments/page/5/#comments> (“I think that the Scholastica price hike is a pretty good indicator that law reviews subs are becoming a closed game. Pretty soon, practitioners, clerks and profs from lower-ranked schools that don’t have much institutional support won’t be able to afford to submit as widely as they need to. This at the time when the academy is wringing its hands over being too far removed from the actual practice of law.”).

## V. SOME CONCLUDING THOUGHTS AND PROPOSALS

Legal scholars have basically intuited that they should resort to saturation submission to deal with the law review system. This article explains that this is indeed the correct strategy because more submissions help ensure a higher placement.

However, this article goes further and identifies two realities that result in harm for poorly-resourced authors. First, not all journals accept all articles that deserve to be accepted. Second, journal rankings do not seem to be strongly correlated to the merit of the articles.

The first is a simple fact of life. No journal can accept all articles of any given merit level commensurate to its rank. The second observation, however, suggests that the existing system may be unfair. Moreover, it does potentially suggest that the negative impact of the peculiarities of the system on poorly-resourced authors can be rectified by changing how articles are reviewed. There have been numerous proposals, such as the institution of peer review, which have been thoroughly discussed elsewhere.<sup>64</sup> This article does not intend to add to that discussion.

But to the extent that these two problems cannot be fixed, the fairness of the system can be improved by democratizing the availability of saturation submission tactics. For example, instead of charging authors for each article submitted to each journal, the system could be changed to charge authors upon publication.<sup>65</sup> Charging authors upon publication allows them to submit to as many journals as they wish, so long as they can afford the publication fees, and opens up the availability of saturation submission to all authors.

Opening saturation submission to all authors, however, means that all journals have to review more articles. From personal experience as an articles editor, this author can say with certainty that journals are already overburdened with article submissions. The deficiencies of the system cannot be practically remedied by making reviewing articles more difficult than it already is.

Alternatively, the system can be structured to punish saturation submission. One way to do so is to increase the fees for additional submissions. *Scholastica* at present charges \$6.50 for every article

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64. See, e.g., Posner, *supra* note 7 (“Ideally, one would like to see the law schools ‘take back’ their law reviews, assigning editorial responsibilities to members of the faculty.”).

65. This is a common practice in physics journals. See, e.g., *Publication Charges and Reprints for Physical Review Letters*, AM. PHYSICAL SOC’Y (Jan. 2017), <http://journals.aps.org/authors/publication-charges-physical-review-letters>.

submitted to a journal. The formula can be changed so that it costs \$4 per submission for the first 10 submissions, \$5 for the next 10, \$6 for the next 10, etc., until the 100th submission costs \$13. Punishing saturation submission would not solve the fundamental arbitrariness inherent to journal acceptance, but, to the extent it would stop authors from submitting to any and all journals in existence, it would mean that negative effects of such arbitrariness are borne by all authors and not just those who are poorly-resourced.

An interesting and particularly welcome development to that end is the increase in the number of journals offering an exclusive submission track, under which authors agree to exclusively submit their articles for a set period of time in exchange for an expedited, but binding, decision on publication.<sup>66</sup> The exact motivation for this trend is not clear,<sup>67</sup> but it is of significance that these journals accept articles through free avenues. These exclusive submission tracks help restore some sense of balance between the poorly-resourced scholars and the infinitely-resourced because they allow free and open access to all scholars and they impose some costs on scholars who engage in saturation submission.

One other beneficial fix to the system would be to strengthen the relationship between journal acceptance and journal rank:

$$Probability_{acceptance}(lower-ranked) \geq Probability_{acceptance}(higher-ranked)$$

A way to do so is to implement a system, within Scholastica, that allows lower-ranked journals to reject articles for higher-ranked

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66. Journals offering an exclusive submission track this season include *Northwestern University Law Review*, *Buffalo Law Review*, and this law journal. *Print Submissions*, NW. U. L. REV., <http://www.northwesternlawreview.org/submissions> (last visited Feb. 6, 2017); Ari Goldberg, *Buffalo Law Review—Volume 65 Exclusive Submission Track*, SCHOLASTICA (Jan. 30, 2017), <https://submissions.scholasticahq.com/conversation/questions/buffalo-law-review-volume-65-exclusive-submission-track>; Alfred Brophy, *Duquesne Law Review: Exclusive Submission Window*, THE FACULTY LOUNGE (Jan. 10, 2017, 4:18 PM), <http://www.thefacultyounge.org/2017/01/duquesne-law-review-exclusive-submission-window.html>.

67. It has been speculated that this change is a result of journals becoming “tired of being screeners for [higher-ranked journals],” who “[use] this to lock down a few top authors who either don’t want to play the game or need something published fast.” YesterdayIKilledAMammoth, *Northwestern Law Review Exclusive Submissions*, PRAWFSBLAWG (Dec. 29, 2016, 11:12 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/12/northwestern-law-review-exclusive-submissions.html#comments>. The problem with higher-ranked law journals using lower-ranked ones as a screen is a well-recognized evil within the law review system. Galle, *supra* note 4, at 5. A full discussion of this subject matter is beyond the scope of this article.

journals.<sup>68</sup> Journal editors can be presented with these options when rejecting an article: (1) the article is unacceptable at this journal and at a journal of higher rank; (2) this article is acceptable but not of interest to this journal at this time; or (3) no opinion. When there is more than one rejection on ground (1), an article can be automatically rejected by Scholastica at all journals ranked higher than the highest-ranked journal which has rejected an article on ground (1). For example, if the journal ranked 34 and 18 rejected an article on ground (1), then that article is automatically rejected at all journals ranked 18 and higher.<sup>69</sup> Such a system would help ensure that the probability of acceptance at higher-ranked journals would always be lower than that at lower-ranked journals, reduce the element of randomness within journal acceptances, and help cut down on the benefits of saturation submission.

At any rate, the existing incentives of the law review system create a market system for the placement of articles in law journals, which preserves a meritocracy only for those who can afford saturation submission strategies but punishes those who cannot. The negative effects may be ameliorated, but not fully remedied, without a complete change in these incentives. There sadly appears to be very little inclination within legal scholarship to alter the structure of the law review system.

Nonetheless, if we legal scholars do nothing about eliminating these existing incentives, then we must also concede that legal scholarship is a game of “pay to play.” And if we lazily insist on the *U.S. News & World Report* rankings of the schools publishing the journals publishing a scholar’s papers as a proxy of his or her scholarship, rather than judge the scholar based on a critical reading of the actual works, then we have no ground to complain when other

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68. Such a proposal would require institutionalizing journal rankings within the fabric of Scholastica itself. This would be a tragic outcome that rightly would be considered a surrender by editors of lower-ranked journals. However, as documented by Cicchini, the lower-ranked journals are already suffering from extensive abuse and humiliation from legal scholars who incorporate the *U.S. News & World Report* rankings in their submission practices. Cicchini, *supra* note 8. This proposal at the least restores some sense of balance by giving the editors of lower-ranked journals some formal input into the publication decisions of higher-ranked journals. Higher-ranked journals would also appreciate this proposal because it allows them to leverage on the editorial input of lower-ranked journals to filter out unmeritorious articles. Indeed, given the widespread reliance in the higher-ranked journals on expedites from lower-ranked journals to guide their article review process, it is clear that many higher-ranked journals are comfortable with outsourcing some of their own editorial discretion to the editors of lower-ranked journals.

69. It is possible to adjust the threshold for automatic rejections to require, say, five journals to reject an article on ground (1) before automatic rejection is applied at the highest-ranked journal rejecting the article on ground (1). The threshold is arbitrary and an appropriate setting can be found to balance the interests of journals and authors.

disciplines judge ours as unmeritocratic and look upon our work with contempt. Indeed, as of now, not even our own field thinks well of our system:

In regard to summer money being dependent on article placement, think of how utterly absurd it is that at some schools the salaries of tenured law professors are to a significant extent set by 2Ls, making publishing decisions about subjects they almost always know next to nothing about. I'm assuming that people actually read the articles in tenure files, and make judgments independent of placement, when voting on their colleagues' professional futures. Oh who am I kidding? What a mess.

Posted by: Another Tenured Prof <sup>70</sup>

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70. Another Tenured Prof, *Submission Angting Spring 2017*, PRAWFSBLAWG (Mar. 12, 2016, 7:31 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angting-spring-2017/comments/page/19/>.