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Problems of Burdens and Bias: A Response to Bornstein

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Bornstein (1991) has proposed a manuscript submission process based on an adversary legal model, with the manuscript, like a criminal defendant, being presumed innocent (worthy of publication) unless and until proven guilty (not worthy of publication) by the referees, who act as "prosecutors." The author would be provided with an opportunity for rebuttal, and the associate editor would serve as the trial judge, deciding whether the piece should ultimately be published. The editor-in-chief would hear appeals from decisions made by the associate editor. While there is much to be said about this adversary approach, this paper points out certain problems in using the criminal case as a model. The most significant problem is that the burden of proof is not properly allocated. A better model would be that of the civil lawsuit, where the plaintiff (author) carries the burden of proof to establish the strength of the claim (that the manuscript is worthy of publication). This paper also suggests certain modifications to Bornstein's proposal, such as publication of the referees' (prosecutors') comments and the author's rebuttal. Although Bornstein's proposal, as modified herein, would not solve all of the problems Bornstein has identified with the current submission process, this paper concludes that the new procedure would do much to advance the science.

In his interesting paper, "Manuscript Review in Psychology: Psychometrics, Demand Characteristics, and an Alternative Model," Robert F. Bornstein has identified several problems with the academic manuscript submission process in psychology. His documentation of these problems is accomplished primarily by reviewing numerous studies on the subject. The studies indicate that reviewer and editorial bias or unreliability play a signifi-

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cant role in determining what gets published. To the extent that articles are rejected because they are not timely, interesting, significant or important, or because the research has previously been published, the system may do no more than reflect an honest appraisal of the manuscript. If these were the only problems, an alternative procedure might not be needed. However, Bornstein has identified other problems with the editorial process which indicate that meritorious manuscripts are being rejected because they reflect new, unpopular, or unorthodox approaches; are written by unknown authors or authors from less prestigious institutions; or contradict an editor's or reviewer's prior beliefs. The stifling of new ideas in any science is intolerable. If, as the evidence suggests, the current manuscript review process is doing that, it is time for a new process.

Dr. Bornstein has proposed a new manuscript submission process based on an adversary legal model. Under his proposal the manuscript, like a criminal defendant, would be presumed innocent (worthy of publication) unless and until proven guilty (not worthy of publication). Referees would no longer be expected to present an unbiased review of the piece, but rather would serve as "prosecutors," making out the case against publication.[1] Their comments, however, would be reasonably restrained by the knowledge that the author would have the opportunity for rebuttal. The associate editor would serve as the trial judge, reviewing the manuscript, the review, and the rebuttal before deciding whether the piece should ultimately be published. The editor-in-chief would sit as a Supreme Court to hear appeals from decisions made by the associate editor.

While there is much to be said in favor of Bornstein's proposal, we have agreed to assume the role he has proposed for us, that of prosecutors. In that role we have identified several details that must be addressed before the new process could effectively be put into place. We have also taken it upon ourselves to suggest a few modifications which might improve the proposal. The shortcomings with the proposed procedure are principally matters of omission. As such, while we are still "prosecuting" Bornstein, we have reduced the charges and are seeking only to further flesh out the proposal.

The most glaring problem with the identified procedure is that it improperly allocates the burden of proof. Every trial is designed to resolve some disputed issue (such as whether a manuscript merits publication). In order to reach a decision on that issue, there must be an initial presumption. In

[1] Bornstein's comment that "an attorney makes no attempt to present any evidence except that which supports his or her position" (1991, p. 454) must be addressed. Prosecutors, in particular, have obligations to disclose evidence favorable to criminal defendants (Berger v. United States, 295 U.S. 78 [1935]; Brady v. Maryland, 373 U.S. 83 [1963]). This obligation has been recognized by the United States Supreme Court as a departure from a pure adversary model (United States v. Bagley, 473 U.S. 667 [1985]). However, all attorneys are under an obligation to disclose to the court any adverse law and to refrain from making any false statements (Redlich, 1976, p. 53, 63).

criminal trials, the initial presumption is that the defendant is innocent, unless and until proven guilty (Estelle v. Williams, 425 U.S. 501, 503 [1976]; United States v. Fleischman, 339 U.S. 349, 363 [1950]).[2] In civil trials, the initial presumption is that the defendant is not liable (Cound, Friedenthal, and Miller, 1980, p. 12). In each case, the party against whom the initial assumption works is said to have the "burden of proof," which is also sometimes called the "risk of non-persuasion" (Cleary, 1984, p. 947; Comment, 1929, p. 117). In other words, that party must convince the trier of fact (the jury if there is one; the judge in other cases) that the initial presumption is wrong. If the trier of fact is left unpersuaded, that party is said to have failed to carry the burden of proof and will lose the case. This interrelationship between presumptions and the burden of proof has led at least one court to call them "first cousins" (*In re* Estate of McGowan, 197 Neb. 596, 250 N.W.2d 234, 238 [1977]).

As an example of how the burden of proof works and of its extreme importance, consider Bornstein's assessment of the study by Peters and Ceci (1982). In that study, authors' names and affiliations were changed, along with some introductory material, and manuscripts were resubmitted to journals that had published them within the previous 18–32 months. In eight of the nine cases that went undetected, the manuscript was rejected due to serious methodological flaws detected by one or more reviewers. Peters and Ceci attribute the almost unanimous rejection of these previously published articles to the lowered institutional status of the authors on the resubmitted manuscripts. However, as Bornstein correctly notes, that conclusion is less than certain. Several changes were made in the paper, and time had lapsed, possibly rendering some manuscripts out-of-date. Because the data are inconclusive, we must revert to our initial presumption. If the manuscript review process currently in place is presumed adequate until proven inadequate, the Peters and Ceci study does not prove that it is inadequate. However, if we start with the assumption that the current process is not reliable unless and until it is proven reliable, the Peters and Ceci study certainly does not establish reliability. The assignment of the burden of proof, then, is outcome determinative.

Most trials begin with the party that carries the burden of proof (the prosecution or the plaintiff, depending on whether it is a civil or criminal trial) making an opening statement to the jury. The defense then may make its opening statement, waive its opening statement, or defer its opening statement until later (Mauet, 1988, p. 51). The prosecution/plaintiff then presents

[2] All of the legal citations in this paper refer to documents which should be readily available in any law library. Case citations first identify the parties involved in the lawsuit, then provide the volume number, the reporter, the page number, and finally the date. Thus, Estelle v. Williams, 425 U.S. 501, 503 (1976) may be located at volume 425 of United States Report on page 501, and the specific quote or reference is to be found on page 503.

its entire case; all of its witnesses are called to testify before even one defense witness is permitted to testify (Cound, Friedenthal, and Miller, 1980, pp. 11–12). The defendant usually notes this procedure in the opening statement and asks the jury to keep an open mind until all of the evidence has been presented (Mauet, 1988, p. 69). After the prosecution/plaintiff has introduced all of its evidence, it will "rest" (Cound, Friedenthal, and Miller, 1980, p. 12). At this point in the trial, the defense will often make a motion for a directed verdict, arguing that the prosecution has failed to carry its burden of proof (ibid.). If the motion is successful, the defense "wins" the case without ever having had to present any evidence (Federal Rule of Civil Procedure 50[a]). If the motion is denied, the defense may call witnesses and present its case, or it may simply rest and hope that the prosecutor/plaintiff has not convinced the jury of guilt or liability (Cound, Friedenthal, and Miller, 1980, p. 12). Because a criminal defendant is presumed innocent, the prosecution carries the burden of proof, and the jury must be convinced of guilt beyond a reasonable doubt, it is not a simple matter to convict a criminal defendant, even when no defense is presented.

The party with the disadvantage of carrying the burden of proof is given the procedural advantage of presenting its evidence first. Also, at the end of trial when each side presents a closing argument to the jury, the party with the burden of proof goes first and has the opportunity to make a rebuttal after the defense argument. The right to go first and to have time afforded for rebuttal are almost always given to the party who carries the burden of proof (Cleary, 1984, pp. 947–948; Mauet, 1988, p. 278; Comment, 1929, pp. 117–118). On appeals, the party who lost below (the appellant) must persuade the appellate court to overturn the decision. Therefore the appellant writes the first brief and has the opportunity to write a rebuttal brief, while the winner below (the appellee) writes only one brief, the second one (Federal Rule of Appellate Procedure 28). At oral argument before the court, the appellant goes first and has a rebuttal, while the appellee argues only once (Federal Rule of Appellate Procedure 34[c]).

Dr. Bornstein, being an author, gave to the author all of the procedural advantages (going first and having the opportunity to rebut), but also cloaked the manuscript with the presumption of publishability. Thus, the referee/prosecutor carries the burden of proof but does not receive any procedural advantages. That is clearly unfair to the referee. The author presumably has prepared the article over a number of months, has done all the background reading, and has thought about the important points for a long time. The referee has a relatively shorter period (Bornstein has suggested the same time period that is now used for manuscript reviews) in which to read the author's piece, do background reading, check the sources identified by the author, and write the review. The author then has an opportunity to rebut.

When it comes time for the associate editor to make the final determination, Bornstein would have the referee's review "held to the same high scientific standards as the manuscripts themselves" (Bornstein, 1991, p. 458). With such procedural advantages, and an initial presumption of publishability, most articles should be found "publishable." Dr. Bornstein has given to the "prosecutor" an almost impossible case to win.

The procedures used in the trial of a civil lawsuit might be a more appropriate model for manuscript review. This process would be very similar to Bornstein's proposal, but the manuscript would not be presumed publishable, but rather would be presumed not publishable. The author would have to carry the burden of convincing the associate editor that the article was publishable, but the author would have the procedural advantages of going first and of having the right to rebut. The referee would act as defense counsel, arguing against the author's case, but he or she would not have the burden of swaying the associate editor's opinion away from the initial presumption. The advantage of this model is that there would be a proper correlation of the burden of proof and the procedural advantages of going first and last.[3] As a result, the "trial" would be more fair.

If the civil lawsuit model is adopted, the next question involves not who carries the burden of proof, but rather the nature of the burden.[4] In criminal cases the burden is "beyond a reasonable doubt" (Davis v. United States, 160 U.S. 469, 487 [1895]; *In re* Winship, 397 U.S. 358, 364 [1970]). Even if the jury thinks it more likely than not that the criminal defendant is guilty, it must acquit unless guilt is established beyond a reasonable doubt (Younger and Goldsmith, 1984, p. 812). Civil suits usually involve a standard less demanding than those in criminal suits. The plaintiff wins a civil trial if the jury is convinced that the defendant is liable by "the preponderance of the evidence," "by the greater weight of the evidence," or by the "convincing force of the evidence" (ibid.). Thus, a jury might hold for the plaintiff even though it was not convinced "beyond a reasonable doubt" that the plaintiff should win. A middle ground standard of proof is also used in some cases. In those cases it is said that the plaintiff must establish his or her point "by clear and convincing evidence" or by evidence which is "clear, precise and indubitable" (ibid., p. 813). Although there is no obvious answer as to which standard should be adopted in the case of manuscript review, a standard must be identified so that the author and the referee know what is expected and so that the associate editor will have a basis on which to decide. Since Born-

[3] The other alternative which would correlate the procedural advantages with the burden of proof would require the referee to go first. Obviously, that could not work.

[4] Dr. Bornstein (1991, p. 447) has noted that the absence of a "precise operational definition of what characteristics and qualities must be present for a manuscript to be acceptable for publication" is one of the obstacles to valid and reliable manuscript reviews under the current process.

how much space can be allocated to the criticisms? If an average ten page paper prompts a four page reply and a two page rebuttal, then each article will effectively increase in length by 60 percent. Even if, as Bornstein suggests, journals were to begin charging authors to publish their work, this greatly increased length would either force journals to expand significantly or cause them to accept fewer pieces for publication. Nonetheless, this cost might be justified if the honest and open debate leads to more serious contemplation and exposure of unpopular ideas. Not only would those ideas be suggested in the primary articles, but also in the published reviews of more traditional manuscripts.

It is interesting to note that legal scholars have not adopted the adversary system as their model for scholarship. Under the law review system, potential authors make multiple submissions to student edited journals that are usually funded by law schools. The student–editors then choose those articles they want to publish. The system has long been criticized because it does not involve peer-review (Austin, 1990; Byse, 1988, p. 19). It has been said that legal scholars are "peculiarly able to say nothing with an air of great importance" (Rodell, 1936–37, p. 38). However, some authors have noted that legal scholarship tends to be of a different type (prescriptive rather than descriptive or interpretive) [Rubin, 1988, p. 1848] and written for a different audience (more practical than theoretical) [Brown, 1988, p. 52] than other scholarship, which may justify the different procedures (Kissam, 1988; Rubin, 1988, p. 1850). Since most articles are rejected by at least one law review (and usually many more), it is not at all unusual to be told that the rejection is based not on quality, but on considerations of space allocation. It is a sad fact of life for the disappointed author, but sometimes there is no room at the journal. For a profession, it is far better to have a glut of quality papers than a paucity. Perhaps journals and authors should recognize space allocation as a legitimate basis for making publication decisions. That is certainly preferable to the practice of rejecting articles on the basis of non-existent problems or illegitimate rationalizations.

Conclusion

Dr. Bornstein's basic premise is worthy of serious consideration, but it needs some refinement if it is accurately to reflect the adversary legal system. Adopting a civil lawsuit model instead of a criminal one helps, but problems with space allocation and appropriate standards of proof still exist. The most important feature of Bornstein's proposal may be the idea of holding referees accountable for their criticisms. If new ideas are stymied by referees who are not held accountable for their opinions, science cannot advance. Dr. Bornstein would require referees to justify their actions in a piece which is subject

to rebuttal. If nothing else, that alone should provide some comfort to would-be authors who have felt the slings and arrows of criticisms to which no reply was allowed. Publication of the referee's comments along with the article would be a welcome addition, but it would add to space allocation problems. Nonetheless, the benefits of having an honest and open debate would outweigh any potential disadvantages.

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