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## LAW REVIEWS, CITATION COUNTS, and TWITTER (Oh my!): Behind the Curtains of the Law Professor's Search for Meaning

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# LAW REVIEWS, CITATION COUNTS, and TWITTER (Oh my!): Behind the Curtains of the Law Professor’s Search for Meaning

*Lawprofblawg\* and Darren Bush\*\**

*In this article we discuss “the game.” “The game” is the quest for measuring scholarship success using metrics such as law review ranking, citation counts, downloads, and other indicia of scholarship “quality.” We argue that this game is rigged, inherently biased against authors from lower ranked schools, women, minorities, and faculty who teach legal writing, clinical, and library courses. As such, playing “the game” in a Sisyphean effort to achieve external validation is a losing one for all but a few. Instead, we argue that faculty members should reject this entrenched and virulent hierarchy, and focus on the primary purposes of writing, which are to foster innovation in a fashion that is both pleasing to the author and that improves society. We discuss this rigged game, and seek to reframe our academic life to focus on enhancing innovation and discourse. We would start by skipping abstract writing.*

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\* Social Media Personality, @lawprofblawg Twitter user, Above the Law blogger, and a professor at a top-100 law school. This author would like to thank Reed Fryar at the University of Houston Law Center for doing the research work that my RAs refused to do. This article was greatly improved thanks to the comments of Caprice Roberts, Spencer Waller, Katherine Macfarlane, and everyone who participated in the Future of Legal Scholarship symposium. I also thank Olivia Sullivan and Grace Urban at the *Loyola University Chicago Law Journal* for hosting, and all of the work that entails. I am under a nondisclosure agreement related to my opinion of Professor Bush’s fashion sense, so do not bother asking. This article was originally submitted with two spaces after each period.

\*\* Leonard B. Rosenberg Professor of Law, University of Houston Law Center. I thank my trusty research assistant Reed Fryar, the ever so awesome Daniel G. Donahue, Foreign and International Law Librarian at the O’Quinn Law Library, everyone LPB thanks, as well as comments from my fellow panelists and presenters at the symposium. Special thanks to Alexandra Harrington, who did amazing work and mediated coauthor squabbles. I am under a nondisclosure agreement related to the identity of Lawprofblawg, so do not bother asking.

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#### INTRODUCTION

Now<sup>1</sup> more than ever, those who go home at night and curl up with good law review articles are in a blissful state. Law professors<sup>2</sup> have published more law review articles<sup>3</sup> in more law reviews<sup>4</sup> than ever

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1. By “now” we mean at the time of publication of this article. We understand that is not the same as the time of the writing of this article, which, depending on the editors, could be a month ago or earlier. We also do not intend “now” to mean at the time you chose to read this article, which you accidentally happened upon in your search for something relevant to your field. See STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME: FROM THE BIG BANG TO BLACK HOLES 143 (1988) (discussing concept of relative time).

2. With apologies to those of you who do the real work of legal education, this article’s primary audience is tenure and tenure-track law professors who have the power to change the world of legal academia, but will not.

3. There are even articles about writing articles. See, e.g., C. Steven Bradford, *As I Lay Writing: How to Write Law Review Articles for Fun and Profit: A Law-and-Economics, Critical, Hermeneutical, Policy Approach and Lots of Other Stuff That Thousands of Readers Will Find Really Interesting and Therefore You Ought to Publish in Your Prestigious, Top-Ten, Totally Excellent Law Review*, 44 J. LEGAL EDUC. 13, 30 (1994); Richard Delgado, *How to Write a Law Review Article*, 20 U.S.F. L. REV. 445 (1986); Leonard L. Riskin, *On Writing a Law Review Article*, 49 J. LEGAL EDUC. 150 (1999).

4. Scholastica boasts of 350 law reviews, while ExpressO says that it has over 550. However, we cannot be certain of the number of journals or even the number of articles in those journals. Calculating this number goes far beyond Bistromathics. See *Bistromathics*, FANDOM, <http://hitchhikers.wikia.com/wiki/Bistromathics> (last visited Jan. 4, 2019) (“Just as Einstein observed that time was not an absolute, but depended on the observer’s movement through space, so it was realized that numbers are not absolute, but depend on the observer’s movement in

before,<sup>5</sup> and at an increasing rate.<sup>6</sup> Even before the articles are published, professors “publish” them on Social Science Research Network (SSRN).<sup>7</sup>

The scholarly craft, creating a work of scholarship, has extended to the additional component of getting it recognized.<sup>8</sup> In the olden days, professors gleefully<sup>9</sup> grabbed their reprints and forced many secretaries to stuff them into envelopes, assuring gainful employment for mail carriers as they cast those reprints around the globe.<sup>10</sup> In a few years, the seeds<sup>11</sup> planted from such careful activity meant citations and fame, albeit no fortune.

Now, professors engage in a variety of different measures to assure their message is broadcast widely. Social media, op-eds, and other means assure that stalwart law professors get their messages to the greater audience of other law professors, who, in turn, are doing the exact same

restaurants.”).

5. Academics constantly debate the quality of the article versus the quality of the publications, assuming there is such a trade-off. For an interesting discussion of this, see Franita Tolson, *How Many Law Review Articles Do You Write a Year?*, FACULTY LOUNGE (Apr. 1, 2012, 10:56 AM), <http://www.thefacultyounge.org/2012/04/how-many-law-review-articles-do-you-write-a-year.html>, and associated comments.

6. Our research librarians have assured us it would take an army of librarians to give a proper accounting of how many law review articles are published each year. Therefore, we rely on Carl Sagan and suggest it is in the “billions.”

7. Many, if not most, law professors “publish” their articles first on SSRN. The point is to ensure that people who are searching that network of publications find the article. Citations are then to the SSRN link page. However, most articles are published twice, as they then go on to be published in a student-run law review. In May 2016, Elsevier bought SSRN, raising concerns that SSRN would be behind a large paywall. More than 68,000 articles were uploaded to SSRN in the past twelve months. See David Nagel, *Elsevier Stirs Up Controversy with SSRN Acquisition*, CAMPUS TECH. (May 18, 2016), <https://campustechnology.com/articles/2016/05/18/elsevier-buys-up-ssrn-stirs-up-controversy.aspx> (quoting Orin Kerr: “With Elsevier having bought SSRN, we’ll see how many restrictions Elsevier will impose before the professors bail.”).

8. See, e.g., Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540 (1985); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996); Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409 (2000); Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483 (2012). Some journals have been curious about which of their publications are the most cited. See, e.g., Fred R. Shapiro, *The Most-Cited Articles from the Minnesota Law Review*, 100 MINN. L. REV. 1735 (2016). Even Yale has had this insecurity. See Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1461–65 (1991) (listing the most-cited *Yale Law Journal* articles, in case you thought the title was misleading).

9. Glee is defined by Merriam-Webster as “exultant high-spirited joy.” We define this word because many law professors may be unfamiliar with the concept. *Glee*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/glee> (last visited Jan. 4, 2019).

10. In exchange, we all hoped to receive letters or emails back saying, “I read your article with interest,” which was code for “your article landed in the recycling bin.” See also James Lindgren, *Fifty Ways to Promote Scholarship*, 49 J. LEGAL EDUC. 126, 131 (1999) (“It’s easier to read an article that arrives in the mail than to obtain it from the advance sheets.”).

11. The authors note that seeds could create useful vegetation or weeds.

thing.

Administrators, legislatures, and tenure committees come into the mix to measure the size<sup>12</sup> of the academic's scholarship. Measurement, as with all Freudian acts,<sup>13</sup> requires careful thought. Citation counts,<sup>14</sup> downloads, indices, and the like<sup>15</sup> have been used to determine whose scholarship is "best."<sup>16</sup> Or, one could make a nice living creating scholarship measurements to demonstrate the inadequacy of previous scholarship measurements. Alternatively, one could measure the value of an article by the company it keeps; specifically, the ranking of the journal in which the article is placed. Regardless, the search to demonstrate that one's scholarship matters is very real. And that recognition must be instantaneous, as if millennials (who get more blame for things than they should) governed the whole process.

This whole system of publication has made the world far more complicated. There is a great mass of electronic trees being killed, and only some of those articles get read. Even fewer make an impact. What then, is the purpose of what law professors spend the bulk of their time doing?

This article explores the law professor's search for meaning.<sup>17</sup> Section

12. Size matters not. Look at me. Judge me by my size, do you? Hmm? Hmm. And well you should not. For my ally is the Force, and a powerful ally it is. Life creates it, makes it grow. Its energy surrounds us and binds us. Luminous beings are we, not this crude matter. You must feel the Force around you; here, between you, me, the tree, the rock, everywhere, yes. Even between the land and the ship.

STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK (Lucasfilm Ltd. 1980) (quoting Yoda).

13. SIGMUND FREUD, *On Transformations of Instinct as Exemplified in Anal Erotism*, in 17 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 125, 129 (James Strachey et al. eds. & trans., 1955) (discussing penis envy). Cf. KAREN HORNEY, *The Flight from Womanhood*, in FEMININE PSYCHOLOGY 54, 60–61 (Harold Kelman ed., 1967) (discussing "womb envy").

14. See Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 IND. L.J. 83, 92 (2006) ("Citations potentially allow a finer assessment of quality than a yes/no measure of placement, but they raise issues of their own.").

15. See Orin Kerr, *Law Faculty Productivity Over Time*, WASH. POST (Feb. 18, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/18/law-faculty-productivity-over-time/?utm\\_term=.1408bb2bcf8c](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/18/law-faculty-productivity-over-time/?utm_term=.1408bb2bcf8c). Brian Leiter puts such attempts to measure faculty productivity, scholarship impact, etc., under the heading "Faculty Quality." See Brian Leiter, *Faculty Quality*, BRIAN LEITER'S L. SCH. RANKINGS, <http://www.leiterrankings.com/faculty/> (last visited Jan. 4, 2019).

16. See Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 469 (2000) (discussing how the correlation between citations and a publication's quality can be skewed); see also Gregory Sisk et al., *Scholarly Impact of Law School Faculties in 2012: Applying Leiter Scores to Rank the Top Third*, 9 U. ST. THOMAS L.J. 838, 838 (2012) ("[T]he 'Scholarly Impact Score' for a law faculty is calculated from the mean and the median of total law journal citations to the work of tenured members of that law faculty over the past five years.").

17. While we take our title from Victor Frankl's great book, *Man's Search for Meaning*, we mean no disrespect to Holocaust survivors. Both of us have been greatly influenced in our lives as

I discusses the reasons law professors might originally write. Section II explores how the publication process has been alienated from the original reasons law professors write, and why none of the measures of scholarly success or impact are meaningful as anything other than a self-destructive quest for external validation. Section III offers some glimmer of hope of rehabilitation for a defective system. Section IV offers suggestions for remedying the problems discussed in earlier sections of the article. The article, in a stunning rebellion against all the law review articles that have come before it, then, in an effort to be merciful to any readers who have gotten that far, concludes.

### I. THE ART OF UNHAPPINESS

To explore why law professors write, we turn to Professor Stephen Bainbridge. Professor Bainbridge wrote:

You want to know why I write law review articles? Because it's fun. I enjoy the process of finding a puzzle, doing the research, and then I really enjoy writing it up. I love the whole process of writing. Thinking about how best to express an idea. Trying to come up with something semi-clever or funny or snarky to work into the text.<sup>18</sup>

The notion that the fundamental purpose of writing is to engage in the creative process is shared by a variety of writers. For example, Professor Bainbridge quotes George Orwell's essay, *Why I Write*.<sup>19</sup> In it, Orwell points to four categories of motivation for writing: sheer egoism, aesthetic enthusiasm, historical impulse, and political purpose.<sup>20</sup> By sheer egoism Orwell suggests writers seek to "be remembered after death, to get your own back on the grown-ups who snubbed you in childhood, etc."<sup>21</sup> We call this motivation for writing "external validation," as it seems to be about assuring that others either love, respect, or fear you. As a motive for writing, it is perhaps the worst one.

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students of history and oppression. Frankl's keen insight as it applies to academia is this:

We needed to stop asking about the meaning of life, and instead to think of ourselves as those who were being questioned by life—daily and hourly. Our answer must consist, not in talk and meditation, but in right action and in right conduct. Life ultimately means taking the responsibility to find the right answer to its problems and to fulfill the tasks which it constantly sets for each individual.

VICTOR E. FRANKL, *MAN'S SEARCH FOR MEANING* 77 (Ilse Lasch trans., rev. ed. 1962).

18. Stephen Bainbridge, "*Why Do Law Professors Write Law Review Articles? Is the Wrong Question*," PROFESSORBAINBRIDGE.COM (May 11, 2017, 2:29 PM), <https://www.professorbainbridge.com/professorbainbridgecom/2017/05/why-do-law-professors-write-law-review-articles-is-the-wrong-question.html>.

19. *Id.*; George Orwell, *Why I Write* (1946), available at [http://www.orwell.ru/library/essays/wiw/english/e\\_wiw](http://www.orwell.ru/library/essays/wiw/english/e_wiw).

20. Bainbridge, *supra* note 18; Orwell, *supra* note 19.

21. Bainbridge, *supra* note 18; Orwell, *supra* note 19.

Orwell's second category, aesthetic enthusiasm, shall be dubbed "creation" or "act of creation" throughout the remainder of this article. The act of creation inherently confers pleasure. "Perception of beauty in the external world, or, on the other hand, in words and their right arrangement."<sup>22</sup> In other words, a writer receives joy by the external creation of an internal idea.

The last two categories are external to the author to some degree. Historical impulse reflects a desire to preserve facts or data for posterity. Political purpose means an aspiration to have one's writing improve society in some way.

Parallels to Orwell's notions of creation are found in Marx's discussion of labor:

Let us suppose that we had carried out production as human beings. Each of us would have *in two ways affirmed* himself and the other person. 1) In my *production* I would have objectified my *individuality, its specific character*, and therefore enjoyed not only an individual *manifestation of my life* during the activity, but also when looking at the object I would have the individual pleasure of knowing my personality to be *objective, visible to the senses* and hence a power *beyond all doubt*. 2) In your enjoyment or use of my product I would have the *direct* enjoyment both of being conscious of having satisfied a *human* need by my work, that is, of having objectified *man's* essential nature, and of having thus created an object corresponding to the need of another *man's* essential nature. . . . Our products would be so many mirrors in which we saw reflected our essential nature.<sup>23</sup>

In other words, the act of creation benefits the individual creating the object by allowing for the physical manifestation of their expression into an object. The creator's satisfaction comes, in part, as another human enjoys the object of creation. The sociality of the act of creation is essential for it to be fulfilling for the creator. Marx's view of capitalism was that it distorted the sociality of the act of production.<sup>24</sup> The result of which is that the producer/laborer, or, in this case, author, becomes a commodity.<sup>25</sup>

22. Bainbridge, *supra* note 18; Orwell, *supra* note 19.

23. Karl Marx, Comments on James Mill (1844), available at <https://www.marxists.org/archive/marx/works/1844/james-mill/>.

24. See KARL MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844 (Martin Milligan trans., 1959) (1932), available at <http://www.marxists.org/archive/marx/works/download/pdf/Economic-Philosophic-Manuscripts-1844.pdf> ("[T]he worker is related to the *product of his labor* as to an alien object."); see also JON ELSTER, MAKING SENSE OF MARX 74–78 (1985) (explaining Marx's theory on the alienation generated by capitalism).

25. See Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 968 (1985) (discussing Marx's definition of "the fetishism of commodities").

Others have commented on the twin goals of creation being in the pleasure of creation and the service to humankind. For example, the Dalai Lama has suggested that “artists . . . have the responsibility to . . . help to serve humanity,”<sup>26</sup> but “sometimes . . . pay too much attention to material possessions.”<sup>27</sup> Artists, for the Dalai Lama, have an ultimate goal to be compassionate towards others. The artistic expression of compassion creates ultimate happiness in the artist. Ralph Waldo Emerson echoed this notion: “[T]he purpose of life is . . . to be useful, to be honorable, to be compassionate, to have it make some difference that you have lived and lived well.”<sup>28</sup>

This is not what we typically hear from the legal academy. What we typically hear, in our thousands of hours of listening, is not so much about the joy of writing or service to society. Usually, the conversation is about whether or not the writer is well published, well established, or otherwise considered awesome by the writer’s peers. In short, the typical quest is for external validation by a number of sources. Is it cited? Is it well placed? Am I famous?<sup>29</sup>

In other words, the creative process and its laudable goals have been displaced by a quest for external validation. The origin of such external validation is self-doubt, impostor syndrome, and fear.<sup>30</sup>

Many also have commented about the thwarting of the process of creation. The basic gist is that the creative process is alienating to the creator for multiple reasons. For Marx, capitalists exploited the act of creation, stealing the value of the creation (the surplus value), and making the act of production alienating. For others, the plague of creation reads a bit like a line from Yoda.<sup>31</sup>

26. *The Dalai Lama’s Message to Artists—Why Your Creativity Will Build a Better World*, FINERMINDS, <http://www.finer minds.com/consciousness-awareness/dalai-lama-creativity/> (last visited Jan. 4, 2019).

27. *Id.*

28. Thomas H. Bienert, Jr., *West Honoree Dean Zipser Exemplifies Serving Others and Living Well*, ORANGE COUNTY LAW., Feb. 2017, at 23, 23 (quoting Ralph Waldo Emerson).

29. For an example of such lists of popularity, see *List of Famous Law Professors*, RANKER, <https://www.ranker.com/list/list-of-famous-law-professors/reference> (last visited Jan. 4, 2019). For a parallel concept, find your eighth-grade yearbook. *Cf.* THE LORD OF THE RINGS: THE FELLOWSHIP OF THE RING (New Line Cinema et al., 2001) (“Keep it secret. Keep it safe.” (quoting Gandalf)).

30. See Dan Schawbel, *Brene Brown: How Vulnerability Can Make Our Lives Better*, FORBES (Apr. 21, 2013, 11:30 AM), <https://www.forbes.com/sites/danschawbel/2013/04/21/brene-brown-how-vulnerability-can-make-our-lives-better/#12421d2136c7> (“The fear of failing, making mistakes, not meeting people’s expectations, and being criticized keeps us outside of the arena where healthy competition and striving unfolds.”).

31. “Fear is the path to the dark side. Fear leads to anger. Anger leads to hate. Hate leads to suffering.” STAR WARS: EPISODE I—THE PHANTOM MENACE (Lucasfilm Ltd. 1999) (quoting

Regardless, there is much focus on how to measure what we do as faculty members, and its relative importance to the world. The next section discusses the troubles inherent in such a race for recognition and why we have chosen to abandon that race.

## II. THE DESTRUCTION OF CREATIVITY IN EXCHANGE FOR EXTERNAL VALIDATION

We next turn to the mechanisms that hinder innovation and creativity. We feel that much exculpatory language must be inserted here for the sake of minimizing our hate mail on the off chance you read this. We are not saying that your work is unimportant.<sup>32</sup> Quite the contrary, we would love to hear more about it, and less about where you placed it and who cited it. We are not saying that you do not deserve all the accolades. We are suggesting that the system is problematic, and that leads to some people not receiving the same levels of validation based upon things beyond their control.<sup>33</sup> In other words, we do not hate the player, we hate the game.<sup>34</sup>

### A. Law Review Rankings

*“An author values a compliment even when it comes from a source of doubtful competency.”*

—Mark Twain<sup>35</sup>

Perhaps the most difficult way to achieve in the quest for external validation is to get an article published in a top-ten law review. After all, there are only ten flagship journals, and they receive what we estimate to be billions of submissions from law professors around the globe.<sup>36</sup> An

Yoda).

32. We have both read your work and found it to be quite compelling, thoughtful, well-researched, and contributing to your field.

33. This is the definition of “privilege.” For a poignant example of how that plays out, see April Watters, *If Someone Doesn’t Understand Privilege Show Them This*, YOUTUBE (Oct. 17, 2017), <https://www.youtube.com/watch?v=gqPgXhslGWY> (illustrating the realities of privilege through an exercise with a group of students).

34. See *Don’t Hate the Player Hate the Game*, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=Don%27%20hate%20the%20player%20hate%20the%20game> (last visited Jan. 4, 2019) (defining “don’t hate the player hate the game” as “[a]nother way of saying don’t blame me; this is how the system works”).

35. MARK TWAIN, *AUTOBIOGRAPHY* (1906), *quoted in* THE WIT AND WISDOM OF MARK TWAIN 91 (Bob Blaisdell ed., 2013).

36. See Barry Friedman, *Fixing Law Reviews*, 67 DUKE L.J. 1297, 1321–22 (2018) (“*The Flood of Publication*. By common consensus, the volume of scholarship is both huge and too much. In the Wise survey, even without being asked ‘many respondents indicated that there are too many law reviews.’ Nobody can say how many; in 1998, estimates varied from four hundred to eight hundred, and more are coming online all the time. In the mid-1980s the estimates were that law

extremely competitive vetting process takes place, with the journals carefully reading many submissions in a matter of seconds before rejecting them.<sup>37</sup>

If you look at all the articles published in the top ten law reviews, it is very difficult to find an author who did not graduate from, or who does not work in, a top-ten law school.<sup>38</sup> Economists might call this a serious endogeneity<sup>39</sup> problem.<sup>40</sup> Another way of saying this: To the extent we cannot seem to find articles by practitioners or people who graduated outside of the top ten law schools published in top-ten law reviews, we might conclude that practitioners are unable to write law review articles well, and neither can people who did not graduate from the top ten law schools. But wait! Some of those people who have published in top-ten law reviews and who work at top-ten law schools also have practice experience. Perhaps they were the only ones sprinkled with magic fairy dust?<sup>41</sup>

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reviews filled some 160,000 pages a year; in 1990, the guesstimate was that some five thousand articles were published annually.” (footnotes omitted)). The authors attest that we have read every word. We also argue that the last sentence does not mean what you think it means.

37. We are sure we are not alone in having an article rejected by a law review in a matter of mere seconds, with a rejection letter that read “after careful consideration.” As Professor Friedman states:

By common consensus, the process for submitting articles to be published and selecting them for publication is seriously broken. It is too hurried and too frantic to allow deliberate choices to be made. The expedite system has journals and authors crawling over one another to make decisions, at the expense of deliberation and thoughtful consideration. No one is happy.

*Id.* at 1349.

38. This mirrors an issue that arises in undergraduate admissions. “There’s a disease in that so many people are focused on 10 to 20 highly selective colleges that aren’t any better than 100 other colleges . . . .” Alia Wong, *Elite-College Admissions Are Broken*, ATLANTIC (Oct. 14, 2018) (quoting Richard Weissbourd), <https://www.theatlantic.com/education/archive/2018/10/elite-college-admissions-broken/572962/>.

39. For an explanation of endogeneity, please go ask your nearest econometrician. Otherwise, see *Endogeneity (econometrics)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Endogeneity\\_\(econometrics\)](https://en.wikipedia.org/wiki/Endogeneity_(econometrics)) (last modified Dec. 9, 2018). One famous quandary, not entirely unrelated to law review article selection, is the “Matthew Effect.” See *Mathew Effect*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Matthew\\_effect](https://en.wikipedia.org/wiki/Matthew_effect) (last modified Nov. 21, 2018).

40. See, e.g., Olufunmilayo B. Arewa, Andrew P. Morriss & William D. Henderson, *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941, 1010 (2014) (arguing placement is a limited signal of quality because of “insider bias,” lack of blind submission, and variation by subject matter); Gregory Scott Crespi, *Judicial and Law Review Citation Frequencies for Articles Published in Different “Tiers” of Law Journals: An Empirical Analysis*, 44 SANTA CLARA L. REV. 897, 901–02 (2004) (finding that while higher-ranked journals are cited more, there is difficulty finding that it was due to quality of the article).

41. Satire, according to the Devil’s Dictionary, is an “obsolete kind of literary composition in which the vices and follies of the author’s enemies were expounded with imperfect tenderness.” AMBROSE BIERCE, THE DEVIL’S DICTIONARY (1906), available at <http://www.gutenberg.org/files/972/972-h/972-h.htm> (last modified Aug. 22, 2015). Sadly, that

More specifically, our research suggests that the vast majority of authors in the top ten law reviews for 2017 graduated from top-ten law schools. Of those, Yale accounts for 27% and Harvard accounts for 22%. No other school comes close. NYU accounts for the next highest level, at 6.7%, Stanford at 6.3%, and University of Chicago at 5.46%. Thus, the graduates of five schools account for nearly 70% of the publications in the top ten law reviews in 2017.<sup>42</sup>

Ordinarily, we might seek to determine whether or not there are racial or gender impacts on institutionally determined outcomes. Race, however, is a tricky concept to identify in practice, so we leave to wiser people whether there are racial impacts to such institutional determinations of article quality.<sup>43</sup>

However, we note that recent articles have suggested that there are entry barriers for people of color in higher-ranked law schools. As one article notes, “On average, minority students end up in lower-ranked law schools, which they pay more to attend than white students, resulting in higher debt burdens. Minority law graduates have lower bar exam passage rates, employment rates, and income levels.”<sup>44</sup> The result would yield a disproportionate share of law professors being white, as the bulk

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particular dictionary lacks an entry for sarcasm. However, see Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111, 111 (2012), available at [http://www.greenbag.org/v16n1/v16n1\\_ex\\_post\\_kerr.pdf](http://www.greenbag.org/v16n1/v16n1_ex_post_kerr.pdf).

42. Data on file with the authors. We are not suggesting that this is a sufficient percentage to be monopoly power over law review publications, although we might if one of us understood antitrust law. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (“[I]t is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.”).

43. For an excellent discussion of the effects of race on citation counts, see Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561–66 (1984). See also Victor Ray, *The Racial Politics of Citation*, INSIDE HIGHER ED (Apr. 27, 2018), <https://www.insidehighered.com/advice/2018/04/27/racial-exclusions-scholarly-citations-opinion> (arguing that the political nature of citation in the legal and nonlegal professions results in the lack of minority authored works because “[i]nequality is reproduced (and whiteness is institutionalized) by citation patterns as earlier periods of overt exclusion are legitimated by an almost ritualistic citation of certain thinkers”). Racism in academia can be both insidious and direct. See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1752–53 (1989) (“[A]lthough the overt forms of racial domination described thus far were enormously destructive, covert color bars have been, in a certain sense, even more insidious. After all, judgments based on expressly racist criteria make no pretense about evaluating the merit of the individual’s work. Far more cruel are racially prejudiced judgments that are rationalized in terms of meritocratic standards.”); see also Adrienne Katherine Wing, *Lessons From a Portrait*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 356 (Gabriella Gutiérrez y Muhs et al. eds., 2012) (illustrating the obstacles faced by a black law professor who is tasked with writing journal articles in order to earn tenure and seven lessons that she learned from the experience).

44. Erin L. Thompson, *How Law Schools Are Failing Minority Students*, HUFFPOST (June 6, 2018, 3:47 PM), [https://www.huffingtonpost.com/entry/minority-lawyers-hanging-from-their-own-bootstraps-how-law-schools-fail-those-who-seek-justice\\_us\\_5b17f63ce4b00229eba3c6f3](https://www.huffingtonpost.com/entry/minority-lawyers-hanging-from-their-own-bootstraps-how-law-schools-fail-those-who-seek-justice_us_5b17f63ce4b00229eba3c6f3).

of law professors graduate from one of two schools in the higher *U.S. News & World Report* ranks. It would also suggest that one would expect that placement in higher-ranked law reviews, if based upon the author's alma mater, would yield disproportionately fewer minorities published in higher-ranked law reviews.

Gender discrimination implicit in institutional selectivity bias is easier to determine because law professor bio pages self-identify a gender. A random sample of the top ten law reviews suggests that the number of women authors in 2017 is around 20%. If we are generous and count repeat players, it might even be up to 33% for the population. In *The Yale Law Journal*, for 2017 nine out of the twelve published authors are men.

Apart from the questions surrounding the potential for displacement of women and minorities in a worldview in which rankings matter, there is another troubling aspect to this notion of external validation. While the very top rankings are seemingly permanently fixed (they do not change over time), the remainder can fluctuate. As an example, *George Mason Law Review* was a second-tier law review when one of us published in it.<sup>45</sup> It now rests at number forty-one on the *U.S. News & World Report* rankings. Thus, the article's quality has "appreciated" for no reason inherent in the article itself. In contrast, one of us has published in a law review that has decreased in stature, thus assuring that the article appears as lower in quality to external viewers who only have a short-term memory of law review rankings.

Worse, the initial signal for quality, apart from the alma mater of the author, appears to be whether or not a lower-tier law review has made the author an offer. The "expediting" process suggests that one proxy for article quality is whether another, lower-ranked but respected law review believes the article is publication worthy.<sup>46</sup> Often times, authors leverage

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45. Mark A. Glick et al., *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357 (2002) (co-author Bush is a third author on this piece). Professor Bush, being author "et al.," is one of the most published people in all the land. See also Hadas Shema, *On Self-Citation*, SCI. AM.: BLOGS (July 24, 2012), <https://blogs.scientificamerican.com/information-culture/on-self-citation/> ("Self-citing is often frowned upon, being considered (and sometimes is) vanity, egotism or an attempt in self-advertising.").

46. See Lawprofblawg, *Expedite: A Short Play About 8th Grade and Law Reviews*, ABOVE THE LAW (Feb. 6, 2018, 4:01 PM), <https://abovethelaw.com/2018/02/expedite-a-short-play-about-8th-grade-and-law-reviews/> (discussing how professors are more likely to be questioned about their written work if it is not noticed by top-tier law students); see also Friedman, *supra* note 36, at 1302 ("Today we all play the game of Offer-and-Expedite, in which authors who have received one offer to publish a piece engage in a mad scramble to obtain a better offer from a review perceived to be ranked more highly. Offer-and-Expedite is an ugly game, in which faculty abuse student editors in breathless haste to climb the law review ladder, while student participants stomp on the heads of journals 'below' them to snap up the hot manuscript of the moment. This process makes serious

the articles from lower ranks to the very top in an excruciating battle to climb the *U.S. News & World Report* ladder. Some schools offer bounties for such placements.<sup>47</sup>

The ridiculousness of the signals suggests that if this is the ultimate end game for many of us, our self-esteem and value as an author rides on the whims of law students on law reviews at higher-ranked law schools. Those students to some degree free ride on the work of law students at lower-ranked schools,<sup>48</sup> as well as use proxies for quality that may be totally unrelated to the article itself. And, most importantly, because of institutional discrimination, many law professors cannot avail themselves of this method of achieving “self-esteem.”

The market-clearing notion of article placement is an imperfect, dysfunctional market based upon improper signaling. As an example, one speaker at this symposium noted that his placement in *The Yale Law Journal* was not preceded by offers from lower ranked journals.<sup>49</sup> In a perfect market, assuming that article placement is a signal for quality, every lower-ranked journal should have sent an offer. As a contrasting example, suppose an article is accepted in a lower-ranked journal but leverages up to a higher-ranked journal, as commonly happens. Within clusters of journals ranked approximately the same, there is rarely a bid war or any competition between those journals (examples would be publication faster, more reprints, etc.). Quite simply, there is nothing about the law review world that resembles a competitive or even well-functioning market.

In contrast, there are plenty of markets where nonhomogeneous goods are called upon in order of merit. For example, electricity markets are known for calling the lowest cost generators first, followed by higher-cost units. These markets also account for qualitative variables, such as location of the resource in providing congestion relief, and the like. Such markets tend to run efficiently absent some wielding of manipulation. No

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consideration of the worth of any article for publication practically impossible.”); Eric J. Segall, *The Law Review Follies*, 50 LOY. U. CHI. L.J. 385, 392 (2018) (discussing a personal anecdote showing law journal editors’ heavy reliance on lower-ranked journals as a proxy for article quality).

47. See Hugh Willmott, *Journal List Fetishism and the Perversion of Scholarship: Reactivity and the ABS List*, 18 ORG. 429, 429 (2011) (“Application of [rankings] logic, I will suggest, acts like a suffocating ligature as we are pressured, incentivised and/or (self)-disciplined to squeeze our research activity and scholarly work into the constricted mould of the journals accorded the highest ranking in a given list.”), available at <http://journals.sagepub.com/doi/pdf/10.1177/1350508411403532>.

48. To students at high-ranked law reviews, we are not saying you do not work very hard. We are suggesting that you use a terrible informational signal as a proxy for quality because you are so busy.

49. Anthony Michael Kreis, *Picking Spinach*, 50 LOY. U. CHI. L.J. 395, 397–400 (2018).

such efficient outcome can be said for law reviews, no matter how much we would like to think our placements are a signal for quality.<sup>50</sup>

A final point about journal rankings as a measure of quality relates to the hierarchical structure of law schools in general. Apparently, no one has published in 2017 an article on teaching, clinics, library science, or legal writing that was of sufficient quality to land a spot in a top-ten law journal.<sup>51</sup> More on class issues in academia later in the article.

### B. SSRN Downloads

A surrogate for demonstration of worth via law journal placement is number of SSRN downloads. We suppose the notion here is that if someone has downloaded your article, they did so with intent to read, and, perhaps, cherish it. Such cherishing might produce citations, which we will address in a bit. But suffice to say that the argument for downloads is that it is a quick and good proxy to measure article quality and scholarly reputation. Or, as Pepperdine Law Dean Paul Caron puts it:

These rankings, of course, are imperfect measures of faculty scholarly performance—as are the existing ranking methodologies of reputation surveys, productivity counts, and citation counts. Our modest claim in our article, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 Ind. L.J. 83 (2006) (Symposium on The Next Generation of Law School Rankings), is that the SSRN data can play a role in faculty rankings along with these other measures. Bill Henderson (Indiana) thinks we are too modest, and that SSRN may provide a better measure of faculty performance than these other methodologies.<sup>52</sup>

In our fantasy world, SSRN would displace law review publications because, after all, most articles published in law reviews are already on SSRN. So why does it matter if it is published on the internet twice? Competition would be singularly focused on getting people to download your article so that you can achieve whatever it is we get when we have

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50. See generally Diana L. Moss, *Electricity and Market Power: Current Issues for Restructuring Markets (A Survey)*, 1 ENVTL. & ENERGY L. & POL'Y J. 11, 38 (2006).

51. Legal Research and Writing Professors (LRW) have withdrawn from the market, instead choosing to publish in peer-reviewed journals and specialty journals. However, that is likely the result of the entry barriers faced in getting law students to recognize that LRW was, in fact, their favorite subject and not constitutional law. See Leiter, *supra* note 16, at 472 (noting constitutional law scholars' dominance in the rankings). For a gripping discussion of how non-hierarchical the legal profession is, see Lisa McElroy, *Are Legal Writing Professors Like Nurses?*, DORF ON LAW (Feb. 25, 2014), <http://www.dorfonlaw.org/2014/02/are-legal-writing-professors-like-nurses.html>, and Dan Filler, *Are Legal Writing Professors Like Nurses?*, FACULTY LOUNGE (Feb. 25, 2014, 11:26 AM), <http://www.thefacultylounge.org/2014/02/are-legal-writing-professors-like-nurses.html> (discussing McElroy's article).

52. Paul Caron, *SSRN Tax Professor Rankings*, TAXPROF BLOG (May 1, 2018), [https://taxprof.typepad.com/taxprof\\_blog/2018/05/ssrn-tax-professor-rankings-1.html](https://taxprof.typepad.com/taxprof_blog/2018/05/ssrn-tax-professor-rankings-1.html).

achieved Nerdvana.<sup>53</sup>

There are two difficulties that one might initially encounter with download rankings as a proxy for quality. First of all, you can buy the quality signal, as firms solicit to engage their broad network to download articles and raise the author's prominence.<sup>54</sup> Second, as of the most recent ranking of downloads, one gets a familiar pattern of people, at least in legal academia. While we do not begrudge anyone their download ranking, there are some serious institutional defects associated with the download game that mimics issues of race and gender we find with law reviews. In other words, with all popularity games, the mass of the network matters.

### C. Citations

Some argue citation counts are a better method to determine the value of a person's work. After all, what better way to know that someone read and valued your work than to have the honor of having someone cite it in a footnote<sup>55</sup> in their own work? At the very least, the student editor who used your work for the verifiable statement of fact source had to read *some* portion of your work, after all.

Our problem with this method of external validation is that it oftentimes, yet again, leads to the entrenchment of institutional hierarchies to the detriment of minority groups. Some examples might prove fruitful to highlight this phenomenon, but we do not wish to rehash the literature here. Instead, let us offer some stylized facts.

In quite a variety of fields, citations to women-authored articles

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53. See *Nerdvana*, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=Nerdvana> (last visited on Jan. 4, 2019) (“State of total geekdom.”).

54. One such email reads:

Dear Sir,

I'm Nazmul, Social Media Management and Marketing Expert long 4 years. Sir, I see you paper in SSRN site. This is amazing and really resourceful that holds the top rank. I can help you by increasing your download number and abstract view. This technique will hold you in top rank. I'll offer you 100 download paper just \$25 lowest rate. You can pay after completing the download see your RANK. I'll also offer test task if you want. Actually I've a team with 11 members. We can promote your page, video tutorial, page ads, SEO, Leads generation, grow up youtube subscriber and Web Development successfully.

Please contact if you want in following WhatsApp number and mail. Don't hesitate to contact with me.

We say, why buy that which you can program for yourself? Email on file with the authors. See Caprice L. Roberts, *Unpopular Opinions on Legal Scholarship*, 50 LOY. U. CHI. L.J. 365, 382 (2018), (“Plenty of SSRN downloads will make you the envy of your cohorts—they’ll even wonder whether you’ve paid for bots.” (footnote omitted)).

55. My coauthor believes no one reads the footnotes. If you read this, please email me at [lawprofblawg@gmail.com](mailto:lawprofblawg@gmail.com).

substantially lag behind men. For example, in top astronomy journals, citations to articles with women as first authors are disproportionately lower than those with men as first authors, even as more women have entered astronomy.<sup>56</sup> In hard-core sciences, men receive a disproportionate share of the citations too.<sup>57</sup> In communications, publications from male authors were reported to associate with higher quality in tests.<sup>58</sup> History fares no better.<sup>59</sup> High-impact medical journals also have been reported to be less likely to encounter women as a whole or particularly as first authors.<sup>60</sup> It would be a stunning surprise indeed if legal academia were somehow immune from these same issues.

Against this background of institutional bias, there are signals sent based on gender that make the use of this method laden with concern. Men cite themselves far more often than women do, across almost all fields.<sup>61</sup> Women working with men are far less likely to receive credit for their work.<sup>62</sup>

The self-citation game is not just for men. It is for institutions as well.

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56. See Virginia Gewin, *Gender Bias: Citation Lag in Astronomy*, 546 NATURE 693, 693 (2017), available at <https://www.nature.com/naturejobs/2017/170629/pdf/nj7660-693b.pdf>; see also Neven Caplar et al., *Quantitative Evaluation of Gender Bias in Astronomical Publications from Citation Counts*, 1 NATURE ASTRONOMY 141 (2017).

57. See Cassidy R. Sugimoto et al., *Global Gender Disparities in Science*, 504 NATURE 211 (2013), available at [https://www.nature.com/polopoly\\_fs/1.14321!/menu/main/topColumns/topLeftColumn/pdf/504211a.pdf](https://www.nature.com/polopoly_fs/1.14321!/menu/main/topColumns/topLeftColumn/pdf/504211a.pdf) (arguing that gender imbalances continue to persist in research output worldwide).

58. See Silvia Knobloch-Westerwick et al., *The Matilda Effect in Science Communication: An Experiment on Gender Bias in Publication Quality Perceptions and Collaboration Interest*, 35 SCI. COMM. 603, 615–17 (2013) (analyzing the relationship between gender and perceived quality of scholarly work among 243 communication scholars and finding that publications from male authors were perceived to be of higher quality than female authors).

59. See Andrew Kahn & Rebecca Onion, *Is History Written About Men, by Men?*, SLATE (Jan. 6, 2016, 11:41 AM), [http://www.slate.com/articles/news\\_and\\_politics/history/2016/01/popular\\_history\\_why\\_are\\_so\\_many\\_history\\_books\\_about\\_men\\_by\\_men.html#methodology](http://www.slate.com/articles/news_and_politics/history/2016/01/popular_history_why_are_so_many_history_books_about_men_by_men.html#methodology) (finding that men authored almost 76% of 614 history titles from 80 different publishing houses).

60. See, e.g., Giovanni Filardo et al., *Trends and Comparison of Female First Authorship in High Impact Medical Journals: Observational Study (1994–2014)*, BMJ (Mar. 2, 2016), available at <https://www.bmj.com/content/bmj/352/bmj.i847.full.pdf> (finding that female authorship in high-impact general medical journals is significantly higher than twenty years ago).

61. See Molly M. King et al., *Men Set Their Own Cites High: Gender and Self-Citation Across Fields and over Time*, 3 SOCIUS 1, 7–8 (2017), <http://journals.sagepub.com/doi/pdf/10.1177/2378023117738903> (finding that men self-cited their papers fifty-six percent more often than women).

62. Jeff Guo, *Why Men Get All the Credit When They Work with Women*, WASH. POST: WONKBLOG (Nov. 13, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/11/13/why-men-get-all-the-credit-when-they-work-with-women/?utm\\_term=.bbcbaf5ddee6](https://www.washingtonpost.com/news/wonk/wp/2015/11/13/why-men-get-all-the-credit-when-they-work-with-women/?utm_term=.bbcbaf5ddee6); cf. Christopher A. Cotropia & Lee Petherbridge, *Gender Disparity in Law Review Citation Rates*, 59 WM. & MARY L. REV. 771, 775 (2018) (finding women receive higher citation rates in law review journals than in other disciplines).

Harrison and Mashburn find that citation counts are *strongly related* to law review rank and author's alma mater.<sup>63</sup> When combined with our data that suggests that the author's alma mater is a strong determinant of whether the article gets published in the top law reviews in the first place, the game becomes transparent. Your best chances of getting published in a top-ten law journal are if you graduated from a top-ten school. Your best chances of getting strong citation counts are if you publish in a top-ten journal. Your best chances of getting into academia are if you come from one of the top ten schools. Your best chances of being published in a top-ten law journal are if you teach at a top-ten law school.<sup>64</sup> Your best chances . . . .<sup>65</sup>

All of this may come off as sour grapes. But when one looks at who gets into the top ten law schools, there is a problem. For example, not only are women underrepresented in the top law reviews (and therefore in citation counts), but also people of color. Minorities are woefully underrepresented in the top law schools, with black enrollment not even at nine percent.<sup>66</sup>

This is not just a law school thing. There is plenty of evidence that citation counts and peer review are impacted by race.<sup>67</sup> As one article eloquently states:

When I think about citation patterns, and the politics of peer review more broadly, I am often reminded that the Black Panthers argued black people in the United States were never tried by a jury of their peers.

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63. Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 69 (2015).

64. See Albert H. Yoon, *Editorial Bias in Legal Academia*, 5 J. LEGAL ANALYSIS 309, 310 (2013) (finding a bias among law journal editors for professors from their own institution).

65. As Professor Goldstein articulates it:

Before saying something about the current relevance of what I attempted to do in the article, I wish to say that ranking by citation counts could become an invidious virus in the world of scholarship. It bears no relationship to scholarly merit. It is nondiscriminating in its discrimination. It is not even a reliable indicator that the work cited was read, let alone understood by the citer. But I suppose that at a time when law schools are ranked, like Miss Americas, by a national periodical, it should come as no surprise that in partial celebration of its 100th Anniversary *The Yale Law Journal* ranks its articles by the numbers.

Arthur Austin, *The Reliability of Citation Counts in Judgments on Promotion, Tenure, and Status*, 35 ARIZ. L. REV. 829, 838 n.73 (1993) (quoting Joseph Goldstein, *Commentary*, 100 YALE L.J. 1485 (1991)).

66. Alexandra Svokos, *Diversity Is Lacking at Some of the Top Law Schools, Report Says*, HUFFPOST (Feb. 4, 2015, 1:42 PM), [https://www.huffingtonpost.com/2015/02/04/law-school-diversity\\_n\\_6614266.html](https://www.huffingtonpost.com/2015/02/04/law-school-diversity_n_6614266.html).

67. Ray, *supra* note 43. For a discussion detailing how minority students statistically pay more to attend lower-ranked schools, thereby decreasing their potential to rise to positions of judicial power, see Erin Thompson, *Law Schools are Failing Students of Color*, NATION (June 5, 2018), <https://www.thenation.com/article/law-schools-failing-students-color/>.

White people nearly always controlled access to jury pools. In many disciplines, peer review, access to publishing opportunities and suggestions on whose work should be cited must pass through white gatekeepers.<sup>68</sup>

Socio-economic status (SES) also plays a role in citation counts, along the lines laid out above. It is not as if the top ten law schools are known for being places where the impoverished learn. A famous example from *Hillbilly Elegy* relates a student survey that suggested ninety-five percent of Yale Law School students come from upper-middle class or higher income levels:

A student survey found that over 95 percent of Yale Law's students qualified as upper-middle-class or higher, and most of them qualified as outright wealthy. Obviously, I was neither upper-middle-class nor wealthy. Very few people at Yale Law School are like me. They may look like me, but for all of the Ivy League's obsession with diversity, virtually everyone—black, white, Jewish, Muslim, whatever—comes from intact families who never worry about money.<sup>69</sup>

The prestige of the law school from which one graduated plays a large role in whether one gets a teaching job at all and where it is. It plays a larger role in which journals a professor gets published.<sup>70</sup> Thus, even as some minor gains are made in terms of racial and gender equality, elite law schools have been terrible at educating the poor and lower-middle class.<sup>71</sup>

We pause to say more about SES because of some recent pushback on the topic. The path from high school to elite law school is a perilous journey for those born without privilege. In high school, absent compulsory SAT and ACT testing, many people from lower socio-economic status won't even know they are college ready, let alone go to a top-ten undergraduate school.<sup>72</sup> College costs and uncertainty about

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68. Ray, *supra* note 43.

69. J.D. Vance, *As a Poor Kid from the Rust Belt, Yale Law School Brought Me Face-to-Face with Radical Inequality*, HUFFPOST (June 29, 2016, 9:11 AM), [https://www.huffingtonpost.com/entry/yale-law-school-inequality\\_us\\_5772a27ee4b0dbb1bbbc11b9](https://www.huffingtonpost.com/entry/yale-law-school-inequality_us_5772a27ee4b0dbb1bbbc11b9).

70. Deborah Jones Merritt, *Scholarly Influence in a Diverse Legal Academy: Race, Sex, and Citation Counts*, 29 J. LEGAL STUDIES 345, 360 (2000) (finding that prestige of the institution outweighs race when accounting for differences in citation counts).

71. Richard D. Kahlenberg, *Economic Segregation in American Law Schools*, CHRONICLE OF HIGHER EDUC.: BLOGS (Sept. 28, 2011), <https://www.chronicle.com/blogs/innovations/economic-segregation-in-american-law-schools/30441>. The elite universities themselves reflect the institutional barriers that arise from race, class, and gender. For example, *Faculty Development & Diversity*, YALE UNIV., <https://faculty.yale.edu/faculty-demographics> (last visited Jan. 4, 2019), shows that Yale Law School's "ladder" faculty in 2017 was about 69% white and 37% female, and in the overall university, only 4% of the new hires were Black/African American and only 5% were Hispanic/Latino.

72. Susan M. Dynarski, *ACT/SAT for All: A Cheap, Effective Way to Narrow Income Gaps in*

financial aid disproportionately affect minorities and people from lower SES.<sup>73</sup> Once a student gets to an undergraduate institution, the notion that SES plays a role is fairly uncontroversial. It is difficult to escape one's class.<sup>74</sup>

To get to an elite law school, a prospective student needs to have a good LSAT.<sup>75</sup> SES plays a role here as well. Standardized tests are well known to favor those of higher SES.<sup>76</sup> Even students from lower SES who do well on standardized tests may not choose to go to an elite institution.<sup>77</sup> This is not, or at least should not be, a controversial proposition. The elite schools themselves recognize this phenomenon.<sup>78</sup>

*College*, BROOKINGS (Feb. 8, 2018), [https://www.brookings.edu/research/act-sat-for-all-a-cheap-effective-way-to-narrow-income-gaps-in-college/?utm\\_medium=social&utm\\_source=twitter&utm\\_campaign=es](https://www.brookings.edu/research/act-sat-for-all-a-cheap-effective-way-to-narrow-income-gaps-in-college/?utm_medium=social&utm_source=twitter&utm_campaign=es).

73. Scott Jaschik, *What High Schoolers Don't Know About Tuition Rates*, INSIDE HIGHER ED (Oct. 15, 2018), [https://www.insidehighered.com/admissions/article/2018/10/15/study-documents-high-schoolers-widespread-ignorance-about-college?utm\\_content=buffercc197&utm\\_medium=social&utm\\_source=twitter&utm\\_campaign=IHEbuffer](https://www.insidehighered.com/admissions/article/2018/10/15/study-documents-high-schoolers-widespread-ignorance-about-college?utm_content=buffercc197&utm_medium=social&utm_source=twitter&utm_campaign=IHEbuffer).

74. See Gregor Aisch et al., *Some Colleges Have More Students from the Top 1 Percent Than the Bottom 60. Find Yours.*, N.Y. TIMES: THE UPSHOT (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html?smid=tw-share&mtref=abovethelaw.com&gwh=5AC00F1682D38B330B72324C33E6E494&gwt=pay> (citing statistics that show that “[m]ost students who grow up poor remain poor as adults, and most students who grow up affluent remain affluent”). For an interesting discussion of elite colleges in Chile and mobility, see Seth Zimmerman, *How Elite Universities Shape Upward Mobility into Top Jobs and Top Incomes*, VOX (Oct. 8, 2018), <https://voxeu.org/article/how-elite-universities-shape-upward-mobility> (“[A]dmission to highly selective, business-focused degree programmes has very large effects on the rates at which students attain top jobs and top incomes, but . . . these benefits accrue only to male students from wealthy backgrounds—not to female students, nor to non-wealthy male students.” (citation omitted)).

75. See Lawprofblawg, *Classism in Academia*, ABOVE THE LAW (Aug. 28, 2018, 12:00 PM), <https://abovethelaw.com/2018/08/classism-in-academia/> (citing Eric Segall and Adam Feldman’s article that found “94% of those who teach at elite law schools went . . . to those very law schools. That means your best chance of success at becoming an elite academic is . . . your LSAT score”) (Eric Segall and Adam Feldman’s article is on file with the authors).

76. See Bettina Spencer & Emanuele Castano, *Social Class Is Dead. Long Live Social Class! Stereotype Threat Among Low Socioeconomic Status Individuals*, 20 SOC. JUST. RES. 418, 419 (2007) (“[F]irst generation college students generally do not perform as well on standardized tests as students whose parents completed college. They explain this gap by stating that, ‘parents with college degrees may be more inclined to motivate their children,’ ‘parents with college degrees may have a higher standard of living which enables their children to attend better quality schools,’ and, ‘parents with college degrees may provide extra educational resources in their home or in their recreational activities.’”).

77. See MaryBeth Walpole, *Socioeconomic Status and College: How SES Affects College Experiences and Outcomes*, 27 REV. HIGHER EDUC. 45, 46 (2003) (“Researchers have found that this group of students [lower SES] is less likely to attend college, is more likely to attend less selective institutions when they do enroll, and has unique college choice processes. Furthermore, they are less likely to persist or to attend graduate school.” (citations omitted)).

78. See Daniel Markovits, Yale Law School Commencement Address: A New Aristocracy (May 2015), available at <https://law.yale.edu/system/files/area/departments/studentaffairs/>

We suspect one reason it is controversial is a lack of recognition of relative privilege.<sup>79</sup> Even knowing what an elite law school is stems from some degree of privilege.<sup>80</sup> That privilege becomes institutionally ossified as prior rankings set expectations for future ones.<sup>81</sup>

Even for those of truly lower SES at elite institutions, there are still further barriers that do not assure a successful path to legal academia. Even seemingly trivial things like technology can be a hurdle,<sup>82</sup> not to mention precarious issues such as paying for things like books or health care.

We seek not to belabor this point, but rather to suggest that the climb from high school to law professor is a precarious one.<sup>83</sup> Ninety-four percent of all faculty members at top-ten schools graduated from those top ten schools. Eighty-five percent attended one of twelve elite schools.<sup>84</sup> And nearly all of the 2017 top-ten law review authors are from those schools, and nearly all of the most-cited law professors are from

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document/markovitscommencementrev.pdf (“[M]ost of you (although not all) came to the Law School from highly selective colleges. Acceptance rates at Harvard, Princeton, Stanford, and Yale colleges—to pick some familiar examples—have also averaged around 8 percent in recent years. And not all of you, but again most, came to college from highly competitive high schools, and indeed in many cases from highly selective elementary schools, and even *pre-schools*.”); see also Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 L. & SOC’Y REV. 1, 34 (2007) (“Graduates from top 10 schools are overwhelmingly the children of advantage.”). It is possible those who come from privileged backgrounds fail to recognize it. “Graduates of top-tier schools have all the advantages, but the data suggest that they do not necessarily appreciate them.” Dinovitzer & Garth, *supra*, at 34.

79. See Anat Shenker-Osorio, *Why Americans All Believe They are ‘Middle Class’*, ATLANTIC (Aug. 1, 2013), <https://www.theatlantic.com/politics/archive/2013/08/why-americans-all-believe-they-are-middle-class/278240/> (analyzing the reasoning behind the fact that almost half of Americans identifying themselves to be in the middle class based on common perceptions of extreme wealth and poverty).

80. See Staci Zaretsky, *Supreme Court Justice Didn’t Know What an ‘Ivy League’ School Was*, ABOVE THE LAW (Sept. 12, 2014, 12:01 PM), <https://abovethelaw.com/2014/09/supreme-court-justice-didnt-know-what-an-ivy-league-school-was/> (explaining that Justice Sonia Sotomayor’s comments about her decision to apply to Ivy League schools after a recommendation from a friend because she “came from a world where that wasn’t part of the expectations”).

81. See Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 L. & SOC’Y REV. 105, 127–29 (2006) (presenting evidence that law school rankings can be a self-fulfilling prophesy).

82. See Amy L. Gonzales, Jessica McCrory Calarco & Teresa K. Lynch, *Technology Problems and Student Achievement Gaps: A Validation and Extension of the Technology Maintenance Construct*, COMM. RES. (Aug. 31, 2018), <https://journals.sagepub.com/doi/full/10.1177/0093650218796366> (showing relationship between lower SES students and students of color relying on older, problem-prone devices and those devices leading to lower GPAs).

83. See Eboo Patel, *Attending an Elite College Is an Identity*, INSIDE HIGHER ED (Jan. 9, 2018), <https://www.insidehighered.com/views/2018/01/09/attending-elite-college-identity-too-opinion> (discussing how individuals positioned “in the upper reaches of the top third of American society” are there, in major part, as a result of their efforts to attend elite educational institutions).

84. Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441, 460 (2015).

those schools.<sup>85</sup> In short, you are most likely to be in the upper echelons of citation counts if you are white, male, from a relatively wealthy or upper-middle class family, and graduated from a top-ten school. A prestigious primary school may help as well.<sup>86</sup> We are certain we will get emails from law professors seeking to prove they were not in these categories and yet published in the top ten. However, we will not get many.<sup>87</sup>

Another obvious point about citation counts: The company you keep plays a large role in your citations. As a popular review of citations reflects, some areas do not have massive amounts of literature. For example, for smaller fields such as antitrust law, corporate and securities law, family law, intellectual property, international law, labor and employment law, and legal ethics and legal profession, absent cross fertilization to other topics such as intellectual property, it is impossible to achieve citation count success.<sup>88</sup>

Thus, to be successful in the citation game, it is better to write in areas with which larger “networks” are able to absorb citations and increase your ratings. As a parallel, one might think about the old days of VHS and BETA. As VHS became dominant, it sure was lonely in the BETA circles, with selections dwindling. Antitrust, family law, and legal profession are lonely and tiny networks, indeed.<sup>89</sup>

Missing from the categories altogether are things mentioned before: legal writing, clinics, and libraries. We suppose the notion is that nothing new and innovative could possibly be had in those fields worthy of publication in a top-ten law journal (despite rapid technological changes and other innovations that say the contrary), yet it would seem that there are a large number of clinical and legal writing professors to suggest at

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85. Data on file with authors.

86. We may or may not be kidding about this.

87. See Tracey E. George & Albert H. Yoon, *The Labor Market for New Law Professors*, 11 J. EMPIRICAL LEGAL STUD. 1, 6 (2014) (“In the early stages of the job market, law schools are more willing to consider candidates who do not possess the traditional credentials of legal academia, such as an elite law school education or a judicial clerkship. As law schools narrow their searches, they shift the focus of their recruitment efforts on candidates who possess these high-status credentials.”). Professors George and Yoon also find that “women and nonwhites are no more likely than similarly situated men and whites to get a job offer or, if they get an offer, for the offer to come from a more elite school.” *Id.* at 7.

88. See Shapiro & Pearce, *supra* note 8, at 1498–1502 (listing the single most cited article in each of these areas as having received 636, 1153, 1071, 622, 471, 570, and 1137 citations, respectively).

89. Cf. Claudio Biscaro & Carlo Giupponi, *Co-Authorship and Bibliographic Coupling Network Effects on Citations*, PLOS ONE (June 2014), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0099502> (illustrating how a “bibliographic and co-authorship network” can result in more citations to connected articles).

least some level of higher citation counts. Moreover, having read some of these articles, we find that there is much value in them for everyone, not just non-podium faculty.

#### D. Social Media

Those seeking external validation might also turn, as one of the authors of this article has, to social media. While all of social media is beyond the scope of this article, we focus on social media platforms such as Twitter and Facebook. This article will not help you update your LinkedIn profile.<sup>90</sup>

We classify the types of uses of social media into three models or patterns of behavior, because we have been told that three is the magic number.<sup>91</sup> The first group we will classify as the Hessick tweeters, in honor of one of our symposium participants. The second group we will classify as the pundit tweeters. The final group we classify as the “Look at me!” tweeters. There is some overlap between the groups, and usually one person is a member of more than one group.

##### 1. “Hessick” Tweeters

Professor Carissa Hessick argues, in her excellent article *Towards a Series of Academic Norms for #Lawprof Twitter*,<sup>92</sup> that legal academics should adhere to strict professional standards when engaging in social media.<sup>93</sup> Professor Hessick’s argument is targeted toward Twitter but could be applied to all of social media.

Her basic argument is this: Law professors should assume that every time they tweet about a legal issue, they are making an implicit claim to expertise about the issue. Thus, when law professors engage on Twitter, they should do so primarily to help promote reasoned debate.<sup>94</sup>

Professor Hessick divides the law professor population into a binary world of those who think ordinary norms of scholarship ought to apply, and those who do not. She proposes that the approach suggested in her article is more flexible than a strict scholarship norm (the “scholarly

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90. Also, the revolution will not be televised. GIL SCOTT-HERON, *The Revolution Will Not Be Televised*, on THE REVOLUTION WILL NOT BE TELEvised (Flying Dutchman Productions 1974).

91. BOB DOROUGH, *Three is a Magic Number*, on SCHOOLHOUSE ROCK: MULTIPLICATION ROCK (Capitol Records 1973), available at <https://www.youtube.com/watch?v=aU4pyiB-kq0>.

92. See Carissa Byrne Hessick, *Towards a Series of Academic Norms for #LawProf Twitter*, 101 MARQ. L. REV. 903, 907 (2018) (arguing that legal academics should observe “professional norms when engaging in non-scholarship”).

93. See generally *id.*; see also Orly Lobel, *The Goldilocks Path of Legal Scholarship in a Digital Networked World*, 50 LOY. U. CHI. L.J. 403, 409 (2018).

94. We note that this standard exceeds one that might be set for faculty meetings.

ideal”), as a way to bridge the gap between the two populations.

But *our* article is about external validation’s perils. Professor Hessick’s article is relevant because she argues that academia is defined by reasoning, something that is not prevalent on Twitter.<sup>95</sup> We believe that the notion that an academic is limited in what he or she tweets is stifling to creativity and the ultimate academic endeavor, particularly towards groups whose voices are the ones most typically stifled on social media.

First, Professor Hessick posits that law professors should assume every tweet is an implicit claim to expertise. The Twitterverse identifies law professors as experts in every legal matter. Thus, Professor Hessick claims that law professors should not tweet about areas outside their expertise. And here, Professor Hessick threads the needle. Nonexperts should still tweet, because law professors are experts in pointing out flaws in logic. However, if a law professor is tweeting outside her area of expertise, then a disclaimer may be appropriate (e.g., “I’m not an expert, but . . .”), tweeting a link to a blog belonging to someone who is an expert, or posing one’s thoughts in a question. As Professor Hessick states, “[f]raming non-expert thoughts as questions also has added benefits: It avoids embarrassment if a law professor is wrong about something, and it can make disagreement seem more polite.”<sup>96</sup>

Our concern about this standard is that it is laden with gender and racial implications. For one, impostor syndrome means it is less likely that certain classes of individuals will claim to be experts while others might overstate the claim. As an example, female academics who hail from the middle class might be more likely to experience impostor syndrome.<sup>97</sup> A person with impostor syndrome might be less likely to claim expertise, while those without it might be more likely. In other words, a disclaimer for expertise leaves more areas open to men.

For minority faculty members, it is the same. Diverse students at one university reported greater feelings of anxiety and depression associated with impostor syndrome.<sup>98</sup> Those issues do not magically disappear in law school and on the job market.

And for minority female faculty members, the effect goes double. As

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95. Or faculty meetings.

96. Hessick, *supra* note 92, at 919 n.58.

97. See generally Darlene G. Miller & Signe M. Kastberg, *Of Blue Collars and Ivory Towers: Women from Blue-Collar Backgrounds in Higher Education*, 18 ROEPER REV. 27 (1995); Kate Bahn, *Faking It: Women, Academia, and Impostor Syndrome*, CHRONICLEVITAE (Mar. 27, 2014), <https://chroniclevitae.com/news/412-faking-it-women-academia-and-impostor-syndrome>.

98. Jeremy Bauer-Wolf, *Feeling like Impostors*, INSIDE HIGHER ED (Apr. 6, 2017), <https://www.insidehighered.com/news/2017/04/06/study-shows-impostor-syndromes-effect-minority-students-mental-health>.

Professor Carmen González eloquently states,

A woman who is the only faculty member of color in her law school or the only member of a particular racial or ethnic group faces heightened visibility and pressure to perform because she knows that her success or failure will be attributed not just to her as an individual but to her racial or ethnic group.<sup>99</sup>

This creates some risk aversion in a world where one is the token diverse faculty member.

In other words, the impostor syndrome can have a feedback loop, in which the external signals of death by 1000 microaggression cuts reinforces low self-esteem arising from impostor syndrome. In such a situation, we suspect female faculty members of color would hold out the disclaimer flag more often than white men.<sup>100</sup> It would also be more likely that such professors would adopt more hedging strategies than white men, such as asking a question rather than making a declarative statement. As such, the norm, we suspect, would lead to fewer diverse voices being heard, and the usual from the majority voices.

For those rare faculty members who do not hail from the big three law schools for production of competent faculty,<sup>101</sup> there is an additional challenge that such norms produce class biases. As Professor Francisca de la Riva-Holly observes:

[A]ll my colleagues and the institution itself chimed what I call the “social-class bell,” including the administrative assistant writing to tell me how I should dress “now that I was a professor” or correcting my pronunciation—and then laughing in front of me at my Chicano accent . . . I was unaware of the secret social norms and behaviors. In one of the meetings after my second-year review, one of the senior faculty members said I was not collegial and he did not know if he wanted [to] be colleagues with someone like me (again chiming the social-class bell) since he and the other senior faculty members all came from a middle- or upper-middle-class background.<sup>102</sup>

For those of us who have experienced the “Badge”<sup>103</sup> signal at AALS,

99. Carmen G. González, *Women of Color in Legal Education: Challenging the Presumption of Incompetence*, THE FED. LAW., July 2014, at 48, 52.

100. See Doug Sundheim, *Do Women Take as Many Risks as Men?*, HARV. BUS. REV. (Feb. 27, 2013), <https://hbr.org/2013/02/do-women-take-as-many-risks-as> (discussing a study that found women take fewer risks than men).

101. Endangered species is defined as “a species at risk of extinction because of human activity.” *Endangered Species*, DICTIONARY.COM, <http://www.dictionary.com/browse/endangered-species> (last visited Jan. 5, 2019).

102. González, *supra* note 99, at 53 (alteration in original).

103. The badge itself becomes a status symbol, not just indicating the school of the attendee, but their relative place in the conference. “Speaker” vs. “Attendee.” One of the authors cut that portion of the badge off and was denied admission, despite the rest of the badge being intact. See

the implication is clear. Those at certain social strata have opinions and conduct worthier of adoration than that of others. As Professor Reyes writes, “Professional environments create institutional norms that make it difficult for women to speak out.”<sup>104</sup>

So can hierarchies. Tenured faculty may be able to take more risks in the Twittersphere than those with the dubious distinction of “other faculty,” who might infuriate a friend of a friend. There are risks to backlash, and standards have a distinction of separating the haves and the have-nots. Just as an example, imagine a librarian who has meticulously studied a subject who goes up against a tenured faculty member who has written on it. Which is the expert? Which deserves that title, and which ought to put the disclaimer?

Professor Hessick’s second norm is that professors should tweet primarily to help promote reasoned debate. We agree, with the understanding that there are many ways to promote debate on Twitter.

With these caveats, we believe there is much to laud here. Professors who stick with addressing academic thoughts, after careful consideration, further advance the ball of scholarship, albeit on a platform perhaps not well suited or intended for scholarship. We have all witnessed professors who have not even had a chance to read an opinion espouse on it in the press, so perhaps some of Professor Hessick’s concerns extend beyond just social media.

Regardless, the fundamental conclusion is that there is as much the same-stacked game here as there is with academic publishing. Thus, we might encounter the same stifling of creativity, the same hesitations about innovation, and the same conformity we find in other academic endeavors.

## 2. “Pundit” Tweeters

Punditry has gotten a bad rap lately.<sup>105</sup> The original pundit was an

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B. TRAVEN, *THE TREASURE OF THE SIERRA MADRE* 161 (1935) (“Badges, to god-damned hell with badges! We have no badges. In fact, we don’t need badges. I don’t have to show you any stinking badges . . .”).

104. Maritza I. Reyes, *Professional Women Silenced by Men-Made Norms*, 47 *AKRON L. REV.* 897, 933–34 (2015).

105. Or really, since forever. See Peter Arenella, *The Perils of TV Legal Punditry*, 1998 *U. CHI. LEGAL F.* 25, 43 (criticizing punditry as creating an audience that “tends to forget the human tragedy it is witnessing as [a] trial merges with the other soap operas presented for the audience’s viewing pleasure”); Nina Totenberg, *Capturing an Audience’s Attention: Explaining the Law Through Radio, Television, and Print*, 40 *S. TEX. L. REV.* 957, 967 (1999) (“[T]alking heads are boring.”); Ward Farnsworth, *Talking Out of School: Notes on the Transmission of Intellectual Capital from the Legal Academy to Public Tribunals*, 81 *B.U. L. REV.* 13, 51 (2001) (arguing that academics should not participate in punditry, though “this loss cannot be greatly mourned in view of the low quality of the punditry that academics frequently offer”); Neal Devins, *Misunderstood*,

expert in the field who offered their insights to the media and the public. A “public intellectual,”<sup>106</sup> as it were. However, real pundits are boring, with their complex arguments and use of facts. Nowadays, punditry is often viewed as partisan shouting matches or worse.<sup>107</sup>

The distinction is an important one, as professors become more engaged in the political bloodbath that is the modern era. Professors have become partisans. This is nothing new.<sup>108</sup> Anyone who has engaged in antitrust litigation well recognizes that, to emerge victorious in litigation, one must have prominent (and expensive) paid experts in your corner.<sup>109</sup> Nowadays, professors are not only partisans, they have also commenced running for office in greater numbers. None of this is new, but it is increasingly becoming the norm.

Those who are concerned about the erosion of academic norms do not necessarily think this is at all a good thing. As one commentator wrote:

What used to be cloistered academic discussions amongst peers with PhDs is now broadcast and splashed on front pages across the world. If fundamentally transformative educators rise to the occasion, they will recognize that their arguments, discussions, and debates can truly be tools for bettering our world and for getting more people involved in solving the challenges that face us. But, professors must realize that they cannot sink to our current level of discourse; they must lift us up to theirs.<sup>110</sup>

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82 B.U. L. REV. 293, 295 (2002) (arguing that academics harm the entire field when falsely holding themselves out to be experts on a topic).

106. See generally RICHARD A. POSNER, *PUBLIC INTELLECTUALS: A STUDY OF DECLINE* (2003). Since Posner’s tome, the amount of public intellectual activity has increased in large part due to blogging. Orin S. Kerr, *Blogs and the Legal Academy*, 84 WASH. U. L. REV. 1127, 1132 (2006).

107. See *In Pictures: America’s Top Pundits*, FORBES (Sept. 24, 2007, 6:00 AM), [https://www.forbes.com/2007/09/21/pundit-americas-top-oped-cx\\_tvr\\_0924pundits\\_slide/#2d99a3de4109](https://www.forbes.com/2007/09/21/pundit-americas-top-oped-cx_tvr_0924pundits_slide/#2d99a3de4109) (describing America’s most popular pundits as, among other things, “aggressive,” “rude,” and “kooky”).

108. See Amy Gajda, *The Law Professor as Legal Commentator*, 10 J. LEGAL WRITING INST. 209, 210 (2004) (“While many law schools have hired public relations and media professionals to guide them in their quest for greater news coverage, the same law schools may give very little, if any, tenure credit to professors who write for newspapers or appear on television. The public may have decided that it is interested in law. Big stories like *Bush v. Gore*, O.J., and Rodney King helped fuel that interest. But law schools continue to contemplate whether media involvement is right for law professors.”).

109. See Jessie Eisinger & Justin Elliott, *These Professors Make More than a Thousand Bucks an Hour Peddling Mega-Mergers*, PROPUBLICA (Nov. 16, 2016), <https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers> (arguing that law professors often accept large paychecks in exchange for advocating in favor of the consumer benefits of large corporate mergers, but that their predictions of such benefits are often wrong).

110. Matt Shuham, *The Professor as Pundit*, HARV. POL. REV. (Oct. 31, 2012),

Well, that is nice in theory, but that is not what happens. Many professors have used their Twitter handles and other social media to engage in partisan attacks, oftentimes without facts to support their arguments. To quote the previous commentator, “Rather, it appears that the exact opposite is taking place: our professors have abandoned their sacred role as the unbiased arbiters of fact and fiction in favor of much more partisan roles.”<sup>111</sup>

The problem in that quotation is that law professors have *never* been unbiased arbiters of fact. That assumes a level of scientific inquiry that is typically set aside for hard sciences. And, even there, bias has always been present as people seek to prove things that cohere to their belief systems.<sup>112</sup>

And here is where Professor Hessick’s article holds true: When a professor continually engages solely in punditry, their academic reputation may suffer from negative effects. There is a corollary, however: As the professor engages in punditry, their overall reputation may *increase*, as they become better known as a member of whatever side they are taking.

Two of the most prominent examples are Professors Larry Tribe and Alan Dershowitz. Professor Tribe has been known to retweet and discuss some of the internet’s most interesting conspiracy theories.<sup>113</sup> He has come under fire for being increasingly partisan, and the question arises whether it has impacted his scholarly reputation. This is a question we cannot answer.<sup>114</sup> We can only observe that we are seeing more of Professor Tribe in the press, that his Twitter following grows, and the ultimate answer whether his overall reputation will have suffered or

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<http://harvardpolitics.com/covers/the-professor-as-pundit/>.

111. *Id.*

112. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 161–64 (1981) (discussing ways scientists have engaged in biased research to further the eugenics movement); Julia Belluz, *20 Years Ago, Research Fraud Catalyzed the Anti-Vaccination Movement. Let’s Not Repeat History*, VOX, <https://www.vox.com/2018/2/27/17057990/andrew-wakefield-vaccines-autism-study> (Apr. 2, 2018, 10:39 AM) (discussing bias and fraud in vaccine research); Tim Lydon, Opinion, *With Climate Change, Fake News Is Old News*, THE HILL (Apr. 5, 2018, 2:00 PM), <http://thehill.com/opinion/energy-environment/381814-with-climate-change-fake-news-is-old-news> (discussing the funding of research to counteract scientific consensus of climate change caused by humans); see also STEPHEN C. PEPPER, *WORLD HYPOTHESES* 180, 310 (1942) (discussing coherence and correspondence theories of truth).

113. See Joseph Bernstein, *Why Is a Top Harvard Law Professor Sharing Anti-Trump Conspiracy Theories?*, BUZZFEED NEWS (May 11, 2017, 3:18 PM), [https://www.buzzfeed.com/josephbernstein/larry-tribe-why?utm\\_term=.vwbLMJrrP#.mbPKWz99g](https://www.buzzfeed.com/josephbernstein/larry-tribe-why?utm_term=.vwbLMJrrP#.mbPKWz99g) (describing Tribe as “one of the country’s foremost constitutional lawyers,” who is known for “sharing wild allegations about the Trump administration from unreliable sources”).

114. We can. We just refuse.

improved awaits the judgment of history.

While Professor Dershowitz has raised eyebrows in the past, we highlight one tweet in particular. Namely, Professor Dershowitz asserted that it was “unfair” for Paul Manafort to be jailed.<sup>115</sup> More precisely, Professor Dershowitz said, “[m]y own view is it is terribly unfair for Manafort to join thousands of other people, many of them minority people many of them poor, who are sitting in jail with the presumption of innocence.”<sup>116</sup> Professor Dershowitz’s quotation highlights a few issues with respect to punditry. People were stunned to discover that Professor Dershowitz was upset that Manafort would be sent to jail for committing crimes while out on bail. We, however, were more upset that Professor Dershowitz was worried about Manafort being housed with poor people and minorities.

While Harvard’s reputation will not suffer because of the punditry of two of its “finest,” other schools would not fare as well. There are reputational effects that transcend the professor. As an example, Professor Amy Wax of Penn Law School has probably caused more ulcers for Penn Law’s communications department than all the rest of the professors combined. In addition to an op-ed coauthored with Larry Alexander lamenting the loss of Bourgeois culture,<sup>117</sup> she then went on air to state that “a black student has *never* finished in the top quarter of a graduating class [at] Penn Law as far as she can remember and that they ‘rarely, rarely’ finish in the top half.”<sup>118</sup> The result was to remove Professor Wax from teaching first year subjects to protect the school from accusations that it was endorsing her viewpoint.<sup>119</sup>

115. We are not suggesting that his recent discussion about his social situation at Martha’s Vineyard is not without importance, or whatever else he does since publication of this article.

116. Martin Cizmar, *WATCH: CNN’s Toobin Destroys Alan Dershowitz for Whining Manafort Was ‘Unfairly’ Jailed*, RAWSTORY (June 15, 2018, 9:05 PM), <https://www.rawstory.com/2018/06/watch-cnns-toobin-destroys-alan-dershowitz-whining-manafort-unfairly-jailed/>.

117. See Amy Wax & Larry Alexander, *Paying the Price for the Breakdown of the Country’s Bourgeois Culture*, PHILA. INQUIRER (Aug. 9, 2017, 4:01 PM), <http://www.philly.com/philly/opinion/commentary/paying-the-price-for-breakdown-of-the-countrys-bourgeois-culture-20170809.html> (arguing, as a reason for transitioning back to this way of life, that those who embrace bourgeois culture today reap benefits that include lower homicide rates, lower opioid addiction rates, and lower poverty levels).

118. Joe Patrice, *Professor Declares Black Students ‘Rarely’ Graduate in the Top Half of Law School Class*, ABOVE THE LAW (Mar. 8, 2018, 11:07 AM), <https://abovethelaw.com/2018/03/professor-declares-black-students-rarely-graduate-in-the-top-half-of-law-school-class/>.

119. Professor Wax has also weighed in on Professor Ford’s allegations against Justice Kavanaugh. See generally Madeleine Ngo, *Penn Law Prof. Amy Wax on Brett Kavanaugh Allegations: ‘It’s Too Late, Ms. Ford’*, DAILY PENNSYLVANIAN (Oct. 1, 2018, 3:30 AM), <https://www.thedp.com/article/2018/10/amy-wax-brett-kavanaugh-upenn-glenn-loury-metoo->

While not belaboring the numerous things that professors have put on social media, from the controversial to the comedic, suffice to say that there are limitations to social media. At the very least, those with the privilege of tenure have the ability to engage in punditry of the worst kind without fear far more than people who are untenured. Worse, it is not as if the social media world is a friendly place, and the unsophisticated tweeter looking for validation may find they get just the opposite.<sup>120</sup>

### 3. “Look at me!” Tweepers

Some academics merely use their Twitter account as an extension of their scholarship, as a kind of parental refrigerator for their accomplishments. This seems to be a relatively safe, yet low-impact method of interacting with the world, as it perfectly replicates what legal scholarship does. Namely, it only speaks to those that desire to pause at that fridge.

The problem is that this, too, is prone to network effects of the kind that one finds in law reviews. In other words, the size of the network dictates the number of retweets and therefore the reach of the scholarship. While hashtags can level that playing field some, it is not a surefire way to assure that people will read or download an article, or even retweet the tweet promoting the article.

Law schools frequently engage in this behavior as well. All too often, rather than engage alumnae, law schools merely tweet out what some of their professors do. That is useful, but not nearly sufficient to bring about a strong following of faculty, students, alumnae, and other followers.

### 4. The Upshot of Social Media

As more law professors go into the internet as a scholarship expansion pack, academia races to ascertain the value of such activities. Up until now, social media is still pretty much a law professor hobby, an extension of the “real” work of writing law review articles and teaching.

Regardless, the base institution of academia extends to its periphery. In other words, those institutionally established hierarchies that self-perpetuate in terms of law review, and academic placement and prestige extend into the “real world” beyond the “ivory tower.”

But the internet can be fun, intellectually engaging, and thought-provoking. However, if professors are only seeking to amplify their own

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affirmative-action. By the time of print, we are sure there will be other eye-raising pronouncements from Professor Wax.

120. We offer this WARNING: Punditry may cause death threats, harassment, trolling, hate mail, #mansplaining, racist and sexist remarks, and all other sorts of vile commentary one does not usually receive from law review articles that no one reads. More on this issue in Lawprofblawg’s next article, which he will sole-author.

status, they might expect to find themselves in a losing game unless they are already holding some privilege cards.

### III. THE PROBLEM WITH EXTERNAL VALIDATION

#### A. *The Game is Rigged*

The problem is threefold.<sup>121</sup> First and foremost, the search for external validation is Sisyphean.<sup>122</sup> As a famous television show once lamented, “you’re dealing with the demon of external validation. You can’t beat external validation. You want to know why? Because it feels sooo good.”<sup>123</sup> In other words, external validation is like a drug, and once a goal is achieved, then other goals will be required to get the next “hit.”<sup>124</sup>

The problem with invidious distinctions is that someone must win for someone else to lose. As Thorstein Veblen wrote:

Wherever the circumstances or traditions of life lead to an habitual comparison of one person with another in point of efficiency, the instinct of workmanship works out in an emulative or invidious comparison of persons. . . . In any community where such an invidious comparison of persons is habitually made, visible success becomes an end sought for its own utility as a basis of esteem. Esteem is gained and dispraise is avoided by putting one’s efficiency in evidence. The result is that the instinct of workmanship works out in an emulative demonstration of force.<sup>125</sup>

If the marketplace of academic ideas<sup>126</sup> were actually competitive,

121. DOROUGH, *supra* note 91.

122. See E.K. HUNT & MARK LAUTZENHEISER, HISTORY OF ECONOMIC THOUGHT: A CRITICAL PERSPECTIVE 379–80, 384 (3d ed. 2011). The consumer’s Sisyphean attempt at constrained optimization requires an almost mechanical approach to choices. Implicit in this notion is that the sole purpose of humans is to consume as much as their budget allows. Absent the budget constraint, humans would consume until fully satiated. *Id.* at 379–80. E.K. Hunt calls this the “ethical hedonism” of consumer theory. *Id.* at 384. By analogy, the purpose of someone seeking external validation would be to maximize the validation of any article written.

123. *Northern Exposure: Grand Prix* (CBS television broadcast May 9, 1994).

124. As an example, it is not lost on one author of this article that the other has far too many letters behind his last name.

125. THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 15–16 (1967), available at <http://moglen.law.columbia.edu/LCS/theoryleisureclass.pdf>. See also ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985).

126. Many have indicated that the goal of the marketplace of ideas is truth. See Alberto Bernabe Riefkohl, *Freedom of the Press and the Business of Journalism: The Myth of Democratic Competition in the Marketplace of Ideas*, 67 REV. JURIDICA U.P.R. 447, 465 (1998) (“The dominant metaphor for ‘freedom of the press’ throughout most of this century has been the ‘marketplace of ideas’. As originally proposed, it was based on the assumption that ‘the truth’ will always win in a free and open encounter with falsehood . . . .”); Christopher T. Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 727 (1986) (“The marketplace of ideas thesis suggests that truth emerges from an evolutionary process of criticizing and building upon

then this might not be problematic. However, for reasons we discussed above, that is not the case. As such, invidious distinctions perpetuate systemic race, class, and gender issues.

Invidious distinctions go beyond race, class, and gender. Institutionally, the game is stacked against people who are of diverse races, classes, genders, *and* titles, *and* curricula. As an intellectual exercise, try finding the most recent law review article in a top thirty flagship law journal by a legal research and writing professor. You probably will be spending some time on this, because they have largely removed themselves from that process due to the exceptionally high barriers to entry.<sup>127</sup>

Finally, the quest for external validation does not, on its own, improve society. External validation typically is achieved through conformity and hierarchy.<sup>128</sup> Perpetuating the status quo is less likely to lead to any innovation, particularly for those who are rewarded by the status quo.<sup>129</sup> Some of the most forward-thinking ideas were met with open hostility from the academy, and while most academics focus on the here and now, one's work lasts a lifetime and should not be judged merely in the present.

We have observed that, to the extent that people are seeking external validation, it is difficult for others to give it. In this sense, academic quests for external validation are much like eighth grade. For example, think of what you are told as you enter academia. Write good articles so that they

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earlier ideas . . ."). Cf. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 26–27 (1982) (“History provides too many examples of falsity triumphant over truth to justify the assertion that truth will inevitably prevail.”); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 7 (“The market model avoids this danger of officially sanctioned truth; it permits, however, the converse danger of the spread of false doctrine by allowing expression of potential falsities.” (footnote omitted)). See also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

127. See generally PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA, *supra* note 43.

128. Professor Gordon writes that “many of us spend our professional lives contesting hierarchy and exclusion—whether on the basis of race, gender, or class—but when it comes to academia—and I would suggest especially legal academia—we appear to have finally found a hierarchy we can believe in.” Ruth Gordon, *On Community in the Midst of Hierarchy (and Hierarchy in the Midst of Community)*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA, *supra* note 43, at 313, 326–27; see also Arewa, Morriss & Henderson, *supra* note 40, at 1009–10 (discussing external validation of those in the hierarchies in United States law schools).

129. This is not news to law professors. The familiar indicia of success that lead to being a law professor are based upon judicial clerkships, law review experience, and similar signals. However, the more alike a group is, the less likely it is to innovate. See, e.g., Sylvia Ann Hewlett, Melinda Marshall & Laura Sherbin, *How Diversity Can Drive Innovation*, HARV. BUS. REV. (Dec. 2013), <https://hbr.org/2013/12/how-diversity-can-drive-innovation> (“[D]iversity unlocks innovation by creating an environment where ‘outside the box’ ideas are heard.”).

will be published in top law reviews. Get to know the top people in your field so that they will write you good tenure letters. Make sure your colleagues like you so they do not vote against you because they think of you as obnoxious. Go to conferences to present with other people so they get to know you and hopefully approve of your talks. To the extent that legal academia seeks to assure us that we are a member of the Lake Wobegon<sup>130</sup> faculty, then we need the validation of a unique group of individuals who already have some level of “fame,”<sup>131</sup> or at least the academic equivalent of it.

Numerous articles exist about the stress of seeking external validation.<sup>132</sup> Seeking the validation of other academics through the gauntlet known as tenure is perhaps one of the most stressful methods of acquiring validation. However, external validation as an end goal creates other health effects. One study of 600 college students found that those that base their esteem “on external sources—including appearance, approval from others and even their academic performance—reported more stress, anger, academic problems, relationship conflicts, and had higher levels of drug and alcohol use and symptoms of eating disorders.”<sup>133</sup>

Attempting to seek external validation from colleagues is also terrible if you are trying to extract praise from a narcissist. According to

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130. See generally GARRISON KEILLOR, LAKE WOBEGON DAYS (1985) (e.g., where all the faculty members are above-average).

131. IRENE CARA, *Fame*, on THE ORIGINAL SOUNDTRACK FROM THE MOTION PICTURE FAME (RSO Records 1980).

Fame  
 I'm gonna live forever (fame)  
 I'm gonna learn how to fly, high  
 I feel it comin' together (fame)  
 People will see me and cry, fame  
 I'm gonna make it to heaven (fame)  
 Light up the sky like a flame, fame  
 I'm gonna live forever (fame)  
 Baby, remember my name.

*Id.* Cf. Roberts, *supra* note 54, at 380 n.35 (“Fame was not my motivation [for accepting an offer to translate my work], though I joke that I am huge in far-off countries. My motivation is to share the learning. It is worth it to me if there is one reader who might learn something from reading my translated work.”).

132. See, e.g., Jennifer Crocker, *The Costs of Seeking Self-Esteem*, 58 J. SOC. ISSUES 597, 598 (2002) (discussing the long-term effects of the pursuit of self-esteem); Jennifer Crocker & Lora E. Park, *The Costly Pursuit of Self-Esteem*, 130 PSYCHOL. BULL. 392, 393 (2004) (“[I]n the pursuit of self-esteem, people often create the opposite of what they need to thrive and . . . this pursuit has high costs to others as well.”).

133. M. Dittmann, *Self-Esteem That's Based on External Sources Has Mental Health Consequences, Study Says*, MONITOR ON PSYCHOL., Dec. 2002, at 16, available at <https://www.apa.org/monitor/dec02/selfesteem.aspx>.

literature, the legal profession has a disproportionate share of narcissists and sociopaths.<sup>134</sup> It is difficult to imagine the legal academy not being even more concentrated in that regard. The difference between a narcissist and someone seeking external validation might best be described by the DSM-5 itself. A narcissist has an exaggerated sense of self-importance, expects to be recognized as superior even without achievements that warrant it, exaggerates achievements and talents, is preoccupied with fantasies about success, power, brilliance, beauty or the perfect mate, believes that he is superior and can only be understood by or associate with equally special people, requires constant admiration, has a sense of entitlement, expects special favors and unquestioning compliance with his expectations, takes advantage of others to get what he wants, has an inability or unwillingness to recognize the needs and feelings of others, is envious of others and believes others envy him, and behaves in an arrogant or haughty manner.<sup>135</sup> A narcissist, therefore, will be unlikely to elevate you and fulfill your need for external validation: the narcissist can only lift himself up by taking you down. There is no “we,” and your successes will not be celebrated the same as his.<sup>136</sup> This is food for thought if you are seeking to get validation from your colleagues.

Not everyone seeking external validation has low self-esteem or is a narcissist. But the psychological evidence suggests that external validation is not the best way to achieve self-esteem.

The quest for external validation is a game we all play, to varying degrees. The problem is that, as an institution, we fail to recognize it consistently. For example, let us take law school rankings. We have all had discussions in which the fallacy of the rankings has been an issue. We have all had discussions expressing displeasure or pleasure at our school’s relative climb or fall in the rankings. This creates a cognitive dissonance in which we create exceptions for our own performance or our own school’s performance. “The rankings suck, but my school is finally being recognized for our outstanding scholarship,” one might say.

Seeking external validation might also produce desires to “people

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134. See, e.g., Lindsay Dodgson, *The 10 Professions with the Most Psychopaths*, BUS. INSIDER (May 20, 2018, 8:32 AM), <https://www.businessinsider.com/professions-with-the-most-psychopaths-2018-5#3-media-person-in-tv-or-radio-8> (including “lawyer” as one of the “top 10 career choices for psychopaths”).

135. Lawprofblawg, *How to Deal with Your Colleague, Professor Narcissus*, ABOVE THE LAW (Sept. 22, 2015, 3:43 PM), <https://abovethelaw.com/2015/09/how-to-deal-with-your-colleague-professor-narcissus/>.

136. *Id.*

please.”<sup>137</sup> That might mean saying yes to projects one does not wish to write, accepting additional service work that one does not wish to do, et cetera. This might explain why diverse faculty members get the lion’s share of committee assignment work as they seek to fit into an institution filled with barriers against their success.

### *B. Sour Grapes?*<sup>138</sup>

One argument why you might discredit our pleas to avoid external validation is that you believe the authors of this article have sour grapes, having never been published in a top-ten law review. Our answer to that is partly that we will no longer be submitting to those law reviews. Our data predicts a zero percent success rate for doing so.<sup>139</sup>

Our second reaction to this argument is that at least one of us has published a few times in top-thirty law reviews. Well, one of the law reviews climbed to top thirty after he published in it. Then it fell again. Another was in the top thirty and then dropped after publication. It is really hard to keep tabs on our “law review stock portfolio.” Our hope is that, one day, a law review in which we published will climb into the top ten, assuring our article is prominent.

The second author points out that if he were in the “game” for prominence, he would not have been on the plaintiff’s side of antitrust law, where lack of prominence and always losing is assured.<sup>140</sup>

Regardless, as one of us is predominantly an antitrust professor and another practices underwater basket weaving law, it is nigh on impossible for us to publish in those journals. As we sip our wines, we do not believe our grapes are sour.

### *C. Measuring “Quality” Intermittently*

It might be argued that law schools must measure the quality of articles published. That requires, due to the imperfect nature of the endeavor, that

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137. See ERICH FROMM, *ESCAPE FROM FREEDOM* viii, 185–86, 206 (1941) (discussing conformity as an anxiety-reducing coping mechanism and its potential to lead to authoritarian personalities).

138. If there are any sour grapes in this article, they will diminish over time. Unripe grapes have very high acidity. Over time, as grapes ripen, the sugar content increases and the acidity decreases. Thus, over time, this article’s sour grapes, if present, will yield a fine wine.

139. We have at our disposal a template of a rejection letter as well. See, e.g., Lawprofblawg, *Rejection Letter*, LAWPROFBLAWG (July 24, 2012), <https://lawprofblawg.wordpress.com/2012/07/24/rejection-letter/>. We have come to this conclusion independently and not in any way that might be considered a group boycott.

140. See, e.g., *Malaney v. UAL Corp.*, No. 3:10-CV-02858-RS, 2010 WL 3790296 (N.D. Cal. Sept. 27, 2010) (mocking the plaintiff’s expert testimony, for which the judge hopefully suffered higher airfares—as predicted in the plaintiff’s expert testimony—while in a middle seat).

we rely on proxies to establish the quality of an article. For example, are prominent movie stars sought after because they act well, or because they are prominent stars?<sup>141</sup>

The difficulty of that line of thinking is that if your proxies are biased, then your measurement of quality is imperfect. As an example, consider the duality that occurs when a faculty member targets a potential hire who has well-placed publications. The proxy frequently folds under the faculty member's withering attack. Oftentimes, the subject of the attack is someone who does not conform to the predispositions of the faculty at the school. In other words, the proxy is useful to support candidates that reaffirm the faculty's pre-analytic vision,<sup>142</sup> but is readily dispatched when the candidate does not.

Many law schools have tenure standards through which the faculty retains discretion in reviewing tenure decisions. This is to assure that people who have turned out to be toxic are barred tenure. However, it has also served to target people who have made no mistake other than to be the victim of institutional racism and sexism. In the tenure process, peer-review letters turn out to be the standard of review, along with the recommendation of the dean (if a central campus is involved). Missing from the review process are the very proxies which some are screaming necessary to measure quality, assuming as an academy we could agree on any.<sup>143</sup>

#### IV. TOWARDS LIBERATION

We have spent time discussing why we believe the process of law review publication and metrics of scholarly impact do great disservice to the fundamental goals of scholarship. As you might recall from Section II,<sup>144</sup> the fundamental goals of scholarship are to improve society by informing policy debate and to engage in the creative process.<sup>145</sup>

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141. See Robert K. Merton, *The Matthew Effect in Science*, 159 SCI. 56, 56 (1968) (analyzing how "psychosocial processes affect the allocation of rewards to scientists for their contributions").

142. "[A]nalytic effort is of necessity preceded by a preanalytic cognitive act that supplies the raw material for the analytic effort. In this book, this preanalytic cognitive act will be called Vision." See JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* 41 (Elizabeth Boody Schumpeter ed., 1954).

143. See *Writing for & Publishing in Law Reviews*, UNIV. WASH. LIBRARIES, [http://guides.lib.uw.edu/law/writinglawreview/measuring\\_quality](http://guides.lib.uw.edu/law/writinglawreview/measuring_quality) (last updated Jan. 5, 2019, 4:00 PM) (explaining that the quality of law reviews has been determined by ranking the journal's reputation, the author's prominence, and citations).

144. Assuming you did not fall asleep in Section I.

145. See, e.g., *The Wire: One Arrest* (HBO television broadcast July 21, 2002).

Bunk: A man must have a code.

Omar: Oh, no doubt.

*A. Focus on What Creates Maximum Benefit to Society*

There is no singular way to improve society.<sup>146</sup> An article might be a law professor's path to improving society. Other paths might include teaching, op-eds, amicus briefs, and social media.

For example, one of us has written op-eds, helped write amicus briefs, written articles, helped change statutes, and tilts his head towards the windmills of industrial concentration. It is difficult to determine which of these paths has produced maximum scholarly impact, or whether the combined broth of activity has produced the unsavory flavor of reputation, however rated.

In contrast, one of us just tweets all day and writes snarky blog posts, the sum total of pages no doubt exceeds the number of pages produced by the second author. That is for what the first author will forever be remembered.

In both instances, we can attest that neither of our proudest achievements has produced great fame or fortune. LPB's most famous achievement was a snarky tweet to Dinesh D'Souza.<sup>147</sup> Author Bush's most famous article involves an energy crisis in California that happened in 2001. The happiness of our work does not reflect well at all in our scholarship metrics or social media counts.<sup>148</sup>

*B. Focus on What Creates the Most Joy*

The goal of living is to be happy.<sup>149</sup> We are not suggesting that what law professors have been writing has not produced the maximum amount of happiness, but conversations in the hallways of AALS might suggest another story. The number of articles which authors feel obligated to do,

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*Id.*

146. Cf. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 824 (1935) ("Fundamentally there are only two significant questions in the field of law. One is, 'How do courts actually decide cases of a given kind?' The other is, 'How ought they to decide cases of a given kind?' Unless a legal 'problem' can be subsumed under one of these forms, it is not a meaningful question and any answer to it must be nonsense.").

147. Lawprofblawg (@lawprofblawg), TWITTER (Nov. 12, 2017, 5:41 PM), <https://twitter.com/lawprofblawg/status/929886824880885762> ("That awkward moment when you're lukewarm on a candidate until you're sure he's into 14 year old girls and then you're all in.") (commenting on Dinesh D'Souza (@DineshDSouza), TWITTER (Nov. 12, 2017, 5:58 AM), <https://twitter.com/DineshDSouza/status/929709895603097600>). While it was not Lawprofblawg's finest scholarly moment, more people saw that tweet (four million plus) than will ever read our articles.

148. This might be our most famous article, for example, but it is not as if we liked working with each other.

149. HIS HOLINESS THE DALAI LAMA & HOWARD C. CUTLER, *THE ART OF HAPPINESS: A HANDBOOK FOR LIVING* 13 (1998) (quoting Dalai Lama, "I believe that the very purpose of our life is to seek happiness.").

the number of times we have heard about commitments, and the number of times we have heard about overcommitted writers suggest that the velocity and requirements of publication have caused limited enjoyment of the art.<sup>150</sup>

We are not suggesting that if you are a prolific writer your articles are causing your exploitation. We are suggesting that the focus on external validation has the potential to increase velocity beyond that which enables professors to enjoy life and be happy. As many articles have pointed out, no one says on their deathbed, “I wish I had written one more article,”<sup>151</sup> although we can think of a few people who might like that on their tombstone.

We expect that there will be claims of pure happiness and joy arising from article placement, prestige, and prominence. That is fine.<sup>152</sup> We are not attempting to step on your mojo or deny you your appropriate kudos. We are instead concerned about the institutional barriers that prevent others from getting their appropriate kudos, and that it detracts from their ultimate happiness by seeking that which cannot be.

### C. *F\*\*k That Noise, but . . .*

Once one casts aside the goal of external validation, it becomes easier to write without fear. Writing without fear makes it easier to attack issues in a nonlinear and innovative way. It enables the writer to explore new approaches, and to potentially make greater contributions to the literature than might be the case when under the magnifying glass of external validation.

As Brene Brown said:

I spent a lot of years trying to outrun or outsmart vulnerability by making things certain and definite, black and white, good and bad. My inability to lean into the discomfort of vulnerability limited the fullness

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150. We have also heard too many “Henry V” conversations, as we call them. As the French spend the night awaiting the battle, they commence boasting of their provisions, culminating in the Dauphin going over the top:

I will not change my horse with any that treads but on four pasterns. Ca, ha! he bounds from the earth, as if his entrails were hairs; le cheval volant, the Pegasus, chez les narines de feu! When I bestride him, I soar, I am a hawk: he trots the air; the earth sings when he touches it; the basest horn of his hoof is more musical than the pipe of Hermes.

WILLIAM SHAKESPEARE, HENRY V act 3, sc. 7, available at <http://shakespeare.mit.edu/henryv/full.html>.

151. See, e.g., Susie Steiner, *Top Five Regrets of the Dying*, GUARDIAN (Feb. 1, 2012, 6:49 AM), <https://www.theguardian.com/lifeandstyle/2012/feb/01/top-five-regrets-of-the-dying>.

152. See generally SIGMUND FREUD, DIE VERNEINUNG (1925), available at <http://gutenberg.spiegel.de/buch/die-verneinung-915/1> (discussing denial).

of those important experiences that are wrought with uncertainty: Love, belonging, trust, joy, and *creativity* to name a few.<sup>153</sup>

In other words, fear stifles creativity.<sup>154</sup>

Numerous authors have discussed the importance of writing fearlessly.<sup>155</sup> It implicates the advancement of society as well, for if ideas are limited by fear of reprisal, then they are constrained.<sup>156</sup>

#### D. . . . *Don't Listen to Us Until You Are Tenured*

The authors of this article have made every attempt to ensure that this article is accurate and interesting.<sup>157</sup> However, the information provided in this article is provided “as is” without warranty of any kind. We do not accept responsibility for your reading this article, feeling all inspired to write creatively, only to have your tenure denied or to be fired from your institution for your article entitled, “Why Deans Suck.”<sup>158</sup> We do not accept any responsibility or liability for any content, reliability, accuracy, or completeness of this article should you decide to stop conforming to law school social norms. You must suffer as the authors have.

We cannot and will not guarantee that you will be free from societal

153. Dan Schawbel, *Brene Brown: How Vulnerability Can Make Our Lives Better*, FORBES (Apr. 21, 2013, 11:30 AM) (emphasis added), <https://www.forbes.com/sites/danschawbel/2013/04/21/brene-brown-how-vulnerability-can-make-our-lives-better/#12421d2136c7>.

154. Browsing inspirational websites produces lots of quotes of similar nature from a variety of sources. “Failure is part of the creative process. If you’re afraid of it, you can’t really create.” Attrib. Danny DeVito. *Quotes About Writing, Fear and Creativity*, FEAR OF WRITING, <https://www.fearofwritingonlinecourse.com/quotes-about-writing-fear-and-creativity/> (last visited Jan. 5, 2019). See also RALPH KEYES, *THE COURAGE TO WRITE: HOW WRITERS TRANSCEND FEAR* 64, 75 (2003) (“One of the most fundamental of human fears is that our existence will go unnoticed. . . . Any writing exposes writers to judgment about the quality of their work and their thought. The closer they get to painful personal truths, the more fear mounts—not just about what they might reveal but about what they might *discover* should they venture too deeply inside. To write well, however, that’s exactly where we must venture.”); see also Peter Sims, *The No. 1 Enemy of Creativity: Fear of Failure*, HARV. BUS. REV. (Oct. 5, 2012), <https://hbr.org/2012/10/the-no-1-enemy-of-creativity-f>; *Sylvia Plath Quotes*, GOODREADS, <https://www.goodreads.com/quotes/358562-the-worst-enemy-to-creativity-is-self-doubt> (last visited Jan. 5, 2019) (“The worst enemy to creativity is self-doubt.”); *Matisse in His Own Words*, HENRI MATISSE, <http://www.henrimatisse.net/quotes.html> (last visited Jan. 5, 2019) (“Creativity takes courage.”).

155. “To produce a mighty book, you must choose a mighty theme. No great and enduring volume can ever be written on the flea, though many there be who have tried it.” HERMAN MELVILLE, *MOBY DICK* 303–04 (Black & White Classics ed., 2014) (1851).

156. “You can’t be a writer and have nothing to write about. You have to have life experiences.” See Larry Wilmore, *Neil deGrasse Tyson*, INTERVIEW (Nov. 1, 2016), <https://www.interviewmagazine.com/culture/neil-degrasse-tyson> (quoting Neil DeGrasse Tyson).

157. These tasks were assigned to the two authors based upon comparative advantage. See DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 87–93 (1911) (discussing comparative advantage).

158. Just for the record, deans are wonderful people, including, but not limited to, the current deans at the University of Houston Law Center and LPB School of Law.

ostracism,<sup>159</sup> not be uninvited to dinner parties, or ignored at author receptions.<sup>160</sup> Again, you must suffer as we have.

We are not liable for any loss or damage of whatever nature (direct, indirect, consequential, or which may arise as a result of your taking our advice or otherwise reading this article), including loss of tenure, firing, failure to lateral to your dream school, or deciding to leave academia altogether to become a yak herder.<sup>161</sup>

Having said all of that, imagine your freedom as you choose projects based upon important factors such as your happiness and its importance to society, and not whether a law student thinks it is great.

#### CONCLUSION

The purpose of this article is to challenge traditional thinking about how we as law professors engage with each other and the public. More specifically, the authors argue that we<sup>162</sup> have lost our way. Rather than focus on ideas, we have become more focused on the external measurement of the idea's worth by today's flight-of-measurement fancy or by historical measurement techniques. Ironically, all the while we tell students to focus on the learning and not on the grade.

But the grading for law professors is not blind. There are many reasons to question the inherent value of a system that perpetuates a hierarchy based upon class, race, gender, sexual orientation, and gender identity.<sup>163</sup> The academy has its favorites, and that leads to problems in terms of innovation, inclusion, and ultimately the quest for knowledge.

Ours is an appeal to cast aside the quest for external validation, and instead focus on the ultimate goal of academia: understanding and improving society. From that comes the ultimate personal goal, one that is missing from academia: happiness and fulfillment.

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159. See Kipling D. Williams & Steve A. Nida, *Ostracism: Consequences and Coping*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 71, 71 (2011), available at <http://journals.sagepub.com/doi/abs/10.1177/0963721411402480?journalCode=cdpa>.

160. For extreme cases, depending on your privileged status, you might even find yourself shunned at Martha's Vineyard. The authors have never been shunned there, having been unable to afford to go there. See Niraj Chokshi, *Alan Dershowitz Says Martha's Vineyard Is 'Shunning' Him over Trump*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/alan-dershowitz-marthas-vineyard.html> (“[A]n unnamed ‘academic at a distinguished university’ has refused to attend any dinner or party where [Dershowitz] is present.”).

161. See generally Pema Gyamtsho, *Economy of Yak Herders*, 2 J. BHUTAN STUD. 86 (2000), available at [http://himalaya.socanth.cam.ac.uk/collections/journals/jbs/pdf/JBS\\_02\\_01\\_04.pdf](http://himalaya.socanth.cam.ac.uk/collections/journals/jbs/pdf/JBS_02_01_04.pdf) (describing the practices of yak herders in remote mountain areas of Bhutan).

162. The collective “we” of law professors, not “we” the authors.

163. While mostly missing from this article, the authors recognize that sexual orientation and gender identity are also implicated in terms of hierarchical barriers in academia. We are always concerned about the privacy of others, and we did not run data on this important issue out of an abundance of caution in terms of inadvertently outing someone.