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THE ETHICS OF BAITING AND SWITCHING IN LAW REVIEW SUBMISSIONS

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Law review publishing, like many things, has both positive and negative features. The positives are considerable: Expedited processes for article placement and editing. Publishing options so numerous that virtually anyone with a JD can find an outlet. Editors who are less entrenched in orthodox thinking. A tendency to feature timely and practical research that is relatively useful to lawyers, government officials, and members of civil society. Training for future academics and legal professionals. And a remarkable openness to insights from a wide variety of academic disciplines.

The negatives are also significant: Few journals use peer review. Authors submit to journals from which they would not accept an offer of publication. The stylistic conventions can be suffocating. The footnotes are baroque and often of limited value. As indicia of merit, journal rankings seem to matter at least as much as the quality of the scholarship itself. Some of the top journals now appear more inclined to publish the work of fellows and visiting assistant professors at elite schools than the work of tenure-track and even full professors at non-elite schools.¹ And so forth.

In this short contribution, I want to focus on the negative side of the ledger by highlighting one aspect of the law review process that does not seem to draw much criticism, arguing that it should, and discussing potential remedies.

The issue I have in mind is a certain type of puffery in the submissions process. Consider the following scenario: Professor X writes a law review article. She knows that student editors seek articles that are groundbreaking, important, and provocative, but are somewhat poorly equipped to evaluate whether a submission satisfies those criteria. She also knows that some colleagues will read her work and are competent to evaluate its merits, while many others will make judgments about her abilities as a scholar solely in light of the quality of her placements. And she knows she will have plenty of

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1. See, e.g., Thomas W. Merrill, *The Digital Revolution and the Future of Law Reviews*, 99 MARQ. L. REV. 1101, 1104 (2016) (reporting that editors at the *Columbia Law Review* give particularly careful consideration to “submissions by post-graduate fellows or visiting assistant professors at top law schools”).

opportunities to revise her draft between the time of its acceptance and publication. So X settles upon what seems like a clever gambit: Insert exaggerated claims of novelty and significance into the abstract, introduction, and perhaps other sections of the draft that she will submit to law reviews, and then, after securing a satisfactory placement, moderate those claims in drafts made available to colleagues and the public. In short, X decides to bait and switch—puff to an audience that will have a hard time detecting it, and then walk back the hyperbole before disseminating to an audience that could have easily detected it. By doing so, X improves her prospects for a desirable placement and avoids making unscholarly claims before peers.

My impression is that this practice is alien to other academic disciplines. Given the general prevalence of peer review, social scientists and the like have little to gain and possibly a lot to lose from it. Plus, they have little opportunity for it anyway; many non-legal journals prohibit authors from initiating material changes post-submission.

But baiting and switching happens in legal academia. Several law professors have told me they engage in the practice. To a room of junior scholars, one recommended it as an effective way to land offers from top journals. The others identified it, unprompted, as a potential contributor to their own publishing success. Each represented a different school and acknowledged the practice on a separate occasion.

It is possible that these individuals are exceptional, but I doubt it. All of them spoke as if the bait-and-switch is unproblematic—as if they had never encountered a contrary view. There are considerable incentives to bait and switch, particularly for new academics hoping to secure tenure and improve the visibility of their research. It is easy to do. In many cases, it is probably hard for students to catch. Others have reported evidence of the practice.² And besides the absence of an offer from a journal that probably would not have extended one anyway, there are no real repercussions even in the event of detection.

* * *

In any event, whether the practice is common or not, I want to make a simple point, in a spirit of what I hope will be understood as constructive and non-sanctimonious reflection: baiting and switching seems unethical.

Most obviously, it appears difficult to square with accepted principles of truth-telling and candor. In 1966, the American Association of University

2. See Paul Horwitz, *Three More Takes on Novelty Claims in Legal Scholarship*, PRAWFSBLAWG (Aug. 19, 2013, 11:51 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/08/three-more-takes-on-novelty-claims-in-legal-scholarship.html> [https://perma.cc/79RM-MPN4].

Professors promulgated a Statement on Professional Ethics to guide academics in their work.³ The Statement's opening paragraph emphasizes that professors' "primary responsibility to their subject is to seek and to state the truth as they see it."⁴ The Statement further explains that professors "accept the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge"; underscores the importance of "intellectual honesty"; and encourages professors to "make every reasonable effort to foster honest academic conduct."⁵ The Association of American Law Schools Statement of Good Practices by Law Professors similarly expresses that the "scholar's commitment to truth requires intellectual honesty."⁶ Simply put, baiting and switching seems to violate these principles as a form of intellectual dishonesty. It is a deliberate ruse.

The practice also seems problematic in view of an established principle of legal ethics. The American Bar Association's Model Rules of Professional Conduct provide that a lawyer "shall not knowingly . . . make a false statement of material fact or law to a tribunal."⁷ The Rules further state that "[i]n an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."⁸ In law practice, the violation of these dictates is frowned upon at least in part because it impedes just decision-making. The stakes are probably lower in most academic publishing, but the bait-and-switch otherwise seems harder to justify. Insofar as students view authors as scholars rather than advocates, they are less likely to be on guard against, and therefore less likely to detect, hyperbolic rhetorical maneuvers. Because students are at a greater informational disadvantage than judges on legal matters, they are probably less capable of identifying misrepresentations even when they look for them. And in law review submissions, there is no adversarial process to check against excessive or unfounded claims.⁹ Given these conditions, I would think that lawyer-authors who accept the principle of

3. AAUP, STATEMENT ON PROFESSIONAL ETHICS (rev. 2009) (1966), <https://www.aaup.org/report/statement-professional-ethics> [<https://perma.cc/LT5A-TNU5>].

4. *Id.* at para. 1.

5. *Id.* at paras. 1–2.

6. AALS, STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES (amended 2017) (1989), <https://www.aals.org/members/other-member-services/aals-statements/ethics> [<https://perma.cc/586T-96T8>].

7. MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1), (3) (AM. BAR ASS'N 1983).

8. *Id.* at r. 3.3(d).

9. Merrill, *supra* note 1, at 1103–04.

candor to the tribunal would, by extension, find baiting and switching to be unacceptable.

Rules aside, there are also consequentialist reasons to oppose the practice. To understand, it is helpful first to consider the scenarios in which intentional over-claims might occur. Imagine two submissions—A and B—competing for a spot in a forthcoming volume. A puffs while B does not. Whatever their other qualities, A's exclusive use of puffery is likely to operate as a form of advantage over B. Where the difference in the quality of the submissions is extreme, that advantage is unlikely to matter much: If, under conventional metrics, A is clearly superior to B on the merits, a reasonably competent editorial board would probably offer to publish A over B even if A had not puffed. Inversely, if A is clearly inferior to B on the merits, a reasonably competent board would likely offer B notwithstanding the hyperbole in A. But A's puffery could make a significant difference in all other cases. Where the two submissions are roughly equivalent on the merits, it may operate as a tie-breaker, resulting in a publication offer for A. Where A is marginally superior to B, it may reduce the likelihood of an ill-advised offer to B. And where A is marginally inferior to B, it may offset the deficiency, such that the offer goes to A despite A's inferiority.

These scenarios might appear to suggest that the ethics of the matter vary in part with the circumstances. On one hand, the bait-and-switch is largely innocuous where the gap between the quality of the articles is so extreme that one author's purposeful over-sell has no meaningful effect on the editorial board's deliberation, and the practice looks positively beneficial insofar as it improves the odds of publication for superior work. On the other hand, it is hard to justify insofar as it yields publication offers for scholarship that is deficient: It is unfair to students, as it exploits limitations in their understanding of the law to secure placements for work that is less likely to strengthen the reputation of the publishing journal. It is unfair to other authors, as it forces them to either game the system in similar fashion or settle for offers in less prestigious journals notwithstanding the potential superiority of their submissions. And by tricking journals with wider readership into publishing articles that contribute relatively little to public knowledge, it could very well inhibit the dissemination of the best ideas.

The most charitable view, then, is that authors bait and switch because they sincerely believe their drafts are likely to be superior to the other submissions on the merits. On this view, baiting and switching is simply a way to mitigate the uncertainty that inheres in a process run by editors short on time and expertise. It is a way, in other words, to shore up the prospect of what the author views to be a meritocratic outcome.

Yet, there are several problems with this defense. First, it does not appear to be the *actual* rationale in many cases. As far as I can tell, most authors who bait and switch have not considered, at least to any great extent, whether the practice is ethical. The thinking is largely strategic and careerist. This raises at least the possibility that authors puff even with respect to work that they do not sincerely believe to be superior, and that in fact is not.

Second, authors may lack the knowledge necessary to make an informed judgment about the relative strength of their submissions. Each year features thousands of new articles, only a small fraction of which are familiar to any given author. This means that conclusions about the superiority of one's writing are likely to be impressionistic and faith-based—"I *believe* my article will be better than the others under consideration, whatever the others might say." To be sure, one acquires a familiarity with the qualitative tendencies of legal academic publishing fairly early on in one's career, but the bait-and-switch does not appear to be particularly common among experienced academics.¹⁰ It is more common, or so it seems, among junior scholars—i.e., those who have spent the least amount of time internalizing scholarly standards and are therefore least equipped to determine whether their work is the type that might justifiably over-claim to reduce the risk of an un-meritocratic publishing outcome.

Third, even insofar as authors bait and switch exclusively on the basis of a seasoned belief in the superior quality of their scholarship, it is doubtful that such a belief can be objective. Experiments in psychology indicate that individuals often fare poorly at the task of social comparison.¹¹ For example, researchers have suggested that the basic need for a positive self-concept, the freedom of judgment that results from subjective concepts of merit, and the tendency for greater familiarity with the self may contribute to both unduly inflated perceptions of personal ability and unduly deflated perceptions of the abilities of others.¹² Assuming these ideas carry over into law review publishing, authors may believe that their work is first-rate, and thus the type for which a bait-and-switch might contribute to a meritocratic outcome, even when the work is second-rate and the act of manipulation impedes such an outcome.

10. Horwitz, *supra* note 2.

11. See, e.g., Vera Hoorens, *Self-Enhancement and Superiority Biases in Social Comparison*, 4 EUR. R. SOC. PSYCHOL. 113, 117 (1993) (describing the illusory superiority effect).

12. See Mark D. Alicke, *Global Self-Evaluation as Determined by the Desirability and Controllability of Trait Adjectives*, 49 J. PERSONALITY & SOC. PSYCHOL. 1621, 1621 (1985) (discussing some of these dynamics); Jonathon D. Brown, *Evaluations of Self and Others: Self-Enhancement Biases in Social Judgments*, 4 SOC. COGNITION 353, 372–73 (1986) (same).

Finally, there is a sense in which baiting and switching is simply unnecessary precisely when it could, in theory, be most justifiable. An article that presents novel findings or analysis is not puffing if it frankly points out its own novelty.¹³ An article with truly momentous implications is not puffing if it describes them as such. The problem of baiting and switching is, by definition, one of intentional overstatement. If exaggeration is unnecessary to proffer a compelling depiction of outstanding work, then strategic puffery is likely to occur most frequently with respect to scholarship that already has other weaknesses. That is precisely the context in which the act is most problematic, for the reasons identified above.

* * *

So let us assume that baiting and switching is unethical. What might be done about it?

One step would be to explicitly address the practice in a model code of ethics. Drafts of at least two such codes contain provisions that appear relevant. Rules proposed by Michael Closen and Robert Jarvis include a provision stating that “[l]aw review . . . authors shall conduct themselves at all times with integrity.”¹⁴ Scott Dodson and Jacob Hirsch’s draft code states that “[a]n author’s submission to a journal is a good-faith representation that the author believes the manuscript as submitted will be publishable upon the conclusion of the expected editorial process and will not require fundamental changes.”¹⁵ Yet none of this language specifically addresses the issue at hand. To reduce uncertainty, it would be helpful for a revised code to denounce the bait-and-switch in explicit terms, stating that it is unethical for an author to insert into a submission, temporarily and exclusively for the purpose of securing a desired offer of publication, a legal or factual claim that the author knows to be deficient.

In theory, law review editors could also adopt measures to identify manipulation and respond. One conceivable option is to insert provisions into publication agreements to establish that, between the date of acceptance and

13. A number of legal scholars have objected to the proliferation of novelty claims in recent scholarship. See, e.g., Horwitz, *supra* note 2. My view is that a truthful and non-deceptive claim of novelty is not only ethical, but also potentially helpful to readers who might be ill-equipped to ascertain the significance of the work. Whether such a claim is aesthetically pleasing to those who consume legal scholarship for a living is a separate matter.

14. Michael L. Closen & Robert M. Jarvis, *The National Conference of Law Reviews Model Code of Ethics: Final Text and Comments*, 75 MARQ. L. REV. 509, 514 (1992); see also Robert M. Jarvis, *Law Review Authors and Professional Responsibility: A Proposal for Articulated Standards*, 38 DRAKE L. REV. 889, 894 (1988) (proposing a rule that “[a]n author shall act fairly in all dealings with members of the Law Review Staff”).

15. Scott Dodson & Jacob Hirsch, *A Model Code of Conduct for Student-Edited Law-Journal Submissions*, 67 J. LEGAL EDUC. (forthcoming 2018).

publication, any detection of a material moderation of an author's claim regarding the novelty or significance of the argument will constitute grounds for rescindment unless the author can demonstrate a good-faith basis for the change, such as new feedback from faculty reviewers. To deter abuse, law reviews might provide notice of these provisions on their websites. Another option is to stipulate in the publication agreement that the editorial board must approve any material change to an initial draft. Having included such a provision, the law review, perhaps with the support of a faculty adviser, could simply decline to authorize revisions that reflect an author's bad-faith effort to walk back puffed-up claims.

A different set of strategies might focus on faculty governance. As I see it, there is a reasonable argument that the difficulty of the transition from lawyer to scholar should inform the promotion policies of schools that hire non-PhDs at the entry level. Insofar as it is simply unrealistic to expect former lawyers—including those who complete brief fellowships—to quickly eschew the habits of advocacy in favor of truth-seeking, epistemic humility, and candor, law schools should accept and account for the likelihood of a gradual transition. For instance, rather than insist upon a certain number of publications within the first few years of the tenure track, schools might sensibly *prohibit* new faculty members from publishing until those members have had time to internalize the norms of scholarship. Alternatively, schools might adopt rules of internal gate-keeping, whereby senior faculty must approve as publication-ready the article drafts of junior faculty before the latter can submit to law reviews. Such measures might help to curtail problematic forms of puffery among those who face the strongest incentive to engage in the practice.

Still another set of strategies would seek to address this incentive by replacing student editors with a system of peer review. Much like scholars in other disciplines, legal academics would have little reason to exaggerate the significance of their research if savvy specialists—individuals who could easily see through and reject a bold over-sell—held exclusive authority to review submissions and extend offers of publication.

The reality, however, is that most of the conceivable reforms are unrealistic. Students have little incentive to act as enforcers, given that doing so would both take time and require uncomfortable conversations about professional ethics, and the same is probably true of most professors. The current *laissez faire* is comfortable, even if somewhat ethically perilous.

Nevertheless, there are meaningful steps that individuals can easily take to help improve matters. Authors can commit not to bait and switch and instead follow a simple rule: In law review submissions, avoid claims that one would be unwilling or unable to defend before experts in the field. Authors can also make efforts to limit the pressure to publish exclusively in top journals,

including by reading and praising excellent scholarship that happens to appear elsewhere. And rather than tolerate the bait-and-switch or openly endorse it as a smart tactic, they can encourage each other to avoid it. I hope this piece makes clear that there are good reasons for doing so.