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"The eye sees only what the mind is prepared to comprehend."

—Henri Bergson[1]

INTRODUCTION

In the early 1970s, the leading symphonies in the United States were composed almost entirely of men.[2] In fact, only about five percent of the musicians comprising those symphonies were female.[3] Of course, given the time period, such disparity is hardly surprising. After all, it was not until the late 1960s and early 1970s when the women's rights movement began to really capture the attention of the American people and, perhaps most importantly, the American government.[4] Nonetheless, in the 1980s—a time when people were much more concerned with gender discrimination—the percentage of female musicians was still abysmally low, with no major orchestra reporting a composition more than twelve percent female.[5] Since the 1980s, however, the numbers have risen drastically. In 2014, for example, it was estimated that, on average, women made up about thirty-seven percent of the top twenty orchestras in the United States.[6] If you are wondering what led to this huge increase in such a relatively short period of time, the answer might surprise you.

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1. ARMAND LAUFFER, UNDERSTANDING YOUR SOCIAL AGENCY 38 (3d ed. 2010).

2. *See* HOWARD J. ROSS, EVERYDAY BIAS: IDENTIFYING AND NAVIGATING UNCONSCIOUS JUDGMENTS IN OUR DAILY LIVES 122 (2014) (noting that in 1970 the Boston Symphony Orchestra, the Cleveland Orchestra, the Philadelphia Orchestra, the New York Philharmonic, and the Chicago Symphony Orchestra were mostly composed of male musicians).

3. *Id.*

4. *See* ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 280–81 (2001) (explaining that as women began working more frequently outside of the home, the government started prohibiting sex-based workplace discrimination in the 1970s).

5. ROSS, *supra* note 2, at 122.

6. Suby Raman, *Graphing Gender in America's Top Orchestras*, TUMBLR

What happened was that, around the 1980s, orchestras changed the way they conducted auditions.[7] The change was quite simple—people auditioned behind a screen such that they could be heard but not seen.[8] Importantly, blind auditions were implemented not out of any concern that the prior practice was leading to gender discrimination, but because "it was suspected that selections might be biased in favor of the students of a relatively small group of renowned teachers."[9] Regardless, the impact this change had on female success at these auditions was unmistakable. The percentage of women in these orchestras grew rapidly, effectively doubling in only a short period of time.[10] In fact, a recent study of this phenomenon found that "blind auditions increased the likelihood a female would be hired by 25 percent."[11]

Orchestra auditions, of course, are certainly not the only area in which people have realized that a blind process of assessment might provide the best results. Nonetheless, this particular example nicely illustrates the degree to which decision makers may not even be aware of the qualities that are influencing their judgment. In the orchestra example, they feared it was the identity of the auditionee's teacher that might sway them but subsequently learned that gender seemed to be playing a rather large role as well.[12] Thus, the evolution of orchestra auditions provides an excellent example of unconscious or implicit bias—a subject with which those of us in legal education have long been concerned.[13] Even as far back as the late 1800s, Christopher Langdell, suspecting that law students from prestigious families were more likely to receive higher grades,

(Nov. 18, 2014), http://subyraman.tumblr.com/post/102965074088/graphing-gender-in-americas-top-orchestras.

7. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716 (2000) ("[Orchestras] shifted to blind preliminaries from the early 1970's to the late 1980's.").

8. *See* KEVIN LANG, POVERTY AND DISCRIMINATION 363 (2007) (describing how blind auditions hide musicians behind screens and muffle musicians' footsteps to eliminate bias).

9. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 147 (2013).

10. *Id.*

11. Goldin & Rouse, *supra* note 7, at 736.

12. *See id.* at 715–16 (explaining that most auditionees had been male students of a select few teachers, which resulted in changes to the auditions).

13. *See, e.g.*, Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 363 (2007) (discussing implicit bias in the legal setting); Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1 (2010) ("Commentators have marveled at the continuing lack of gender diversity in the legal profession's most influential and honored positions.").

instituted the now widespread practice of anonymous grading at Harvard Law School.[14]

Many legal scholars have also pointed out the likelihood of similar bias in publication decisions by student law review editors. In fact, some have argued that we should institute blind submission (i.e., where the author's name and affiliation are removed) to help neutralize the potential for such bias.[15] Although such a solution may be wise, and perhaps even necessary, this Article has a broader aim. Specifically, its purpose is to discuss the article selection process, noting how the current process actively promotes decision making on the basis of implicit bias. This Article then discusses some of the specific forms of bias that are likely to (and seemingly do) arise in the selection process—the point being that, if we can recognize and acknowledge such potential, we can better hope to neutralize bias going forward. Just as the leading US orchestras needed literal screens to blind them from certain implicit bias, perhaps law review editors need, if not literal, figurative screens of some variety to encourage publications that are more representative of the diversity of voices in the legal academy.

I. THE SELECTION PROCESS: A RECIPE FOR IMPLICIT BIAS

Twice a year, law reviews find themselves besieged by authors hoping to find homes for their latest articles. With the introduction of electronic submission procedures, authors can submit more easily than ever before. As a result, the number of submissions law reviews receive annually has skyrocketed.[16] For instance, in the early 1980s, it was estimated that a top law review would receive between 200 and 300 unsolicited manuscripts each year.[17] By 1995, that number had climbed to 1200.[18] Today, law reviews are reporting submission numbers as high as 2200.[19]

14. *See* Jesse A. Schaefer, Comment, *Beyond a Definition: Understanding the Nature of Void and Voidable Contracts*, 33 CAMPBELL L. REV. 193, 206 (2010) (stating that Langdell was the "father of the case method and anonymous grading").

15. *See, e.g.,* Jonathan Gingerich, *A Call for Blind Review: Student Edited Law Reviews and Bias*, 59 J. LEGAL EDUC. 269 (2009) (suggesting that student-run law reviews adopt anonymous submissions).

16. *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, 205 (2007) (noting that a top law review editor said he or she was "surprised" by the increase in article submissions due to electronic submission procedures).

17. Josh E. Fidler, *Law-Review Operations and Management*, 33 J. LEGAL EDUC. 48, 60 (1983).

18. Carl Tobias, *Manuscript Selection Anti-Manifesto*, 80 CORNELL L. REV. 529, 531 (1995).

19. *See* Christensen & Oseid, *supra* note 16, at 203–04 (explaining that the top fifty law schools receive between 1500 and 2000 submissions per year).

Consequently, the task of the student law review editor has become, to say the least, more difficult. As Professors Christensen and Oseid point out, "The overwhelming volume of submissions student editors receive imposes tremendous pressure on them to work hard and to make efficient decisions."[20] The students know that they must make a quick decision on each article; otherwise, they risk losing the piece to another journal. The stakes are further raised by the fear of accepting a bad article, given the stain such an article could bring to the reputation of the law review and also the budding academic reputation of the student. In short, law review editors want to do a good job, but the huge number of submissions combined with the relative inexperience the students possess in gauging academic legal writing makes this job extremely difficult.

As a result, student editors are more likely to rely on proxies in making these decisions. After all, human beings, when asked to make decisions that would otherwise be quite time consuming, typically rely on shorthand approaches to make the task more manageable.[21] For example, if given a deck of standard playing cards and asked to sort the cards into two piles, hearts and diamonds in one pile and spades and clubs in the other, most people would simply use color as a proxy, making one pile of the red suits and one of the black suits.[22] Law review editors face similar temptations. As one student editor reported, the "pressure on student editors to make ill-informed, snap decisions about articles" leads to giving "excessive consideration to proxies" that are assumed to positively correlate with article quality.[23]

There is a grave risk, however, in such an approach. Specifically, there is the danger that these proxies could be motivated by implicit attitudes and stereotypes. In fact, numerous studies have revealed that when asked to make decisions in both stressful and time-sensitive situations, individuals are more likely to rely on implicit bias.[24] For example, one study involved white participants and measured those participants' beliefs about the characteristics of both whites and blacks.[25] As the two scientists

20. *Id.* at 205.

21. *See, e.g.*, AMY S. WHARTON, THE SOCIOLOGY OF GENDER 70–71 (2012) (describing proxies as a form of "social shorthand").

22. Example taken from BANAJI & GREENWALD, *supra* note 9, at 33–34.

23. Christensen & Oseid, *supra* note 16, at 178.

24. Irene Dankwa Mullan, Paula Y. Goodwin & Matthew Wynia, *Fair Resource Allocation in Clinical Care for Socially Disadvantaged Groups and Health Disparity Populations: Issues and Strategies, in* FAIR RESOURCE ALLOCATION AND RATIONING AT THE BEDSIDE 323, 338 (Marion Danis et al. eds., 2014) ("Implicit biases play a larger role in decisionmaking when decisions are made under stress, including that due to time pressure.").

25. *See* John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 4 (Jennifer

involved explain: "[W]e presented participants with the social categories 'blacks' and 'whites' on a computer screen and asked them to respond as quickly as possible whether the word that followed could ever describe a member of that category. These words included . . . positive and negative characteristics . . . ."[26] The researchers hypothesized that "[f]aster reaction times are presumed to reflect greater category association," and indeed the results bore that out.[27] Specifically, the study found that, under time pressure, whites "associate more positive characteristics with whites than with blacks."[28] Similarly, in a study relating to decision making by physicians, researchers found that "[u]nder high time pressure, but not under low time pressure, implicit biases regarding blacks and Hispanics led to a less serious diagnosis."[29]

In explaining why time pressures increase the likelihood of implicit bias influencing decision making, one scholar summarizes the theory as follows: "In situations where an individual's implicit and explicit attitudes differ, the implicit attitude serves as the 'default,' and the explicit attitude 'only overrides the implicit attitude if the individual has the cognitive capacity available to do so.'"[30] Given, then, the pressures under which law review editors must make decisions about article selection, there is greater likelihood that those decisions could be based on implicit attitudes. And because "legal education serves a profession that is committed to inclusiveness and diversity,"[31] the entire legal community should be concerned with implicit biases influencing law review editors' decision making given that such biases can greatly undermine our efforts at achieving both diversity of thought and diversity of voice.

L. Eberhardt & Susan T. Fiske eds., 1998) (describing poll results showing that white respondents thought that blacks were lazy or less intelligent than whites).

26. *Id.* at 14.

27. *Id.*

28. *Id.*

29. Irena Stepanikova, *Racial-Ethnic Biases, Time Pressure, and Medical Decisions*, 53 J. HEALTH & SOC. BEHAV. 329, 329 (2012).

30. Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 431 (2011) (quoting Kipling D. Williams & Cassandra L. Govan, *Reacting to Ostracism: Retaliation or Reconciliation?*, *in* THE SOCIAL PSYCHOLOGY OF INCLUSION AND EXCLUSION 47, 56 (Dominic Abrams et al. eds., 2005)).

31. Donald J. Polden, *Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education*, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B., Spring 2009, at 1, 13, http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/principles_and_goals_accreditation_5_6_09.authcheckdam.pdf.

II. LEGAL SCHOLARSHIP AND THE PROXIES FOR "QUALITY"

To say that law review editors rely on proxies to help them gauge the quality of legal scholarship is hardly a revelation. Commentators have been pointing this out for years. Judge Posner described this reliance on the part of law review editors as follows:

> So they do what other consumers do when faced with uncertainty about product quality; they look for signals of quality or other merit. The reputation of the author, corresponding to a familiar trademark in markets for goods and services, is one, and not the worst. Others, and these dysfunctional, are the congeniality of the author's politics to the editors, the author's commitment to gender-neutral grammatical forms, the prestige of the author's law school, a desire for equitable representation for minorities and other protected or favored groups, the sheer length of an article, the number and length of the footnotes in it, and whether the article is a "tenure article" on which the author's career may be riding.[32]

As a result, authors seeking to publish "well" are routinely advised on how to manipulate the proxies to work in their favor.[33] However, as I lay out the traditional proxies in this Part, my purpose in doing so is not so much to announce their existence, but is instead to present them as possible avenues of implicit bias—crutches, if you will, upon which the overworked and stressed law review editor might be tempted to lean a little too heavily.

After all, before one can hope to neutralize the effects of implicit bias, one must first be aware of the possibility that such bias could even exist. Indeed, "[t]he possibility for moderating or overcoming implicit bias is at its highest when individuals are aware of the potential for bias and for controlling it."[34] In other words, "[i]f knowledge is power, simply recognizing the prevalence of implicit bias and being open to the possibility that it is influencing our decision-making should be the first step toward empowerment."[35]

A. The Author's Academic Pedigree

"Letterhead bias" is a term with which legal scholars are well acquainted. It refers to the belief that law review editors view article submissions from those at higher ranked schools as being inherently higher quality and thus more likely to receive an offer of

32. Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1133–34 (1995) (footnotes omitted).

33. Tobias, *supra* note 18, at 536–38.

34. THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA 71 (John T. Parry & L. Song Richardson eds., 2013).

35. John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 10 (2010).

publication.[36] I describe this phenomenon as a belief, but there is quite a bit of evidence to back up these suspicions. For instance, Professors Christensen and Oseid, as part of their survey of law review editors, asked the following: "Are You Influenced by Where an Author Now Teaches?"[37] They found that "[a] majority of respondents from nearly every school segment indicated they are influenced by the law school where an author teaches."[38] According to their study, letterhead bias was particularly strong among "top" law reviews, with one hundred percent of respondents from law reviews ranked in the top twenty-five answering "yes" to the question.[39]

Beyond surveys, other legal scholars have attempted to test for letterhead bias more directly. James Lindgren, for example, worked at Chicago-Kent College of Law, but he was also a visiting scholar at the University of Chicago.[40] Thus, when the time came for him to submit an article for publication, he sent the article out using two different letterheads—some under Chicago-Kent letterhead and some under University of Chicago letterhead.[41] As a result, he reported:

> From the 30 reviews that I contacted from the University of Chicago—even though I had a nonprofessional title—I received offers from the main law reviews of Penn and Northwestern. From the partly matched twenty-five reviews that I contacted from Chicago-Kent the best offer I received was from Arizona.[42]

Former student editors have also shared stories of their experiences that seem to bolster the suspicion that law review editors rely too heavily on institutional affiliation. Consider, for example, the following:

> A former editor of one journal admitted that during her year as an editor, the journal received an article that the editors very much liked from a professor at a nonelite law school. After much debate, they decided that they couldn't "take a chance" on that professor's law school. Later that year, they received an article in the same field from a professor at an

36. *See* Gingerich, *supra* note 15, at 274–75 (discussing prestige bias).
37. Christensen & Oseid, *supra* note 16, at 188.
38. *Id.*
39. *Id.* at 189.
40. Dan Subotnik & Glen Lazar, *Deconstructing the Rejection Letter: A Look at Elitism in Article Selection*, 49 J. LEGAL EDUC. 601, 610 (1999).
41. *Id.*
42. *Id.*

> elite law school, an article that they thought inferior. But they accepted it anyway.[43]

Another former editor reports that his law review would sort submissions into piles "depending on the prestige of the law school from which the manuscript was submitted"—articles in the "good" pile received careful readings while articles in the "bad" pile did not.[44]

B. The Author's Subject Matter

According to Judge Posner, once upon a time law review editors had a much more egalitarian approach when it came to the subject matters of those articles accepted for publication: "No single field of law mesmerized students . . . . The scholarship both that they wrote and that they chose from the submissions by faculty reflected the diversity of law itself."[45] Today, however, it is a different story. In fact, according to the Christensen and Oseid study, nearly one hundred percent of all law review editors responded "yes" to the question of "Are You Influenced by the Topic of the Article?"[46] Indeed, as Carl Tobias puts it, the currently preferred topics are those that fall into the "hot, trendy or cute" category.[47]

More specifically, the favorite topics of law review editors appear to be "constitutional law (22%), corporate law (12%), procedure (10%), and governmental law (9%)."[48] Interestingly enough, there is no correlation between these subject matters and the number of law professors in that field. As James Lindgren points out, "[c]ontracts, for example, is the second most common teaching area, but elite law reviews publish only a few contracts articles and student notes a year."[49] Likewise, there is no correlation between these heavily published subject areas and the areas of law in which most attorneys practice:

> Wills, divorces, real estate transactions, and criminal law are staples of many lawyers' livelihood. Indeed, in the Laumann-Heinz study of the Chicago bar, real estate was the most common of twenty-three specialties analyzed. Probate was the third most common specialty, divorce was sixth, and criminal (defense) was eighth. Yet elite law reviews are not interested in these topics. All four placed at the bottom of the list of topics for faculty articles—criminal law (3%), property (2%),

43. James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 530 (1994).
44. *Id.*
45. Posner, *supra* note 32, at 1132–33.
46. Christensen & Oseid, *supra* note 16, at 195.
47. Tobias, *supra* note 18, at 530.
48. Lindgren, *supra* note 43, at 533.
49. *Id.* at 532.

> family law (1%), estates (1%). Indeed, I do not think that the *Yale Law Journal* has published a wills article in my lifetime.[50]

The Christensen and Oseid study also revealed that articles on tax, admiralty, professional responsibility, and law school pedagogy are less likely to yield publication offers.[51]

C. The Author's Previous Publications

When asked whether publication decisions are influenced by an author's previous placements, a substantial number of law review editors, especially those from the higher ranked journals, responded that they are.[52] Another study found that frequent publication in high ranking journals was one of the chief proxies used by law review editors when deciding to make offers of publication.[53] Such reliance, according to Erik M. Jensen, is understandable given the large number of submissions: "[U]nder 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."[54]

In light of this proxy, I often advise young scholars to think carefully about the order in which they attempt to publish various works in progress. For instance, if an author is currently working on a constitutional law piece and a legal writing pedagogy piece, I would suggest she attempt to publish the former first. After all, constitutional law articles are more in vogue and thus likely to receive more offers of publications and at higher ranked journals. Once the author has secured a home for the constitutional law piece, she can then submit the piece on legal writing (a subject less likely to place well) and perhaps benefit from the tailwind created by her previous publication. In contrast, if she were to publish the legal writing piece first and it does not place well, she may be creating a headwind against which all future publications must battle.

D. The Author's Race and Gender

Although less has been written on the subject of racial and gender bias in law review publication decisions, this list of potential proxies for "quality" would be incomplete if it did not at least raise the possibility of such discrimination. After all, even a quick review

50. *Id.*
51. Christensen & Oseid, *supra* note 16, at 196.
52. *Id.* at 191–92.
53. Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 ALB. L. REV. 565, 584 (2008).
54. Erik M. Jensen, *The Law Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL EDUC. 383, 385 (1989).

of the relevant social science literature reveals that such bias exists in many aspects of academic employment. For instance, one study submitted curricula vitae ("CVs") to various search committees tasked with hiring a psychology professor.[55] The CVs were identical except that some had traditional male names, while the others had traditional female names.[56] The study found that "[b]oth men and women were more likely to vote to hire a male job applicant than a female job applicant with an identical record."[57] These results mirror similar studies on race that found that job applicants with traditional African American sounding names needed to send fifty percent more résumés to get a callback than applicants with white sounding names, even though both résumés were otherwise identical.[58] In fact, white sounding names yielded as many callbacks as an additional eight years of experience yielded for a black candidate.[59] All of this data raise the question: Might similar forms of bias also exist in the area of law review selection?

In 2010, Professor Minna J. Kotkin looked at law review publications and based on her findings raised the important question of whether gender bias exists:

> The data show that at the elite law schools, the percentage of women on the faculty averages 28%, very close to the national average of 30%. Presumably, in a perfect market, the best scholars are at the best law schools, and the best journals publish the best scholars. Given that the percentage of female authors is 20.4%, there is at least the possibility of gender bias. The disparity is even more remarkable when considered in relation to what I call the "prime writing cohort"—tenure-track teachers—who are 44% female.[60]

Professors Jennifer C. Mullins and Nancy Leong conducted a study that offers further evidence of gender bias in law review publication.[61] Specifically, their longitudinal study found that, in terms of student note publication, female students authored around forty percent, while male students authored around sixty percent.[62]

55. Rhea E. Steinpreis, Katie A. Anders & Dawn Ritzke, *The Impact of Gender on the Review of the Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study*, 41 SEX ROLES 509, 513–14 (1999).

56. *Id.* at 514–15.

57. *Id.* at 509.

58. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004).

59. *Id.*

60. Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the "Top Ten" Law Reviews*, 31 WOMEN'S RTS. L. REP. 385, 387 (2010) (footnotes omitted).

61. Jennifer C. Mullins & Nancy Leong, *The Persistent Gender Disparity in Student Note Publication*, 23 YALE J.L. & FEMINISM 385 (2011).

62. *Id.* at 387.

Both of these studies should at least raise the question in our minds of whether the gender of the author is playing a role in article selection, just as it apparently was in the orchestra example I used to begin this Article.

Although less has been written on racial bias and article selection,[63] both the rich body of scholarship that currently exists on racial disparities in the legal academy as well as the social science literature on implicit racial bias on the basis of race make this a potential proxy for "quality" that requires our attention. Could it be that student editors are implicitly biased against those authors who they believe to be a member of a racial minority? Without empirical research on the topic, we really cannot say. We already know, however, that "[t]eachers tend to underestimate the abilities of minority students."[64] Thus, to discover that law review editors hold similar bias might not be that surprising. Regardless, my purpose in even raising that possibility is the same as cataloging the other potential proxies discussed above. Namely, greater awareness that decision making might be influenced by these proxies that in turn carry the risk of being a product of implicit bias. This awareness can make the decision maker somewhat more immune to that type of influence.

III. PROXIES: THE PERNICIOUS AND THE PERVERSE

I think there can be little dispute at this point that law review editors employ proxies in making publication decisions. As stated earlier, I am not the first person to raise that point—it has been made repeatedly, and no one has yet to try and argue otherwise.[65] Further, the use of such proxies, given the workload of the average law review editor is entirely understandable. In fact, if we converted law reviews from student edited to peer reviewed, I have no doubt that: (1) those making publication decisions would continue to employ proxies and (2) the proxies would likely grow to include several new points of inquiry even more unrelated to the article's quality.[66]

63. *But see* Talibah-mawusi Smith*, The Law and Educational Inequities: In Other Words, the Dilemma of Writing While Black,* 4 IDAHO CRITICAL LEGAL STUD. J. 73, 97 (2011) ("Black students and professors who pursue either kind of writing share a common experience—White institutions and White academic decision-makers treating Black writers' works as being subpar.").

64. Jack Glaser, Katherine Spencer & Amanda Charbonneau, *Racial Bias and Public Policy*, 1 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 88, 90 (2014).

65. *See, e.g.*, Nance & Steinberg, *supra* note 53, at 571–72.

66. *See* Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 57 (2015) (suggesting that perhaps "reform efforts are hopeless because legal scholarship would simply trade one set of problems (e.g., article selection bias by students) for another (e.g., article selection bias by peers)") (citing Benjamin H. Barton, *Saving Law Reviews from Political Scientists: A*

So what then is my point? My point is quite simply that we need to ask ourselves whether these proxies are effective at helping identify the "best" legal scholarship. I would argue that they are not. Instead, as indicators of quality, these proxies are largely misleading, resulting in three distinct harms.

First, the current system discourages creativity. Eugene Volokh has famously decreed that, in order for it to be considered "good," legal scholarship: should "(1) make a claim that is (2) novel, (3) nonobvious, (4) useful, (5) sound, and (6) seen by the reader to be nonobvious, useful, and sound."[67] For authors who wish to place well, however, novelty could mean the kiss of death for those who do not have other proxies working in their favor (e.g., those from lower ranked institutions with either no previous placements or previous placements in "weaker" journals). After all, knowing that authors maximize their chances of placing well if they satisfy the traditional proxies for quality, authors are more likely to be concerned with molding their scholarship to satisfy those criteria than attempting to be novel. At the very least, even an author with a novel thesis might be so distracted by the need to conform the article to certain proxies of quality that the overall effectiveness of the piece (as originally imagined) might be compromised. Even for those authors who do benefit from these proxies (i.e., professors at highly ranked schools writing in areas deemed desirable to top law reviews), the current system likewise offers few incentives for them to attempt to be innovative or creative. If the goal is merely a high placement, they are already pretty much guaranteed that.

Second, the current system undermines diversity of voice. Do we really believe that those who teach at lower ranked law schools are inferior scholars?[68] Even if we could agree that the answer to that question is yes, does that mean that the voices of those scholars offer less value to the academy? Are we to believe that those who write about less "sexy" topics are providing less benefit to the academy? Blind adherence to the current proxies would indicate that all those questions are true. Yet, I would imagine that very few in the academy would actually agree with such statements. Instead, the law—and particularly the legal academy—has a rich and proud tradition of moving toward greater inclusion. The current proxies of quality undermine those efforts, promoting legal scholarship that is largely underinclusive and entirely too monochromatic.

Defense of Lawyers, Law Professors, and Law Reviews, 45 GONZ. L. REV. 189, 205–06 (2009–2010)).

67. EUGENE VOLOKH, ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW 9 (3d ed. 2007).

68. *See* Kotkin, *supra* note 60, at 406 ("[I]t is hard to imagine that there is such a significant difference between the scholarship potential of those teaching in top fifty schools as compared to the rest of the professoriate.").

Third, the current system marginalizes practical skills scholarship. Although this harm is in some ways merely a more specific example of my second objection, I highlight it separately because (1) practical skills scholarship is an entire class of scholarship that covers many areas (legal pedagogy, legal writing, clinical educations, etc.) and (2) given the current reforms taking place in the legal academy and the concomitant emphasis on skills training,[69] we need to be mindful of any system that has the potential to undermine those efforts. The current proxies, however, are deadly to practical skills scholars. Beyond the fact that such authors are not writing in one of the preferred areas,[70] many do not work at top institutions—as many of those institutions were slow to add, if they have added at all, tenure-track faculty who teach and write in these areas.[71] Indeed, many of the leading scholars in these areas did not attend elite law schools as, in years past, aspiring professors with elite JDs were channeled into doctrinal teaching while aspiring professors with less-than-elite JDs were hired into lower status positions to teach legal writing, clinical skills, etc.[72] Finally, women disproportionately populate the ranks of those teaching legal skills,[73] and as pointed out above, evidence suggests

69. *See, e.g.*, Nelson P. Miller & Bradley J. Charles, *Meeting the Carnegie Report's Challenge to Make Legal Analysis Explicit—Subsidiary Skills to the IRAC Framework*, 59 J. LEGAL EDUC. 192 (2009); Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 CLINICAL L. REV. 807 (2007); Kelly S. Terry, *Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose*, 59 J. LEGAL EDUC. 240 (2009).

70. *See* Tobias, *supra* note 18, at 536 and accompanying text.

71. *See* Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 530, 540 (1995) ("The lack of tenure-track or tenured legal writing appointments at the higher-ranking schools may reflect a subtle interplay of long-held faculty views about legal writing, typical faculty hiring patterns, and the elite schools' historic lack of attention to legal research and writing.").

72. *See, e.g.*, Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias*, 87 ST. JOHN'S L. REV. 171, 177 (2013) ("However, one professor did invite me to apply to my alma mater for an opening in the legal writing department. Because the job was not tenure-track, but merely a contract position, I was told that perhaps the faculty would overlook where I got my J.D. . . . ."); Deborah Jones Merritt & Barbara F. Reskin*, Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 261 (1997) ("[C]redentials like graduation from a prestigious law school, membership in Order of the Coif, and possession of a master's degree in either law or a nonlaw field significantly decreased the likelihood that a faculty member would teach a skills course.").

73. *See, e.g.*, Ann C. McGinley, *Reproducing Gender on Law School Faculties,* 2009 BYU L. REV. 99, 128 ("Like the positions of paralegals and secretaries, the jobs of legal writing professors are gendered female.") (footnote omitted).

that female law professors already have greater difficulty getting higher placements rates.[74]

An objection to all this is that simply because someone has a harder time placing in a top journal, does not mean that one cannot get published anywhere. Further, given the wide electronic availability of articles today, it is largely irrelevant where an article is published. I might accept those objections but for the fact that there is yet another proxy at play in this process. Namely, that the academy treats an article's placement as a proxy for the article's quality. As Professor Alfred Brophy explains:

> Much of the obsession [with placement] rests on an assumption that there are better reviews and that it is desirable to publish in a better review than a worse one. For purposes of career promotion, there is likely truth to this. For purposes of job placement and pay increases, it is not unreasonable to assume that articles placed in more prominent journals are more useful, as a general matter, than articles placed in less prominent journals. In fact, some schools are reputed to pay bonuses for articles placed in highly regarded journals. This is because evaluators use journal placement as a proxy for article quality.[75]

Thus, an author disadvantaged by the proxies, despite being able to place her article, is nonetheless marginalized by her inability to place it "well." Perhaps she will have difficulty with promotion, perhaps her ability to move laterally will be undermined, or perhaps she will merely feel "less than" her colleagues with higher placements.[76] All are distinct harms with which we should be concerned. After all, beyond the harms the individual author may face, the legal academy is harmed both internally and externally by routinely holding up only certain varieties of scholarship and authors as the "gold standard" of legal scholarship.

CONCLUSION AND SOLUTION

The guiding criterion for publication decisions by law review editors should be the quality of the piece. I would hope that no one would disagree. Given the current practice of law review submission, including the high number of submissions and the pressures law students feel to "get it right," it is understandable that these editors will frequently need to rely on shortcuts or proxies to realistically make publication decisions on a timely basis. The point I wish to interject is that we all need to be a bit more critical in

74. *See* Merritt & Reskin, *supra* note 72, at 274.

75. Alfred L. Brophy, *The Signaling Value of Law Reviews: An Exploration of Citations and Prestige*, 36 FLA. ST. U. L. REV. 229, 230 (2009).

76. *See* Kotkin, *supra* note 60, at 389–90 ("And for anyone who wants to move up the feeding chain, placement is critical.").

what proxies we employ and whether they bear some defensible relationship to article quality or whether they are merely a product of implicit bias.

How do we do that? Perhaps the answer is, as in the orchestra context I began the Article talking about, instituting blind review. Or perhaps the answer is including faculty in all publication decisions. Or perhaps law reviews need to implement more extensive procedures for reviewing all submissions. Any of those might help, but my point here is not to advocate for any such specific remedy. Instead, my recommendation is much more modest. Namely, the driving force behind such reliance on proxies, many of which are likely influenced by implicit bias, is the speed at which decisions are being made.[77] Thus, the solution is two-fold. First, student editors need to simply slow down these decisions as much as they can. Second, regardless of how quickly they make publication decisions, student editors need to become open to the possibility that those decisions might be the product of implicit bias. Thinking more critically about those proxies, the implicit biases upon which they may rest, and the resulting harms blind adherence to such proxies can cause are necessary first steps in ultimately achieving a scholarly community that reflects the rich diversity of the legal community's members.

77. Christensen & Oseid, *supra* note 16, at 198–99 ("Most [students] spent between five and thirty minutes reading an article before making a publication decision.").