Calculating the Gender Gap in Legal Scholarship: An Empirical Study

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CALCULATING THE GENDER GAP IN LEGAL SCHOLARSHIP:
AN EMPIRICAL STUDY

ABSTRACT

Women have been attending law school at approximately equal rates as men for decades and began comprising a greater percentage of law school entrants than men in 2016. Yet, men continue to hold a solid majority of leadership positions across the legal field: from seats on judicial benches to podiums in front of law school classrooms. This paper examines one under-evaluated, yet critical gender gap within the legal profession: legal scholarship—specifically legal scholarship published by the flagship law reviews at the top twenty law schools. This article presents original research demonstrating that law reviews might be perpetuating the law professor gender gap because, for the five-year period studied, the law reviews published, on average, twice as many articles with male authors than with female authors.

Based on this evidence, this article highlights points along the article review process that could be subject to implicit biases and suggests ways for those biases to be noticed and minimized. Who gets to speak and whose ideas are heard, matters. Currently men get to speak, and be listened to, more than women in legal scholarship. This article seeks to demonstrate why this should, and how this can, concretely change.

1. Nancy Leong, Discursive Disparities, 8 FIU L. REV. 369, 370 (2013) (“Concretely, the [discursive] disparity has negative consequences for women’s lives, careers, and personal well-being. More broadly, the disparity distorts our discourse by conforming that discourse to male perspectives.”)
I. INTRODUCTION

A. Women in the Law: Rejected to a Majority

In 1872, the Supreme Court of the United States held in Bradwell v. Illinois that it was not a violation of the Fourteenth Amendment to the United States Constitution for a state to deny women law licenses, even if otherwise qualified, thereby precluding them from the practice of law, on the basis of sex. 2 Undeniably, women have advanced in the legal profession since Bradwell. 3 Women’s progress in the legal field became particularly clear within the last couple years when the law school entering class of 2016 hit a milestone as the first class to have more women than men. 4 Today, women comprise 51% of the population and 51% of law school students. 5

Despite the progress women have made in law school attendance rates, law school students today might look at the front of their classrooms and wonder, as undoubtedly decades of law school students before them have wondered: 6 Where are all the women? 7 And rightly so. 8 A 2011 report from the American Bar Association indicates that 74.9% of tenured law school faculty at ABA-

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5. See Olsen, supra note 4; but see Graber, supra note 3, at 45 (despite the fact that women attend law school now at slightly higher rates than men, “[j]ustice may be blind, but the nation’s leading law schools have proven to be anything but gender-blind” as women continue to underperform relative to men in law school which can impact their career opportunities).
6. Women and men have been attending law school in nearly identical numbers now for over twenty years. Justin D. Levinson & Danielle Young, Implicit Gender Bias in the Legal Profession: An Empirical Study, 18 DUKE J. GENDER L. & POL’Y 1, 2 (2010).
7. Law students might wonder “where are all the women” in many legal settings, not just in front of the classroom. “[W]omen are grossly underrepresented in leadership roles in the legal profession.” See id. at 4.
8. The positive impact of having diverse faculty on diverse student performance has been studied and documented before. Although this specific issue is outside the scope of this paper, having diverse faculty is not just an important concept in the abstract, but has proven to have positive impacts on diverse law school students’ performance. See, e.g., Christopher Birdsall, Seth Gershenson & Raymond Zuniga, Stereotype Threat, Role Models, and Demographic Mismatch in an Elite Professional School Setting, IZA-INST. OF LAB. ECON. (Dec. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3210628 (finding the effects of demographic mismatch are particularly impactful for nonwhite female students); see also Kevin R. Johnson, The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective, 96 IOWA L. REV. 1549, 1562 (2011) (Dean of U.C. Davis Law School sharing “[d]ifferences of perspective, experience, and knowledge can influence legal scholarship just as they can affect teaching” while advocating for diverse faculty as enhancing the law school education experience).
accredited schools are men and 25.1% are women. In practical terms, that means a law school student is approximately three times more likely to have a male professor than a female professor.

B. Personal Experiences

While serving on the articles team for the Washington University Law Review, I wondered if, and to what extent, other law reviews considered the many attributes each author they had selected to publish brought to the journal. I wanted to know whether there was a gender gap in author publication rates, and if so, given the heavy emphasis on scholarly publications in order to achieve tenure, whether gender gap in publication rates could be playing a role in the gender gap of law school professors I had noticed as a student. These are not simple questions, and I did not anticipate finding singular answers. For


10. AM. BAR FOUND., supra note 9. The fact that law schools still have tenured faculty positions has undoubtedly slowed the potential turnover in the field of law professors as relatively few tenure-track positions are available each year, particularly in proportion to the pool of qualified applicants.


13. Female professors experience different work demands from students, which result in significantly more work for them and higher expectations than their male counterparts. These increased demands, along with other issues such as gendered student evaluations, can complicate the tenure process for women. Colleen Flaherty, ‘Dancing Backward in High Heels,’ INSIDE HIGHER Ed (Jan. 10, 2018), https://www.insidehighered.com/news/2018/01/10/study-finds-female -professors-experience-more-work-demands-and-special-favor [https://perma.cc/NU4Z-E5VH] (citing Amani El-Alayli, Ashley A. Hansen-Brown & Michelle Ceynar, Dancing Backwards in High Heels: Female Professors Experience More Work Demands and Special Favor Requests, Particularly from Academically Entitled Students, 79 SEX ROLES 136–150 (Aug. 2018)); see also KerryAnn O’Meara, Alexandra Kuvaeva, Kudrun Nyunt, Chelsea Waugaman & Rose Jackson, Asked More Often: Gender Differences in Faculty Workload in Research Universities and the Work Interactions That Shape Them, 54 AM. ED. RES. J. 1154, 1171 (Dec. 2017). Finally, for a broader discussion from a professor’s perspective regarding the challenges of race and gender identity in law school, see Robert S. Change & Adrienne D. Davis, Making Up Is Hard to Do:
instance, there are other factors that display both gender-and race-based biases, such as student evaluations, that also play a role in the tenure process. However, given the lack of data regarding gender gaps in legal publication, and the privileged perspective I had into the review process, I was interested in gathering data regarding which authors top law reviews published. I hope that this article will concretely establish what is, likely, commonly known: top law reviews need to make significant progress in order to reach gender equality for the authors they publish.


C. Timeliness

1. Publication Requirements for Tenureship at Tier I Law Schools Have Increased

The tenure process is notoriously opaque, undoubtedly varies by law school, and is oftentimes unfair.\(^\text{(15)}\) That said, recent shifts in publication norms for tenure make the question of whether there is a gender gap in publication rates particularly timely.\(^\text{(16)}\) Specifically, there has been a shift in the publications requirements for tenureship at Tier I law schools, from two articles to three.\(^\text{(17)}\) If, for instance, there is a publication gap for women, Black people and people of color, or other groups underrepresented in legal academia and in the legal field more generally, then the increased pressure to publish three articles at very good law reviews in order to achieve tenure at a Tier I school might have disparate impacts on groups not being published, and thus any gender gaps in scholarship publication rates are increasingly consequential. Moreover, given that Tier I law schools are increasing publication norms for tenure,\(^\text{(18)}\) it is reasonable to expect that this publication norm will spread to lower-ranked schools, thereby further impacting faculty representativeness throughout all law schools. Other scholars, such as Paula A. Monopoli, have support for the position that the heavy focus on scholarship has hindered women’s progress in the legal academy.\(^\text{(19)}\) As this article will demonstrate, because the top twenty law reviews are not publishing men and women at equal rates, so long as scholarship, specifically scholarship published in elite law reviews, is required for tenureship, it is very likely that women will continue to be underrepresented as law professors relative to their representation as law school students.\(^\text{(20)}\) Thus, these increases in scholarship


\(^\text{16.}\) loftus C. Carson, II, Employment Opportunities and Conditions for the African-American Legal Professoriate: Perspectives from the Inside, 19 TEX. J. C.L. & C.R. 1, 18 (2013) (noting the recent shift from two to three articles to be published requirements to become a professor at a Tier I law school).

\(^\text{17.}\) Id.

\(^\text{18.}\) Id.

\(^\text{19.}\) Paula A. Monopoli, Gender and the Crisis in Legal Education: Remaking the Academy in Our Image, 2012 Mich. St. L. Rev. 1745, 1747 (2012) (“incentivizing of scholarship at the expense of pedagogy and the slow progress of women to tenured, full professorships—are linked”); see also McGinley, supra note 9, at 142–43 (for a discussion regarding “careerism,” “a practice enacted by men whose masculine identities depend on their breadwinner status and upward mobility. It includes working long hours, placing their work ahead of other considerations, and working on tight deadlines. Men who practice careerism often rely on women’s support in order to be free to work the schedules they work.” Increased institutional scholarship expectations negatively impact women, partially because of the gendered ideas behind “careerism.”).

\(^\text{20.}\) See Monopoli, supra note 19 and accompanying text; Olsen, supra note 4.
expectations for tenure will very likely hinder the progress of underrepresented minorities onto law school faculties.\textsuperscript{21}

2. Recent Litigation Challenging Law Reviews’ Articles Selection Processes

Recent litigation regarding law reviews’ articles selection processes also makes this study particularly timely. In October 2018, Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) filed a pair of joint lawsuits against Harvard Law Review and New York University (NYU) Law Review.\textsuperscript{22} The lawsuits challenge Harvard and NYU law reviews’ methods of considering diversity statements for a very small number of seats as part of the admittance processes for students onto their respective law reviews, as well as the law reviews’ practices of asking authors for their demographic information when the authors submit articles for review for potential publication. FASORP alleges white male authors have been denied opportunities to publish as a result of these law reviews considering race, gender, and other diversifying factors.\textsuperscript{23} Counsel for FASORP vowed to file suit against other law reviews as well, citing the clarity of Harvard and NYU Law Reviews’ policies as the reason why FASORP sued those two journals first.\textsuperscript{24}

The United States District Court for the Southern District of New York and the United States District Court for the District of Massachusetts recently dismissed FASORP’s actions against both NYU Law Review and Harvard Law Review, respectively.\textsuperscript{25} As of late spring 2020, FASORP filed a notice of appeal for its claim against NYU Law Review,\textsuperscript{26} and, based on the docket, the case appears to be ongoing.

The law has not directly addressed whether law reviews can consider the demographics of underrepresented groups when admitting students onto the

\textsuperscript{21} See Carson, supra note 16 and accompanying text.


\textsuperscript{23} Id.


\textsuperscript{26} Notice of Civil Appeal, Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) v. New York University Law Review, et. al. (2020) (No. 20–01508).
journal or when selecting scholarship for publication. Moreover, neither lawsuit against NYU or Harvard provides insight into this particular issue because, at the current stages in the litigation, the district courts dismissed both cases on standing grounds or because of failures to state claims. In *Grutter v. Bollinger*, the Supreme Court of the United States upheld affirmative action policies at the University of Michigan Law School, emphasizing that a racially diverse student body positively contributes to the education of all students in law school. The logic of *Grutter* can likely be extended to the law review membership and review processes. Having a diverse law review that is able to adeptly select more diverse, more nuanced scholarship, will further enhance the education of students on the journal. Although the future of *Grutter* remains uncertain, the diversity practices at Harvard, NYU, and other law reviews with similar policies are defensibly within the *Grutter* holding.

3. *U.S. News & World Report* Proposed Scholarly Impact Rankings Increase the Importance of Legal Scholarship

Finally, potential updates in law review scholarship rankings make an empirical study of the gender gap in legal scholarship imminently important. In

27. Law schools at every level need to do more to support students of color. See Erin Thompson, *Law Schools Are Failing Students of Color*, THE NATION (June 5, 2018), https://www.thenation.com/article/law-schools-failing-students-color/ [https://perma.cc/W4NT-KDJ4]. Changing the law review admission process to enable more students of color to be on the journal would be one step that would enable law schools to better serve these students.


30. Johnson, supra note 8, at 1556.


32. Aidan F. Ryan, *Texas Group Sues Harvard Law Review for Using ‘Race and Sex’ to Select Members*, CRIMSON (Oct. 9, 2018), https://www.thecrimson.com/article/2018/10/9/law-review-FASORP-lawsuit/ [https://perma.cc/U6VX-D2PZ] (A former NYU Law Review member spoke regarding the affirmative action policies on the NYU Law Review: “‘We were looking for diversity—race, gender, other background experiences all played into that—but it was done perfectly consistent with the Grutter plan,’ Harpalani said. ‘So that’s how NYU Law Review worked.’”).


34. *Grutter*, 539 U.S. at 345.
February 2019, U.S. News & World Report announced that the publication is considering ranking law schools by scholarly impact. Although this scholarship ranking would be separate from the oft-cited law school rankings, ranking law schools by scholarly impact could impact which articles law schools decide to publish, with potentially significant negative consequences. In particular, this proposed scholarly impact ranking could exacerbate “home journal” biases. Because there are already significant opportunities for bias present within the review process, it is important that law reviews critically evaluate and address potential points of implicit bias in the article review process as they currently stand, before any of the new rankings are released and potentially further exacerbate pre-existing biases.

II. RESEARCH QUESTIONS PRESENTED

(1) Are law reviews publishing male and female authors at equal rates? (2) If no, why not? (3) Within the framework of the articles review process, are there points in the articles selection process that could be subject to implicit bias? (4) Finally, if there are points in the articles selection process that could be subject to implicit bias, what changes can be made to reduce the potential impacts of any biases in the review process?


38. See infra Section V.

39. It would be particularly helpful to have author demographic data for all manuscripts submitted to law reviews and expanded demographic data for authors of articles published. Unfortunately, that data is particularly difficult to acquire for all journals. This Article suggests that journals track that data in order to see which authors are being represented at each stage of the review process. See discussion infra Section VI proposing ways to address implicit biases throughout the law review articles selection process.
III. METHODOLOGY

A. Sample Size

The dataset presented is comprised of law review volumes from the 2013–14, 2014–15, 2015–16, 2016–17, and 2017–18 journal cycles for each of the flagship law reviews for the top twenty schools. I reviewed over one hundred law review volumes, including the 2,074 authors published within those volumes in total.

B. Articles & Rankings

In order to address whether male and female authors are being published at equal rates, I coded the gender of each author who published a piece within as an “Article” in the flagship law reviews of the top twenty law schools within the five-year period studied. If an article had more than one author, I coded the gender of each author individually because the alternative would create a system in which articles had a certain percentage authorship by gender, e.g. 66% female and 33% male in an article co-authored by one man and two women. Such a system would be both confusing and unduly complicated for no analytically beneficial reason. Additionally, each author of an article, whether as a sole author or as a co-author, can list the article on their resume and thereby benefit professionally from the publication. The professional impacts from publication tie into the potential impacts of publication rates on tenure opportunities by gender—the question of ultimate concern. I used the flagship law reviews of the top twenty law schools instead of the other most likely contender, the top twenty law reviews as ranked by the Washington & Lee rankings, because professors surveyed find the law school rankings to be a better indicator of journal quality than the Washington & Lee rankings system.

40. Complete datasets are available upon request.
41. Zaretsky, supra note 36.
42. Id. In order to determine which articles were published, I examined PDFs of each issue of each volume of the law reviews considered either as listed on each respective law review’s publication site or, if the site was not easily laid out, then I would search and find the full volume on HeinOnline, https://home.heinonline.org/ [https://perma.cc/73J9-W728]. Only “Articles” were reviewed as opposed to Commentaries, Book Reviews, or other pieces because Articles are frequently considered to be the most prestigious type of publication within a law review, and thereby the most beneficial, professionally, for authors.
43. Id.
45. Michael D. Cicchini, Law Review Publishing: Thoughts on Mass Submissions, Expedited Review, and Potential Reform, 16 U. N.H. L. REV. 147, 151 (2017) (indicating the majority view of law professors is to preference using the U.S. News & World Report rankings to determine their preference of which journals to publish with as opposed to relying on the Washington & Lee rankings system). As an example, for those unfamiliar with law review rankings, University of
Southern California is ranked eighteenth by U.S. News & World Report but ranked forty-first on the Washington & Lee journal rankings system. Under this presumption, authors who are most concerned with publishing with the highest ranked law review would prefer to publish with Washington University than, for example, Boston College, which is ranked twenty-seventh by U.S. News & World Report but has the twenty-fourth highest ranked journal according to Washington & Lee.


47. There are some schools “missing” from the W&L rankings that are present in the USNWR Rankings. This is because the USNWR rankings and the W&L rankings do not correlate perfectly; not every school ranked in the top twenty by USNWR has its respective flagship law review ranked in the top twenty by W&L. W&L Journal Rankings, supra note 44.
C. Masthead Collection Process

In order to determine who was on the articles team and who was the Editor-in-Chief or President of the law review, I examined the mastheads available at the beginning of each law review journal volume.

D. Determining Gender

In order to determine the gender of the authors and editors, I searched for each author and editor on Google. I focused on finding professional biographies for all individuals through their respective employers’ websites, which were almost always law schools or law firms. Then, I would code the individual as female if feminine pronouns (she/her) were used to describe the individual within their professional institutional biography, or male if masculine pronouns were used (he/him). For the individuals for whom I was unable to locate a professional institutional biography, I would search for media coverage of the individual that used feminine or masculine pronouns as part of the article. Finally, if the first two attempts failed, I would locate the individual’s LinkedIn profile by searching their name in combination with their law school alma mater and would determine their gender based on their LinkedIn photo. All authors and editors coded for gender for purposes of this study were found online through one of the above three methods.

E. Methodology Limitations

Because the journals do not independently track and publish the gender of either authors or editors,48 in order to proceed with the study I needed to assume that the institutions or media organizations writing regarding the individual’s gender identity were correct.49

48. To my knowledge, journals neither independently track nor publish any demographic information about their membership members and very few track any demographic information for authors. I argue that journals should track both and other scholars have taken similar positions. See infra notes 122–123 and accompanying text.

49. I sincerely hope that I represented author and editor gender identity correctly for reasons beyond data accuracy. I assumed the editor names on the masthead and the author names next to their scholarship were the individuals’ preferred names. As there have been at least one transgender and/or gender nonconforming student at Yale in each year for the past couple years, it is possible I misidentified at least one student if that student was a law review editor. In order to proceed with the study, I made the assumption that students identified as the gender most readily identifiable to a stranger if they were identified by their LinkedIn profile, as opposed to an institutional biography. Although Yale is only one school of the twenty listed here, it is possible that other students at other schools identify as a gender that is not the gender most readily apparent to a stranger or that a student or author identifies as a nonbinary gender. Trans at YLS: A Guide for Trans Students & Allies, YALE L. SCH. (2015), https://law.yale.edu/sites/default/files/area/department/studentaffairs/document/trans_at_yls-2015.pdf [https://perma.cc/H46V-K8JA].
IV. ARE THE TOP TWENTY LAW SCHOOLS’ LAW REVIEWS PUBLISHING MALE AND FEMALE AUTHORS AT EQUAL RATES?

A. Prior Literature

Although some of the particular challenges of becoming a professor as a woman,\(^{50}\) as a person of color,\(^{51}\) or both,\(^{52}\) have been discussed in the literature, there is limited empirical data on the gender disparity of legal scholarship published by top law reviews.\(^{53}\) The last empirical study conducted on gender disparity in elite law reviews was in 2010, by Minna J. Kotkin.\(^{54}\) Kotkin’s study of gender disparity and privilege in the top ten law reviews found that “there is a significant gender disparity in publication at all of these journals, with some variation as to degree.”\(^{55}\) The findings presented in Kotkin’s study also indicate that a “significant gender disparity” remains in all of these journals.\(^{56}\) However, there is room for optimism. Kotkin reports that female authors constituted an average of 20.4%\(^{57}\) of authors published by top law reviews from 2006–08,\(^{58}\) but the findings presented in this paper indicate that in the five journal cycles studied, from 2013–18, the average percentage of female authors published was 31.56%, over a 50% increase from Kotkin’s 2010 findings and just over a 10% increase on a 100-point scale.\(^{59}\)

Scholars have previously examined disparities of publication rates of underrepresented minorities within the legal field, including gender disparities

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50. Bean, supra note 14, at 32; Chamallas, supra note 14, at 199, 205–06; Farley, supra note 14, at 333–34, 339.
52. Meera E. Deo, JD, PhD, Trajectory of A Law Professor, 20 Mich. J. Race & L. 441, 441 (2014) (providing “evidence to support the thesis that ongoing changes in legal education will likely continue to create barriers both to entry and advancement for women of color law faculty members and those who aspire to join legal academia”); see also Meera E. Deo, JD, PhD, Intersectional Barriers to Tenure, 51 U.C. Davis L. Rev. 997, 1024 (2018) (discussing specific limitations women of color face to publishing scholarship because “the type of scholarship that many women of color law faculty produce is sometimes undervalued at their institution and by their colleagues, creating additional complications in the tenure and promotion processes”).
53. Kotkin, supra note 37, at 404.
54. Id.
55. Id. at 386.
56. Id.
57. Id. at 387.
58. Important distinguishing factors between the study conducted here and Kotkin’s study are that Kotkin counted all work published by authors which were non-symposium pieces (including pieces such as essays and book reviews) and Kotkin’s study was over a three-year period for the top-ten law reviews. In contrast, this study only evaluated articles authors’ and surveyed the top twenty law schools’ flagship journals, for reasons discussed more fully in the methodology portion of this paper. See supra Section III for expanded discussion of methodology used and reasoning behind the methodology.
59. See discussion infra Section IV.b.
for authors of student notes, and gender disparities in author citation rates. Although there is limited empirical work specifically studying the gender gap in law review publications, scholars have previously discussed the gender gap in scholarly publications in other fields. For instance, the gender disparity within scholarship in political science, social work, science, psychology, and other academic fields has been studied. One broader issue of this scholarly gap across academic fields is that men are able to write about, and consequently impact, what is discussed in scholarly fields more than women because their scholarship is getting more attention on the whole by being published more.

B. Findings: Top Law Reviews Publish, On Average, Nearly Twice as Many Men as Women

Flagship law reviews for the top twenty schools did not publish men and women at equal rates during the 2013–14, 2014–15, 2015–16, 2016–17, and 2017–18 journal cycle years. The journals published 2,074 articles authors in total and of those, 1,414 (68.17%) were men and 660 (31.82%) were women. Thus, over the five-year period, it was over twice as likely that the journal would publish a male author as opposed to a female author.

64. Gerhard Sonnert & Gerald Holton, Career Patterns of Women and Men in the Sciences, 84 AM. SCIENTIST 63, 63 (1996).
66. Although not all studies are able to point to definitive data, the importance of interpreting “null” findings has also been discussed within the literature. Sven Kepes, George C. Banks & In-Sue Oh, Avoiding Bias in Publication Bias Research: The Value of “Null” Findings, 29 J. BUS. & PSYCHOL. 183, 183 (2014).
67. Leong, supra note 1, at 370.
68. See table titled “Male Authors vs. Female Authors Published Overall” infra Section IV.b.
Top law reviews have significant potential to impact academic careers. Simply put, if top law reviews do not publish women at equal rates to men, they also certainly preclude women from achieving tenure at equal rates to men.69 This conclusion can reasonably be extended across groups of underrepresented minorities in the legal community.70

However, law reviews did make progress within the data period studied in terms of the percentage of female authors published. From the 2013–14 journal publication cycle to the 2017–18 publication cycle, law reviews published approximately 5% more female authors, from below an average of 30% in the 2013–14 journal cycles to an average of 35.58% published in the 2017–18 journal cycle.71

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69. See supra notes 11, 12, 16 and accompanying text.
70. Id.
71. See table titled “Percent Authorship by Gender Over Five Journal Cycles” infra Section IV.b.
V. WHY IS THERE A PUBLICATION GENDER GAP? EXPOSING POTENTIAL POINTS OF IMPLICIT BIAS THROUGHOUT THE ARTICLES SELECTION PROCESS

A. Law Reviews’ Submission Preferences Are Implicitly Biased Towards Men

All law reviews included in the sample studied express distinct submission preferences for judges, professors, judicial clerks, or practicing attorneys, and top law reviews almost never publish student work as an article if a student is the sole author. Expressing an outright preference for, and simultaneously excluding, those who are not judges, professors, or practitioners, inherently expresses a preference for men because each of these groups includes more men than women. Women comprise only 33% of federal judges, 30% of state judges, and only 20% of state supreme court justices.

72. The term “implicit” here is used to describe attitudes, memories, and stereotypes that are outside of “conscious, intentional control.” See Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 CAL. L. REV. 945, 946 (2006); see also Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1497–1539 (2005).


74. “Notes” are often student work but typically only come from students at the home institution of the journal.

75. See infra notes 77–80.

judges, 77 25% of professors, 78 and 38% of practicing attorneys. 79 Although the preferences that law reviews express for authors is logical given the need for expertise on legal topics, these preferences likely impact the pool of authors who submit articles for review in the first place.

Not only is the pool of judges, professors, or practicing attorneys heavily skewed towards men, 80 but also law students are implicitly gender-biased towards associating leadership roles in the legal profession with men. 81 Justin D. Levinson and Danielle Young studied the implicit gender biases that law students have towards certain legal jobs by creating a new Implicit Association Test (IAT), a “Judge/Gender IAT,” designed to test whether people associate judges with men or women. 82 Despite the fact that men and women now enter law school at equal rates, 83 Levinson and Young found that a diverse group of male and female students associate judges with men, not women. 84 Given that men comprise nearly 70% of the judicial bench, this is not surprising. 85 However, the fact that law reviews express preferences for individuals in specific jobs overwhelmingly filled by men, 86 and students on law reviews impliedly associate these same jobs with men, 87 makes it less likely that law review editors would consider women to be the expert authorities they would want to publish on a topic.

B. Curriculum Vitae Requirements Favor Elite Schools and Prior Publication Experience, Thereby Reinforcing and Perpetuating Selection of Male Authors

The curriculum vitae (CV) requirement is also a problematic component of the inherently expressed preferences for judges, professors, judicial clerks, or practicing attorneys. 88 Nearly all law reviews for the top-twenty ranked schools

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78. AM. BAR FOUND., supra note 9; McGinley, supra note 9.
80. See supra notes 76–78.
81. Levinson & Young, supra note 6, at 3.
82. Id.
83. Olsen, supra note 4.
84. Levinson & Young, supra note 6, at 3.
86. VA. L. REV., supra note 73.
87. Levinson & Young, supra note 6, at 3.
88. VA. L. REV., supra note 73 (“We welcome Article submissions from judges, professors, practitioners, and law clerks.”).
require authors to submit CVs along with the article. This requirement persists widely despite numerous prior studies demonstrating that the use of CVs in evaluating candidates can be highly flawed and subject to implicit biases. For instance, prior scholarship demonstrates that law review editors consider the pedigree of the school the author is from as a proxy for article quality, sometimes referred to as “letterhead bias.” Although letterhead bias has not been studied extensively within the legal-scholarship context, the studies conducted thus far indicate that the institution the author is writing from can significantly impact what publication offers the article receives. Separate studies also demonstrate that the institution where articles are published is often perceived as an indicator of article quality, with the average article published at a journal of a higher-ranked institution being cited more often than the average article published by a journal of a lower-ranked institution. Thus, institutional bias contributes to a never-ending cycle of elitism in the article review selection, publication, and citation process.

C. Articles Team Composition

Articles teams need to be diverse in order to be able to effectively select scholarship. Yet, how diverse the articles team can be is necessarily limited by
how diverse the law review editorial staff is as a whole. Lynne Kolodinsky’s
2014 empirical study regarding the gender divide of student editors at the top
twenty law reviews provides support for the proposition that women are
underrepresented on top law reviews when compared to female representation
in law school classes. Recent news reports have also noted the significant
underrepresentation of racial and ethnic minorities on top law reviews. The
bottom line is that the lack of diversity on top law reviews necessarily inhibits
articles teams from being diverse with negative consequences for selected
scholarship.

There is a slight but statistically significant relationship between the
percentage of male articles editors and the percentage of female authors
published. As the percentage of male articles editors increased, the percentage
of female authors published decreased slightly, seen depicted in the graph below.

Articles Committee to select rigorous and important content for publication, TWITTER (Aug. 28,
2020, 5:13 PM), https://twitter.com/GeorgetownLJ/status/1113934371298381827 (discussing the
importance of having diverse articles teams in order to have a rigorous discussion for critically
selecting scholarship); Mark A. Godsey, Educational Inequalities, the Myth of Meritocracy, and
the Silencing of Minority Voices: The Need for Diversity on America’s Law Reviews, 12 HARV.
BLACKLETTER L.J. 59, 71 (1995) (“Minority voices are indirectly muted when all of the incoming
articles are screened by all-white committees and then edited in six or seven stages by the same
homogeneous group of people.”). Law reviews are one of the last forums to discuss the need for
leadership diversity. The importance of diverse leadership has been discussed extensively in the
corporate setting, see, e.g., James A. Fanto, Lawrence M. Solan, & John M. Darley, Justifying

95. See infra note 102 and accompanying text.
Twenty Law Reviews (May 2014) (unpublished student note, Cornell University) (on file with
Cornell Law Library).
97. David Lat, Minorities and Women and Law Reviews, Oh My!, ABOVE THE LAW BLOG
reviews-oh-my/ (observing the severe lack of diversity at top law reviews, with most top law
reviews having fewer than ten members identifying as racial minorities out of over 150 members
total and with women also being significantly underrepresented, despite equal or nearly equal
representation in the incoming class).
98. Stacier, supra note 94.
D. Law Review Leadership’s Personal Biases

Articles are often selected by the articles team with minimal external inputs. Therefore, within law reviews, the individuals whose personal biases have the greatest possibility of influencing the selection process are likely the individuals with the most power in the review process: the Chief Articles Editor\textsuperscript{99} and the Editor-in-Chief. Knowing this led to separate but related questions regarding how personal biases of journal leadership influenced the percentage of female authors published.\textsuperscript{100}

For the data periods studied, volumes led by a female Chief Articles Editor published an average of 30.98% female authors, while volumes led by a male Chief Articles Editor published an average of 31.98% female authors. For the data periods studied, volumes led by a female Editor-in-Chief published, overall, an average of 31.79% female authors, while volumes led by a male Editor-in-Chief published an average of 31.72% female authors. These findings indicate that the gender gap in legal scholarship persists despite the gender of law review leadership.

\textsuperscript{99} Sometimes referred to as the Senior Articles Editor or an equivalent title.

leadership. Therefore, the solution to addressing law reviews’ gender biases, reflected in the gender of the authors published, is not as easy as simply having, for example, a female Editor-in-Chief. However, these findings are not surprising given the gendered implicit biases that both male and female law students display towards leadership roles in the legal profession and the existing disparities in the pool of preferred authors (judges, practicing lawyers, and law professors). 101 Hopefully, future studies will expand the findings presented in this paper to address the relationship between racial and ethnic minority leadership on law reviews and racial and ethnic minorities published. 102


Another element that could bias articles selections is the rankings systems that both law schools and journals use. Higher-ranked journals might feel less pressure to attempt to “game” the rankings system compared with lower-ranked journals, which might feel pressure to move up in journal rankings. However, even that is not certain because undoubtedly higher-ranked journals feel pressure to maintain their respective rankings.

The top twenty journals are ranked below with number one being the journal in the top twenty that published the highest percentage of female authors and with number twenty being the journal in the top twenty that published the lowest percentage of female authors, for the period studied. 103

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101. See Levinson & Young, supra note 6, at 3.
102. The severe underrepresentation of racial and ethnic minorities on law reviews makes studying publication rates of minority authors particularly important, but difficult to study. Godsey, supra note 94, at 61 (highlighting the extreme lack of diversity on law reviews, including 76% of law reviews with no black or African American members, 69% with no Hispanic members, and 85% with no Asian members). Minorities, particularly minority women, remain severely underrepresented in law review leadership positions. Adriane Kayoko Peralta, The Underrepresentation of Women of Color in Law Review Leadership Positions, 25 BERKELEY LA RAZA L.J. 69 (2015).
103. See table below.
The data indicates no clear relationship between either the U.S. News & World Report Ranking\textsuperscript{106} or the Washington & Lee Journal Ranking\textsuperscript{107} and the percentage of female authors published. Notably, two of the top three law schools, Yale and Stanford, are in the top five law reviews that published the highest percentage of women.\textsuperscript{108} However, Harvard, which is ranked third by

<table>
<thead>
<tr>
<th>Highest To Lowest Avg. % Female Authors Published</th>
<th>2019 USNWR Ranking\textsuperscript{106}</th>
<th>2019 W&amp;L Ranking\textsuperscript{106}</th>
<th>School</th>
<th>% Female Authors Published</th>
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<tbody>
<tr>
<td>1</td>
<td>6</td>
<td>11</td>
<td>New York University (NYU)</td>
<td>46.72</td>
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<td>2</td>
<td>9</td>
<td>7</td>
<td>University of California – Berkeley</td>
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<td>3</td>
<td>16</td>
<td>13</td>
<td>University of California – Los Angeles</td>
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<tr>
<td>4</td>
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<td>1</td>
<td>Yale University</td>
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<tr>
<td>5</td>
<td>2</td>
<td>3</td>
<td>Stanford University</td>
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<td>6</td>
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<td>Vanderbilt University</td>
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<td>15</td>
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<td>University of Texas – Austin</td>
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<td>University of Virginia</td>
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<td>9</td>
<td>18</td>
<td>27</td>
<td>Washington University in St. Louis</td>
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<td>19</td>
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<td>University of Southern California (Gould)</td>
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<tr>
<td>11</td>
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<td>Harvard University</td>
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<td>20</td>
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<td>University of Minnesota</td>
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<td>Cornell University</td>
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<td>14</td>
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<td>Georgetown University</td>
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<td>University of Michigan – Ann Arbor</td>
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<td>4</td>
<td>Columbia University</td>
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<td>Northwestern University</td>
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<td>4</td>
<td>10</td>
<td>University of Chicago</td>
<td>22.32</td>
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\textsuperscript{105} W&L Journal Rankings, supra note 44.

\textsuperscript{106} Zaretsky, supra note 36.

\textsuperscript{107} W&L Journal Rankings, supra note 44.

\textsuperscript{108} Zaretsky, supra note 36.
U.S. News & World Report,\textsuperscript{109} ranks eleventh of the top twenty, based on percentage of female authors published.

\textbf{VI. PROPOSED CHANGES TO THE ARTICLES SELECTION PROCESS TO REDUCE POTENTIAL IMPACTS OF IMPLICIT BIASES}

The research presented in this paper indicates there is a gender gap in legal scholarship published as “Articles” by the top twenty law schools’ flagship law reviews.\textsuperscript{110} As law review publications can impact professors’ tenure prospects, law reviews must take steps, including recognizing their own power and role in the tenure process, in order for gender equality to improve among tenured law school professors.\textsuperscript{111}

At the very least, it is necessary for law reviews and articles selection committees to recognize that, by expressing a preference for judges, professors, or practicing attorneys,\textsuperscript{112} they are inherently narrowing the pool of “approved” authors to include substantially more men than women. One could argue that law reviews are, in fact, publishing what is a reflective portion of men to women in their journals as compared with the proportion of men to women in the “approved” jobs. However, it is unpersuasive to argue that maintaining a gender gap is permissible simply because it reflects what is already a significantly gender-imbalanced profession. Law reviews should and must recognize the impact they could have both on those whose voices are amplified through publications and professors whose careers may be impacted. Having more diverse law professors would substantially positively impact the legal field as a whole.\textsuperscript{113}

There are two distinct options for solving the gender disparity in law reviews: knowing nothing or knowing and considering everything. Concrete suggestions for each approach are proposed in turn below.

\textsuperscript{109} Id.

\textsuperscript{110} See supra Section IV.b.

\textsuperscript{111} Some corporations have realized the importance of taking the bias out of the hiring process, instead of on the people doing the hiring. For that reason, the solutions proposed here focus on taking the bias out of different steps in the articles review process, as opposed to trying to “debias” each articles editor. In the law review context, it is particularly important to focus on debiasing the process, as opposed to debiasing the editors, because articles editors change each year and thus changes to the process would likely lead to longer-lasting progress relative to focusing on removing bias from the individual editors. Jay J. Van Bavel and Tessa V. West, Seven Steps to Reduce Bias in Hiring, WALL ST. J. (Feb. 20, 2017), https://www.wsj.com/articles/seven-steps-to-reduce-bias-in-hiring-1487646840 [https://perma.cc/GH2R-LSXR].

\textsuperscript{112} See supra note 88 and accompanying text.

\textsuperscript{113} Godsey, supra note 94, at 67–70 (discussing the responsibility of law reviews to “Provide a Forum of Debate Equally Accessible to All Voices.”).
A. Knowing Nothing

Within the top twenty flagship law reviews, there are three journals that use blind review processes, to greater or lesser degrees: Yale, Harvard, and Stanford. The caveat to all of the types of blind review practiced by these three journals is that at least one person on the team, typically the lead or most senior articles editor, knows who the author is. This is typically needed for practical purposes, primarily so the teams can communicate with the authors.

![Graph: Avg. Percent Female Authors Published]

The results indicate two of the three law reviews that practice some form of blind review published, on average, a higher percentage of women than the average of the top twenty law reviews. Thus, the data suggests that even a degree of blind review has a positive relationship with the percentage of women published. Other scholars have also called for law reviews to implement blind review processes. Hopefully the research presented in this paper will bolster and provide support for prior calls for blind review.

True double-blind review, distinguished from the current “blind” review processes which are not 100% blind, would require some form of a wall or screen between the author and the articles team. This wall could be formed

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116. Id.

117. Id.
physically or digitally. If either a student or an administrative staff member on each law review were responsible for holding the identity of the author secret from the articles team and functioning as the messenger between the articles team and the author, then law reviews could effectively implement a physical wall. This would undoubtedly be more complicated than current systems where the articles teams correspond with the authors directly and might minimize the capacity of law reviews to build personal relationships with each author, which could theoretically hurt lower-ranked journals. However, the potential benefit of diversifying the legal profession and legal scholarship would be worth the extra hassle involved.

If law reviews or authors think a physical wall would be too complicated, a digital wall could also be implemented. Most law reviews use submissions platforms such as Scholastica to facilitate law review submissions. These platforms already support levels of anonymity in author submissions and could anonymize the submissions further, for instance by assigning each submission and its respective author a number, which would be all that the articles teams would know or see regarding the author. Given that the submissions platforms are already in place, it would be possible for changes to be made on the already-existing platforms without the burden of having to build new platforms from scratch that would support this level of anonymity.

If law reviews are unwilling to implement true double-blind review processes, a modest and easily implementable step is a policy that all editors involved in the articles review process review the author’s CV and any identifying information last. As all authors are relatively easy to find online and most authors include a good deal of biographical information in the first footnote, it is imperative that the “review the CV last” policy be interpreted broadly to include avoiding all identifying information. Implementing this type of policy would afford authors greater opportunities for their work to be reviewed on the merits as opposed to primarily on their CV.

B. Knowing Everything: Lessons from Corporations Working to Reduce Biases in Hiring

The law review articles selection process is remarkably similar to any competitive hiring process: large pools of talented people compete for very limited slots with the pool of candidates narrowing at each step. Because of the similarity between the law review articles selection process and a competitive


119. See, e.g. note 1. From this footnote, you can know both where I went to law school and where I went to college. You also know some of the people worked or otherwise helped me with this article. This is precisely the type of information that could bias a person reviewing this article.
hiring process, law reviews have a lot to learn from companies who have committed to reducing bias in their hiring practices.120

Scholars and companies alike have studied and documented the need to diversify the pools of applicants at each stage of the hiring process in order to ultimately hire diverse employees.121 It is reasonable to believe that, similar to how having more female applicants and more females in the initial resume review round leads to a greater chance of hiring a woman, having more female authors submit manuscripts and more female authors in the initial article review stages would lead to more publication offers to female authors. Thus, in order to ultimately publish diverse authors, it is necessary to include the work of diverse authors at each stage of the review process.

Yet, law reviews will not know if they have authors who are underrepresented minorities throughout the review process if they do not collect and track authors’ demographic information. Therefore, collecting and tracking authors’ demographic information at each stage of the process is imperative.122 There are commonly four key phases to the review process and tracking which authors clear each review stage and which are rejected would provide important data for editors, ultimately allowing editors to assess their own biases with the critical assistance of objective data.123 These four stages are: the submission stage, the individual editor review stage, the articles team review stage, and the publication offer stage.

Once data has been collected for each review stage, the review process can be continually improved year after year, volume after volume. Ultimately, it should be a priority for each journal to be attentive to and work towards minimizing points of bias present throughout the articles selection process. Ultimately, if these biases are reduced, likely more diverse authors will be published and ultimately more diverse junior faculty will be hired.

122. Wherry, supra note 115, at 439 (supporting the idea of tracking data of authors at various stages throughout the articles review process).
123. Id.
VII. ADDITIONAL CAUSE FOR CONCERN: THE negative effects of the Coronavirus PANDEMIC on female academics publishing

Hindsight is twenty-twenty and of course history will be able to better ascertain the effects of the Coronavirus (COVID-19) pandemic on the world, including on the publication rates of women versus men. Despite early suggestions that pandemics have historically led to moments of brilliance, and perhaps such brilliance would emerge again during this pandemic experience, it is noteworthy that neither William Shakespeare nor Isaac Newton had childcare responsibilities when they were each stuck self-isolating, writing King Lear or developing early theories of gravity, respectively.124 Initial reporting suggests that the pandemic has lowered women’s article submission rates across academic fields.125 It appears, at least so far, that COVID-19 restrictions have exacerbated gender inequalities, leading women forced into more traditional gender roles to not have the time and space necessary for research.126 This appears to be because in a male-female household partnership, if men do not step up to tend to group and family cohesion, then women ‘step in’ and legal scholarship is taking the hit.127

VIII. LIMITATIONS & FUTURE RESEARCH

In order to properly assess the data presented, it is important to acknowledge potential limitations of this data. First, as addressed before, the basis of assessing gender is not perfect. As a result, the data may incorrectly reflect authors’ and editors’ gender identities. Given the careful review process for gender identity,128 this is unlikely, although not impossible.

Another factor limiting the types of conclusions that can be made is that there is not necessarily a direct correlation between where an author publishes and their tenure options. The data presented clearly identifies a gender gap of authors published by top law reviews, but the link between the gender gap of authors published and the gender gap of tenured professors cannot be made directly. There are many factors involved in the tenure process.129 However,

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126. Id.

128. See supra Section III for more information regarding the methodology used.
129. Scholarship requirements are not the only factor at issue, although it is an important one, as other university expectations of faculty disproportionately have a negative impact on women.
scholarship is a known and heavily emphasized requirement, and therefore it is reasonable to suggest that a gap in scholarship opportunities for women leads to a gap in tenure opportunities.  

Finally, this study focused primarily on the gender gap in law review articles publications. However, the gender disparity is almost certainly not the only disparity in legal scholarship. I strongly encourage interested scholars to expand this study to determine the rate at which the flagship law reviews of the top twenty schools are publishing authors of color.  

IX. CONCLUSION  
The research presented in this paper empirically demonstrates that a substantial gender gap exists for articles authors published by the flagship law reviews at the top twenty law schools. This legal scholarship gender gap parallels the significant gender gap for women in legal leadership positions, including as particularly relevant here, law professors. Because law review publications can impact tenure possibilities for authors, law reviews must be

Monopoli, supra note 19, at 1773 (“Facially neutral university norms about the unified model of teaching and scholarship have a disparate impact [on women].”).  

130. See supra notes 13, 14, 17–18, and accompanying text.  

131. As Professor Kimberly Norwood has noted, both gender bias and racially gendered bias in the legal profession are “very real and pervasive.” Norwood, Gender Bias as the Norm in the Legal Profession: It’s Still a [White] Man’s Game, 62 WASH. U. J. L. & POL’Y 27 (2020). An ABA report released in June 2020 highlighted the particular challenges that women of color face in the legal profession. Seventy percent of female minority lawyers had left the field of law or were considering leaving the legal profession because of challenges that they faced. When one considers that only, for instance, 2% of equity partners at large firms are women of color, and that this statistic has remained static for twenty years, this underscores that the legal profession should stop the back-patting. Debra Cassens Weiss, Majority of minority female lawyers consider leaving law; ABA study explains why, ABA JOURNAL (June 22, 2020, 4:19 PM), https://www.abajournal.com/news/article/most-minority-female-lawyers-consider-leaving-law-aba-study-explains-why [https://perma.cc/5SR8-34MM]. The full study discussed can be found here: Destiny Perry, Paulette Brown, and Eileen Letts, Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color, AMERICAN BAR ASSOCIATION: COMMISSION ON WOMEN IN THE PROFESSION (July 3, 2020, 12:03 PM), https://www.americanbar.org/content/dam/aba/administrative/women/lef/outleftbehind-int-f-web-061020-003.pdf [https://perma.cc/X8TF-A95T].  

132. See supra Section IV.  

133. Hopefully the data presented here will shed greater light on another facet of equality women face in the legal profession with the ultimate goal of remedying this inequality. Levinson & Young, supra note 6, at 41 (noting that one of the best ways to remedy inequality, specifically including the continued subordination of women in the legal profession, is to understand the inequality as fully as possible).  

134. See supra notes 11–12, and accompanying text.  

135. See supra notes 13, 14, 17–18 and accompanying text.
aware of points of implicit bias present throughout the articles review process and actively work to reduce these points of bias.\textsuperscript{136}

Law reviews are uniquely positioned to effect change. Although almost all statutes are created retrospectively, law reviews have the capacity to advance legal change prospectively. Yet, if the ideas advanced prospectively continue to systematically deprioritize voices that the letter of the law itself already deprioritizes, then law reviews will continue to perpetuate a system of law that is retrospective and underinclusive.

Although the legal scholarship gender gap presented here may not be surprising, it is my hope that the empirical evidence of this gap will spur law review editorial teams to thoughtful discussions and provoke them to take concrete actions to reduce points of bias throughout their articles review process because who gets to speak, and who is listened to, matters.\textsuperscript{137}

Shontee M. Pant\textsuperscript{*}


\textsuperscript{137} Leong, \textit{supra} note 1, at 370.

* J.D. Washington University in St. Louis School of Law; B.A. Principia College. Thank you to the editors at the Saint Louis University Law Journal, particularly Chioma Chukwu and Louise Taylor, for their patient and thoughtful edits. Thank you to my mother, Christina Pant, for reading and providing input on prior drafts. And a heartfelt thank you to Professor Kimberly Jade Norwood at Washington University in St. Louis School of Law, for teaching the “Implicit Bias in the Law” seminar that inspired this article. And then for rejecting the first handful of paper ideas I proposed. I would not have written this article if you had not believed that I could do better. As will shortly become relevant, I served as the Chief Articles Editor for the \textit{Washington University Law Review} for Volume 97. Views reflected in this paper are solely my own.