1999

Deconstructing the Rejection Letter: A Look at Elitism in Article Selection

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> [T]here are many . . . ameritocratic considerations that frequently enter into evaluations of a scholar's work. The proper response . . . is not to scrap the meritocratic ideal [but] to abjure *all* practices that exploit [its] trappings . . . —friendship, the reputation of one's school— . . . that have nothing to do with the intellectual characteristics of the subject being judged.
>
> — Randall L. Kennedy[1]

> Deep down in the jungle so they say
> There's a signifying [monkey] down the way
> There hadn't been no disturbin' in the jungle for quite a bit,
> For up jumped the monkey in the tree one day and laughed,
> "I guess I'll start some shit."
>
> — Old African-American toast[2]

"Teachers teach nonsense," says Duncan Kennedy, when they seek to "persuade students that legal reasoning is distinct, *as a method for reaching correct results*, from ethical or political discourse in general."[3] Of course, the "nonsense" has some sense to it. It provides the legal process with the patina of neutrality which allows the law to become a "major vehicle for the maintenance of existing social and power relations[, which are] characterized by domination."[4]

Does nonsense, one wonders, flow the other way as well? Consider the student law review editor who rejects an article ostensibly because of deficiencies in the author's legal reasoning. Might the real reason be *political?* Imagine that the editor represents a highly influential law review and the author is an

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The authors acknowledge the help of Ken Rosenblum, Jane Reinhardt, Rena Seplowitz, Gerard Giannattasio, Peter Davis, Amy Stein, Melissa Koehn, Deborah J. Merritt, Bruce Morton, Jill Selden, Howard Glickstein, Lillian Spiess, and, above all, Rose R. Subotnik.

1. Racial Critiques of Legal Academia, 102 Harv. L. Rev. 1745, 1807 (1989).
2. Roger D. Abrahams, Deep Down in the Jungle: Negro Narrative Folklore from the Streets of Philadelphia, 1st rev. ed., 113 (Chicago, 1970).
3. See Andrew Altman, Critical Legal Studies: A Liberal Critique 14 (Princeton, 1990) (quoting Kennedy, Legal Education as Training for Hierarchy, *in* The Politics of Law, ed. David Kairys, 47 (New York, 1982)).
4. *Id.* at 15 (quoting David Kairys, Introduction, *in* Politics of Law, *supra* note 3, at 5–6).

assistant professor who needs an acceptance by an elite journal for promotion. Notwithstanding assurances that it comes only "after careful consideration," might rejection be a vehicle for reifying social and power relations which are characterized by domination?[5] If so, and if we wish to mitigate inefficiencies produced by the current system, might we not, using exam grading as a model, move to blind reviewing of articles?

Such a change might solve a related problem. A continuous barrage of rejection letters is manifestly hurtful to those who spend months and often years in article production. A recipient of such messages will be thinking hard about whether, in fair competition, "I could have had class. I could have been a contender. I could have been somebody."

While a certain stoicism might keep most legal academics from recognizing the pain, criticalists will feel differently, for capturing the lived experience of oppression provides their raison d'être and a source of relief.[6] Quoting an unnamed theologian, Charles R. Lawrence III and Mari J. Matsuda write: "'The public expression of pain summons God into our presence.' When we acknowledge the suffering that comes from oppression or racism or alienation or violence, there is a moment of epiphany when we can see that our pain is shared."[7]

Can critical legal studies help us evaluate the phenomenon of law review article selection, the subject matter of our inquiry? Not much, unfortunately, because of its reluctance to take its legal realism and Marxist roots out of the realm of high theory. Its successor movement, critical race theory, is less skittish. The CRT agenda, explains Richard Delgado, is "to move methodically from one area of the law to the next[,] showing how doctrine in each area is contingent, mystifying, and calculated to advance the interests of the powerful."[8] The charge that the law consistently favors the powerful in the distribution of benefits and burdens extends now to such diverse concerns as free

5. Perhaps the best evidence of who runs the legal academy lies in the institutional affiliation of AALS presidents. Over the last 20 years all but six have come from the top 25 schools of 176 ranked by U.S. News & World Rep., Mar. 29, 1999, at 90–95. For whatever it is worth, three of those six are self-identified as minorities. All the presidents, save two, have come from schools ranked in the top 50. None have come from the lower two tiers of law schools, which educate almost half the student population. For a list of presidents and their affiliations, see the AALS Directory of Law Teachers.

   A colleague asks why student editors would want to exercise control over faculty at non-elite schools. For now, suffice it to say that students of elite journals benefit from emphasizing the gap between their schools and the non-elite schools. If anyone is good enough to get published in the *Harvard Law Review*, what's the big deal about Harvard?

6. We use "criticalists" to mean adherents of critical legal studies and of critical race theory.

7. We Won't Go Back: Making the Case for Affirmative Action 30 (Boston, 1997).

8. When Equality Ends: Stories About Race and Resistance 208 (Boulder, 1999); see also Mari J. Matsuda et al., Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment 6 (Boulder, 1993).

speech,[9] immigration policy,[10] welfare policy,[11] employee rights,[12] the criminal justice system,[13] and the tax structure.[14]

Of all criticalist charges, the most provocative for academics—and it is relevant to our inquiry—is the one directed at educational institutions. At its heart is the notion that objective merit is, to a large extent, a fiction. As Richard Delgado bluntly puts it: "[M]erit is that which I, the preexisting and presituated self, use to judge you, the Other. The criteria I use sound suspiciously like me and the place where I stand."[15] In this view, knowledge and epistemology are indissolubly tied to political power;[16] educational philosophies reflect the hegemonic interests of insiders;[17] and school entrance tests such as the SAT and the LSAT discriminate against minorities—indeed may have been selected for that precise reason—and their use should be severely curtailed.[18]

We are not suggesting here that CRT has won the battle over the law's (non)neutrality. But surely it has won the battle for legitimacy in the law reviews. Twenty years ago, as Delgado tells us, minority academics were excluded from the civil rights debate.[19] Now hundreds of their articles appear in the law reviews, including the elite ones, and a large fraction of the articles are

9. See generally, e.g., Richard Delgado & Jean Stefancic, Symposium, Images of the Outsider in American Law and Culture; Can Free Expression Remedy Systemic Social Ills? 77 Cornell L. Rev. 1258 (1992).
10. See, e.g., Patricia J. Williams, The Rooster's Egg 68 (Cambridge, Mass., 1995).
11. See, e.g., Dink Stover, A "Welfare Prince" Looks at Welfare Reform, 15 Touro L. Rev. 439 (1999).
12. See Regina Austin, Sapphire Bound! 1989 Wis. L. Rev. 539.
13. See, e.g., Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677 (1995).
14. Beverly Moran & William Whitford, A Black Critique of the Internal Revenue Code, 1996 Wis. L. Rev. 751.
15. Brewer's Plea: Critical Thoughts on Common Cause, 44 Vand. L. Rev. 1, 9 (1991).
16. See generally, e.g., John O. Calmore, Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World, 65 S. Cal. L. Rev. 2129 (1992).
17. See, e.g., Gary Peller, Toward a Critical Cultural Pluralism: Progressive Alternatives to Mainstream Civil Rights Ideology, *in* Critical Race Theory: The Key Writings That Formed the Movement, eds. Kimberlé Crenshaw et al., 127 (New York, 1995).
18. See Susan Sturm & Lani Guinier, Symposium: Race-Based Remedies; Rethinking the Process of Classification and Evaluation: The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 Cal. L. Rev. 953, 966 (1996). Sturm and Guinier vigorously argue that since admissions tests are invalid, and many students could perform satisfactorily if given a chance, educational institutions should use a lottery system to help make admissions decisions. Their proposal is discussed in Dan Subotnik, Goodbye to the SAT/LSAT? Hello to Equity by Lottery? Evaluating Lani Guinier's Plan for Ending Race Consciousness, ___ Howard L.J. ___ (1999). Bar examinations have faced similar challenge. See Cecil J. Hunt II, Guests in Another's House: An Analysis of Racially Disparate Bar Performance, 23 Fla. St. U. L. Rev. 721 (1996).
19. See Richard Delgado, Comment, The Imperial Scholar: Reflections on a Review of Civil Rights Literature, 132 U. Pa. L. Rev. 561, 562–63 (1984).

on CRT.[20] The outsiders seem to have become insiders.[21] Implicit in this development, of course, is not only that legal academic culture can be changed, but also that—in the eyes of student editors, at least—critical race theorists have made a reasonable case or, at least, that whatever the results of any particular engagement, the continuous and broad-based attack on America's political and legal structures leads to careful scrutiny of their foundations. This examination, some believe, helps keep our institutions honest, thereby strengthening them.[22]

We do not mean here to examine the criticalist agenda. Nor do we wish generally to equate the status of minorities and law professors in America. Rather, our purpose in referring to that agenda is to provide context for the narrow thesis of this essay: that, just as in the criticalist view the law bolsters establishment positions, so the top law reviews systematically favor articles from authors (whether majority or minority) at high-status institutions (HSIs).

If criticalists are right that institutions are designed primarily to extend the power of their founders, then it should follow that standards for their decision-making would be selected and applied with the same objective. Since articles by faculty at low-status institutions (LSIs) can ordinarily add little if any status value, one would expect such articles to be substantially disadvantaged in the evaluation process at such venerable institutions as the *Harvard Law Review*.[23] If this is the case—and again this is the proposition to be tested—it would represent a major blow to any notion that our law reviews, and maybe even our law schools, function, at bottom, as meritocracies.

Having a connection with an LSI, the authors of this piece obviously have a stake in the outcome. It is likely that some will see us as Salieris—mediocrities who simply cannot accept our own lack of talent.[24] But if the top law reviews are acting unfairly, self-interest is irrelevant; it's generally understood that unfair practices are going to be challenged by the people who stand to benefit from their elimination. We do not dismiss CRT just because any changes it calls for would benefit minority CRT authors.

Two questions thus arise. Are LSI teachers Salieris to HSI Mozarts? Do law reviews objectivize them as such?

20. See generally Richard Delgado & Jean Stefancic, Critical Race Theory: An Annotated Bibliography, 79 Va. L. Rev. 461 (1993).

21. See Jean Stefancic & Fred R. Shapiro, Symposium on the Trends in Legal Citations and Scholarship: Introduction, 71 Chi.-Kent L. Rev. 743, 749 (1996).

22. See Altman, *supra* note 3, at 3. Others have not had so benign a view. See generally Paul D. Carrington, Of Law and the River, 34 J. Legal Educ. 222 (1984); Daniel A. Farber & Suzanna Sherry, Beyond All Reason: The Radical Assault on Truth in American Law (New York, 1997).

23. One might argue that editors have earned great rewards for themselves and their employers by finding previously unknown talent. To be sure. The problem is that law review editors are not apprentices in the publishing business; they have little incentive to discover the next Ronald Dworkin.

24. The reference, of course, is to Peter Shaffer's play (and later film) *Amadeus*.

The first question is, ultimately, unanswerable. In this postmodern age, no generally accepted way to measure quality is available because there is wide disagreement about appropriate standards. A heuristic has come into use to solve the problem of quality: placement of articles in the top journals.[25] The best articles, by this standard, must be those that appear, say, in the law reviews at Yale, Harvard, Stanford, NYU, Columbia, Chicago, Virginia, Duke, and Michigan.[26]

The analytical problem should now be clear. If editors at the top journals do not conduct blind reviews of submitted articles (and we know they don't), then selection will likely be grounded to some extent on a basis other than quality. And if, in fact, editors' selections of articles are based on extraneous factors such as the rank of the author's school, and if the selected articles become defined as the best, then we have a closed circle begging for criticalist denunciation.

Imagine, for example, that one-fourth of the articles appearing in the *Harvard Law Review* are by Harvard faculty. One inference that could be drawn is that the *Law Review* is, as CRT would predict, feathering the school's nest. A conclusion that it is a house organ would be strengthened by the fact that it was established in 1887 in no small part for the purpose of promoting Harvard's name.[27] It is easy to imagine one of the arguments for founding such a journal. A law review would define quality. Without it, and with the emergence of new law schools, how could government officials know whom to appoint to the Supreme Court? How could wealthy alumni and philanthropic organizations and government agencies be sure that in supporting future Larry Tribes, rather than the assertive people at some upstart school, they would be supporting the best?

That the top law reviews in fact disproportionately publish in-house work is well established. A 1983 study found these in-house publishing percentages: 33 percent for Harvard's law review, 35 percent for Stanford's, and 29 percent for the University of Chicago's.[28] This study—along with a number of others since then—touted the benefits of blind review,[29] a system in operation in

25. See James Lindgren & Daniel Seltzer, Symposium on the Trends in Legal Citations and Scholarship: The Most Prolific Law Professors and Faculties, 71 Chi.-Kent L. Rev. 781 (1996).

26. These are the top nine schools, in order, in the 1999 ranking by *U.S. News and World Report*. See note 5 *supra*.

27. For a discussion of the history and use of law reviews at Harvard and elsewhere, see generally Bernard J. Hibbitts, Last Writes? Reassessing the Law Review in the Age of Cyberspace, 71 N.Y.U. L. Rev. 615 (1996).

28. See Ira Mark Ellman, A Comparison of Law Faculty Production in Leading Law Reviews, 33 J. Legal Educ. 681, 685 Table 2 (1983). Perhaps more stunning, faculty at the leading schools published from about 50 to almost 90 percent of their work in their own school's law review. See *id.* at 687 Table 3. It is no doubt because of the leverage they have over editors at their own schools that junior faculty have been encouraged to publish elsewhere. See Jordan H. Leibman & James P. White, How the Student-Edited Law Journals Make Their Publication Decisions, 39 J. Legal Educ. 387, 395 (1989).

29. See Ellman, *supra* note 28, at 688–89, 692.

most other areas of academic publishing. One of our purposes is to update and expand on previously published studies. A second, as we have indicated, is to expand the focus of that kind of study and evaluate a proposition for which there are no data: that the law reviews at the top schools also tend to publish articles from schools ranked in the same cohort, thereby silencing voices from below.

While no systematic study of law reviews shows conscious exclusion of faculty at LSIs, quite a lot of anecdotal evidence points in that direction. Charles W. Collier, who was an articles editor at the *Stanford Law Review* in 1984, has described the evaluation process: "Articles by . . . authors at well-known, prestigious institutions—such as Harvard, Yale, and Michigan—were automatically given a full first reading. And articles by Stanford law professors came to us with such a heavy presumption in their favor that they were almost never rejected, regardless of their quality."[30] A similar sentiment, albeit in favor of Harvard Law faculty, was expressed by another editor at an unidentified top school.[31] An articles editor at Duke in 1991 conceded, with some embarrassment, an "assumption that an appointment at a top-ten school probably represented an effective proxy for merit."[32] Several recent law review articles unabashedly rate law reviews according to the institutional status of their authors.[33] It should not be surprising, then, that the most extensive study of the law review selection process concludes that "the lack of blind review seriously compromises the credibility of the manuscript review process,"[34] a conclusion to which the present authors heartily subscribe. The study ends

30. Intellectual Authority and Institutional Authority, 42 J. Legal Educ. 151, 169 (1992).

31. James Lindgren, An Author's Manifesto, 61 U. Chi. L. Rev. 527, 530 (1994).

32. See Ronald J. Krotoszynski, Jr., Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption, 77 Tex. L. Rev. 321, 329 n.25 (1998).

33. See Robert M. Jarvis & Phyllis G. Coleman, Ranking Law Reviews: An Empirical Analysis Based on Author Prominence, 39 Ariz. L. Rev. 15 (1997); see also Tracey E. George & Chris Guthrie, Symposium, An Empirical Evaluation of Specialized Law Reviews, 26 Fla. St. U. L. Rev. 813 (1999). According to George and Guthrie, snagging an author from a first-tier school would yield a law review 625 points, while a fifth-tier author would produce a mere 225 points. *Id.* at 827, 828 (citing Jarvis & Coleman, *supra*, at 16 n.7). Given the ratio of submissions to acceptances in this system, an author in the fifth tier clearly has no chance at stardom.

34. Leibman & White, *supra* note 28, at 405. James Lindgren concurs. See Lindgren, *supra* note 31, at 538. Leibman and White acknowledge that one "very prestigious" law review (later identified as Yale) does use a blind review in the initial screening process. Leibman & White, *supra* note 28, at 405. See Hibbitts, *supra* note 27, at 651 n.201.

Whatever its past practices, the system now in effect at the *Yale Law Journal* cannot really be considered blind reviewing. Only after a first screening are articles read blind. (Telephone conversation with Gerardo Vildostegui, editor in chief, Oct. 26, 1999.) Since Yale gets such a large number of submissions, it should not be surprising that it too ends up with disproportionately few articles by LSI authors. See Table 4. Nevertheless, it should be noted, Yale does better by LSI faculty than almost all other journals in its cohort.

The *Harvard Law Review* approach is apparently just the reverse of Yale's; at Harvard articles are first read blind and only afterwards with school affiliations. (Telephone conversation with Thomas Lee, a recent articles editor, Oct. 28, 1999.)

At no other elite law review that we know of is there even a half-hearted attempt at blind reviewing. At these schools, moreover, submissions from big-name schools are read first. This, as suggested above, essentially ensures that LSI authors are frozen out.

with a call for blind reviewing.[35] There appears, then, to be good reason to undertake a serious examination of the review process.[36]

Tables 1 through 4 establish the basic relationships between the status of the author's school and that of the law review's school.

A simple calculation derived from Table 1 shows that, on average, well over 20 percent of the articles published in the law reviews of the top-ranked schools were by in-house authors. Similarly, a glance at Table 2 shows that most of the top 9 schools published articles by in-group faculty over 40 percent of the time.[37] Yet these schools represent only 5 percent of the American law schools listed in *U. S. News and World Report*.[38] Authors from the top 26 schools, on average, wrote more than two-thirds of all articles appearing in the top 9 journals, according to Table 3. Table 4 highlights the virtual impossibility, for an author at a third- or fourth-tier law school, of getting an article published in a top-9 journal.[39] Indeed, the University of Virginia seems to have created a veritable caste system in which faculty of tiers three and four are the untouchables.[40] LSI authors' experience at the foregoing journals should be compared

35. See Leibman & White, *supra* note 28, at 420.

36. James Lindgren actually recommended such a study six years ago. Lindgren, *supra* note 31, at 537.

37. A recent study shows that affiliation with a high-ranked school predicts publishing in prestigious places (independently of such factors as status of J.D. school, types of clerkships, and advanced degrees). See Deborah Jones Merritt, Symposium on the Relation Between Scholarship and Teaching; Research and Teaching on Law Faculties: An Empirical Exploration, 73 Chi.-Kent L. Rev. 765, 798 (1998).

38. They represent a somewhat higher percentage of full-time faculty (8%), because they tend to be large schools. Thanks to Rick Morgan of the American Bar Association's Office of the Consultant on Legal Education for this information.

39. The reader's attention is called to the experience of tier-three and -four authors at the *Harvard Law Review*. The five-year average of 11.6 percent may finally help explain an eight-year-old story that has lost none of its haunting power. In April 1991 Mary Joe Frug, a well-published professor at New England Law School, was murdered outside of her home in Cambridge, Massachusetts. In 1992 the *Harvard Law Review* published her last article, A Postmodern Feminist Legal Manifesto (An Unfinished Draft), 105 Harv. L. Rev. 1045 (1992). Several months later, some *Law Review* members lampooned Frug—and the *Law Review* itself—in a piece entitled "He-Manifesto of Post-Mortem Legal Feminism" by "Mary Doe, Rigor-Mortis Professor of Law." See Mona Harrington, Women Lawyers: Rewriting the Rules 64–65 (New York, 1994) and The Diversity Battle at Harvard Law, Christian Science Monitor, June 7, 1993, at 9. At Harvard and New England Law, and indeed in academic communities around the country, many were shocked, even stupefied, by the insensitivity. Calls were issued for disciplining the offending students. Nothing, however, was done.

    The relevance of all this? Now we can "understand" the parody. Had Mary Joe taught at Yale, there would have been nothing incongruous in the *Law Review's* publication decision; such a happening would be routine and unworthy of comment. What was "funny" was the notion, well captured by the parodists, that in life Mary Joe would not have been published—that maybe she finally acquired the requisite rigor, and thus beat the system, by getting herself killed.

40. A recent articles editor at Virginia told us that an author's publishing history was examined in the selection process, and "some preference was given to untenured faculty" at the University of Virginia, but this editor insisted that "where people came from did not matter." (Telephone conversation, Sept. 16, 1999; name available on request.)

    In four of the five years under review the *University of Chicago Law Review* likewise published no articles by faculty of third- or fourth-tier schools. Yet in a recent letter to Subotnik, far

Table 1
Percentage of Articles by In-House Faculty

	1993–94	*1994–95*	*1995–96*	*1996–97*	*1997–98*	*5-Year Ratio*
Yale Law Journal	30.77	21.43	30.77	7.69	15.38	21.21
Harvard Law Review	14.29	37.50	44.44	11.11	30.00	27.91
Stanford Law Review	22.22	25.00	18.18	16.67	0	16.33
NYU Law Review	14.29	40.00	20.00	37.50	18.75	24.39
Columbia Law Review	55.56	26.67	28.57	22.22	50.00	34.43
Chicago Law Review	22.22	22.22	36.36	28.57	25.00	27.08
Virginia Law Review	50.00	45.45	50.00	27.27	45.45	43.14
Duke Law Journal	12.50	11.11	28.57	11.11	28.57	17.50
Michigan Law Review	12.50	30.77	9.09	7.14	21.43	16.67

Tables 1–4 deal with articles in the main law reviews of each of the top 9 law schools as ranked by *U.S. News and World Report*, March 29, 1999. We initially planned to focus on the top 10 schools, but there was a tie for 10th place and we preferred to keep the group small. These tables do not take into account articles by authors from non-American universities or from American universities without law schools.

In Table 1 an in-house article is defined as one written, alone or jointly, by at least one author affiliated (within the two years prior to publication) with the university publishing the article.

Table 2
Percentage of Articles from Top 9 Schools

	1993–94	*1994–95*	*1995–96*	*1996–97*	*1997–98*	*5-Year Ratio*
Yale Law Journal	38.46	28.57	69.23	23.08	61.54	43.94
Harvard Law Review	57.14	75.00	55.56	55.56	50.00	58.14
Stanford Law Review	22.22	50.00	54.55	33.33	22.22	36.73
NYU Law Review	28.57	40.00	20.00	50.00	50.00	41.46
Columbia Law Review	66.67	46.67	57.14	54.55	66.67	57.38
Chicago Law Review	33.33	77.78	45.45	85.71	50.00	56.25
Virginia Law Review	70.00	63.64	75.00	63.64	54.55	64.71
Duke Law Journal	37.50	22.22	42.86	44.44	28.57	35.00
Michigan Law Review	50.00	53.85	27.27	35.71	28.57	38.33

An article included in Table 2 is one written, alone or jointly, by at least one author affiliated (within the two years prior to publication) with one of the top 9 law schools.

to that at the *Journal of Legal Education*, many of whose articles must pass both peer and blind review. Twenty-five percent of *JLE* articles, it turns out, are by third- and fourth-tier authors. Is there a paradox here? A number of the very schools that have been so supportive of critical race theory in their publishing policies have totally rejected its central message of corrupt elitism.[41]

from acknowledging the almost impossibly high barrier for LSI faculty (which might have offered a measure of consolation), the editor felt it necessary to support the meritocractic assumption by offering the ludicrously false "hope that you will allow us to consider publishing your work in the future."

41. The Pennsylvania, Stanford, Michigan, and Virginia law reviews, for example, have all published CRT articles by Richard Delgado.

Table 3
Percentage of Articles from Top 26 Schools

	1993–94	*1994–95*	*1995–96*	*1996–97*	*1997–98*	*5-Year Ratio*
Yale Law Journal	61.54	42.86	84.62	69.23	69.23	65.15
Harvard Law Review	85.71	87.50	77.78	55.56	70.00	72.09
Stanford Law Review	55.56	75.00	72.73	58.33	55.56	63.27
NYU Law Review	28.57	40.00	40.00	87.50	81.25	63.41
Columbia Law Review	100.00	60.00	64.29	63.64	91.67	73.77
Chicago Law Review	55.56	100.00	72.73	100.00	83.33	80.85
Virginia Law Review	90.00	100.00	87.50	90.91	72.73	88.24
Duke Law Journal	62.50	44.44	57.14	88.89	57.14	62.50
Michigan Law Review	100.00	53.85	45.45	50.00	57.14	58.33

An article included in Table 3 is one written, alone or jointly, by at least one author affiliated (within the two years prior to publication) with one of the top 26 law schools. We focus on the top 26 because there was a tie for 25th place.

Table 4
Percentage of Articles from Schools in Bottom 2 Tiers

	1993–94	*1994–95*	*1995–96*	*1996–97*	*1997–98*	*5-Year Ratio*
Yale Law Journal	23.08	21.43	0	7.69	0	10.61
Harvard Law Review	14.29	0	22.22	11.11	10.00	11.63
Stanford Law Review	0	12.50	0	8.33	0	4.08
NYU Law Review	0	0	40.00	0	0	4.88
Columbia Law Review	0	0	14.29	9.09	0	4.92
Chicago Law Review	0	0	18.18	0	0	4.26
Virginia Law Review	0	0	0	0	0	0
Duke Law Journal	12.50	11.11	14.29	0	0	7.50
Michigan Law Review	0	0	18.18	14.29	21.43	11.67

To be included in Table 4, an article cannot have an author affiliated (within the two years prior to publication) with a law school in the top two tiers of the *U.S. News* rankings. For example, we excluded an article (98 Col. L. Rev. 1323 (1998)) by two authors, one affiliated with Marquette and the other with Northwestern.

It should not be supposed that ameritocratic acceptance policies affecting LSI faculty are limited to the top 9 law reviews. A brief review of the journals at schools ranked 15, 18, and 21 shows that only 16, 20, and 26 percent, respectively, of the articles they published came from third- and fourth-tier schools.[42]

To be sure, the foregoing data, by themselves, are not dispositive if faculty at HSIs write substantially more than do those at LSIs (so that their articles represent a higher percentage of total articles submitted) or if their articles are, in some demonstrable way, better. In short, HSI faculty members may,

42. We picked these schools—Texas, Southern California, and North Carolina—at random. Southern California is tied with Minnesota, and North Carolina with Notre Dame.

indeed, be more productive. In what is apparently the latest and most comprehensive study of faculty productivity, members of the top-producing faculties produced 9.3 times as many articles as did those at the bottom.[43] This would seem to settle the productivity isue. But the matter is not so simple. The study did not count all articles, although in the computer age it should have been easy enough to do so. It counted only articles published in the most-cited law reviews.[44] Given our thesis—that faculty at lower-tier schools are not treated evenhandedly by the major law reviews—we must deem that study inconclusive for our purposes.

As to quality of articles, there are no data; and, of course, the very difficulty of producing such data is at the heart of our project. Shall we presume that the top-ranked schools have earned their position by attracting the best scholars? Anecdotal evidence suggests otherwise. Consider the experience of Mary Davis, a professor of law at the University of Kentucky. In spring 1997 she submitted a (mass) torts article to fifty law reviews and received no offers. That fall, while visiting at William and Mary, she retitled and updated the article and resubmitted it with the imprimatur of her new school. In the first week alone, she reports (via e-mail), she had five offers or expressions of interest from schools "usually ranked in the top thirty." For the rest of the semester, moreover, her phone "rang off the hook." Davis concludes that the school affiliation validated her scholarship.

James Lindgren's experience is also informative. He has told us about a "nonscientific study" he once did. He mailed an article to a huge number of law reviews, five times as many as usual for him, "on the same day in the same mailbox—part on Chicago-Kent stationery and part on University of Chicago stationery." (At the time, Lindgren was a professor of law at Chicago-Kent and a visiting scholar at Chicago.) He emphasizes that "[t]he manuscripts (including the star footnote) were identical." The results were not: "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 25 reviews that I contacted from Chicago-Kent the best offer I received was from Arizona." Further, Lindgren reports, "at about 21 days after the mailing, I had received 2.5 times more acknowledgments of my manuscript from Chicago submissions."

If Davis's and Lindgren's experience is typical—a proposition not easy to test without using questionable tactics[45]—it would be hard to conclude that LSIs do not hire an appreciable number of top scholars.[46] Indeed, if article

43. See Lindgren & Seltzer, *supra* note 25, at 793–95 Table 4. Averages were compiled for the top 10 and bottom 10 on the list of 75 faculties.

44. *Id.* The 9.3 figure represents an average of the two different tabulations.

45. We have in mind here an experiment in which people would submit articles under different titles claiming real and fictitious school affiliations.

46. But again, on what basis can scholarship be judged if LSI authors do not have a fair (equal) access to outlets for publications?

selection were justiciable under an antidiscrimination statute, the combination of disparate results and corrupt process would be actionable.[47]

If many commentators have advocated a blind review process as a response to the heavy thumb on the scale applied for articles from HSIs, why has such a system not been adopted?[48] Why, in other words, are editors not content to look within the four corners of submitted drafts? Two explanations have been advanced.

The first is that students are simply not qualified to evaluate faculty writing.[49] They are, accordingly, forced to rely on some proxy for merit. But surely this response proves too much. If law review editors cannot make selection decisions, perhaps faculty should do the selecting and limit students to editing, as indeed happens in so many other fields.

The second response is based on the volume of submissions to the top-rated law reviews: the *Harvard Law Review*, for example, receives 2,000 articles per year.[50] Even with an extremely competent staff, no serious evaluation of that many articles is feasible. Thus, the argument goes, it should not be surprising that an author's record and institutional affiliation serve as proxies for merit. Erik M. Jensen sums up the situation: "The legal publication system is, to put it bluntly, absurd. Nevertheless, the submissions glut is a crime without criminals. . . . [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." He concludes that "credentials, which bear some relationship to the quality of authors' past work, serve that function."[51]

The notion that scholars' prestige should be taken into account in evaluations of their work is not indefensible. As Richard Posner says, "The reputation of an author, corresponding to a familiar trademark in markets for goods and services, is one [criterion], and not the worst."[52] What Posner may have in mind—and he would surely be right—is that readers, knowing Posner's work,

47. Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971) (holding that Title VII required the "removal of artificial, arbitrary, and unnecessary barriers" such as "testing mechanisms that operate as 'built-in headwinds' for [protected] groups").

48. The articles editors of the 1994 *University of Chicago Law Review* acknowledged that publishing decisions should not be based on "credentials rather than merit" and that blind review would have the "benefit of avoiding the appearance of impropriety." See The Articles Editors, A Response, 61 U. Chi. L. Rev. 553, 554–55 (1994).

49. On this point there seems to be no dispute. See Roger C. Cramton, "The Most Remarkable Institution": The American Law Review 36 J. Legal Educ. 1, 7–9 (1986); Lindgren, *supra* note 31, at 527; Richard A. Posner, The Future of the Student-Edited Law Review, 47 Stan. L. Rev. 1131, 1136 (1995).

50. See Harvard Law Review, The Greenbook: Manual of Operations and Procedures 1999–2000 (Cambridge, Mass., 1999).

51. The Law Review Manuscript Glut: The Need for Guidelines, 39 J. Legal Educ. 383, 385 (1989). Melissa Koehn (in a private communication with the authors) rightly suggests that a tight market for law professors, such as we have now, substanitally vitiates the case for school affiliation as a proxy for merit. For a nice psychological description of the powerful impact of an author's status on an unseasoned editor, see Collier, *supra* note 30, at 161–67.

52. See Posner, *supra* note 49, at 1133–34.

may well be more interested in what he has to say on a particular subject than in the views of a less-well-known scholar. For publishers or editors to pitch to such readers would surely not be unreasonable. What is indefensible, Posner insists, is giving points for such things as the author's academic affiliation or the number and length of footnotes.[53] And, indeed, the literature on law reviews offers little support for such practices. And yet, again, unless one simply assumes that LSI authors do not have what it takes, the foregoing study suggests that the prestige of an author's school is given considerable weight.

There is another way to look at the selection process. If there were a consensus that law review editors were exercising their discretion well and that the selected articles were of good quality, even if the process was unfair, perhaps the current system could be justified. But the last seventy years have produced a continuous flow of complaints about the quality of articles.[54] It is hard to imagine that a larger pool of authors would not have produced better ones. It is, however, not hard to extrapolate from market theory—though there is obviously no way of proving the point—that a sense of entitlement and the absence of the firm discipline of the marketplace are keeping faculty at top schools from making their best efforts.[55]

Will our study lead to change in the operation of law reviews? The evidence is not encouraging. As suggested earlier, our findings have long been anticipated, so the new data will not help. More important, as CRT would predict, the top law reviews, where change seems most to be needed, thus far at least have shown little interest in reform. Nor have HSI faculty (excepting only Richard Posner) or even CRT adherents, who might have been expected to identify with a subordinated class, pushed those journals in that direction. What is more surprising—and disappointing—is the silence of women, a number of whom define their very womanness in terms of the drive for inclusion and collaboration and the aversion to hierarchy.[56] With little support for diversity in this respect from other subordinated groups who are

53. *Id.* at 1134.

54. See Clarence M. Updegraff, Management of Law School Reviews, 3 U. Cin. L. Rev. 115, 119–20 (1929); W. Lawrence Church, A Plea for Readable Law Review Articles, 1989 Wis. L. Rev. 739; Kenneth Lasson, Scholarship Amok: Excesses in Pursuit of Truth and Tenure, 103 Harv. L. Rev. 926 (1990); Dennis W. Arrow, Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated, 96 Mich. L. Rev. 461 (1997).

    We do not suggest here that CRT itself has been immune to corruption. Quite the contrary, sad to say. See Daniel Subotnik, What's Wrong with Critical Race Theory? Reopening the Case for Middle Class Values, 7 Cornell J.L. & Pub. Pol'y. 681, 682 (1998); Dan Subotnik, Critical Race Theory—The Last Voyage, 15 Touro L. Rev. 657, 678–79 (1999). Is it surprising under the circumstances if law review authors wrap their ideas in race theory to maximize chances of successful article placement?

55. CRT theorist Michael Selmi makes a similar argument with respect to affirmative action: emphasizing diversity will lead to a "tightening [of] the job market for white men, which may then provide effort incentives for those men who will now have a greater fear of unemployment." Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate, 42 UCLA L. Rev. 1251, 1305 (1995).

56. See, e.g., Lani Guinier et al., Becoming Gentlemen: Women, Law School, and Institutional Change 50, 66–67 (Boston, 1997). See also Deborah Tannen, You Just Don't Understand: Women and Men in Conversation (New York, 1991); Deborah Tannen, Gender and Discourse (New York, 1994).

arguably natural allies, all that might reasonably be anticipated is a decision by LSI faculty to bypass the big-name schools (perhaps instead submitting to nonlegal journals that exercise blind review) and, above all, to undermine the meritocratic assumption that HSI law reviews publish the best.

Perhaps some HSI editors will find merit in our reasoning regardless of who we are(n't). Perhaps this article will restore productive energies to the hundreds of LSI law teachers who have been beaten down by the current system. Even if no such change is effected, however, this LSI-based piece may not be worthless; for, as we shall see, it may help console those of us who need to believe in the value of our work but whose faith in ourselves is belied by

- a file cabinet filled with rejection letters
- our pleas, often in vain, to answering machines for a response of any kind
- our loss of raises and promotions because our articles are not well enough placed or because delays in acceptance result in their preemption
- mixed feelings of invisibility and surplusage as we slink through AALS and other conferences
- (above all) the fear that, since so much bad work *is* published, our own rejected work product must, indeed, be worthless

Law professors may be particularly vulnerable to feelings of failure. Duncan Kennedy writes:

> We are generally dependent on the stream of pellets of meritocratic praise and blame, addicted to the continual reward of being told that we are better, and that our law schools are better, according to an objective merit scale, than other teachers and other schools. And as a group we are excessively susceptible to injury by judgments that we fall below others.[57]

Just relieving the suffering of LSI faculty, then, may be a blessing. At least Salieri's vision supports this conclusion. Crushed under the sin of incompetence, trying to make sense of his life after a near-fatal seizure, he rises from his sickbed to share it with his fellow sufferers. Because it "summons God into our presence," we pass it along: "Mediocrities of the world—now and to come—I [we] absolve you. Amen."

57. Sexy Dressing Etc. 46 (Cambridge, Mass., 1993).