

Peer Review and Legal Publishing: What Law Librarians Need to Know about Open, Single-Blind, and Double-Blind Reviewing*

Nancy McCormack**

Legal publishing is changing, and more legal periodicals are requiring that submitted papers undergo peer review using one of three systems: open, single-blind, or double-blind. As the use of peer review in these journals increases, and as the call for law reviews to change their method of article selection grows, our patrons will want to know the difference between the various peer review methods and why a journal's editors might select one method over another. Professor McCormack provides an overview of all three methods, and discusses the future of the peer review process in the publication of articles in legal periodicals.

Introduction

¶1 Peer review¹ is a broad term with a variety of meanings. In law, peer review can mean: (1) a process that assists in the self-regulation of a profession; (2) the process that requires experts in a (generally narrow) field to evaluate an author's work and ideas in that same field, usually for the purpose of publishing a paper or awarding a grant; (3) the longer term scrutiny and discussion of a published work by a research community years after its arrival on the scene; or, arguably, (4) the very foundation of the legal process itself—trial by jury.² In the legal field, the term can mean all these things, but the form of peer review that law librarians are most likely to encounter is the second—the process that requires experts in a specific field of law to evaluate, especially for publication in a periodical, another author's work in that field.

¶2 Periodicals are a vital part of a librarian's stock in trade. As the system of peer review becomes more the norm for selecting articles for publication—especially in traditional law reviews³—law library patrons will have questions about

* © Nancy McCormack 2009.

** Head, Law Library and Assistant Professor of Law, Lederman Law Library, Queen's University, Kingston, Ontario, Canada.

1. Peer review is sometimes called "refereeing."

2. See SALLY BROWN, PHIL RACE & JOANNA BULL, *COMPUTER-ASSISTED ASSESSMENT IN HIGHER EDUCATION* 97 (1999).

3. In 2008, for example, the *South Carolina Law Review* began to make use of the peer review process. See *South Carolina Law Review*, Peer Review Pilot Project, <http://www.sclawreview.org/peerreview/index.php> (last visited Sept. 17, 2008). Others are taking smaller steps toward the inevitable—The *Yale Law Journal Pocket Part*, *Harvard Law Review*, and *Stanford Law Review* now use a blind submission process. The *Yale Law Journal*, Submissions, <http://yalelawjournal.org/submissions.html> (last visited Sept. 17, 2008); *Harvard Law Review*, Guidelines for Submitting Manuscripts,

what it all means, and librarians will want to know the pros and cons of the system. For example: What advantage does single-blind have over double-blind or open peer review? Why would a journal or law review be more likely to choose one method over another? This article aims to answer these and other questions by providing an overview of the process, examining the strengths and weaknesses of the various methods of peer review, and assessing whether peer review ultimately achieves what it sets out to do.

¶3 The reasons for adopting a system of peer review are obvious. Most individuals in research communities consider that one of the major strengths of peer review is its function as a safeguard to detect errors or unwarranted assertions, to improve quality, and to ensure standards.⁴ Editors, it is argued, with the help of such expert oversight, are better able to determine the value of the papers being considered, thus enabling them to publish a body of reliable information for the future use of other researchers in the area.⁵ Indeed, peer review is central to the research process today in virtually every area of study.⁶

History of Peer Review

¶4 Peer review came into being hundreds of years ago. As early as 1731, the Royal Society of Edinburgh consulted individuals “most versed in these matters”⁷ before publishing a collection of medical articles entitled *Medical Essays and Observations*.⁸

¶5 The method was not, however, universally embraced. In the nineteenth century, a proliferation of science journals hungry for content sprang up, and there was no effort to discourage authors by subjecting their work to lengthy and rigorous evaluation.⁹ In addition to the desire for content, many of these journals were managed by editors who worried less about objectivity and more about openly advocating and promoting their own individual views of the world.¹⁰

¶6 All this began to change during the early and mid-twentieth century, when individual journal editors found themselves no longer able to assess every submis-

<http://www.harvardlawreview.org/manuscript.shtml> (last visited Sept. 17, 2008); The Stanford Law Review, Articles, <http://lawreview.stanford.edu/submissions/articles/index.htm> (last visited Sept. 17, 2008). *PrawfsBlawg* (a blog featuring discussions by law professors from an assortment of American law schools) has noted the growing list of peer-reviewed law journals. See Posting of Matt Bodie to *PrawfsBlawg* (Project on Peer-Review Law Journals), http://prawfsblawg.blogs.com/prawfsblawg/2006/01/project_on_peer.html (Jan. 2, 2006, 7:36 PM).

4. See Drummond Rennie, *Editorial Peer Review: Its Development and Rational*, in *PEER REVIEW IN HEALTH SCIENCES 7* (Fiona Godlee & Tom Jefferson eds., 2d ed. 2003).

5. See *Rethinking Peer Review: How the Internet is Changing Science Journals*, NEW ATLANTIS, Summer 2006, at 106, 107 [hereinafter *Rethinking Peer Review*].

6. See Richard A. Posner, *Law Reviews*, 46 WASHBURN L.J. 155, 155 (2006).

7. David A. Kronick, *Peer Review in 18th-Century Scientific Journalism*, 263 JAMA 1321, 1321 (1990) (quoting author's translation of *Preface* to 1 ESSAIS ET OBSERVATIONS DE MÉDECINE DE LA SOCIÉTÉ D'ÉDINBOURG (1740)).

8. *Id.*

9. See *Rethinking Peer Review*, *supra* note 5, 106–07 (citing comments of Ohio State University science historian John C. Burnham).

10. See *id.* at 106.

sion received, due not only to the complexity of the works but also to the volume. These editors invited experts to participate in the selection of papers for publication by serving on editorial boards affiliated with the publication. Eventually, even this was not sufficient. The proliferation of scientific output following the Second World War made it impossible for affiliated boards to continue to vet all the work submitted.¹¹ As a result, editors began, as a desperate last resort, calling on individuals with expertise in the specific and related fields of which the paper under review was a part.¹² In this way, the peer review system as we know it today was born.

Law Reviews and Peer Review

¶7 Law reviews, though, have followed a different path. In North America, journals published by law schools have dominated the legal periodical scene since the *University of Pennsylvania Law Review* began publishing in 1852.¹³ By the early twentieth century, these reviews were beginning to play a large role in the life of the law school as well as in the legal community. Scholarly papers and case comments written by students, their professors, and various prominent legal experts were the focus of the law reviews. The submissions were, and still are today, for the most part selected and edited largely by students with some assistance from faculty.

¶8 For over a century, then, lowly law students have been “the gatekeepers of the academic study of law, to the astonishment of other scientific disciplines.”¹⁴ As Laurence Friedman, law professor and sociologist of law, comments, “People in other fields . . . can hardly believe their ears. What, *students* decide which articles are worthy to be published? No peer review? . . . Amazing.”¹⁵

¶9 Not only is it amazing, it is also the source of much current debate in the legal community. Many scholars feel that student editors of law review articles, while they were perhaps once competent to evaluate the merit of scholarly articles

11. *Id.* at 107.

12. *Id.*

13. PENNumbra, About Penn Law Review, <http://www.pennumbra.com/about> (last visited Sept. 17, 2008) (beginning as the *American Law Register*). In addition, the *Albany Law School Journal* first appeared on the scene in 1875 as the “nation’s first student-edited law review. . . .” Albany Law School, The History of Albany Law School, http://www.albanylaw.edu/sub.php?navigation_id=292 (last visited Sept. 17, 2008). However, the journal only lasted a year. See Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 764 (1985) (citation omitted). Amongst other vintage law reviews are the *Harvard Law Review* (1887), the *Yale Law Journal* (1891), the *Columbia Law Review* (which followed the *Columbia Jurist* first published in 1885), and the *West Virginia Law Review* (1894). See *id.* at 763–83. Swygert and Bruce do not quite regard the *West Virginia Law Review* as an early law school periodical because it was “the successor to a monthly publication of the West Virginia Bar called *The Bar* that originated in 1894.” *Id.* at 780 n.343 (citations omitted). But cf. West Virginia University College of Law, Welcome to the West Virginia Law Review, http://law.wvu.edu/student_life/west_virginia_law_review/west_virginia_law_review_about_us (last visited Sept. 17, 2008) (stating it is “the fourth oldest law review in the country”).

14. C.J.J.M. Stolker, *Legal Journals: In Pursuit of a More Scientific Approach*, 2 EUR. J. LEGAL EDUC. 77, 82 (2005).

15. Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENV. U. L. REV. 661, 661 (1998).

owing to the much narrower range of topics, have for the last few decades had great difficulty grappling with non doctrinal scholarship (that is, scholarship dealing with the intersection of law and other disciplines).¹⁶ The authors of law journal articles now increasingly draw from areas such as economics, gender studies, literary theory, sociology, mathematics, philosophy, political theory, and so on, making the enterprise much too difficult for a group of generally young people, who are not only not specialists, but have barely entered the field of law. As a result:

[Student editors] do what other consumers do when faced with uncertainty about product quality; they look for signals of quality or other merit. The reputation of the author, corresponding to a familiar trademark in markets for goods and services, is one such signal, and not the worst. Others—and these dysfunctional—are the congeniality of the author's politics to the editors, the author's commitment to gender-neutral grammatical forms, the prestige of the author's law school, a desire for "equitable" representation of minorities and other protected or favored groups, the sheer length of an article, the number of footnotes in it, and whether the article is a "tenure article" on which the author's career may be riding.¹⁷

¶10 Student editors, many legal academics posit, have insufficient knowledge to support offering advice on substantive improvements to a piece; instead, they focus too intently on the corrections that they *can* make and *do* understand—those to footnotes and citations.¹⁸ These offer little assistance to the author, nor do they help in making the piece a sounder offering to the profession at large.

¶11 In 1995, Richard Posner, writing in the *Stanford Law Review* on the future of the student-run publications, suggested, "Law reviews should give serious consideration to having every plausible submission of a non doctrinal piece refereed anonymously by one or preferably two scholars who specialize in the field to which the submission purports to contribute."¹⁹ He conceded that the downside would be the loss of some good submissions, along with a general slowing down of the publication process, but argued that the quality and reputation of law reviews in the future depended on this kind of paradigm shift.²⁰

¶12 Other prominent members of the legal profession have also insisted that legal publishing, and particularly law reviews, need to change, and that the field has lessons to learn from the sciences. Justice Michael Kirby, writing for the *Melbourne University Law Review*, noted:

It is a bracing experience for a lawyer to be published by a refereed journal in a scientific discipline. My recent participation with the ethical issues of the human genome project has acquainted me with the more strenuous standards of those publications. Articles must often be cut back on the insistence of anonymous reviewers. Detailed comments of referees are commonplace. They insist that assertions must be supported by references. Space

16. Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 *STAN. L. REV.* 1131, 1133–34 (1995). For a searing critique of student-edited law reviews, see James Lindgren, *Exchange, An Author's Manifesto*, 61 *U. CHI. L. REV.* 527 (1994) ("Our scholarly journals are in the hands of incompetents.").

17. Richard A. Posner, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 297–98 (1999) (citations omitted).

18. See Posner, *supra* note 6, at 157–58.

19. Posner, *supra* note 16, at 1136.

20. *Id.* at 1137, 1138.

is scarce. Scientific publication is a privilege. It belongs as a right to no one. With so many articles competing for publication in a hierarchy of journals, every author must justify publication by the strict touchstone of utility.²¹

¶13 Change in this regard is slow, but it is beginning to happen. The legal community, while coming to it later than other disciplines, seems at last to understand that peer review is central to reliable scholarship, including its own. Commercially published journals, faculty-edited and student-edited law journals and reviews (the student-edited publications still to a far lesser extent) are now accepting the need for referees, and more than ever are peer-reviewed, often using the double-blind reviewing process.²²

Types of Peer Review

¶14 Journals that make use of peer review generally use one of three systems: open, single-blind, or double-blind. Open peer review, as the name suggests, does not attempt to mask the identity of authors or reviewers. While some might view this as the most equitable of systems, others see major potential inequities—from authors being rejected for personal reasons unrelated to their work, to reviewers who feel pressure to publish work from high ranking institutions,²³ or who do not dare openly offer the criticism they might give under the cloak of anonymity.²⁴

¶15 Single-blind reviewing masks the identity of the reviewer from the author but not vice-versa. In contrast, double-blind reviewing keeps the identity of both the reviewer and author hidden from each other. Both are thought to avoid some of the problems inherent in open reviewing, particularly assessing submissions on a variety of non-scholarly criteria. Nonetheless, each of these methods has been the subject of vigorous debate in many fields, and it is this debate that librarians need to understand in order to enlighten patrons who inquire about it.

21. Michael Kirby, *Welcome to Law Reviews*, 26 MELB. U. L. REV. 1, 4 (2002). See also Arthur D. Austin, *The "Custom of Vetting" as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1 (1990) (discrediting the trend of "vetting"—informal pre-publication review by colleagues—in place of conventional peer review in order to garner credibility for legal scholarship).

22. See Kirby, *supra* note 21, at 4. There are numerous peer-reviewed journals and law reviews in the United States, the U.K., Canada, Australia, and New Zealand. A complete list is beyond the scope of this paper, but many can be found using Washington & Lee Law School's database, and searching for "refereed" law journals. Washington & Lee Law School, *Law Journals: Submissions and Ranking*, <http://lawlib.wlu.edu/LJ/index.aspx> (last visited Sept. 26, 2008). The following is offered as a sample of titles from countries outside of the United States: U.K.: *Oxford University Commonwealth Law Journal* and *Liverpool Law Review*; Canada: *Alberta Law Review*, *Indigenous Law Journal*, and *Queen's Law Journal*; Australia and New Zealand: *Australian and New Zealand Maritime Law Journal*, *University of Queensland Law Journal*, *Melbourne University Law Review*, and *Sydney Law Review*. Michael Kirby notes that most Australian law reviews are now peer-reviewed. See Kirby, *supra* note 21, at 4. The same is true in Canada.

23. See Gaell Mainguy, Mohammad R. Motamedi & Daniel Mietchen, *Peer Review—The Newcomers' Perspective*, 3 PLOS BIOLOGY 1534, 1534 (2005), <http://biology.plosjournals.org/perlserv/?request=get-document&doi=10.1371%2Fjournal.pbio.0030326&ct=1>.

24. *Editorial: Pros and Cons of Open Peer Review*, 2 NATURE NEUROSCIENCE 197, 198 (1999).

The Debate over Peer Review

¶16 The debate over peer review has to do, first, with the advantages, if any, of the system, and second, with the type of peer reviewing process that works best to bring about those potential advantages. The alleged benefit of peer-reviewed literature is that it has been vetted by experts in a particular field, who thereby provide assurances that claims are valid and legitimate. Assertions made in these types of published papers are completely different from those “made by politicians, newspaper columnists, think tanks or campaign groups”²⁵ When the peer review process works, statements and opinions are not arbitrary, experiments and data meet certain standards, results follow logically from the data, merit rather than influence determines what is published, and researchers do not have to waste their time reading unfiltered material.²⁶ The process “is germane to the wider questions people ask when making judgements of . . . issues, such as ‘whose claims can we trust?’ and ‘which study is right?’”²⁷

¶17 Even after publication, of course, researchers continue to test the validity of claims in published material:

Peer review of a paper is just the first stage: a hypothesis that survives this first test must go on to be re-tested, and judged against other work in the same area, and for its coherence with work in related areas. Some of a paper’s conclusions will be hotly disputed or further research will show that they need to be revised as more data are acquired.²⁸

Each paper goes toward making up the body of literature that informs future research and draws a bright line between established fact and the remaining or new questions that will lead to future work and speculation.

¶18 This scenario is, naturally, what happens when the peer review system works. Many believe that is not always the case. One of the central questions in this debate is whether the process can ever be completely objective. For example, individuals without the proper set of credentials (usually university degrees in specific fields) will generally not have their work seriously considered by “peers” in a particular field.²⁹ Indeed, a paper written and submitted by an “outsider” is unlikely to make it past the editors to the reviewers, although it might be argued that the problem ought to be overcome if it reaches the double-blind review stage. Gatekeeper bias, however, creates tremendous difficulty for those attempting to publish in areas outside their immediate area of expertise, regardless of how germane, original, or important their ideas might be.

¶19 Another barrier to publication is that submitted work must generally look and read a certain way.³⁰ Papers in journals that are not peer reviewed are likely to

25. SENSE ABOUT SCI., PEER REVIEW AND THE ACCEPTANCE OF NEW SCIENTIFIC IDEAS 2 (2004), available at <http://www.senseaboutscience.org.uk/pdf/PeerReview.pdf>.

26. See *id.* at 8.

27. *Id.* at 5.

28. *Id.* at 2.

29. See, e.g., Brian Martin, *Peer Review and the Origin of AIDS—A Case Study in Rejected Ideas*, 43 *BIOSCIENCE* 624 (1993) (detailing the rejection of a nonstandard theory on the origin of AIDS to illustrate “some of the problems of peer review in dealing with unorthodox ideas”).

30. See *id.* at 625.

undergo far less scrutiny before publication and therefore may be permitted to break some of the rules associated with the traditional academic paper. Individuals on the fringes who might want to experiment with new ways to discuss and convey legitimate ideas or claims in peer reviewed papers, however, will no doubt encounter opposition. Those disinclined to follow the template will not be published and will ultimately have no audience.

¶20 In addition, the so-called experts may not be as “independent” as they assert. New ideas, for example, are not always welcome, particularly if they challenge the status quo or contradict the body of work that these same experts have spent a lifetime building and defending.³¹ This reviewer bias may present itself in a number of ways—either by favoring the ideas of particular individuals or by rejecting them based on the reputation, gender, status, or institutional affiliation of the author, etc. Double-blind reviewing is not a foolproof method for avoiding such problems, given that reviewers in small and highly specialized fields of study are often able to identify would-be authors.

¶21 In theory, no one favors such subjectivity. Studies have been conducted in a variety of fields over the years to determine the prevalence of bias in manuscript selection. In law, for example, there have been discussions of the “halo effect” that different types of letterhead (i.e., letterhead from a top school versus that from a low ranking school) create when authors submit articles for publication along with a cover letter. Speculation abounds as to whether affiliation with a higher ranking institution or being male rather than female guarantees better results when submitting an article.³²

¶22 Kevin M. Yamamoto, for example, in a project involving letterhead impact, discussed the varying responses of law reviews when a journal article was submitted on letterhead from a top school versus that from a school closer to the bottom of the ranks.³³ Similar studies have also been done using gender as the variable, with some of these studies noting a significant increase in the number of female-authored papers published after a journal went to a double-blind system.³⁴ These

31. Thomas Gold, *New Ideas in Science*, 3 J. SCI. EXPLORATION 103 (1989) (arguing that “on the whole the ‘herd instinct’ has been a disaster in science”).

32. See, e.g., Kevin M. Yamamoto, *What’s in a Name? The Letterhead Impact Project*, 22 J. LEGAL STUD. EDUC. 65 (2004).

33. *Id.* In Yamamoto’s study, letterhead from one school versus another made no difference in terms of the time it took for the various law review personnel to respond to the author or to accept or reject the paper, but the only offer of publication came for the article that was submitted with the letterhead from a top tier law school. *Id.* at 67. See also Lindgren, *supra* note 16, at 530, in which is cited the example of a “very much liked” article that was rejected because the journal editors decided not to “take a chance” with an author from a non-elite law school.

34. Amber E. Budden et al., *Double-Blind Review Favours Increased Representation of Female Authors*, 23 TRENDS ECOLOGY & EVOLUTION 4, 5 (2008). The journal *Behavioral Ecology* introduced double-blind peer review in 2001, which provided the authors an “opportunity to examine variation in author demographics associated with the review method.” *Id.* at 4. The authors reported an increase in “female first-authored papers” compared with a similar journal, *Behavioral Ecology and Sociobiology*. *Id.* at 6. The authors concluded:

A difference of 7.9% in the proportion of female first-authored papers following the implementation of double-blind review in BE is three times greater than the recorded increase in female ecology graduates in the USA across the same time period and represents a 33% increase in the rep-

researchers are convinced that institutional affiliation and gender are real barriers to authors attempting to have their work published.

¶23 Another accusation leveled at the peer review process is that, despite the perceived rigor versus that of other methods of journal content selection, it has been shown to be flawed in preventing fraud. Many papers are now penned by multiple authors; both single- and double-blind peer review have been faulted for not doing enough to sort out which authors have made what contributions.³⁵ The problem with not knowing has implications for more than a paper's integrity; it means putting the reputation of a researcher, a journal, and even an academic institution at risk.

¶24 While empirical research still forms a very small part of the work done in law,³⁶ it is surely worth noting a problem the sciences and medicine have been afflicted by, in spite of rigorous reviews of submissions to journals: researchers attempting to pass off false data and results. The journal *Science*, for example, in 2004 and again in 2005, published two articles by South Korean stem-cell researcher Woo Suk Hwang which turned out to be entirely fraudulent, as did the accompanying data.³⁷ The journal conducted an inquiry after the deception had been discovered, and it concluded, in part, that one of the reasons such papers slip under the wire is because reviewers rarely have the opportunity to examine the raw data—this process generally happens only after the paper has been published and researchers in the same area have the time to study and perhaps to replicate the results (the type of longer term peer review discussed earlier³⁸). The journal's inquiry concluded that while it had a review process similar to other top tier journals, *Science* could put into place further safeguards, but ultimately could not

resentation of female authors. Furthermore, this increased representation of female authors more accurately reflects the (US) life sciences academic workforce composition, which is 37% female. *Id.* (citations omitted). See also Julie R. Gilbert et al., *Is There Gender Bias in JAMA's Peer Review Process?*, 272 JAMA 139 (1994) (finding gender differences in "editor and reviewer characteristics" but no gender differences in publication acceptance); Margaret E. Lloyd, *Gender Factors in Reviewer Recommendations for Manuscript Publication*, 23 J. APPLIED BEHAV. ANALYSIS 539 (1990) (finding increased acceptance of female-authored manuscripts by female reviewers); Robert E. Rains, *Andrea's Adventures in Law Review Land*, 50 J. LEGAL EDUC. 306 (2000) (examining gender bias in manuscript selection with inconclusive results).

35. *Who Is Accountable?*, 450 NATURE 1, 1 (2007), available at <http://www.nature.com/nature/journal/v450/n7166/pdf/450001a.pdf>.

36. *But see* Susan Finch, *Law Dean Writes of Regret Over Errors; Author Stands By Article's Conclusions*, TIMES-PICAYUNE (New Orleans), Sept., 17, 2008, at 1 (noting "numerous errors" in data underlying empirical study of the Louisiana Supreme Court published in the *Tulane Law Review*).

37. Woo Suk Hwang et al., *Evidence of a Pluripotent Human Embryonic Stem Cell Line Derived from a Cloned Blastocyst*, 303 SCIENCE 1669 (2004); Woo Suk Hwang et al., *Patient-Specific Embryonic Stem Cells Derived from Human SCNT Blastocysts*, 308 SCIENCE 1777 (2005). The two papers involved concerned the cloning of human beings and subsequent stem-cell lines. The data in both papers has been shown to be completely false. Seoul National University, the research institution at which the data was faked, delivered a report in January 2006 condemning the fraud. See Seoul National University Investigation Committee, Summary of the Final Report on Professor Woo Suk Hwang's Research Allegations (Jan. 9, 2006), available at <http://www.nytimes.com/2006/01/09/science/text-clonereport.html?pagewanted=1&r=1>.

38. See *supra* ¶ 1.

guarantee that it would not happen again: “No set of procedures, however rigorous, will be capable of detecting deliberate fraud.”³⁹

¶25 Finally, all these other objections aside, there is absolutely no doubt that the process of peer review slows down publication and the rate at which new ideas or research can reach an audience. As Richard Posner noted:

Refereed journals do not permit authors to submit their articles simultaneously to other journals, because it would produce a very high ratio of referee reports to articles actually published. Having to submit an article seriatim rather than simultaneously will lengthen the time to publication and further deter authors of non-doctrinal scholarship from submitting their articles to the student-edited law reviews.⁴⁰

Open, Double-Blind, or Single-Blind?

¶26 More than just journal quality is riding on the type of peer review chosen. Researchers’ careers depend on publication and project funding; it is vital, therefore, that a greater accountability in the reviewing process is maintained. Even for reviewers themselves, the issue is important. They need the system to work smoothly, since they give their time for free and receive little credit for their efforts. Most of all, a proper reviewing process is crucial for the advancement of a field so that quality is guaranteed and that unorthodox but valuable work on the fringes of an academic discipline is spotted and published.⁴¹

¶27 In 2006, *Nature*, the international weekly journal of science, contemplated a move from its previous process by conducting an experiment with open peer review.⁴² The journal’s editors contacted the authors of the articles that they felt were promising enough to send to outside reviewers. Some of the authors in very competitive areas in the sciences refused to take part in the trial; among other things, they worried about losing proprietary interest in ideas and patents. Five percent of the authors, however, did agree to participate in the experiment. The articles then were posted on the Internet for public comment.⁴³ The editors also contacted specialists in the subject areas of the papers, encouraging them to provide comments.

¶28 The trial took place from June 1, 2006, to September 30, 2006, and the articles received a fair amount of online interest and traffic. Nonetheless, of seventy-one articles posted for open comment, thirty-three received no comments whatsoever. Thirty-eight of the articles received ninety-two comments, of which forty-nine were aimed solely at eight papers.⁴⁴

39. Committee Report, Hwang et al., *Science*, 308, 1777–1783 (2005) (Sept. 15, 2006), available at <http://www.sciencemag.org/cgi/data/314/5804/1353/DC1/1>.

40. Posner, *supra* note 16, at 1137.

41. See Elizabeth Walsh et al., *Open Peer Review: A Randomised Controlled Trial*, 176 *BRIT. J. PSYCHIATRY* 47, 50 (2000).

42. *Overview: Nature’s Peer Review Trial*, *NATURE*, Dec. 2006, <http://www.nature.com/nature/peerreview/debate/nature05535.html>.

43. *Id.* They were also sent to subject reviewers along with the papers from all the authors who declined to participate.

44. *Id.*

¶29 At the end of the experiment, the editors decided not to implement open peer review. They based their decision, in part, on the sheer difficulty of trying to obtain comments from experts in the area, even when direct attempts had been made to solicit them. Also, many of the comments actually provided (such as “Nice work”) were of little use to the editors when determining whether a particular paper should be published, or whether revisions were needed.⁴⁵

¶30 Based on the results of this experiment, this type of open peer review isn’t an option for most journals. It simply is unrealistic to expect informed, well-argued opinions from those who have not been specifically tasked with the job of supplying them. And although the *Nature* experiment was different from the more typical, non-Internet-based type of open peer review where the identities of reviewer and author are known to each other, it may be unrealistic to expect individuals in the same field to critique each other openly and honestly. Those researchers who do advocate for the process acknowledge that junior members in a field would be afraid to openly criticize more senior and established members without hurting their own career opportunities. They might even be pressured to write favorably about work they don’t support. Others believe the process might result in “[u]nwanted, inappropriate or even acrimonious dialogue . . . between author and reviewer, and professional relationships may suffer.”⁴⁶ Still, the obvious advantages to a system like this is that reviewers who have to attach their names to reviews might spend longer thinking about them and produce more useful reviews.⁴⁷

¶31 Consequently, peer-reviewed journals generally use either the single- or double-blind process, each presenting different benefits and problems. The single-blind process allows reviewers to know who the author of the paper is, but not vice-versa. The charge against this practice is that it allows for marginal papers to be published while worthwhile papers are rejected, in some cases because of sexism,⁴⁸ discriminatory attitudes toward authors from certain countries or academic institutions, or because the opinions might not conform with those of the reviewer. Conversely, the papers submitted by friends or supporters of the reviewer might be accepted though they contribute less to the area of study.⁴⁹

¶32 Another worry is that reviewers who know an author’s identity may be over-impressed by its source. In other words, authors with a stellar track record will undergo less scrutiny, though the piece under review might be quite mediocre.

¶33 This last point, however, is something of a paradox. The single-blind process may be more expeditious because a reviewer is able to draw on personal knowledge about the author.⁵⁰ Authors with solid reputations can have their work moved along quickly, propelling the paper through the system from review to pub-

45. *Id.*

46. Walsh, *supra* note 41, at 50.

47. *See id.* at 49.

48. *See* Christine Wenneras & Agnes Wold, Commentary, *Nepotism and Sexism in Peer-Review*, 387 NATURE 341, 341 (1997)

49. *See* Tom Abate, *What’s the Verdict on Peer Review?*, 21STC, Spring 1995, <http://www.columbia.edu/cu/21stC/issue-1.1/peer.htm>. *See also* Wenneras & Wold, *supra* note 48, at 343.

50. *See* David N. Laband & Michael J. Piette, *Does the “Blindness” of Peer Review Influence Manuscript Selection Efficiency?*, 60 S. ECON. J. 896, 897, 905–06 (1994).

lication. This speed of publication enables authors to lay claim, intellectually and legally, to their ideas: “In a world in which intellectual property rights determine recipients of rewards (such as Nobel prizes), competitive journal editors may find it impossible to ignore the speed of handling margin.”⁵¹

¶34 The double-blind process, in contrast, has drawn criticism because of the length of time required for an article to go through the review cycle.⁵² Again, critics of the process charge that this so-called “blindness” is actually a fiction, since a number of studies have indicated that authors and reviewers correctly identify each other a significant amount of the time.⁵³ This is usually because the number of real experts in a given field is generally not that large, and ideas, vision, writing styles, and a number of other clues can easily give it away. Even in larger and more diverse fields this happens.⁵⁴ In one particular study, for example, reviewers were able to identify anonymous authors (or their institutions) 25% of the time.⁵⁵ In another study, reviewers correctly identified 24% of authors.⁵⁶

¶35 Even so, in theory, when the process is truly anonymous, the work should be judged solely on its own merit, without the author having to worry about other forms of bias. This, in turn, should result in the publication of better papers. Indeed, research has suggested that the articles published in journals using a double-blind peer review process may have more impact on the profession as time goes on. In one study, involving articles in economics journals, the authors concluded:

Articles published in journals using the double-blind review process have a significantly greater probability of receiving more citations than would be predicted on the basis of length and journal quality than articles reviewed single-blind. As expected, article length and relative quality of the publishing journal both demonstrate positive and statistically significant explanatory power with respect to the probability that an article achieves specific citation levels.⁵⁷

This study suggests that researchers involved in the double-blind reviewing process undergo short-term pain in the form of publication delays and revisions to the work, but long-term gain in terms of greater influence in an area of study.

51. *Id.* at 906.

52. PEER REVIEW IN SCHOLARLY JOURNALS: PERSPECTIVE OF THE SCHOLARLY COMMUNITY—AN INTERNATIONAL STUDY 1 (2008) (study commissioned and funded by the Publishing Research Consortium), available at <http://www.publishingresearch.net/documents/PeerReviewFullPRCReport-final.pdf>; see also Richard Smith, Editorial, *Peer Review: Reform or Revolution? Time to Open up the Black Box of Peer Review*, 315 *BMJ: BRIT. MED. J.* 759, 759 (1997).

53. Frank Davidoff, Editorial, *Masking, Blinding, and Peer Review: The Blind Leading the Blinded*, 128 *ANNALS INTERNAL MED.* 66, 66 (1998); David S. Liebeskind, Letter to the Editor, *The Fallacy of Double-Blinded Peer Review*, 181 *AM. J. ROENTGENOLOGY* 1422, 1422 (2003) (“until . . . guidelines can be established and implemented, the double-blinded review process remains a myth”).

54. See Posting of Bill Hooker to Action Potential (Double-blind peer review?), http://blogs.nature.com/nn/actionpotential/2005/12/doubleblind_peer_review.html (Dec. 28, 2005, 1:08 AM).

55. Douglas S. Katz et al., *Incidence and Nature of Unblinding by Authors: Our Experience at Two Radiology Journals with Double-Blinded Peer Review Policies*, 179 *AM. J. ROENTGENOLOGY* 1415, 1416 (2002).

56. See Robert A. McNutt et al., *The Effects of Blinding on the Quality of Peer Review*, 263 *JAMA* 1371, 1375 (1990).

57. David N. Laband & Michael J. Piette, *A Citation Analysis of the Impact of Blinded Peer Review*, 272 *JAMA* 147, 148 (1994).

Conclusion

¶36 The periodicals law librarians deal with on a daily basis are gradually making the shift from non-peer-reviewed to peer-reviewed, though law reviews, particularly in the United States, are slow to make the transition.

¶37 Those who feel they ought not to embrace the peer-review process, particularly the double-blind method, argue that student editors would still be able to discern the identity of authors or their institutions from clues provided in the paper.⁵⁸ They also suggest other methods that students could and do use to assess merit.⁵⁹ Most importantly, they argue, law reviews receive too many papers in a year, and a peer review process would significantly slow down publishing.⁶⁰

¶38 Nonetheless, despite the nay-sayers, the call for reform is loud and clear. The use of peer review in the legal publishing field is now much more common in commercially published periodicals, and noticeably on the increase in faculty-edited law journals.⁶¹ Even student-edited law reviews are increasingly using the process for special or symposium-based issues.⁶² As the advantages of peer review and expert feedback become more apparent, and as the *cachet* of the publications that use it increases, we can expect to see even the student-edited law reviews capitulate.

58. See Nathan H. Saunders, *Student-Edited Law Reviews: Reflections and Responses of an Inmate*, 49 DUKE L.J. 1663, 1681 (2000).

59. *Id.* at 1667–68. See also Posner, *supra* note 16, at 1136–37.

60. See Yamamoto, *supra* note 32, at 84.

61. See, e.g., Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 651–52 (1996).

62. E.g., The Executive Board of the *Chicago-Kent Law Review*, *Symposium Format as a Solution to Problems Inherent in Student-Edited Law Journals: A View from the Inside*, 70 Chi.-Kent L. Rev. 141, 142 (1994–95).