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Law Review Publishing: Thoughts on Mass Submissions, Expedited Review, and Potential Reform

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Law Review Publishing: Thoughts on Mass Submissions, Expedited Review, and Potential Reform

MICHAEL D. CICCHINI*

ABSTRACT

The current law review publishing system—in particular, mass submissions and expedited review—works well for prestige-driven professors; however, it places a tremendous burden on the editors of journals lower in the hierarchy. This problem is exacerbated by several professorial tactics including, most significantly, submitting articles to journals from which the professor would never accept an offer—not even when he or she fails to receive a “better” offer through the expedite process.

This Essay discusses a potential fix: the eight-hour offer window. If a journal were to adopt a formal policy of holding its publication offers open for only eight hours, professors would, in theory, be unable to use the offer in the expedite process. Therefore, professors would not submit their articles to this journal unless and until they were serious about publishing in it.

Unfortunately, what is good in theory does not always work in practice. This Essay discusses how professors would modify their existing tactics—tactics which currently include misrepresenting the terms of an offer in the expedite process—in order to defeat this attempted reform. The Essay also explores specific ways that a journal could overcome these tactics and implement meaningful reform despite the professoriate’s desire to protect the status quo.

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INTRODUCTION: PROBLEMS IN PUBLISHING

As a practicing criminal defense lawyer I enjoy writing law review articles. It's a great way to advocate for our individual rights, provide useful information for the defense bar, and, in some cases, obtain meaningful change within the system. I even enjoy (for the most part) the process of publishing the articles after I write them. This year, when submitting two articles for publication, I closely followed the *Submission Angsting Spring 2017* blog post and comment thread at *PrawfsBlawg*.¹ This is a public forum but one that few people, other than law professors and would-be law professors, even know exists. The thread essentially allows professor-types to share information and opinions—which they nearly always do anonymously—about the law review publishing process.

Although many law professors frequently complain about the current process, it actually works just fine for them; however, it is a tremendous burden for the editors at the less prestigious journals. From a journal editor's perspective, there are at least two significant problems with the law review submission process. First, professors typically engage in mass submissions of their articles, often submitting to more than one hundred journals simultaneously. This takes a toll on the editors who must wade through hundreds and sometimes thousands of articles before making offers to fill only a few publication slots.²

Second, despite all of the journal editors' work in reviewing and selecting articles, most professors will not accept their offers of publication. In most cases, a professor is merely hoping to obtain an offer of publication to trigger the expedited review process. That is, the professor intends to use the journal's offer to shop the article around to higher ranked journals.³ Journal editors know this.

However, what some journal editors may not realize is that, in many cases, a professor submits his or her article knowing in advance that he or she would not, *under any circumstances*, accept an offer to publish from that journal—not even if the professor fails to obtain a “better” offer during the expedite process. The reality is that many prestige-driven professors believe an article

¹ Matt Bodie, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 9, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017.html> [<https://perma.cc/8AP7-UNV4>].

² See *infra* Part I.A.

³ See *infra* Part I.B.

is better left unpublished than published in, and associated with, the offering journal.⁴

The burden of these and other professorial practices falls on the journal editors.⁵ And the further down the law review hierarchy the journal is located, the greater the risk of abuse and the greater the burden. But there is a theoretical fix to this absurd, prestige-based law review publishing system. A reform-minded law journal could announce, before law review submission season begins, that its publication offers will be held open for *only eight hours*.⁶

In theory, this eight-hour offer—sometimes called an exploding offer—would accomplish two things. First, because eight hours is not enough time for professors to request an expedited review from other journals, it should greatly increase the acceptance rate of the journal's offers. And second, because professors will know, before submitting to the journal, that they will be unable to use its offer to move up the prestige ladder, they will not submit to this journal unless and until they are serious about publishing in it. This would dramatically reduce the number of frivolous submissions.⁷

The problem, of course, is that what is good in theory can be thwarted in practice. Professors have already developed numerous tactics for gaming the current system,⁸ and they could easily adapt these existing practices to contravene a journal's attempted reform. The professors' modified tactics would likely include using a journal's eight-hour offer to request expedited reviews simply by misrepresenting the deadline to the higher ranked journals.⁹ Similarly, professors have already considered the possibility of shaming and blackballing student editors for far less than what is proposed in this Essay, and editors can expect similar retaliation for any attempts to change the status quo.¹⁰

⁴ See *infra* Part I.B.

⁵ I use the term “professorial practices” because those who write law review articles are overwhelmingly professors and aspiring professors. In one recent study, more than sixty percent of articles were written by authors who were already affiliated with law schools. See Albert H. Yoon, *Editorial Bias in Legal Academia*, 5 J. LEGAL ANALYSIS 309, 319–20 (2013). Of the remainder, many authors are no doubt publishing in order to join those ranks. Further, most practitioner-authors who are *not* attempting to enter academia simply have no incentive to engage in many of the tactics described in this Essay. Therefore, although “author” is technically a more accurate word, I frequently use “professor,” “professoriate,” “professor-types,” or a similar term to describe those who publish law review articles.

⁶ See *infra* Parts II and III.

⁷ See *infra* Part II.

⁸ See *infra* Part I.B.

⁹ See *infra* Part IV.

¹⁰ See *infra* Part V.

Part I of this Essay exposes some professorial tactics related to mass submissions and, particularly, the expedite game. Part II discusses the eight-hour offer as a means of reform, and Part III discusses how such reform could be implemented. Part IV examines some potential roadblocks standing in the way of change, and explains how professors would likely attempt to circumvent a journal's reform efforts. Part V discusses the potential repercussions that journal editors could face for changing the current system—a system that exists to serve the needs of professors and elite journals. The Conclusion then examines the post-reform world of law review publishing, after a hypothetical, wide-scale implementation of the eight-hour offer.¹¹

I. THE LAW REVIEW WAY

From the standpoint of journal editors, the law review publishing system has at least two significant flaws: mass submissions and the expedited review process. As explained below, these two flaws negatively impact the editors at nearly every law journal, albeit to varying degrees. Generally—or at least within a very wide “relevant range” of journals—editors at lower ranked journals suffer the greatest impact.

A. Mass Submissions

Once an author finishes an article, the first step in getting that article published is to select the journals to which it will be submitted. For simplicity, this Essay will focus only on general interest flagship journals and will ignore online companion journals and specialty print journals.¹²

The relative desirability of the journals is open to some debate. However, for those authors who are law professors (or hoping to become law professors),

¹¹ The existing law review publishing system has numerous problems, many of which are only superficially addressed in this Essay. One such problem is the staggering cost of article submissions—particularly for independent authors. For a deeper examination of that issue, readers should consult Timothy Lau's article, *A Law and Economics Critique of the Law Review System*, 55 DUQUESNE L. REV. (forthcoming 2017). In it, Lau examines law review publishing from a systematic point of view and offers valuable insights for additional reform.

¹² Law professors rely heavily on rankings and have thrown themselves into great turmoil trying to rank specialty journals and online journals relative to flagship journals. To rank a specialty journal, some professors advocate adding thirty, forty, or even fifty spots to the journal's school's *U.S. News & World Report* (USN) ranking, while others recommend avoiding specialty journals entirely. With regard to online journals, some professors view those at top twenty USN schools as preferable to flagship journals of lower ranked schools, while others believe that online publications should not even be counted as publications or, at least, should be listed in a separate section of the CV.

journal rank is determined by the *U.S. News & World Report* (USN) rank of the law school where the journal is published.¹³ In close cases, a law professor may give the edge to the journal—or, more accurately, the school—with the better USN peer reputation score, which is a component of its overall USN rank. As one professor explains, “I’m a fan of peer score from USNWR. It is the perfect indicator for what we care about: how schools are perceived by law profs.”¹⁴

There are other ways that professors could evaluate law journals, including the various Washington and Lee (W&L) journal-ranking methodologies.¹⁵ However, the majority view among law professors is this:

[A]lways 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.¹⁶

Another professor felt even more strongly about USN’s superiority over W&L. “DEFINITELY USNWR! The only people who care about the W&L rankings are individual authors attempting to justify a lower placement (‘but the journal is ranked #89 on W&L!’).”¹⁷

¹³ See U.S. NEWS & WORLD REPORT: EDUCATION, *2018 Best Law Schools*, <https://www.usnews.com/best-graduate-schools/top-law-schools> [<https://perma.cc/V4EH-H5XL>] (last visited Sept. 2, 2017).

¹⁴ Persephone, *Submission Angsting Spring 2016*, PRAWFSBLAWG (Feb. 20, 2016, 4:59 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/4/#comments> [<https://perma.cc/TA9Y-9A8X>].

¹⁵ See WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW: LAW LIBRARY, *Law Journals: Submissions and Ranking, 2008 – 2015*, <http://lawlib.wlu.edu/LJ/> [<https://perma.cc/98XE-NXL4>] (last visited Sept. 2, 2017).

¹⁶ 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> [<https://perma.cc/495A-M66P>].

¹⁷ AnonProf, *Submission Angsting Spring 2016*, PRAWFSBLAWG (Feb. 14, 2016, 8:45 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/2/#comments> [<https://perma.cc/F9DM-X389>].

This approach is rather strange, as USN ranks law schools and not law journals.¹⁸ And some have convincingly argued that USN—“the surviving rump of an otherwise defunct news magazine”—doesn’t even do *that* properly.¹⁹ Nonetheless, in the rankings- and status-obsessed world of legal academia, USN has become the near-universally accepted method for ranking law journals. One benefit of using the USN is that it allows professors to quickly judge and rank *each other*—both in hiring and promotion decisions—without having to look at the substance of each other’s work. One professor explains it this way:

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.” . . . 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). From there on out, your publication very quickly is seen as less impressive.²⁰

Professor James Grimmelman warned that such simple thinking “is a stinging indictment of how law schools hire and promote. Colleagues who don’t look past the citation to the substance of an article when making such decisions are shirking their responsibilities as scholars and members of a learned profession”²¹ Nonetheless, this warning has largely fallen on deaf ears. Professors love both heuristics and rankings, and the practice of judging a colleague by the journal in which he or she has published is deeply ingrained in the legal academy. Therefore, it is likely here to stay.

For the practitioner-author who has no desire to become a professor, additional factors may come into play when deciding between journals. These

¹⁸ See Lau, *supra* note 11 (“[L]egal 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.”).

¹⁹ Paul Campos, *Scenes from the Class Struggle*, INSIDE THE LAW SCHOOL SCAM (Feb. 29, 2012), <http://insidethelawschoolscam.blogspot.com/2012/02/scenes-from-class-struggle.html> [<https://perma.cc/3UQ9-CFWF>].

²⁰ anonprof, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 3, 2017, 8:49 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/14/#comments>.

²¹ James Grimmelman, *Exploding Offers from Law Reviews: A New Trend?*, PRAWFSBLAWG (Oct. 20, 2015, 9:43 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/10/exploding-offers-from-law-reviews-a-new-trend.html> [<https://perma.cc/D4DW-XRKA>].

might include how quickly a particular journal will publish the article or whether the journal's name is recognizable to judges, lawyers, and clients—three groups that are typically unaware of the USN rankings.²² But these deviations from the norm are not enough to upset the USN applet in any significant way. That is, the *Duke Law Journal* is better than the *Arizona Law Review* which is better than the *Louisiana Law Review*, and so on.

While every professor wants to publish in the highly ranked journals, these journals can only publish a very small fraction of the articles they receive. For example, “[t]he *Southern California Law Review* receives thousands of unsolicited manuscripts each year. From this pool, we ultimately select about 12 articles for publication.”²³ And this leads to the problem of mass submissions.²⁴ Even though (and because) every professor wants to publish in a top journal, it would be unwise to submit *only* to such journals. There are two reasons for this.

First, the overwhelming majority of professors will be rejected by the top journals, yet many of them will want to publish their work *somewhere*—more on that later. Therefore, they must submit more broadly than just the elite journals. And second, although a handful of professors will ultimately win the publication jackpot and receive an offer from a top journal,²⁵ the most common way to achieve that is first to obtain an offer from a lower ranked journal and then send an expedited review request to the top journal which then reviews the article and eventually offers to publish it. This expedite process is the subject of the next Part.

For these reasons, it is very common for a professor to submit his or her article to one hundred or more different journals. For example, in response to an author who reported submitting only to eighty-five journals, one professor advised, “[i]n my opinion, submitting to just the top 85 journals is insufficient. I would recommend at least 150 journals.”²⁶

²² As an extreme example, I am highly confident that most judges, lawyers, and clients where I practice law in the Midwest would assume that a publication in the *Michigan State Law Review* (currently USN 96) is better than a publication in the *Emory Law Journal* (currently USN 22).

²³ SOUTHERN CALIFORNIA LAW REVIEW: SUBMISSIONS: *Article Submissions*, <http://lawreview.usc.edu/submissions/> [https://perma.cc/7MC5-7LDR] (last visited Sept. 2, 2017).

²⁴ For an explanation of the structural reasons for mass submissions, see Lau, *supra* note 11.

²⁵ What constitutes a “top journal” is relative. One artificial category is the USN top fourteen, or T-14 for short. Other cutoffs bandied about by the professoriate include T-20, T-25, T-50, T-60, T-80, and T-100.

²⁶ Been There, *Submission Angsting Spring 2016*, PRAWFSBLAWG (Mar. 15, 2016, 8:14 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/10/#comments> [https://perma.cc/7WKD-H6V9].

This mass submission strategy causes several problems. Most significantly and obviously, “[m]assive simultaneous submission is a nightmare for overworked students, undercuts the quality of the review they are able to give, and injects a large quantity of randomness into the article placement process.”²⁷ In addition, while this mass submission strategy is currently necessary for an author to get the “best” placement, it comes at a financial cost.

While many of the USN top one hundred journals accept submissions via email, most require or at least “strongly prefer” submissions through one of the online systems, Scholastica or Expresso.²⁸ Journals probably prefer this, in part, to help manage the massive number of articles they receive each year. From an author’s perspective, the cost of submitting a manuscript to one journal through Scholastica is currently \$6.50, and the cost through Expresso is \$3.10.²⁹ However, from the standpoint of some authors, while these submission systems may offer a couple of conveniences, there are no real benefits over a simple, cost-free email.

The costs of submissions add up quickly. Assume that a very cost-conscious author submits to one hundred journals before eventually receiving his or her first offer. Also assume that twenty-five of those journals are indifferent to the method of submission and will gladly accept emailed articles. Of the remaining seventy-five, perhaps twenty-five will accept submissions through the less expensive Expresso system, leaving fifty submissions through Scholastica. Under these very conservative assumptions, the cost-conscious author would incur submission costs of *over \$400* for a single article.

As Timothy Lau explains, this is a staggering cost on a per article basis, making it difficult for many practitioners, law clerks, and other independent writers to fully participate in the law review publishing process.³⁰ And even for professors who are able to shift submission costs to their employer-law schools, the law schools may also be shifting the costs: “a lot of people that

²⁷ Grimmelman, *supra* note 21.

²⁸ See, e.g., GEORGE WASHINGTON LAW REVIEW: MANUSCRIPT SUBMISSIONS: *Scholastica Submissions*, <http://www.gwlr.org/submissions/> [<https://perma.cc/X9XC-GBQD>] (last visited Sept. 2, 2017).

²⁹ Many journals have switched from Expresso to the far more expensive Scholastica, possibly, some have argued, to *discourage* submissions. Unfortunately, as discussed in the following paragraphs and in the next Part, while higher costs discourage submissions from serious authors with limited resources, they will not discourage frivolous submissions from professors—many of whom do not pay for their own submissions and have an incentive to submit even to journals in which they would never accept an offer of publication.

³⁰ See Lau, *supra* note 11.

submit . . . aren't paying their own bills. Students' tuition money is funding all or most of their submissions."³¹

Worse yet, the \$400-per-article figure cited above is probably low. In response to a question about the costs of submitting a single article, one professor wrote:

I think I have racked up *about \$650 in submission fees* which fortunately my school pays for. . . . [L]aw faculties are not price sensitive since our employer pays the fee and we have every incentive to maximize the number of submissions since for many of us our annual compensation is impacted by article placement.³²

As the above comment indicates, the mass submission system does have a very significant benefit for professors: if one submits to enough journals, one will usually receive an offer of publication. Unfortunately for journal editors, as difficult as it is for them to read, evaluate, manage, and respond to these mass submissions, what follows next is even worse.

B. Expedited Review

When professors submit their article to a law journal, they are not doing so with the goal of actually publishing in that journal. Rather, they want to receive an offer they can then use to send expedited review requests to higher ranked journals. And sometimes there are multiple rounds of expedites. One first-time author described it this way in the course of posting a question:

I'm facing my third expedite (T100 to T50 to T30). From a courtesy/professionalism perspective, is there any limit to how many times I can or should use the full week [of the offer window] to try to go up the food chain? I think I'm playing the game exactly right, but I want to make sure I am not missing any downside. It feels weirdly exploitative.³³

³¹ YesterdayIKilledAMammoth, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 26, 2017, 12:10 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/10/#comments> [https://perma.cc/P872-986T].

³² Anonymouse, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 28, 2017, 9:57 AM) (emphasis added), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/11/#comments> [https://perma.cc/K8UG-ZGQV].

³³ AngstingAnon, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 3, 2017, 11:18 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission->

A seasoned professor reassured him: “that’s right—that’s how the game is played. Keep on expediting up! Journals don’t like it, but they expect it”³⁴ Another professor described the significance of the expedite process: “if by mid-season (meaning, around late February) you’re not in the expedite cycle your season is pretty much doomed By that time, most T50 journals are so overwhelmed with expedites that they have no time for anything else.”³⁵ Similarly, another professor wrote that “a lot of the ‘better’ journals will not even look at an article . . . until they receive an expedite request on that particular piece.”³⁶

Given this state of affairs, the first offer of publication is so important that some professors take very creative measures to obtain it; then, once obtained, it allows them to set the expedite machinery in motion. For example, one author reports that “profs submit to their own students, creating an indefensible conflict of interests, just to [receive an offer and] get into the expedite pipeline.”³⁷ Law professor Ken Levy elaborates:

[S]tudents feel obliged to accept submissions by their own professors. This much is forgivable, I suppose. What is less forgivable is the professors’ willingness to put them in this position to begin with. They are in effect compelling the students to [offer to] publish their work, no matter how weak it may be³⁸

angsting-spring-2017/comments/page/14/#comments [https://perma.cc/Z6Y9-QUUK].

³⁴ Angstingagain, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 3, 2017, 11:45 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/14/#comments> [https://perma.cc/T8UN-482N].

³⁵ 2Dings, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 16, 2017, 7:43 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/3/-comments> [https://perma.cc/LFD3-5NL4].

³⁶ Anon, *Exploding Offers from Law Reviews: A New Trend?*, PRAWFSBLAWG (Oct. 20, 2015, 9:47 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/10/exploding-offers-from-law-reviews-a-new-trend.html> [https://perma.cc/B5D8-LYGJ].

³⁷ YesterdayIKilledAMammoth, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 15, 2017, 5:19 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/3/#comments> [https://perma.cc/HW3X-V22W].

³⁸ Ken Levy, *US Law Review’s Dirty Game: Review by Student*, TIMES HIGHER EDUCATION (Nov. 12, 2015), <https://www.timeshighereducation.com/opinion/us-law-reviews-dirty-game-peer-review-by-student>. Often, the article is indeed “weak,” and if the professor cannot get another offer in the expedite process, the offering law review is stuck with it. See Albert H. Yoon, *supra* note 5, at 333 (“[I]nsider authors

The anonymous commenter, above, also revealed another publication tactic. “Other profs call their students who are editors and shill for a friend’s article”³⁹—a favor that could, in theory, be returned at a future date if the professor currently doing the shilling ever has difficulty placing his or her own article. One professor openly described and defended the practice this way:

I have in the past, and likely would in the future, recommend pieces to our editors when I know they are in the pile. . . . I don’t say “you should publish this,” but I do say “here is what I liked about it and how I think it fits into the larger literature.”⁴⁰

Whether this particular practice is appropriate is the subject of much debate. But what is not debatable is that, much like the ability to shift submission costs to their employer-law schools (and from there, possibly to the tuition-paying students), this practice gives some professors a tremendous advantage over practitioner-authors and even over less well-connected professors.⁴¹

More troubling yet, some authors go to even greater lengths to get into the expedite game. Rather than asking for an offer from their own students or relying on other professors at other schools to recommend the article to their students, some—hopefully a small minority—simply fabricate an offer out of whole cloth. Professor Shima Baradaran Baughman urges her fellow professors to “[b]e honest with your expedites” and reports:

I spoke with some editors at a T-10 law review that had a black list of authors that had faked expedites in the past that they

are less successful at leveraging offers from their own law reviews because their articles were qualitatively weaker than what their law reviews accept from outside authors . . .”).

³⁹ YesterdayIKilledAMammoth, *supra* note 37.

⁴⁰ CBR, *Submission Angting Spring 2017*, PRAWFSBLAWG (Feb. 16, 2017, 2:09 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angting-spring-2017/comments/page/4/#comments> [https://perma.cc/W6LP-NP2C].

⁴¹ This desire to build and use connections could explain the so-called vanity footnote. Look at any article in any top journal, and you’ll likely see the professor gushing thanks to a dozen or more individuals and, additionally, to the organizers of numerous workshops. This also gives some indication that the true cost of churning out a professor-written law review article goes well beyond the professor’s time and the \$650 needed to submit the article through Scholastica and Expresso. Conference fees, lodging, and travel no doubt add tremendously to the cost of this status-obsessed endeavor.

passed on [to] their faculty and new editors. They had added an additional author this year because the particular author had faked an expedite from one top law review to another and the senior articles editors at those schools happened to be good friends. Ouch.⁴²

Ouch, indeed. However, the professor-types actually have mixed views on this practice of fabricating offers. One thought that blacklisting by the law journals was very troubling, potentially unfair, and simply too harsh. “Some people make bad decisions. It ain’t murder, or even jaywalking, really.”⁴³ Another disagreed. “The list of blacklisted authors is correct—these miscreants [i.e., the authors who fake expedite] need to be punished and being blacklisted is most appropriate.”⁴⁴ Yet another performed a law-and-economics analysis and, given the relatively mild punishment of blacklisting, concluded that from a risk-reward perspective, “any rational lower tiered author or those without any letterhead should ALWAYS make up fake expedites to the top journals.”⁴⁵

In any case, assuming a professor obtains an actual offer—whether from his or her own students, with the assistance of a friend at another school, and/or because of the article’s quality or appeal—the offering journal will usually allow a substantial period of time in which the professor may accept the offer. In my own experience, I have received acceptance deadlines ranging from one day to two weeks, but one week is by far the most common. This one-week window, in essence, provides an author the opportunity to trade up to a higher ranked journal via the expedited review process.

Some professors are so obsessed with the rankings game that they will attempt to trade up even one or two spots in the USN hierarchy—if for no other reason than to extend the expedite process and keep their article in play at the

⁴² Shima Baradaran Baughman, *Underneath the Law Review Submission Process: Part VII Expedited Reviews*, PRAWFSBLAWG (Apr. 24, 2012, 11:30 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/04/underneath-the-law-review-submission-process-part-vii-expedited-reviews.html> [https://perma.cc/6B9H-P2SZ].

⁴³ BDG, *Underneath the Law Review Submission Process: Part VII Expedited Reviews*, PRAWFSBLAWG (Apr. 24, 2012, 6:14 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/04/underneath-the-law-review-submission-process-part-vii-expedited-reviews.html> [https://perma.cc/RD8F-55TB].

⁴⁴ ex-dist.ct.law.clerk, *Underneath the Law Review Submission Process: Part VII Expedited Reviews*, PRAWFSBLAWG (Apr. 25, 2012, 4:48 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/04/underneath-the-law-review-submission-process-part-vii-expedited-reviews.html> [https://perma.cc/J9RZ-8YGC].

⁴⁵ TJ, *Underneath the Law Review Submission Process: Part VII Expedited Reviews*, PRAWFSBLAWG (Apr. 25, 2012, 1:31 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/04/underneath-the-law-review-submission-process-part-vii-expedited-reviews.html> [https://perma.cc/W4YV-69RP].

top journals just a little bit longer.⁴⁶ An incredibly common practice—but an amazing one, at least to me—is to ask the offering journal for an extension of the offer’s deadline for the specific and stated purpose of pursuing better journals.

In general, the behavior exhibited during the expedite process would be unimaginable in nearly any other context. The obvious and often-used analogy is that participating in the expedite process is like agreeing to go to prom with someone on a contingent basis—that is, I’ll go with you only if I don’t find a more attractive date by, say, the Tuesday before the dance. Calling on Monday night to get an extension until, say, Thursday is just layering a second insult on top of the first.

But here the journal editors must share blame. It is their practice of holding offers open for one week or more, and then often agreeing to extend deadlines even further, that enables the expedite system to function.⁴⁷ Essentially, the one-week offer (and extensions thereof) turns the lower ranked journals into “uncompensated screening staff” for the more prestigious journals.⁴⁸ That is, the lower ranked journals are the grease which allows the class-based machinery to operate. Professor Andrew Chongseh Kim described the negative impact of this system on an actual journal as follows:

If we [professors] get a better offer before deadline, we drop the original offer like a bad habit and hopefully expedite our way all the way to the top. The practice is often tough for lower ranked journals [that] have to scramble to find new articles. . . . Over the course of a month, the [editors at one journal] had made *fifteen separate offers* to authors *to fill one slot*, and each time the author declined their offer after expediting upwards.⁴⁹

⁴⁶ See Joseph Scott Miller, *The Immorality of Requesting Expedited Review*, 21 LEWIS & CLARK L. REV. (forthcoming 2017) (some professors will even make “sideways moves to journals that are not more desirable but that provide a later-expiring offer, and thus supply more time in the notional trading pit.”).

⁴⁷ See Joseph Scott Miller, *A Modest Proposal for Expediting Manuscript Selection at Less Prestigious Law Reviews* (UGA Legal Studies Research Paper No. 2016-26), <https://ssrn.com/abstract=2811817> [<https://perma.cc/YH8N-7YHS>] (arguing that “the journal obtains no benefit from assisting the author in his or her efforts to shop the piece to more prestigious reviews”).

⁴⁸ Miller, *supra* note 46.

⁴⁹ Andrew Chongseh Kim, *Exploding Offers from Law Reviews: A New Trend?*, PRAWFSBLAWG (Oct. 20, 2015, 9:04 AM) (emphasis added), <http://prawfsblawg.blogspot.com/prawfsblawg/2015/10/exploding-offers-from-law-reviews-a-new-trend.html> [<https://perma.cc/7Q9Z-ZEWZ>].

And if this isn't bad enough, there is an even bigger kick in the head awaiting the editors at some law journals. Some law professors are so status conscious that they may ultimately reject a journal's offer *even if they fail to receive a better offer* from their expedited review requests. In other words, some professors believe that non-publication is preferable to publication by the offering journal.

For example, one professor cautioned aspiring scholars not to "get it in print' somewhere that is going to hurt you. There are some journals where you'd be better off to not publish at all than to . . . have placed a piece there."⁵⁰ Others have offered specifics on how to identify such journals. One professor warned would-be academics that "a placement outside the T100 is worse than having not published at all."⁵¹ Others are even more conscious of these class distinctions. One would-be professor reported that "I have received advice that I should not accept any offer outside of T-60, as doing so could hurt my chances once (or if) I actually go on the job market."⁵²

As a lawyer who writes about matters of importance to other practicing lawyers, I find this thought process difficult to grasp. I once even passed on a USN top fifty journal offer in favor of a lower journal with an earlier publication date, thus allowing me to get my work into the hands of my colleagues and in front of trial judges nearly a year sooner. Conversely, a professor's view that his or her work is, in some cases, best left unpublished seriously calls into question the value of that work.⁵³

More specifically, some law professors find themselves trapped in an uncomfortable area between lawyer and scholar: they have never (or barely) practiced law, yet also lack formal, advanced training in an academic discipline.⁵⁴ The result is that neither practicing lawyers nor true academics

⁵⁰ anonProf, *Submission Angsting Spring 2016*, PRAWFSBLAWG (Feb. 25, 2016, 7:58 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/5/#comments> [<https://perma.cc/88AQ-X82N>].

⁵¹ 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> [<https://perma.cc/X4KY-5A29>].

⁵² recentgrad, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 28, 2017, 2:49 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/12/#comments> [<https://perma.cc/UUU4-B2VS>].

⁵³ In addition, "[i]t 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." Lau, *supra* note 11.

⁵⁴ This is not true for every professor. However, the classic profile of a new professor-hire includes a J.D. from a top fourteen USN law school, a clerkship, and little or no legal practice experience. Further, for those professors who have such experience, it is usually far removed from the courtroom and even from client contact

have much interest in the subject matter of their work. Even their fellow law professors may have little interest. The following lament nicely captures this predicament, which is perhaps what drives some law professors' preoccupation with class, rank, and prestige over substance:

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 . . . [And] we all realize that, given the proliferation of journals today, almost anything anyone writes can get published somewhere.⁵⁵

Yet the professors' obsession with prestige does not prevent them from using the "proliferation of journals"—those outside the "T100" or "T-60," depending on the particular professor—to obtain that first offer which, in turn, will be used *solely* for purposes of expediting. One professor explained, "I don't think it's unethical to submit to places you wouldn't accept. Does it suck for the students, yes. But it is a known component of our publication system that relies heavily on expedites."⁵⁶

Until Spring 2017, I certainly did not know this practice was a "component of our publishing system." (Another known, but less common, component is renegeing on an agreement after having *accepted* the offer.)⁵⁷ Nonetheless, another professor agreed, and placed blame for this practice—i.e., submitting to journals where the author would not publish under any circumstances—on the higher ranked journals. "I too submit to journals I *would never accept*."

of any kind. See Paul Campos, *Legal Academia and the Blindness of the Elites*, 37 HARV. J.L. & PUB. POL'Y 179, 180–81 (2014).

⁵⁵ AnonProf, *Submission Angsting Spring 2016*, PRAWFSBLAWG (Feb. 23, 2016, 10:11 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/4/#comments> [<https://perma.cc/8Z55-7FMF>].

⁵⁶ Magnolia, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 16, 2017, 9:45 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/3/#comments> [<https://perma.cc/6LRJ-HSUU>].

⁵⁷ See Dave Hoffman, *Breaching a Law Review Contract?*, PRAWFSBLAWG (Mar. 27, 2015, 5:13 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/03/breaching-a-law-review-contract.html> [<https://perma.cc/26R3-2ALM>] (discussing how professors sometimes breach publication agreements in favor of a better offer that was made after the less prestigious offer had been accepted).

Given how the system works (i.e., many journals will not look at your piece until they get an expedite), I think you're foolish not to."⁵⁸

One professor reported engaging in this practice on a very wide scale, stating that he or she "placed in a T30 journal—after submitting to 150 journals, *most of which* I wouldn't have accepted"⁵⁹ Another professor specifically advised: "Regardless of whether you'd publish in the journal, submit to the top 100"⁶⁰ And another reported that he or she recently "[g]ot *three offers* including *top 80*, but decided to withdraw" the article instead of publishing it with any of the offering journals.⁶¹

Although lower ranked journals are hit the hardest by this practice, even highly ranked journals are not immune. A newer professor was presumably serious when he or she asked this question: "If most of the other law reviews still have not responded [to my expedite requests] by next Wednesday—which is likely, given how early it is [in the submission season]—should I just let my T30 LR offer lapse and take my chances?"⁶²

After being repeatedly victimized by such prestige-driven tactics, one lower ranked journal had enough and temporarily instituted an extreme measure that sent some law professors into a state of emotional turmoil: the journal made its publication offers on a first-come, first-serve basis. That is, once an offer is accepted by one of the authors to whom it was extended, the other offers for that publication slot would be withdrawn from those who were too slow on the draw—that is, too status conscious—to quickly accept.⁶³

In light of this, one professor observed that the current system of mass submissions and expedites is "great for journals at the top but bad for journals

⁵⁸ AnonProf, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 16, 2017, 11:36 AM) (emphasis added), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/3/#comments> [https://perma.cc/3E66-UNXA].

⁵⁹ Anon, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 1, 2017, 3:52 AM) (emphasis added), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/12/#comments> [https://perma.cc/K5J4-H5US].

⁶⁰ Anon, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 17, 2017, 8:56 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/4/#comments> [https://perma.cc/G6RB-LUT4].

⁶¹ Anon, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 20, 2017, 1:59 AM) (emphasis added), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/7/#comments> [https://perma.cc/SW9U-9LB7].

⁶² blawprof, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 10, 2017, 8:46 AM) <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017.html> [https://perma.cc/4MYW-BZB9].

⁶³ Kim, *supra* note 49.

at the bottom.”⁶⁴ Of course, it’s great for professors, too. This same professor realized that, if enough lower ranked journals got fed up and started taking similarly drastic measures, “it could *destabilize the entire, highly flawed, law review system that is central to all of our careers.*”⁶⁵ Destabilizing “the entire, highly flawed, law review system” is precisely what the next Part examines.

II. THE EIGHT-HOUR OFFER

As explained above, the current system forces editors—particularly those at the lower ranked journals—to spend a tremendous amount of time and effort reading, evaluating, and making offers for articles they will never have the opportunity to publish. In addition, there are substantial financial costs for authors to submit articles to the journals—costs which, in many cases, will be paid for by tuition-paying students (including, ironically, the student editors who are forced to read the mass submissions that generated the costs in the first place).

Also as explained above, it is the journals’ one-week offer window (along with extensions thereof) that enables this class-based system to function. In theory, then, one solution to this problem is for a journal—regardless of its rank—to change to an *eight-hour* offer window.⁶⁶ Or, as James Grimmelmann has argued, “[a]ll journals should make short exploding offers.”⁶⁷ And because an eight-hour offer window is in each journal’s individual best interest regardless of how long other journals keep their offers open, any journal that implements this policy would—again, at least in theory—reap immediate benefits.

Admittedly, as the next Part demonstrates, professors may be able to circumvent such a reform—particularly if it is adopted by only a small number of non-elite journals. But for now, consider how such a policy would theoretically work if adopted by only a single journal, “Journal 100.” (This example could easily be applied to a journal ranked in the top fifty, or seventy-fifth, or into the triple digits for that matter.) Hundreds of professors currently submit to Journal 100 for the primary, and sometimes the sole, purpose of obtaining an offer to use in the expedite process. The result is that the editors of Journal 100 will be making offers to professors who will *not* accept them.

⁶⁴ *Id.*

⁶⁵ *Id.* (emphasis added).

⁶⁶ See, e.g., Dave Hoffman, *Free Advice to Incoming Law Review Boards*, CONCURRING OPINIONS (Mar. 4, 2013), <https://concurringopinions.com/archives/2013/03/what-can-law-review-editors-do-to-attract-better-articles.html> [<https://perma.cc/3KPB-ARNB>] (regarding offer length, “[a] week is fine, and maybe the norm. But you can offer less time too. Consider this: Columbia routinely gives until the same-day close of business to make a decision. Why shouldn’t you?”).

⁶⁷ Grimmelmann, *supra* note 21.

But what if Journal 100 was able to communicate to professors, before the submission season began, that its offers would come with an eight-hour acceptance window that will *not be extended* under any circumstances? For example, if Journal 100 makes an offer on a Tuesday evening, the professor would have until 5:00 p.m. on Wednesday to accept it, or the offer will expire. Allowing eight business hours ensures that the professor has enough time to check his or her email and respond to the offer, but not much else.

Assuming that this policy is effectively communicated to professors before the submission season, would professors still submit to Journal 100? There would be no incentive to submit to this journal merely to obtain an offer to use in the expedite process, as eight hours is not enough time for other journals to conduct an expedited review. Knowing this upfront, professors would only submit to this journal after they have been rejected by, or are tired of waiting for, the higher ranked journals. That is, professors would only submit to Journal 100 if and when they are serious about publishing in Journal 100.

If adopted on a wide scale, the eight-hour offer would effectively turn the system from a *bottom-up* process to a *top-down* process. Currently, lower ranked journals screen articles for more prestigious journals, which then select the articles they want to publish. With an eight-hour offer window, however, the more prestigious journals would first select the articles they want to publish (without the benefit of receiving expedited review requests), and the lower ranked journals would publish the articles that remain. The end result, however, would be the same. The only difference is whether an article moves upstream (via expedited review) or downstream before eventually finding its home.⁶⁸

It is true that Journal 100 would receive far fewer submissions if professors knew the journal would only hold the offer open for eight business hours. But that is the point of this proposed reform. Journal 100 does not want to be overwhelmed with reading, evaluating, and making offers on articles that it has no chance to publish (often because professors have, deceptively, first ruled out the journal and then submitted to it). Instead, Journal 100 would receive far fewer submissions, but would have much more time to spend on each submission and, more importantly, would have a much better chance of actually publishing those articles for which it does make offers.

And there is a potential, additional benefit—though not one that would accrue unless the eight-hour policy was widely adopted. If enough journals moved to an eight-hour window, aggregate submission costs would fall dramatically. The reason is that professors would only submit to the journals in which they truly would be willing to publish, and mass submissions would end. Granted, the professors who eventually published in Journal 100 would

⁶⁸ See Miller, *supra* note 46 (explaining that the system is a “self-interested matching market, where nearly every piece finds a spot to rest when the music, as it were, stops.”).

incur the same submission costs on a piecemeal basis working *down* the USN ranks, rather than incurring them all upfront in a mass submission designed to work *up* the USN ranks. But the professors who published in the higher ranked journals would actually spend less, as they would not continue to submit down the ranks after receiving their offer. Therefore, if the eight-hour offer system were widely adopted, no professor would spend more, but most would spend less, to publish an article.⁶⁹

Many law professors complain about the current law review publishing system including, oddly, the features that benefit them the most: mass submissions and expedited review. But such complaints are merely knee-jerk reactions to the numerous rejections that all authors inevitably receive when submitting on such a wide scale. As one professor explained, “the angsting comes from how rejection-filled publishing is—even when you’re successful. . . . If you end up publishing with a very good law review like the *Wisconsin Law Review*, your cycle is likely illustrated by rejections from nearly all journals ranked higher than *Wisconsin*.”⁷⁰ Another professor added that “[t]he process is so bruising because, even if you end up getting a great placement like *Wisconsin* . . . you’ll [also] get rejected from many, many journals ranked below *Wisconsin*.”⁷¹

Despite the angst associated with the current system, professors would complain far more loudly if mass submissions and expedited reviews were replaced with a universal, eight-hour offer window. With an eight-hour offer, professors would no longer be able to submit to one hundred or more journals in a mindless pursuit of hyper-technical, but illusory, prestige-based distinctions. For example, a professor who submits to the top thirty journals and receives an eight-hour offer from journal number thirty would, as a practical matter, be forced to accept that offer without the luxury of expediting to journal number twenty-five, or to the so-called top fourteen.

The loss of these artificial and meaningless distinctions (e.g., “T-14” versus “T-25” and “T-50” versus “T-60”) would also force law professors to judge each other not on the precise USN rank of the law school that houses the journal in which an article was published, but instead on the substance of each other’s work. Eliminating such a time-saving heuristic would also not sit well with the professoriate. But this is a heuristic they should immediately abandon

⁶⁹ I use the word “spend” loosely, as the professors typically do not pay for the costs of their mass submissions. Rather, the costs are incurred by the professors’ law schools, which, in turn, may pay for these costs with tuition revenue.

⁷⁰ Farva, *Submission Angsting Spring 2016*, PRAWFSBLAWG (Feb. 14, 2016, 10:12 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/2/#comments> [https://perma.cc/32UW-MT8D].

⁷¹ anon, *Submission Angsting Spring 2016*, PRAWFSBLAWG (Feb. 15, 2016, 8:43 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/submission-angsting-spring-2016/comments/page/2/#comments> [https://perma.cc/LEK6-Q99C].

regardless of whether the current system is reformed. The reason is that, on the one hand, professors judge each other by their journal placements. But on the other hand, many professors simultaneously declare that “[I]aw students are utterly unqualified to judge legal scholarship.”⁷² Professors could resolve these irreconcilable positions by simply judging one another on their work, rather than their journal covers.

The truly elite USN journals would also like to preserve the status quo. In the past, when lower ranked journals have used exploding offers, a group of elite journals promoted a policy through a joint letter, ostensibly for the greater good, where signatory journals committed to holding offers open for a full seven days.⁷³ The reality is that a one-week offer window benefits the elite journals—in addition to other benefits, it gives them time to conduct expedited reviews and pickoff articles from lower ranked journals—which might explain why they promoted the policy in the first place.⁷⁴

And while elite journal editors benefit from the expedited review system, the “[s]tudent editors at less prestigious journals suffer not only a steady diversion of labor to others’ benefit, but also the demoralization of sowing again and again where they will not reap.”⁷⁵ In short, whenever the elite law journals do one thing, it is often a good idea for the non-elites to do—or at least strongly consider doing—the opposite.

III. IMPLEMENTATION

The previous Part discussed the impact of an eight-hour offer window if adopted by a single school and also if adopted more broadly. For now, we will return to our discussion of one journal—Journal 100—and how it might implement such a policy.

To begin, Journal 100 would have to give adequate notice of the policy before law professors submit their articles. The current system of mass submissions and expedited review is deep-rooted; in fairness, it would be quite a shock to submit an article expecting business as usual only to receive an offer that remains open for eight business hours. Unfortunately, *Scholastica* and *Espresso* do not appear to allow for such notice—other than *Scholastica*’s

⁷² Anonymous, *Submission Angsting Fall 2016*, PRAWFSBLAWG (Aug. 7, 2016, 10:25 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/07/submission-angsting-fall-2016/comments/page/2/#comments> [<https://perma.cc/8AQN-6V3V>].

⁷³ Paul Caron, *Elite Law Reviews End “Exploding Offers”*, TAXPROF BLOG (Apr. 19, 2011), http://taxprof.typepad.com/taxprof_blog/2011/04/elite-law-reviews.html [<https://perma.cc/5MB7-AW9E>].

⁷⁴ See Orin Kerr, *Group of Law Reviews Adopts Position Against Exploding Offers: Will Other Journals Follow?*, THE VOLOKH CONSPIRACY (April 19, 2011, 2:39 PM), <http://volokh.com/2011/04/19/important-group-of-journals-agree-to-end-exploding-offers-will-other-journals-follow/> [<https://perma.cc/6A8E-XJJ7>].

⁷⁵ Miller, *supra* note 46.

generic (and often ignored) recommendation that authors check each journal's guidelines and Espresso's text box that usually indicates when a journal will open for submissions.

One way to provide sufficient advance notice is for Journal 100 to consider closing its Scholastica and Espresso accounts—at least for one submission season—to instead accept submissions by email or its online system. This would prevent professors from mindlessly clicking the journal cover (on Scholastica) or the journal name (on Espresso), and would instead force them to visit Journal 100's website which would provide adequate notice of its eight-hour policy. Further, word of this new policy would quickly spread among the professoriate—a group that monitors the smallest disturbances in the status quo and quickly communicates them through its numerous blogs.⁷⁶ Journal 100's notice on its website could read as follows:

Journal 100 is pleased to accept, *via email*, unsolicited articles and essays for publication. The Journal is happy to consider manuscripts that have been submitted simultaneously to other journals; exclusive submission is *not* required. However, if The Journal decides to extend an offer of publication, that offer will be held open for *only eight business hours*, i.e., until 5:00 PM CST the business day following the evening that the offer was extended. If the author does not accept by that time, the offer *expires* without further notice. The Journal does *not* grant deadline extensions.

The website should also give some indication of the purpose behind the policy. For example:

Journal 100 has adopted this policy in response to the problems of mass submissions and expedited review. We understand that an author to whom The Journal extends an offer may receive *other offers* within the eight hour window. Therefore, receiving an offer from The Journal does *not* obligate the author to accept it. However, due to the short time frame for acceptance (eight business hours), we recommend that authors *not* submit their work to us until they would give strong consideration to accepting an offer to publish in The Journal.

⁷⁶ See, e.g., Howard Wasserman, *Northwestern Law Review Exclusive Submissions*, PRAWFSBLAWG (Dec. 28, 2016, 10:58 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/12/northwestern-law-review-exclusive-submissions.html> [<https://perma.cc/YP9B-QJ6B>] (announcing the journal's new submission policy).

From the author's perspective, it would be very helpful to provide additional information on the website. This should be updated regularly, and may include the following:

Authors should not submit their work until March 1, 2018, the day that The Journal will begin reviewing submissions. The Journal will review submissions on a rolling basis until all available publication slots are filled. The Journal publishes four issues per year—two during the Fall and two during the Spring—and generally publishes three articles per issue. Please check this website frequently for updates about the availability of open publication slots.

Shortly after an author accepts an offer to publish in The Journal, he or she will be required to sign a publication agreement. The publication agreement, which will be customized for each individual author's name, manuscript title, and the anticipated volume and issue, is provided below in PDF format for review by prospective authors.

For journals that already accept submissions via email—many do; some exclusively so⁷⁷—eliminating Scholastica and Espresso would not be difficult. Further, even for journals that currently rely on these systems to manage their submissions, the eight-hour offer window is designed to *reduce* the volume of submissions—most notably, the articles that the journal would never have a realistic chance at publishing anyway. Therefore, the journal that implements this policy will have less of a need for the submission management features of the two systems, and could easily survive without them for one submission season. And given the exorbitant fees that Scholastica charges authors to submit—currently \$6.50 to send one article to one journal—the change to cost-free email would be welcomed by some authors.⁷⁸

IV. ROADBLOCKS TO REFORM

Unfortunately, there are many things that could stifle Journal 100's reform efforts or might even prevent such efforts from getting off the ground. First, journal editors are one-and-done; that is, they are editors for only one year, and by the time they learn the ropes of the law review publishing business they are moving on (hopefully) to real business and their first legal jobs. They simply

⁷⁷ See, e.g., UNIVERSITY OF BALTIMORE: PUBLICATIONS: LAW REVIEW: *Article Submission*, <http://law.ubalt.edu/academics/publications/lawreview/submission.cfm> [<https://perma.cc/B3TU-G8JD>] (last visited Sept. 16, 2017) (“To submit articles for review, please email your article, a cover letter, and curriculum vitae or resume.”).

⁷⁸ See Lau, *supra* note 11.

may not have sufficient motivation—understandably so—to reform the system.⁷⁹

Second, if Journal 100 did institute an eight-hour offer policy, and if professors acted as they theoretically should, Journal 100 might receive its submissions later in the season. This could interfere with the journal editors' other obligations, including preparing for final exams. In this case, journal editors may wish to consider the slightly more complex reform suggested by Professor Joseph Scott Miller, which includes “three integrated, data-driven steps,” and involves identifying, by institutional affiliation, which professor-authors are most likely to accept an offer of publication.⁸⁰

Third, and most significantly, even assuming that professors visit Journal 100's website and read the eight-hour offer policy before submitting, they may simply decide to thwart Journal 100's attempted reform effort. That is, even knowing that an offer would be held open for only eight hours, a professor may submit his or her article, obtain an offer, and *still* use it in the expedited review process. How could a professor do this given that eight hours is not enough time for another journal to conduct an expedited review? Quite simply, nothing prevents the professor from misrepresenting the offer deadline to other journals, as letting the real deadline lapse does not matter when the professor had no intention of ever publishing with Journal 100 in the first place.

This idea should not be surprising, as some authors have reportedly committed the more serious deception of fabricating the underlying offer on which the expedite request is based.⁸¹ Further, some professors who receive legitimate offers already alter their deadlines for purposes of expediting. One professor explains that, “[w]hen I have had an expedite expire without another offer, I have gone back in to [S]cholastica [and] put in a new really long expedite deadline”⁸² Unilaterally extending the deadline of the (now-expired) offer allows the professor to remain in the expedite game, even though he or she no longer has a pending offer and arguably should be removed from consideration. The professor even reports that “I've done that twice now I think and both times I've received subsequent higher offers”⁸³

The important point, of course, is that if a professor can unilaterally extend the offering journal's deadline after the offer has expired, nothing would prevent him or her from unilaterally extending the deadline in the first place, before making expedited review requests. Journal 100's eight-hour offer

⁷⁹ In this case, a much simpler reform is to open for submissions later in the season. This could, to some extent, also turn the system from a bottom-up expedite review process into a top-down process—if a journal opened after most of the journals above it (in the USN hierarchy) have filled their publication slots.

⁸⁰ See Miller, *supra* note 46.

⁸¹ Baughman, *supra* note 42.

⁸² Magnolia, *supra* note 56.

⁸³ *Id.*

would then become a one-week offer (or longer) for the creative professor's intents and purposes.

For this reason, the eight-hour reform would be far more effective if implemented by a journal prestigious enough that most professors *would* accept the journal's offer if it was the only one they received. For example, under the current system, if a professor receives an offer from a USN top sixty journal and fails to receive a better offer when expediting, the majority of such professors would accept the top sixty offer. Therefore, most professors who would submit to a USN top sixty journal, knowing that any offer would be held open for only eight hours, would accept such an offer rather than artificially extend the deadline to gamble on a better outcome in the expedite process.⁸⁴

Alternatively, if a journal is lower in the USN pecking order, the eight-hour reform could also be effective if it was adequately publicized. A journal could, for example, do the opposite of what the elite schools did in their joint statement on offer length.⁸⁵ Rather than announcing a one-week offer policy ostensibly for the greater good, a journal could announce its eight-hour offer policy in response to the numerous problems that plague law review publishing, including mass submissions, the expedited review process run amok, and the deceptive tactics employed by some professors.

Making this known through a public statement would do at least two things. First, it would probably win the journal some respect from the sizeable minority that is disgusted by the mindless pursuit of prestige in legal academia. And second, it would alert the higher ranked journals to the eight-hour policy. Then, if a higher ranked journal were to receive a professor's expedited review request based on an offer from the lower ranked, signatory journal, its editors would know that the offer—or at least the deadline—on which the expedite request is based is not genuine. Hopefully, if the editors of the higher ranked journals knew this, they would not tolerate such deception.⁸⁶

Theoretically, if a large majority of journals moved to an eight-hour offer policy, the practice of expediting would grind to a halt. Smaller scale implementations would, however, be vulnerable to abuse by prestige-driven professors. But the amount of abuse would negatively correlate with the scope of the reform: the greater number of journals or the more prestigious the journal(s) that move to an eight-hour offer window, fewer and fewer professors would attempt to game the system. If the *Ohio State Law Journal*, by itself,

⁸⁴ Where this exact cutoff falls is open to debate, but the consensus seems to point to the top sixty—possibly because, at one time, an influential professor missed the top-fifty cutoff and placed in the top sixty instead, thus moving the goalposts for what is considered an acceptable placement.

⁸⁵ The elite schools advocate for a seven-day offer window. See Caron, *supra* note 73.

⁸⁶ See, e.g., Baughman, *supra* note 42 (discussing how some editors are already blacklisting authors who are caught fabricating offers to get into the expedite game).

adopted the eight-hour offer, few professors would fabricate a longer deadline in order to jump into the expedite game. Unfortunately, if the *Ohio Northern University Law Review*, by itself, adopted the eight-hour offer, the reform could yield some positive results—and certainly some respect—for the journal, but would not completely foreclose professorial abuse.

V. BLACKBALLING IS A TWO-WAY STREET

Law professor angst reaches its peak sometime between mid-February and mid-March, the heart of the law review submission season. One illustration of this is a professor who sniped at his colleagues on the *PrawfsBlawg* angsting thread: “I’m forever baffled by the lack of reading comprehension skills displayed on this board—a board that, I thought, was populated by law professors. Please reread my post.”⁸⁷ He or she then went on to restate the technical distinction made earlier between submission strategies designed to win a “T14” placement versus those calculated to win a less prestigious “top 20 or 25” placement.⁸⁸ His or her colleagues’ failure to catch this subtle distinction in the earlier post is what caused the distress.

For a more relevant example, consider this: some law journals often receive more than one thousand submissions to fill only a few publication slots. Many journal editors, understandably, don’t take the time to respond with a rejection email to each and every professor who submits an article. But professors know full well that when they don’t receive the nice thank-you-for-submitting email, a journal’s failure to respond means it is not interested in publishing the article. (Once again, the prom analogy is helpful: when your first choice for the dance won’t respond to you, the answer is “no.”)

Nonetheless, although some professors complain about receiving the impersonal, standard rejection email, others complain when they don’t receive one.⁸⁹ Some even contend, rather ironically, that the failure to send a rejection email is evidence of the students’ “solipsistic narcissism”⁹⁰ and constitutes

⁸⁷ AnonLawProf, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 24, 2017, 12:31 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/9/#comments> [https://perma.cc/E8A4-EYJT].

⁸⁸ *Id.*

⁸⁹ I don’t have a preference as to whether journals send a rejection email. However, I can’t help but chuckle whenever I receive the form email that states: “Frequently we must make the difficult decision to turn down an excellent piece of scholarship.” This language purposely stops short of telling me that *my* “piece of scholarship” was “excellent,” yet it still conveys the rejection in a pleasant way.

⁹⁰ anon, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 17, 2017, 3:29 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/21/#comments> [https://perma.cc/4K99-GNV6].

unethical behavior.⁹¹ One professor even hinted at potentially blackballing the student editors down the road.

The discussion began with a complaint that “Harvard used to be a prompt and reliable reject, but has been a non-responder in the last couple of seasons.”⁹² One professor suggested they could obtain the much desired rejection emails from Harvard and other schools “by simply sending e-mails to any journal that has not responded to us. That way, they will desire to send rejections simply to avoid being swamped by e-mails. Just my 2-cents.”⁹³

That advice certainly isn’t worth “2-cents,” but it likely wouldn’t cause the student editors any serious harm, either. So another professor ramped it up a level: “if enough submitters make it known that editors who don’t act professionally enough may have it held against them in the future (e.g., VAP hiring decisions), that might scare them into doing their job.”⁹⁴

Similarly, recall the earlier discussion about the journal that made *fifteen* offers, still couldn’t fill its single publication slot, and therefore decided to make first-come-first-serve, exploding-type offers to induce an acceptance. The professor who wrote about that incident believed the journal editors made a “creative mistake,” as such offers could “discourage authors from submitting to [that] journal[] in the first place.”⁹⁵

To begin, this professor clearly did not grasp that, from the standpoint of the editors, “discourag[ing] authors from submitting” *is the goal*. But then, and more to the point, the professor stated that, because the journal’s faculty advisors “say this will not be their standard practice going forward, I think it makes sense to keep the names of the journals out of this blog, and the comments, *for now*.”⁹⁶ But he did not discourage disclosure via other means: “I won’t delete any comments that offer to share the names offline.”⁹⁷

⁹¹ anon, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 17, 2017, 11:51 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/20/#comments> [https://perma.cc/BNC9-XRU4] (arguing that the failure to send a rejection email in certain instances is a “poor ethics practice[]” and violates “ethical norms”).

⁹² thegatekeeper, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 1, 2017, 11:42 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/13/#comments> [https://perma.cc/8E9Z-E5EX].

⁹³ Krimrim, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 1, 2017, 11:47 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/13/#comments> [https://perma.cc/QYD7-GCME].

⁹⁴ anon, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 1, 2017, 12:43 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/13/#comments> [https://perma.cc/T7S5-NB35].

⁹⁵ Kim, *supra* note 49.

⁹⁶ *Id.* (emphasis added).

⁹⁷ *Id.*

What professors forget is that blackballing and shaming can work both ways. For example, the professor who was angered by not receiving his formal rejection email suggested holding such a benign, non-event against student editors when they later applied for teaching jobs. Not only would that be grossly disproportionate to the students' alleged "offense," but this professor obviously didn't consider that the students may start blackballing the professors.

Perhaps journal editors will start passing along, to their successor editorial boards, the names of professors who repeatedly use the journal for the sole purpose of jumping into the expedite game. Or worse yet for the professors, perhaps the editors will begin their own blog to share information with editors at other journals, much as the professors are currently doing when sharing information with professors at other schools. In fact, as discussed earlier, one professor reports that this is already happening, albeit on a small scale (as far as we know). Some journal editors are already blacklisting authors who are caught "mak[ing] up an offer to expedite on."⁹⁸ Expanding the blacklist to include those who employ other tactics—including tactics that professors widely view as innocuous—is just a few clicks of the keyboard away.

Further, when some professors complain, they aren't always making generic comments such as the worn-out criticism that "[I]aw students are utterly unqualified to judge legal scholarship"⁹⁹—an odd complaint, given that the only thing separating student editors from some of their professors is one year of law school.¹⁰⁰ Rather, despite a warning from a levelheaded colleague to leave students' names off the *PrawfsBlawg* angsting thread, professors have publicly identified and criticized individual editors by their school, title, and name.¹⁰¹ Perhaps, then, the students will do the same. Is this a risk professors want to take, particularly when their promotions, status, and sense of self-worth can hinge on the already arbitrary distinction between, for example, "T50" and "T60"?

Professors should not dismiss the possibility of this type of backlash. After all, a mere three law students played a substantial, if not primary, role in

⁹⁸ Baughman, *supra* note 42.

⁹⁹ Anonymous, *Submission Angsting Fall 2016*, PRAWFSBLAWG (Aug. 27, 2016, 10:25 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/07/submission-angsting-fall-2016/comments/page/2/#comments> [<https://perma.cc/RC8E-NUBR>].

¹⁰⁰ See Campos, *supra* note 54, at 180 ("A 2003 study found that the average amount of experience in the practice of law among new hires at top twenty-five law schools, among those hires who had any such experience, was 1.4 years." (emphasis added)).

¹⁰¹ See anon, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Mar. 1, 2017, 12:24 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/13/#comments> [<https://perma.cc/PH37-5NQE>].

exposing other law school tactics, such as some schools' use of misleading employment statistics for the purpose of increasing applications and artificially inflating USN rank.¹⁰² The result of the students' efforts was greater transparency and, not surprisingly, a massive reputational and financial hit for law schools.¹⁰³ All it would take is a few enterprising journal editors to start sharing information and exposing law professor publishing tactics in a similar manner. The result would be yet another black eye for the academy.

CONCLUSION: PUBLISHING POST-REFORM

The eight-hour offer window discussed in this Essay would not be popular with many professors. But it is not designed to please the professors; rather, it is designed to alleviate the problems facing journal editors who receive mass submissions, yet find it difficult to induce professors to accept an offer of publication.

As explained earlier, this reform would not temper the professors' desire for prestige; however, it would prevent them from using the lower ranked journals in the mindless pursuit of that prestige. That is, instead of using the lower ranked journals to keep the class-based machinery operating smoothly, professors would be forced to take some risks.

For example, if the eight-hour offer was the industry standard then professors would have to decide *when* to submit to the top eighty journals, rather than continuing to wait on the top fifty. On the one hand, being less class conscious could be rewarded: submitting to the top eighty earlier than other professors could yield an offer from a very desirable journal, such as the *University of Miami Law Review*. On the other hand, because that offer would come with an eight-hour window, a professor would have to accept it before the *Florida State University Law Review*, for example, is able to complete its review and possibly make its own offer.

Being forced to make such judgments would create a level of angst previously unknown to the professoriate. Law professors, as a group, are very risk-averse and would not like the idea of their decisions possibly having sub-optimal outcomes as measured by the USN rankings. But this is not a real-

¹⁰² Paul Campos, *Goodbye is too Good a Word*, INSIDE THE LAW SCHOOL SCAM (Feb. 27, 2013), <http://insidethelawschoolscam.blogspot.com/2013/02/goodbye-is-too-good-word.html> [<https://perma.cc/W7BC-BUUG>] (discussing how the “the tireless unpaid labor of Kyle McEntee, Patrick Lynch, and Derek Tokaz, aka Law School Transparency, found their way into the pages of the New York Times and the Wall Street Journal, and onto the CBS Evening News”).

¹⁰³ Paul Campos, *Halfway Home*, INSIDE THE LAW SCHOOL SCAM (Mar. 4, 2015), <http://insidethelawschoolscam.blogspot.com/2015/03/halfway-home.html> [<https://perma.cc/FEG5-22MC>] (“[T]his fall's entering class will be roughly around 35,300 1Ls, down from 52,500 just five years ago.”).

world problem. If the professor's work has true value, that value will remain whether the article is published in the *Virginia Law Review* or the *Vermont Law Review*. Granted, many law school hiring and promotion decisions can be based on artificial distinctions between, for example, a publication in the top fifty versus the top sixty.¹⁰⁴ But this is the professoriate's self-inflicted problem; it is not the concern of journal editors.

Additionally, nothing about an eight-hour offer window would diminish any particular professor's chances of publishing in the higher ranked journals. Law review placements would still largely be based on things like letterhead bias, a professor's connections with professors at more prestigious schools (who can recommend an article to their students on the law review), and similar factors that have nothing to do with substance or quality. One newer professor explained:

Not too long ago, I was an articles editor on a T14 flagship . . .
. . . To even get to a full committee read, the professor needed to either (1) be a professor at a T14 law [school] (and not a clinical prof!), or (2) be named Orin Kerr or Eugene Volokh.
. . . That might suggest that a professor at a Tier 4 school should aim for lower T50 law reviews and not worry so much about Cornell, Duke, Yale, etc.¹⁰⁵

For better or worse—well, for worse—all of this hero worship and other class-driven behavior would continue, even after the adoption of an eight-hour offer policy. The non-clinical professors at the elite schools would still publish their articles in the elite journals. Consequently, another professor's advice to young academics would still remain sound:

[M]ake friends among professors of the T40 schools, so that they can recommend your papers to the editors of their journals. We do not know exactly how much networking and

¹⁰⁴ One thing that causes law professors tremendous angst is that many publication offers must be accepted *before* the annual USN rankings are leaked. The risk is that the journal could lose a great deal of prestige before the ink on the publication agreement is even dry. This year, for example, the University of Miami and the University of New Mexico (and, therefore, their law reviews) both dropped *seventeen* spots and out of the so-called top sixty in the USN rankings. See Kathryn Rubino, *It's Official—There's a New T14 in Town! (2018 USNWR Rankings are Here)*, ABOVE THE LAW (Mar. 14, 2017), <http://abovethelaw.com/2017/03/its-official-theres-a-new-t-14-in-town-2018-usnwr-rankings-are-here/> [<https://perma.cc/N7KX-UDLZ>].

¹⁰⁵ newlawprof, *Submission Angsting Fall 2016*, PRAWFSBLAWG (Aug. 13, 2016, 12:54 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/07/submission-angsting-fall-2016/comments/page/3/#comments> [<https://perma.cc/682J-6SLZ>].

letter[head] bias affect placement—the beneficiaries will never admit to being beneficiaries—but they are no doubt very significant factors.¹⁰⁶

The eight-hour offer reform would leave all of this unchanged. The big difference under a widely-adopted eight-hour offer policy is that the sub-elite journals would no longer serve as screening devices. That is, law professors and the elite journals could no longer rely on them to be the grease that keeps the class-based machinery humming along smoothly. Instead, the eight-hour offer would lift the burden from the journal editors who are currently forced to read, evaluate, and make offers for articles they will never be able to publish.

Not all journals will be interested in change. The elite journals benefit from the current industry-standard, one-week offer window, as it gives them plenty of time to review and pickoff articles from lower ranked journals. And some lower ranked journals may also be inclined to preserve the status quo. For example, the University of Louisville is currently ranked near the dead-middle of the USN hierarchy. At best, status-driven professors will view an offer from its law journal as a likely means to a better offer; at worst, those professors will treat the journal as one in which they would not, under any circumstances, publish. Yet, as Timothy Lau explains in his discussion of letterhead bias,¹⁰⁷ the *University of Louisville Law Review* has a formal policy “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.”¹⁰⁸ A journal such as this may not want to implement any change that could upset the professors it so eagerly seeks to serve.

Fortunately, the reform discussed in this Essay does not need to be system-wide to disrupt the status quo. Rather, a journal’s editors simply need to decide if they want to continue to serve the needs of the elite journals and the professors—many of whom revel in child-like distinctions between “T-14” and “T-20” and would not allow their work to be published outside the “T-60”—or if they want to take the first step in implementing meaningful change.¹⁰⁹ If only a single journal moved to the eight-hour offer window, that

¹⁰⁶ Anon, *Submission Angsting Spring 2017*, PRAWFSBLAWG (Feb. 26, 2017, 8:33 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/submission-angsting-spring-2017/comments/page/10/#comments> [https://perma.cc/F5TL-GQCR].

¹⁰⁷ Lau, *supra* note 11.

¹⁰⁸ UNIVERSITY OF LOUISVILLE LAW REVIEW: SUBMISSIONS: *Print Edition Submissions*, <http://www.louisvillelawreview.org/submissions> [https://perma.cc/3CMY-2LCB] (last visited Sept. 11, 2017).

¹⁰⁹ This would also be an excellent opportunity for a journal to distinguish itself from other journals based on factors other than USN rank. Many authors, for example, value early publication, a “light edit” policy, an easily navigable and searchable journal website, and favorable publication-agreement terms with regard to copyright.

journal would likely gain some respect and reap some immediate benefits; further, from a larger perspective, other journals would likely follow.

And if enough journals follow, they might even accomplish what one professor feared: they could “destabilize the entire, highly flawed, law review system that is central to [law professors’] careers.”¹¹⁰

¹¹⁰ Kim, *supra* note 49.