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Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study

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CITATIONS, JUSTIFICATIONS, AND THE TROUBLED STATE OF LEGAL SCHOLARSHIP: AN EMPIRICAL STUDY

By: Jeffrey L. Harrison and Amy R. Mashburn*

ABSTRACT

Recent pedagogical, economic, and technological changes require law schools to reevaluate their resource allocations. Although typically viewed in terms of curricular changes, it is important also to focus on the very significant investment in legal scholarship and its impact. Typically, this has been determined by some version of citation counting with little regard for what it means to be cited. This Article discusses why this is a deeply flawed measure of impact. Much of that discussion is based on an empirical study the Authors conducted. The investigation found that citation by other authors is highly influenced by the rank of the review in which a work is published and the school from which the author graduated. Courts, on the other hand, are less sensitive to these markers of institutional authority. Perhaps more importantly, when the purpose of the citation is examined, a very small handful of those citing a work do so for anything related to the ideas, reasoning, methodology, or conclusions found in the cited work. This is slightly less true for judicial citation compared to citations by other authors. Given the level of current investment in legal scholarship and findings that reliance on it is far lower than citation counts would suggest, the Authors offer a number of recommendations designed to increase accountability of legal scholars and the utility of what they produce.

TABLE OF CONTENTS

I. INTRODUCTION.....	46
II. THE STATUS QUO AND JUSTIFICATIONS BY ITS DEFENDERS	50
A. <i>The Current State of Legal Scholarship</i>	50
B. <i>An Estimate of the Investment in Legal Scholarship</i>	52
C. <i>Justifications</i>	54
1. <i>Four Common Flawed Justifications of Legal Scholarship</i>	54
a. <i>Speculation and Examples Prove Influence Beyond Other Law Professors</i>	54
b. <i>Tenure and Academic Freedom Compel Non-Accountability</i>	56

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c.	<i>Other Disciplines May be as Bad as Law</i>	57
d.	<i>Students Benefit from Editing Journals</i>	58
2.	Two Additional Justifications	59
a.	<i>Legal Scholarship is Beneficial</i>	59
b.	<i>The “Public Good” Rationale</i>	61
III.	THE EMPIRICAL STUDY	63
A.	<i>Methodology and Findings</i>	63
1.	Methodology	63
2.	Findings	64
3.	Regression Analysis	68
4.	What it Means to be Cited: Judicial	70
5.	What it Means to be Cited: Scholarship	73
6.	What it Means to be Cited: Double Checking	76
B.	<i>Summary of Findings</i>	76
IV.	JUSTIFICATIONS REVISITED	79
A.	<i>Reassessing the Benefits of Legal Scholarship</i>	79
B.	<i>Reevaluating Whether Legal Scholarship is a “Public Good”</i>	82
V.	RECOMMENDATIONS	83
A.	<i>Encourage Critical Debate</i>	84
B.	<i>Resist the Use of Raw Citation Counts</i>	84
C.	<i>Increase Reliance on Peer Review</i>	85
D.	<i>Implement Blind Submissions and Review</i>	86
E.	<i>Ensure Greater Administrative Oversight of Law Journal Management</i>	86
F.	<i>Gather Information from Constituents about Helpful Scholarship</i>	86
G.	<i>Create a System that Incentivizes More Helpful Scholarship</i>	87
H.	<i>Educate Peer Reviewers</i>	89
VI.	CONCLUSION	89

I. INTRODUCTION

In order to appreciate the unusual nature of legal scholarship, one has only to imagine what another area of professional school-based research—medicine—would look like if it followed the legal research model. Almost all of the researchers will have graduated from a few prestigious medical schools. Their fortunes (tenure, salaries, grants, chairs, travel opportunities, accolades from colleagues, etc.) will be largely dependent on placement of their research publications and citations to them. Those placement decisions, however, will not be made by peer review, determination of adherence to accepted research protocols, and assessment of the utility of the research to its intended beneficiaries, but in large measure by the authors’ ability to

catch the attention of second-year medical students.¹ The students, because of their inexperience and acculturation to an elitist bias, will use indicators of the author's elite status as a surrogate for the quality determinations they cannot make. The student editors are focused on selecting articles that will generate citations by other researchers, not necessarily because this will make the journal influential with or helpful to the consumers of medical services, but rather because these numbers are used to rank their publication against its peers.

As for the content of the research, it is based entirely on the whim of the researcher and is not determined by the pressing needs of the consumers of medical services. Our hypothetical medical research's value will be measured instead by how many other similarly-situated medical researchers cite to it and not by whether any consumers of medical services and products are actually made better off. It will not matter if those citations are to the substance of the research. In fact, it is likely that, for example, an article advancing a radical new theory of cell regeneration will have been cited most often for its accurate, non-controversial list of the parts of a cell. At no point post-tenure will the researcher be required to demonstrate that the research could withstand rigorous peer review or that it had proven useful to clinicians, patients, drug manufacturers, etc. Now, imagine that year after year, millions of dollars (much of it public money) were being invested in this type of research. Finally, factor in that all of those very intelligent, highly educated researchers are qualified and capable of using their time and effort to help the consumers of medical services, but that under the current system have no financial incentive to do so and may pay penalties if their focus becomes too practical.²

This characterization of legal scholarship may be faulted for failing to acknowledge what some might argue are offsetting positives, such as the significant contributions many legal scholars have made that have directly assisted legislatures, judges, lawyers, and clients, and the

1. Richard A. Wise posed a similar question: "Would you want The New England Journal of Medicine to be edited by medical students?" Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES, Oct. 21, 2013, at A15, http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?_r=0.

2. No system is perfect. Medical research, even in the public context, may be criticized as excessively market driven. More generally, some accuse "careerism" and the stress to "publish or perish" as dominating academic life to the extent that scientific research is often seriously "flawed," "squanders money and the efforts of some of the world's best minds," and "encourages exaggeration and the cherry-picking of results." *Problems with Scientific Research: How Science Goes Wrong*, ECONOMIST (Oct. 19, 2013), <http://www.economist.com/news/leaders/21588069-scientific-research-has-changed-world-now-it-needs-change-itself-how-science-goes-wrong> [<http://perma.cc/YH2R-4KFT>]; see also, Alejandro M. Aragón, *A Measure for the Impact of Research*, 3 SCI. REP. 1 (2013), <http://www.nature.com/srep/2013/130411/srep01649/pdf/srep01649.pdf> [<http://perma.cc/82TR-FMBE>] (describing the increasing pressure to publish as resulting in a flood of dubious scientific publications written for the purpose of obtaining numerous citations by colleagues).

intellectual or “public good” value of the publications.³ As is explained in the Sections that follow, an empirical study we have conducted, among others, reveals that this description of legal scholarship is, on the whole, neither unfair nor an exaggeration.⁴ Moreover, to the extent that constituents other than law professors benefit in practical ways from legal scholarship, those benefits are largely the product of happenstance and individual preferences, rather than an intended by-product of the existing structured system of incentives and disincentives that sustains most of the tenured law professoriate.⁵

Legal scholarship has been the subject of criticism for decades, and the negative assessments run the gamut from the substantive to the stylistic. On the substantive end of the spectrum, perhaps the most devastating critique is Professor Mark Tushnet’s conclusion that legal scholarship is “marginal” and “lies at the edges of serious intellectual activity.”⁶ As for stylistic deficiencies at the other end of the spectrum, commentators have noted the awkward, ponderous style and unnecessarily fussy, distracting footnotes.⁷ Concerns about off-putting, excessive theoretical content, and a lack of peer review probably fall somewhere in the middle.⁸

Similarly, legal education has been subjected to an impressive array of criticisms that range from the political to the pedagogical. As for the political, law schools have been accused of being institutions that replicate “illegitimate hierarchy.”⁹ From a pedagogical perspective, legal education has been condemned for its lack of transparency and

3. See *infra* Section II.C.

4. See *infra* Part IV.

5. See generally BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1354–55 (“[L]egal scholars face substantial obstacles to ambitious empirical research [and] confront corresponding disincentives for unambitious but nonetheless useful work for nonacademic audiences.”).

6. Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1205 (1981) (analyzing the limitations inherent in the legal scholar’s role as having their origins in advocacy and observing that he could not imagine “an intellectual history of contemporary America in which legal thought would play an important part”).

7. Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 281–82 (1962) (discussing law review writing style and commenting on “[l]ong sentences, awkward constructions, and fuzzy-wuzzy words” and describing law reviews as “cluttered up with little numbers”); David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html> (discussing the limited appeal of law reviews).

8. Rhode, *supra* note 5, at 1337 (identifying the theoretical content as one of the perceived problems with law review articles); Liptak, *supra* note 1 (explaining the lack of peer review).

9. DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (A CRITICAL EDITION)* i–ii (2004) (identifying “the ways in which legal education contributes to the reproduction of illegitimate hierarchy in the bar and in society”).

accountability, adherence to ineffective pedagogy, excessive cost, and failure to adequately prepare students to enter the practice of law.¹⁰ With a few notable exceptions, however, critics of legal education have not focused much on whether—and precisely how—the shortcomings of legal scholarship are contributing to the problems with legal education more generally.¹¹ This Article posits that the two sets of concerns are fundamentally related, and that any serious effort to reform legal education must include critical evaluation of the resources invested in legal scholarship and consideration of whether at least some of those resources should be redirected and managed differently.

Towards that end, this Article identifies, through empirical analysis, fundamental problems with legal scholarship. Three findings are particularly important. First, citation of articles by law professors is highly correlated with the ranking of the review publishing the article and—in the eyes of other law professors—the prestige of the author’s institutional affiliations.¹² Articles published in reviews that are not highly ranked, or in specialty reviews, are cited so infrequently that it re-

10. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (reviewing law school pedagogy, comparing that pedagogy with the pedagogy of other professional schools, and making recommendations regarding the assessment of student learning); Judith Welch Wegner, *The Carnegie Foundation’s Educating Lawyers: Four Questions for Bar Examiners*, B. EXAMINER, June 2011, at 11, https://law.ubalt.edu/academics/pdfs/Carnegie%20Report%20article_final.pdf [<http://perma.cc/G5Q7-ZW65>] (presenting “key insights from the Carnegie Foundation’s study on legal education, *Educating Lawyers: Preparation for the Profession of Law*, commonly known as the Carnegie Report, published in 2007, while also incorporating information about related developments in law schools that have occurred in ensuing years” (footnote omitted)); *Law Grad Sues Law School for Lack of Transparency*, VAULT BLOGS (May 31, 2011), <http://www.vault.com/blog/vaults-law-blog-legal-careers-and-industry-news/law-grad-sues-law-school-for-lack-of-transparency> [<http://perma.cc/G5CD-F3ZA>] (reporting that a former Thomas Jefferson School of Law graduate sued the school “seek[ing] over \$50 million in damages[,] alleg[ing] fraud; negligent misrepresentation; and violations of the Unfair Competition Law, False Advertising Act, and the Consumer Legal Remedies Act. Among the suit’s assertions is that Thomas Jefferson has provided ‘false and misleading’ employment data to *U.S. News & World Report* for its annual law school survey”); Segal, *supra* note 7 (discussing ineffective pedagogy and the failure to prepare students to practice).

11. For examples of some commentators who have focused on the problems with legal scholarship in this regard, see, e.g., TAMANAHA, *supra* note 5, at 54–61 (arguing that law schools should “critically examine the cost of the legal scholarship frenzy” and questioning whether it is appropriate that “law students are forced to pay for the production of scholarship at current levels”); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 932–40 (1990) (noting that “the limited value of legal scholarship as it appears in law reviews is largely outweighed by its costs”); Rhode, *supra* note 5, at 1330 (noting that “broader issues” are behind concerns about legal scholarship, including “the role of law and legal education and their relationship to legal scholarship,” and questioning “to what extent should students in a professional school acquire and subsidize knowledge about the role of law that will have little immediate relevance to their practice?”).

12. See *infra* text accompanying note 81.

quires one to question whether those works, regardless of quality, are worth their costs.¹³ Finally, when cited, it is rare to find evidence that the citing work actually relied on or was influenced by the cited work.¹⁴

Part II of the Article sets the stage for the empirical study by: (1) describing some of the factors that work together to maintain the status quo; (2) estimating the amount of the current annual monetary investment in this type of scholarship; and (3) identifying and assessing common justifications advanced in defense of the status quo. Part III explains the methodology of the Article's empirical study of legal scholarship citations and describes the study's findings. Part IV analyzes the study's findings and explains why they undermine the two prevailing justifications for the shortcomings of legal scholarship. Among other things, the data: (1) reveal why legal scholarship should not be presumed to be beneficial based on citation counts as evidence of "impact"; and (2) suggest that the "public good" rationale for the level of resources invested in legal scholarship has been exaggerated. Part V makes several practical recommendations based on the study's findings for modifying the nature of the investment in legal scholarship and encouraging the production of legal publications that may be helpful to constituents other than law professors.

Perhaps it is worthwhile to make note of a disclaimer at this juncture. Although what follows is a serious attack on the usefulness of legal scholarship generally, it is not a criticism of any individual effort. Despite their critique, the Authors read and enjoy legal scholarship as much as any other within the profession. That observation, however, captures the theme of what follows: legal scholarship, in its present form, is a massive and unsupportable investment in what benefits a few people in a narrow universe.

II. THE STATUS QUO AND JUSTIFICATIONS BY ITS DEFENDERS

A. *The Current State of Legal Scholarship*

Although things could be (and have historically been) otherwise, the current state of legal scholarship is the result of a strong synergistic relationship among a number of interrelated forces working together to maintain the status quo. Most modern ABA-accredited law schools have adopted and perpetuated what may be loosely described as a graduate school model of legal education.¹⁵ One consequence of

13. See *infra* text accompanying notes 78–79.

14. See *infra* Section III.A.5.

15. Between 1965 and 2010, the total number of ABA accredited law schools went from 135 to 200. *Enrollment and Degrees Awarded 1963–2012 Academic Years*, ABA, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf [<http://perma.cc/2RJ7-4GRL>]. The new law schools had tenured faculties with publication requirements. This added many new manuscripts to the number being submitted

this adoption is the need for law schools to conform to the university's system of tenure and for law faculty to have credibility as academics. This means that at most law schools, most faculty members are not appointed because of their expertise as legal practitioners, but rather because of their academic success at a few elite law schools and a favorable assessment of their potential as scholars.¹⁶ Because tenure requires peer review, and upward mobility for law teachers requires impressing other law professors¹⁷ (ideally, at higher-ranked law schools), the content of legal scholarship must demonstrate the author's proficiency with applying theory¹⁸ and avoid the telltale faults of being too practical, doctrinal, or descriptive.¹⁹ Tenured faculty, above all else, must be scholars.²⁰ In the odd alchemy of the politics of legal education, being concerned about the practicalities of any aspect of legal education—classroom pedagogy, skills instruction, the students' preparedness to practice law, whether public money is being spent responsibly, or the reasonableness of the investment in legal

every year for publication. *Id.*; TAMANAHA, *supra* note 5, at 31 (describing how, in response to demands to make legal education more flexible and relevant to law practice, “[l]egal academics across the country continue to insist on the uniform model of legal education,” which includes “law faculties predominantly staffed by scholarly professors eligible for tenure”).

16. Tracey E. George & Albert H. Yoon, *The Labor Market for New Law Professors*, 11 J. EMPIRICAL LEGAL STUD. 1, 1–2, 20–21 (2014); Scott Jaschik, *Hiring Themselves*, INSIDE HIGHER EDUC. (Nov. 13, 2013), <https://www.insidehighered.com/news/2013/11/13/study-finds-law-schools-perpetuate-elite-legal-education-values-faculty-hiring> [<http://perma.cc/7WZQ-D7MP>]; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 134 (2007); Richard E. Redding, “Where Did You Go to Law School?” *Gatekeeping for the Professoriate and its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 594–95 (2003).

17. Rhode, *supra* note 5, at 1352 (attributing some of the limitations in legal scholarship to “faculty interests in status, recognition, and autonomy” and noting that “[b]eneath the veneer of academic freedom lies a convenient measure of scholarly self-indulgence”).

18. *Id.* at 1337 (asserting that “[t]he ‘high theory’ that carries the greatest prestige for legal scholars is of the least interest to practitioners”).

19. Segal, *supra* note 7; Henry T. Edwards, *The Growing Distinction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). Some argue that law professors’ lack of practice experience is also a reason why their scholarship has such a strong theoretical perspective. David Hricik & Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761, 766–70 (2005). The following is illustrative of the level of repugnance law professors voice for the doctrinal scholarly enterprise, even when they are endeavoring to defend it:

In one way or another, the presenters all suggest that this kind of scholarship is passé, unprofitable, perhaps even pernicious. I want to take issue with this theme, and to offer a sketch of a defense of traditional legal scholarship. I will frankly confess at the onset that doctrinal analysis isn’t something that I especially enjoy doing or reading. But I do think that doctrinal analysis has a valuable and even central place in legal scholarship.

Steven D. Smith, *In Defense of Traditional Legal Scholarship: A Comment on Schlegel, Weisberg, and Dan-Cohen*, 63 U. COLO. L. REV. 627, 627 (1992) (footnote omitted).

20. TAMANAHA, *supra* note 5, at 55–56.

scholarship—is something to be avoided.²¹ Ironically, to be successful, law teachers should not be too concerned about teaching.²²

One final factor was necessary to create and maintain the current idiosyncratic state of legal scholarship: student-edited law reviews.²³ Simply put, law professors needed law reviews in order to obtain tenure.²⁴ Students select which articles will be published and, through the editing process, have a significant influence over which articles are cited in the articles they publish.²⁵ Each of these processes—article selection and editing—is a powerful force in shaping legal scholarship.²⁶ Studies show that students select articles by assuming that the credentials of the authors and the status of the schools at which they teach signal not just reliability but also the likelihood of citation by other law professors, whose value assessments will presumably be similar.²⁷ Through this process, they have also made manifest the professoriate's elitist preference for theory.²⁸ As editors, the students adhere to an arcane and pedantic set of attribution rules that demand support for almost every statement in an article. This assures that there will be many citations to various works and that most of them will not be substantive or represent an affirmation by the author of the article for the substance of the cited work, but rather a harried law student's judgment that the citation "supports" the statement in the text.²⁹

B. *An Estimate of the Investment in Legal Scholarship*

It is impossible to know with certainty the cost of legal scholarship.³⁰ It is, however, possible to make a series of assumptions that

21. *Id.*

22. Segal, *supra* note 7 (“[T]here are few incentives for law professors to excel at teaching. It might earn them the admiration of students, but it won’t win them any professional goodies, like tenure, a higher salary, prestige or competing offers from better schools. For those, a professor must publish law review articles, the ticket to punch for any upwardly mobile scholar.”).

23. Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U. L. REV. 563, 563–66 (2007) (discussing the history of student-edited law reviews).

24. *Id.* at 566.

25. *See generally id.*

26. Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 9 n.29 (2013); Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 ALB. L. REV. 565, 568 (2008).

27. Wise et al., *supra* note 26; Day, *supra* note 23, at 575–76 (discussing how the selection process is biased); Nance & Steinberg, *supra* note 26, at 571–72.

28. Rhode, *supra* note 5, at 1328, 1337, 1342.

29. For an amusing description of what this process produces, see Rhode, *supra* note 5, at 1334–35.

30. Segal, *supra* note 7 (“[M]uch of academia produces cryptic, narrowly cast and unread scholarship. But a pie chart of how law school tuition is actually spent would show an enormous slice for research and writing of law review articles. . . . Last year, J.D., or juris doctor, students spent about \$3.6 billion on tuition, according to American Bar Association figures, accounting for discounts through merit- and need-based

lead to a conservative approximation.³¹ Assume there are 200 law schools with 30 faculty each, for a total of 6,000 law professors. In addition, assume each one earns \$160,000, which includes fringe benefits in the range of 30%. Finally, suppose each school assigns its faculty 12-hour teaching loads, which are then reduced to 9 hours to allow for scholarship production.³² These assumptions result in an estimation of \$960 million per year in law faculty salaries. One-fourth of that figure—\$240 million—can be attributed to the production of scholarship.

Certainly effective teaching requires some level of research and perhaps the \$240 million should be discounted to allow for that. This is not, however, a compelling argument, for the following reason. Suppose the average law teacher works 40 hours a week and is expected to engage in the preparation of legal scholarship one-fourth of that time due to a one-fourth reduction in teaching load. That leaves 30 hours a week to prepare for class and to be in the classroom for 4 or 5 hours. This leaves ample time for any research necessary for teaching excellence.³³

The estimate of \$240 million is likely conservative since it only considers professors' salaries and a constant 9-hour teaching load. Periodically, however, even when professors teach only 4 or 5 hours a week, many schools offer sabbaticals and research leaves that further reduce teaching loads. Scholarly efforts also require the expense of operating one to several publications, article submission costs, research assistant payments, secretarial salaries, photocopying expenses, and so on. An important expense not accounted for is the opportunity cost of not having professors in the classroom, where they are more able to focus

aid. Given that about half of a law school's budget is spent on faculty salary and benefits, and that tenure-track faculty members consume about 80 percent of the faculty budget—and that such professors spend about 40 percent of their time producing scholarship—roughly one-sixth of that \$3.6 billion subsidized faculty scholarship. That's more than \$575 million.”); see Robert Steinbuch, *On the Leiter Side: Developing a Universal Assessment Tool for Measuring Scholarly Output by Law Professors and Ranking Law Schools*, 45 *LOY. L.A. L. REV.* 87, 119–22 (2011) (discussing the costs of publication); Karen Sloan, *Legal Scholarship Carries a High Price Tag*, *NAT'L L.J.* (Apr. 20, 2011), <http://blogs.luc.edu/mediaclips/files/2011/05/The-National-Law-Journal-Legal-scholarship-carries-a-high-price-tag-4.20.11.pdf> [<http://perma.cc/KZ6L-UP76>]; Orin Kerr, *Estimating the Costs of Legal Scholarship*, *VOLOKH CONSPIRACY* (Nov. 21, 2011), <http://volokh.com/2011/11/21/estimating-the-costs-of-legal-scholarship/> [<http://perma.cc/LRW6-Z72G>].

31. Readers may adjust the factors if they are not in accord with their assumptions.

32. TAMANAHA, *supra* note 5, at 39–43 (discussing how “vigorous advocacy” by law professors “produced a long-term trend of pushing down teaching loads while salaries went up” and also noting that although the nine-hour load became common, in practice many professors had loads of 6.71 hours or two courses per year).

33. We do not know if an average law professor teaching a nine-hour yearly load actually does spend thirty hours a week preparing to teach and teaching. To the extent it can be done effectively in less than thirty hours, such a professor's actual release time for teaching is more than the quarter time we have posited here.

on their teaching. Obviously, this would be offset by the benefits of legal research. But if those benefits are as low as suggested by the research reported here, it is hard to believe that they would not be exceeded by the benefit to the students of smaller classes, more individual attention, and a more expansive curriculum.³⁴

C. Justifications

1. Four Common Flawed Justifications of Legal Scholarship

Tenured law professors have reacted in various ways to criticisms and reform initiatives that threaten the status quo. At least one survey indicates that many professors are critical of the flawed law review placement system and are “dissatisfied with the effects of law reviews on their careers.”³⁵ On the other hand, and perhaps predictably, many seem less welcoming of reform efforts that are directed at aspects of the existing legal education system that favor them.³⁶ We have encountered or expect to encounter the following justifications for the current state of legal scholarship. Whether these views are widely shared or representative of only a vocal minority remains to be seen.

a. *Speculation and Examples Prove Influence Beyond Other Law Professors*

The most predictable response of law professors to criticisms regarding infrequent citation of scholarly legal publications is to assert that they “know” legal scholarship enjoys a wide readership despite the lack of citation and believe that lawyers, judges, agency staffers, etc., read law review articles and find the content helpful.³⁷ These op-

34. TAMANAHA, *supra* note 5, at 52–53 (noting that student tuition pays for law professors’ salaries, course reductions, summer grants, etc., and that if allocations for research were dropped and more teaching required, law school budgets could be “slashed”).

35. Wise et al., *supra* note 26, at 69 (reporting that among those surveyed, law professors were among the most critical of the current system).

36. TAMANAHA, *supra* note 5, at 30–31 (describing how law professors couch this defensiveness in terms of their “selflessness”); *Id.* at 28–36 (describing the battle between the Association of American Law Schools (“AALS”) and American Bar Association (“ABA”) over proposed changes that would have allowed more non-tenure track hires at ABA-accredited law schools).

37. See, e.g., Dan Rodriguez, *Scholarship Funding: Why and How*, PRAWFSBLAG (Feb. 25, 2014, 11:02 AM), <http://prawfsblawg.blogspot.com/prawfsblawg/2014/02/scholarship-funding-why-and-how.html> [<http://perma.cc/37L7-UY9B>] (defending the subsidization of legal scholarship on several grounds, including that “legal scholarship can and does help shape the law in constructive directions, can help shed illuminating light on difficult legal and policy puzzles, and can help advance important societal goals”) (“To be sure, at its worst, legal scholarship is banal, remote from considerations of both the bar and the academy, and is overwrought. The same can be said of bad judicial opinions, bad statutes, and bad work product in nearly every field. . . . Choose your favorite example. The work of environmental law scholars from the 70’s and 80’s helped transform modern environmental law; actual people benefited from these efforts. The work of constitutional lawyers helped propel the cause of marital

timistic academics are unconcerned with the results of studies showing a lack of citations because they can imagine any number of ways that their scholarship might have proven useful and are able to point to examples of articles that they assert have been “transformative” of an area of law.³⁸ One wonders if what is actually meant is that the allegedly transformative work has transformed an area of legal *scholarship*, rather than an area of *law*.

Undoubtedly, law professors influence and alter the thinking of other law professors. For all that is known, however, this phenomenon may be most akin to generating climate change in a terrarium. For the purposes of this Article, the core question is: How much of legal scholarship’s transformative power actually makes its way outside the academic dome? The answer is not apparent, but clearly this transformative effect is not a phenomenon to be conveniently presumed into existence or created by conflating scholarly debates about law with the actual operation of law in society. The temptation to do the latter is great because as Professor Tushnet has observed, “[t]he intellectual marginality of legal scholarship is all the more striking in light of the immense role that law plays in American society.”³⁹

Whatever its causes, however, the justification is essentially not only faith-based but also anti-intellectual. Its proponents are notably uninterested in discovering the truth of these assertions through any form of verification. What verification there is points in the opposite direction: Law professors are writing largely for one another and have few readers outside academia.⁴⁰ It is also a logical fallacy to point to the existence of a (relatively speaking) few transformative scholarly works as justification for the thousands of articles subsidized and produced every year.⁴¹ The unstated premise is that if a few articles have a demonstrable transformative effect, many more articles must be having the same effect. This is a faulty generalization and, based on our research, not one that should be accepted without some kind of verification.⁴² Moreover, even if it were true that law review articles enjoy a

equality in the past fifteen years. The work of libertarian legal scholars and political economists are helping shape the debate over eminent domain in the post-Kelo world. The list is a long one. The value of legal scholarship should be judged by its best practitioners, not its worst excesses.”).

38. See, e.g., *id.*

39. Tushnet, *supra* note 6, at 1205.

40. Rhode, *supra* note 5, at 1336–37 (noting the results of a survey that showed that “[o]ver two-thirds of surveyed attorneys had consulted law reviews fewer than six times in the preceding six months; over a third had not consulted them at all”); Wise et al., *supra* note 26, at 71 (finding that judges and lawyers read law reviews infrequently).

41. See *infra* text accompanying note 50.

42. For an argument maintaining that it is “naïve” to believe that legal scholarship is influential on actors outside academia and asserting that the “actual effect of a law review article on the behavior or decisions of judges, let alone other governmental actors, is quite limited,” see Benjamin H. Barton, *Saving Law Reviews from Political Scientists: A Defense of Lawyers, Law Professors, and Law Reviews*, 45 GONZ. L.

wide readership, it would not mean that the current level of subsidization is reasonable and that continuing to invest millions of dollars in scholarship without some tangible evidence of this influence constitutes responsible management of resources.

b. Tenure and Academic Freedom Compel Non-Accountability

Law professors are very quick to detect and defend against perceived encroachments on tenure and to claim that their academic freedom is being infringed upon.⁴³ Given the level of demonstrated sensitivity to these issues, we anticipate that merely advocating putting into place incentives that encourage change in the content of legal scholarship and its intended audience will be criticized as an infringement on academic freedom. Tenure and academic freedom are indeed related,⁴⁴ but the academic freedom argument in this context is disingenuous, confuses ends and means, and may be just a tad paranoid.

Those concerned about the level of investment in legal scholarship are hardly interested in muzzling law professors. Expression would not become the grounds for discipline in any form. Law review articles could be written on any topic appealing to the law professor. Instead, the issue is whether, with *limited* funds, a law school is required to

REV. 189, 205–06 (2009–2010) (reviewing ROBERT J. SPITZER, *SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING* (2008)).

43. TAMANAHA, *supra* note 5, at 28–32, 36 (describing the AALS reaction to ABA initiatives to allow schools to hire full-time, non-clinical faculty in non-tenure track positions and the “fierce defense” of tenure mounted by law professors); Victor Fleischer, *The Unseen Costs of Cutting Law School Faculty*, DEALBOOK N.Y. TIMES (July 9, 2013), http://dealbook.nytimes.com/2013/07/09/the-unseen-costs-of-cutting-law-school-faculty/?_r=0 (arguing that firing tenure-track faculty for budgetary reasons “encroaches on an important principle of academic freedom, namely that a tenure decision should be based on the merit of the case, not the budget of the department”).

44. See Gregory M. Dickinson, *Academic Tenure and the Divide Between Legal Academia and Legal Practice*, 6 DARTMOUTH L.J. 318, 330–35 (2008) (explaining that tenure was designed to ensure that the scholar “was free to research and study as he saw fit and to publish his findings” and “free from administrative interference regarding his teaching duties”); Robert W. McGee & Walter E. Block, *Academic Tenure: An Economic Critique*, 14 HARV. J.L. & PUB. POL’Y 545, 546 (1991) (acknowledging that, “[w]hile tenure can save out-of-pocket expenses [and] promote independence from outside forces,” these justifications do not surmount the effects, as tenure also “increases overall costs, decreases flexibility, disenfranchises the paying consumer of education, increases dependence on unaccountable insiders, and makes it nearly impossible to remove incompetent and unnecessary professors”); James J. Fishman, *Tenure: Endangered or Evolutionary Species*, 38 AKRON L. REV. 771, 772 (2005) (“The original purpose of tenure was to provide economic security, so that scholars could pursue disinterested scholarship and be judged on that scholarship by their peers, rather than by lay employers. Of course, tenure is much more: it implicates notions of academic freedom, justifies participation in university governance, represents part of a social contract that contributes to institutional stability, and—not so often acknowledged—manifests a significant status function that in the law school context reinforces a hierarchy among people in similar fulltime roles.”).

subsidize any and all expression by a law professor. If the answer to this question is “no” (and it must be since this is what happens today), the negative impact on academic freedom is already present. Indeed, it would be an infringement not to allow three-hour teaching loads so that law professors could express themselves even more. People who really believe the academic freedom argument would not only be offended by teaching loads that prevent even more writing, but also by, among other things, the refusal to allow faculty to teach very low enrollment courses, the imposition of limits on travel funding that would support expression at conferences, and limited access to research assistants.

More importantly, tenure and academic freedom are means to an end. Surely that end cannot be to allow law professors to write unpublished haikus (the production of which may actually be more beneficial than some legal scholarship) or to do anything involving expression. There is no principled difference between limiting the subsidization of some research and not paying faculty to teach any possible course even if enrollment is near zero. The uncomfortable fact is that limited funding means that schools are already making decisions about which “freedoms” faculty are going to be paid to exercise. Consequently, the academic freedom argument is simply one in favor of the status quo without any principled connection to actual academic freedom, funding limits, or accountability.⁴⁵

c. Other Disciplines May be as Bad as Law

This is a broader version of the argument that has been raised previously against proposals to subject law review articles to the peer-review process more typical of other disciplines.⁴⁶ It can be employed to argue, in essence, that reform efforts are hopeless because legal scholarship would simply trade one set of problems (e.g., article selection bias by students) for another (e.g., article selection bias by peers).⁴⁷ Clearly, other disciplines have their problems with research and publication,⁴⁸ and we do not advocate adopting any other discipline’s model without modification.

On the other hand, it is hardly productive to assume that other disciplines are as troubled as law and, therefore, can provide no guidance whatsoever on how to improve legal scholarship. Given the unique

45. For an argument that decisions regarding the retention of tenure-track faculty should be immune from economic considerations, see Fleischer, *supra* note 43.

46. See *infra* notes 124–25 and accompanying text.

47. See Barton, *supra* note 42, at 191 (responding to criticisms of legal scholarship by a political scientist by writing an article purporting to show that the critical book “proves that peer-reviewed political science scholarship suffers from at least as many faults and foibles as law review scholarship” and questioning whether that “make[s] political science scholarship worthless too? Or is that just how the journal-world works?”); see also *infra* text accompanying notes 126–27.

48. See *supra* text accompanying note 2.

history of legal education, including the developments that gave rise to student-edited law journals as the primary outlet for legal scholarship, it is difficult to imagine another discipline similarly lacking in peer review, oversight, and accountability, coupled with high salaries for the scholars.⁴⁹ The amount of money being expended on legal scholarship is high, as is the volume of research being subsidized because of the high numbers of tenure-track law professors who are subject to the “publish or perish” imperative. The benefits of legal scholarship to any constituent group (other than law professors) are, as our study demonstrates, attenuated at best. Furthermore, even if it were true that some other discipline’s scholarship was in the same condition as law, that sad reality would not excuse the legal academy’s failure to address its deficits and manage its resources more efficiently.⁵⁰

d. Students Benefit from Editing Journals

Some defenders of the status quo will point to the importance of providing students with the experience of editing journals as a reason not to change.⁵¹ This argument is weak for a number of reasons. First, if the experience of screening and editing articles is of such great pedagogical value to law students, then why not provide it for all of the students rather than only a small percentage? Second, if the tasks actually performed by the students are pedagogically important, other less expensive ways exist for students to develop reading and editing skills than having law schools support, on average, two or more journals. Finally, under the current system, students are involved in replicating bias in the selection process. The educational value of allowing students to perpetuate a selection process that may lower the beneficial impact of legal research is not clear.

This is not to say, however, that students are at fault. They cull through thousands of articles (sometimes to no avail since the same articles have been submitted to dozens of other reviews), edit articles, chase down footnotes for professors *too important* to include them themselves, and deal with the authors’ delicate egos.⁵² In return, students receive a promise that this *may* increase their chances of employment and a minimal number of credit hours (for which they must pay). In many respects, they do what professors are required to do in other disciplines. Although law students clamor for this privilege, the

49. See Rhode, *supra* note 5, at 1356 (asserting that the editorial structure of law reviews is “unlike most other disciplines”).

50. *Id.* at 1333 (“[O]ther disciplines have done better in controlling quality while curbing quantity, and comparable strategies are available for legal scholarship.”).

51. For a discussion of how participation in the editing process is beneficial for students, see Day, *supra* note 23, at 567.

52. Rhode, *supra* note 5, at 1357 (acknowledging the “countless hours of free assistance by captive labor willing to salvage sloppy scholarship and muddled syntax” that law professors receive from student editors).

troubling bargain struck seems remarkably similar to that made by college athletes.

2. Two Additional Justifications

a. *Legal Scholarship is Beneficial*

This is an appealing, and perhaps the only defensible, justification for legal scholarship. At the same time, however, at its most compelling, it is not a justification for the current level of investment, and, at its worst, it may be deeply hypocritical. What this appeal is really about is brought into question by two facts. First, at no point is a law professor required to articulate the actual connection between the requested subsidization and the welfare of others. Second, and perhaps more importantly, it appears this laudable purpose has been perverted into the notion that the value of scholarship is commensurate with the number of times it is cited.⁵³ Thus, the benefit of writing is frequently now referred to as “impact,” and impact is assessed by counting citations, typically by other law professors.⁵⁴

We have heard the adage: “Most writing exists to be read; legal scholarship exists to be written,” but have been unable to track down its source. The statement seems incomplete. Legal scholarship exists to be written *and cited*. Indeed, citations have become the ubiquitous unit of measurement for a number of purposes in legal scholarship. Some law school administrators collect citation statistics from their tenure-track faculty and use these numbers in their assessments as evidence of the scholarship’s impact and the scholar’s influence and reputation. Law professors tout their scholarship citation statistics as a significant achievement⁵⁵ while seeming to put aside that it is gener-

53. See, e.g., Albert H. Yoon, *Editorial Bias in Legal Academia*, 5 J. LEGAL ANALYSIS 309 (2013) (reporting the results of a study finding that law professors place lesser-cited articles in the law reviews of the school at which they teach and equating lesser citations with lower quality); Ronen Perry, *The Relative Value of American Law Reviews: Refinement and Implementation*, 39 CONN. L. REV. 1, 8 & n.28 (2006) (stating that his empirical results were based on the notion that “[w]henver a person thinks [a statement in a law review article] merits an explicit reference, it may be said that the article inspired or influenced further writing, and therefore had some impact” and that more citations signaled more impact). However, Dr. Perry makes no attempt to verify the assumption that those “explicit references” are substantive and, therefore, meaningful before attributing “impact” to them. See Perry, *supra* note 53, at 8 n.28.

54. Perry, *supra* note 53, at 8.

55. This counting mentality has been encouraged by the Social Science Research Network (“SSRN”), which does not simply make articles available to readers but actually ranks authors by numbers of downloads and prepares elaborate top ten lists. Interestingly, though, download patterns reflect a powerful bias in favor of articles found in top ranking law reviews. James Ming Chen, *Modeling Citation and Download Data in Legal Scholarship* (Minn. Legal Studies Research Paper No. 06-25, 2006), <http://ssrn.com/abstract=905316> [<http://perma.cc/KY7C-BA2S>] (advocating that law schools should embrace bibliometrics as a preferred alternative to more subjective assessments of law journals and law schools’ prestige and influence).

ally accepted that citations to law review articles in general are not high.⁵⁶ In fact, law reviews are ranked on the basis of their citations counts—some call this “impact factor,”⁵⁷ and others propose to modify it in various ways.⁵⁸

These attempts to import “impact factor” analysis from other disciplines into law by counting citations to legal scholarship are ironic, given that when one looks just a little beneath the surface and considers the factors that actually generate those numbers and the qualitative nature of the citations themselves,⁵⁹ they are unrelated to any

56. Segal, *supra* note 7 (observing that there are more than 600 law reviews in the United States, and they publish about 10,000 articles a year) (“A 2005 law review article found that around 40 percent of law review articles in the LexisNexis database had never been cited in cases or in other law review articles.”); Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309, 336 (2007) (finding that 43% “of articles are not cited at all, and about 79% get ten or fewer citations”).

57. *Law Journals: Submissions and Ranking Explained*, WASH. & LEE U. SCH. OF LAW, <http://lawlib.wlu.edu/LJ/method.asp#methodology> [<http://perma.cc/F739-WPHA>]; Robert M. Jarvis & Phyllis Coleman, *Ranking Law Reviews by Author Prominence—Ten Years Later*, 99 L. LIBR. J. 573 (2007); *Law Review Rankings*, PRAWFSBLAWG (July 21, 2011, 12:58 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/07/law-review-rankings.html> [<http://perma.cc/JG8L-7QAN>] (“[T]he Washington & Lee Law Library . . . offers a ranking of law journals based on total citations and ‘impact factor[.]’ . . . [Impact factor] in the larger scholarly world is a widely-used metric of the quality of journal editors’ judgment; it represents the mean number of citations per article per year for the journal. It’s not actually a great measure, since it tells us nothing about the quality of the citing articles, and reputation probably produces [impact factor] as much as the other way around.”); Robert Anderson, *That’s Right: Yet Another Post on Law Review Rankings*, WITNESSETH: LAW, DEALS, & DATA (Feb. 21, 2013, 5:01 PM), <http://witnesseth.typepad.com/blog/2013/02/thats-right-yet-another-post-on-law-review-rankings.html> [<http://perma.cc/FRQ9-YF88>] (commenting on Google Scholar Metrics’ ranking of law reviews). See generally Lisa Hackett, *Understanding Law Review Success: An Analysis of Factors that Impact Citation Counts* (Spring 2013) (unpublished seminar paper), <http://www.law.msu.edu/king/2012-2013/Hackett.pdf> [<http://perma.cc/LX8U-X2XW>] (discussing the role of citations in the legal community, the article selection process, the impact factors, and how law reviews can select articles to maximize their citation impact factors).

58. See, e.g., Steinbuch, *supra* note 30 (proposing modifying the Leiter impact factor by considering the publishing school’s *U.S. News and World Report* ranking, calling this process “The Protocol”); Perry, *supra* note 53 (looking at total citations to 186 law reviews and proposing a ranking system).

59. In this respect, citation counts are like student evaluations of teaching. It is also ironic that other disciplines are also dealing with the problem that cites do not measure impact. See Aragón, *supra* note 2 (proposing an alternative measure that does not focus on raw citations). See generally Eugene Garfield, *Address at the International Congress on Peer Review and Biomedical Publication: The Agony and the Ecstasy—The History and Meaning of the Journal Impact Factor* (Sept. 16, 2005), <http://garfield.library.upenn.edu/papers/jifchicago2005.pdf> [<http://perma.cc/FT8F-7PHE>]; Jennifer Howard, *Humanities Journals Confront Identity Crisis*, CHRON. HIGHER EDUC., Mar. 27, 2009, at A1, <http://chronicle.com/weekly/v55/i29/29a00102.htm> [<http://perma.cc/86J7-JTU2>]. Reliance on the numbers of SSRN or direct library downloads is flawed for the same reason. While they might provide some indication of readership, one cannot know for what purposes the articles are being downloaded or by whom. For a recent example of the circularity of citations equals impact thinking, see Gregory C. Sisk et al., *Scholarly Impact of Law School Faculties in 2015: Updating the Leiter Score Ranking for the Top Third* (Univ. of St. Thomas (Minn.) Legal Stud-

measure of benefit except the status of the professors, their schools, and law reviews themselves. In fact, as the results of the study described below explain, at almost every level, these numbers are part of a cycle that replicates an elitist bias that generates not-very-meaningful high numbers for a small number of law professors and significantly disadvantages most others.⁶⁰ To make matters worse, not only is citation not a measure of impact,⁶¹ some of the citations studies are flawed at the simple task of counting citations in that they focus exclusively on a few of the highest ranked law reviews and perpetuate an elitist bias.⁶² Any study seeking to assess and justify the large expenditure on legal research must be designed to look at what is going on more broadly, or as one might say, in the lower decks of the Titanic.⁶³

b. The “Public Good” Rationale

Even if all legal scholarship were beneficial, its subsidization must nonetheless be justified. When law professors assess legal scholarship from a “cost vs. benefits” perspective, they fill in this justification gap by seeming to agree that legal scholarship is a “public good.”⁶⁴ A “public good” is one that produces benefits that cannot be fully internalized by the producer. This leads to free riding and a disincentive to

ies Research Paper No. 15-12), <http://ssrn.com/abstract=2642056>. There, the authors defend equating the number of citations with impact but have no independent basis for determining impact. In effect, the idea that citations equal impact is non-falsifiable and, thus, faith-based.

60. See *infra* Part III.

61. The citations themselves are most often non-substantive and do not represent reliance upon or even consideration of the cited author’s thesis or main points. See *infra* Section III.A.5.

62. See, e.g., Ian Ayers & Frederick E. Vars, *Determinants of Citations to Articles in Elite Law Reviews*, 29 J. LEGAL STUD. 427 (2000); Alfred L. Brophy, *The Signaling Value of Law Reviews: An Exploration of Citation and Prestige*, 36 FLA. ST. U. L. REV. 229 (2009); Dennis J. Callahan & Neal Devins, *Law Review Article Placement: Benefit or Beauty Prize?*, 56 J. LEGAL EDUC. 374 (2006) (examining articles from the journals ranging in rank from first through fortieth); Sisk et. al., *supra* note 59.

Even the relatively simple process of counting can go awry. For example, one recent effort counts the editors of books of readings as authors of all articles found in that collection. In addition, in an effort to rank schools based on scholarly “impact,” the works of faculty who wrote nothing at the ranked schools are included. Finally, this sort of counting attributes citations and, thus, impact to those who edit treatises or are added as coauthors without any effort to determine whether the material cited originated with the newcomer. *Id.*

63. One particularly troublesome study seems to overtly equate “good” articles with the number of citations an article receives. Callahan & Devins, *supra* note 62, at 384 n.24 (“For the purposes of this study, good, ordinary, and bad articles are measured simply by their efficiency in attracting citations.”).

64. Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 151 n.30 (2008) (“[T]here is little doubt that scholarship is a public good that the markets will under-supply.”); Rodriguez, *supra* note 37 (“However, if we start from the premise that scholarship is a public good which qualifies for significant financial support, we have at least framed the debate as about how best to go about supporting this work . . .”).

produce the good in the first place. They compare legal scholarship to clean air and national security.⁶⁵ Several legal scholars have extended this reasoning and argue that law schools should not only be encouraged to produce their fair share of legal scholarship but should also be penalized if they fail to do so.⁶⁶

Casually characterizing legal scholarship as a public good does not advance the analysis very far. First, it cannot be used to justify all investment in legal scholarship. The fact that something is a public good does not mean it makes sense to produce it. All production uses up some resources, so the public good argument must be accompanied by an assessment of what will not be produced if the putative public good is produced. Second, the fact that a good or service has a public good character does not necessarily mean it will not be produced without the subsidization of tuition and tax payers. Finally, even though legal scholarship may, in theory, be a public good, it is hard to justify the current level of subsidization if, in fact, no one cares to free ride because the work is irrelevant.

65. Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 418 (1998) (“[Legal] scholarship is a public good, meaning that consumption of it by one person does not leave less for others and that the cost of excluding free riders from consuming it is prohibitive. The creation of a scholarly work is usually funded by a single law school, while the benefit is shared by scholars (or sometimes lawyers, judges, students, or legislators) everywhere. Why would an institution with any sense of fiscal responsibility pay professors substantial salaries so that they can spend a good part of their time creating knowledge upon which the rest of the world can free ride? The answer is that the institution would not. Instead, it would pay professors only to spend their time doing work that creates a benefit the school could capture for itself.” (footnote omitted)); Rubin, *supra* note 64, at 153 (“But legal scholarship, to the extent that it does have value, must necessarily be regarded as a public good. Like clean air or national security, it is a product whose benefits cannot be limited to particular recipients. It cannot be supported by a simple market mechanism, but must be provided by some form of collective action. Buying research is not like buying fish; it is necessary to support the general enterprise and see what it produces for society as a whole. In the short run, therefore, support for research seems inefficient. In the long run, however, there is no substitute for academic research, and, as an enterprise, it is [sic] has transformed the world.” (footnote omitted)).

66. Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1516–17 (2004) (reviewing MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003)) (“Legal scholarship fits the definition of a public good because ‘consumption of it by one person does not leave less for others and . . . the cost of excluding free riders from consuming it is prohibitive.’ As with public goods generally, a collective action problem develops regarding the decision to produce legal scholarship. A mechanism needs to be adopted that will penalize those schools that fail to produce enough of the public good, and transfer that benefit to those schools that produce more than their fair share.” (footnote omitted)); Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141, 143 (2006) (“A ranking based on a school’s intellectual environment should encourage schools to produce legal scholarship, a valuable public good, and a ranking based on emerging ideas will create an incentive to be part of new fields.”).

Despite the foregoing concerns, we return to reassess these two justifications—the benefits of legal scholarship and the public good rationale—after reporting the findings of an empirical study which shed further light on their validity.

III. THE EMPIRICAL STUDY

A. *Methodology and Findings*

1. Methodology

The sample for the empirical component of this paper was approximately 400 articles published in 2003.⁶⁷ All articles came from publications generated by *The Top 100 Law Schools* as listed by *U.S. News and World Report* in 2003.⁶⁸ The decision was made to use law school ranking as opposed to law review ranking because law school rankings appeared more stable. Whatever error this introduces, if any, is not likely to be of great consequence.⁶⁹ In addition, using law review rankings, which are largely based on some version of citations, seemed to be a poor choice given that the reviews themselves may select articles based on the number of citations likely to be generated. In the following comments, we will use the ranking to refer to both schools and law reviews, although it is more precise when referring to a review to identify it as “the review associated with the school ranked # *x*.” The notion of a “random sample” struck us as an unworkable concept in this context since necessary decisions about the universe of articles included already render the sample nonrandom. Consequently, the sample was purposely designed to *overstate* the impact of legal scholarship. As is true with respect to all decisions we made, others are invited to replicate the process to determine if the selection process biased the results in a meaningful way.

It became apparent that the sample should be subdivided into three groups. The first group was composed of 198 articles. This number includes two articles from each of the principal law reviews associated with the top 100 schools. One school reported not having a law review in 2003.⁷⁰ Thus, the sample in this group was reduced from 200 to 198.

A second group was comprised of articles published in specialty reviews. Because some of the schools in the sample did not publish a specialty review, this part of our sample was trimmed to 93. The last group of works consisted of student notes or comments found in the

67. The actual date of publication could not be determined with precision because dates listed as publication by law reviews are not always consistent with the dates of actual availability.

68. See *Best Graduate Programs: Schools of Law*, U.S. NEWS & WORLD REP., Apr. 14, 2003, at 70, 72, EBSCOhost ISSN: 0041-5537.

69. The most attractive alternative law review ranking approach would be that published by Washington and Lee University. See *Law Journals: Submissions and Rankings Explained*, *supra* note 57.

70. This was Northeastern University School of Law.

principal reviews of the top 100 schools. Since law schools are not completely consistent with the labels “note” and “comment,” an effort was made to select only extended works on topics other than a specific case.⁷¹

For each work, Westlaw was employed to determine the number of total citations, judicial citations, and citations found in secondary sources.⁷² The citation search extended for almost a decade, until mid-2014.⁷³ In addition, for the 198 works found in principal law reviews, 200 citations to those works were examined to assess the use to which the cited work was put by those citing it. A “control group” of 100 additional citations was also selected from articles published in 2001.

2. Findings

Table 1 provides an overview of what this methodology produced. The table is self-explanatory, but it indicates that the total number of cites to the principal articles was 6,564; to student works, 841; and to works in specialty journals, 1,461. Judicial citations in each category were very low relative to citation in secondary works. On average, principal articles were cited .63 times each by courts and 35 times each in secondary sources. For student works and works in specialty journals, these averages fell off dramatically.

Averages, however, can be misleading. For example, 73 of the principal articles were responsible for all judicial citations of works in that category. Thus, 125 were not cited by any court at any level over the ten-year period examined. In the specialty journal group, 9 out of 93 articles accounted for all the judicial citations. In the case of citations by secondary sources, averages are not as deceiving because all but a small handful of the principal articles and specialty journal articles were cited at some point.

As one might expect, citations were not evenly distributed within the sample of 99 principal law reviews. We made an arbitrary distinction and compared citations to the articles appearing in the top 15 reviews with the citations to works in the remaining 84 reviews.⁷⁴ Half of the articles in the group of 15 reviews had judicial cites while 25% of those in the larger group had judicial cites. The top 15 reviews were responsible for 35% of all judicial cites, while the remaining 84 reviews accounted for 65% of the cites. Publishing in a top-15 review doubled the likelihood that a work would be cited by a court. Interest-

71. The full data set is quite long and available from the Authors.

72. These numbers likely include a number of self-citations.

73. It would be unrealistic to expect an article to be cited in the year of publication. Consequently, the time period covered is probably closer to nine years.

74. The top fifteen were Harvard, Yale, Stanford, Columbia, NYU, Chicago, California, Duke, Michigan, Cornell, Pennsylvania, Northwestern, UCLA, Texas, and Georgetown.

ingly, publishing in a top-15 review nearly quadrupled the likelihood of being cited by another scholar.⁷⁵

	Articles (198)	Student Works (99)	Specialty Rev. (93)
Total Cites	6564	841	1461
Total Judicial	126	15	20
Total Secondary	6438	826	1441
Average Judicial	.63	.15	.20
Average Secondary	35.5	8.2	14.6

A series of bar charts further disaggregates the data. The first two charts pertain to the 198 articles found in the principal law reviews. Chart 1 shows the total numbers of each type of total, judicial, and secondary cites as each group of 10 journals is added to the total. Chart 2 illustrates the marginal impact of adding 10 more journals. The first bar in each chart is for the top 10 law schools as ranked in 2003. In Chart 1, the second bar is for the top 20 and so on through all the reviews examined. In Chart 2, the second bar is for journals 11–20 only. What is clear from these two charts is that articles published in the higher ranking reviews were cited more often and that, as one goes to lower ranked reviews, citations fall.⁷⁶

This drop off in citations is significant. For example, the top 10 articles were cited 1,500 times over a ten-year period for an average per article of 150 times, or an average of 15 times per article per year. In the 10 articles in the 80–99 group, for example, the total citations were 180, or 18 times per year, or 1.8 times per article per year. In short, the likelihood of someone being cited who placed an article in a top-10 journal was over 7 times as likely as a person publishing in an eighty-fifth-ranked journal. It is important to note that what is captured here relates to the top 99 law reviews. The drop off in citation rates as one moves to reviews associated with schools ranked 100 to 200 may be even greater.

Three aspects of this examination surprised us, although perhaps they should not have. One is the vast difference between citations by courts and citations in secondary sources at every level of review. This could be attributed to the fact that the number of articles far exceeds the number of written judicial opinions. But this does not account for the low *absolute* number of times courts cite legal scholarship.⁷⁷ The

75. Top 15 placements averaged 75 cites per article while placement below the top 15 averaged 20 cites per article.

76. This is generally consistent with the result published recently by Professor James Chen. *See* Chen, *supra* note 55, at 39–47.

77. As will be discussed below, even these numbers may overstate the impact of legal scholarship. *See infra* Section III.A.4.

second surprising finding is the paucity of citations to lower ranked reviews. The third is the discrepancy between citation rates based on the rank of the school.

One explanation for the third finding relates to the common strategy among law professors to submit their articles to higher ranked reviews before working down the pecking order. This means editors at higher rated reviews have more articles from which to choose. Interestingly though, the rank of the school played a less important role in judicial citation, possibly meaning that what law professors and student editors believe to be the most relevant articles is not the same as what courts believe to be the most useful. Or put differently, with a smaller pool of articles to choose from, editors at lower ranked reviews are almost as effective as their counterparts at highly ranked schools at selecting articles that courts will find useful.

CHART 1: NUMBER OF CITES BY TYPE AND RANKING
CLASSIFICATION: PRINCIPAL REVIEWS

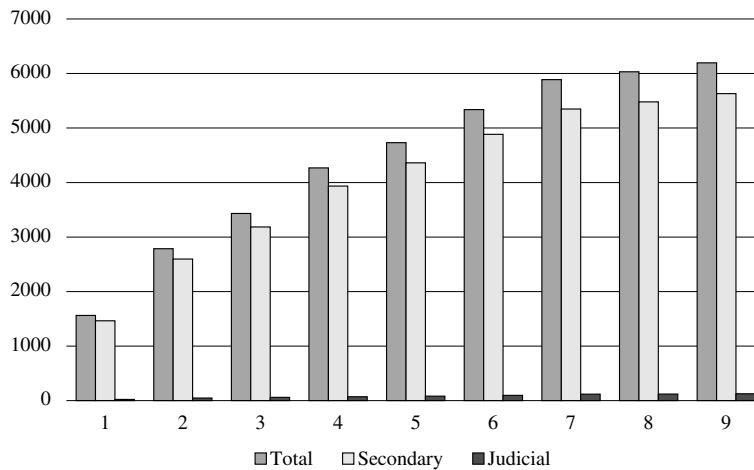


CHART 2: MARGINAL NUMBER OF CITES BY TYPE AND RANKING CLASS: PRINCIPAL REVIEWS

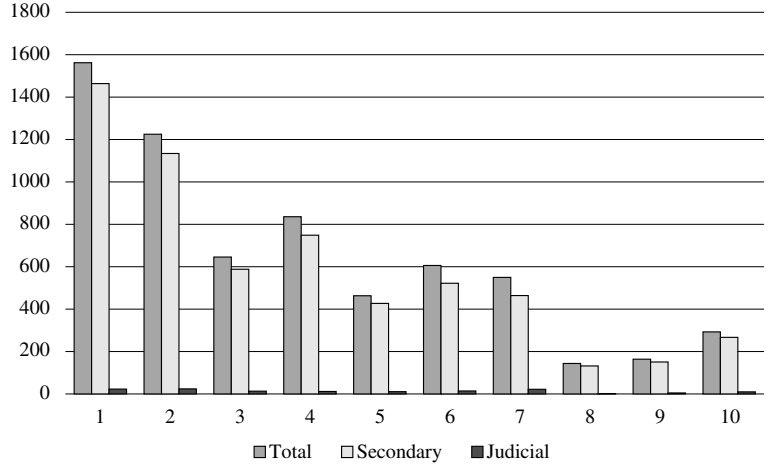


CHART 3: TOTAL CITIES BY RANK AND TYPE: SPECIALTY JOURNALS

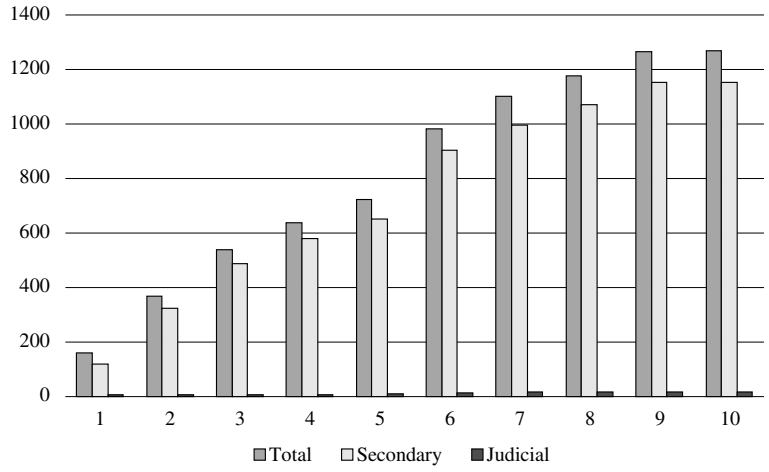
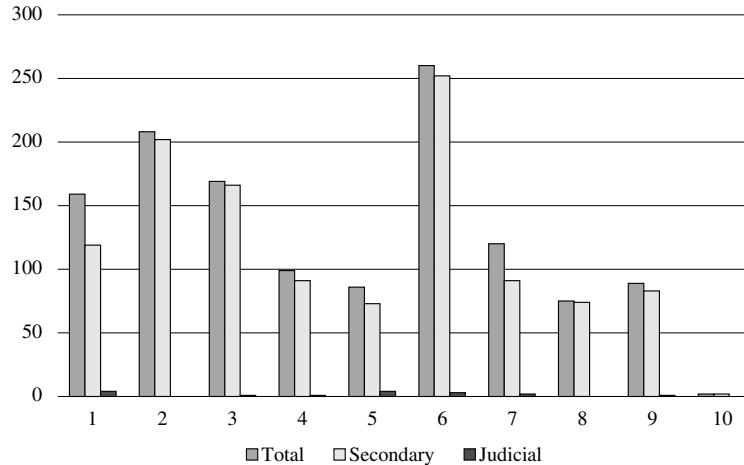


CHART 4: MARGINAL CITIES BY RANK AND TYPE:
SECONDARY JOURNALS



In the case of specialty journals, as one would expect and Chart 3 illustrates, all types of citations increase as more journals are added. And, as shown in Chart 4, marginal citation rates do not reflect a steady decline,⁷⁸ although a slight downward trend is discernable. We do not believe the marginal rates are very useful for a number of reasons. The most important of these is that we were unable to find a reliable source of specialty journal ranking that extended to 100 journals. Consequently, we ranked specialty journals on the basis of the rank of the law school with which they are associated. Further complicating the process is that it is not clear which specialty journal is the most prestigious within each school. Second, the numbers of citations are so low that a single outlier can easily raise the number of its group of ten. The small numbers also mean the charts are less useful when examining judicial cites. In fact, with only 20 judicial cites for 93 articles over a ten-year period, perhaps all that can safely be said is that specialty journals are rarely cited by courts and are cited by secondary sources only 16% as often as articles in principal reviews.⁷⁹

3. Regression Analysis

The statistical analysis focused on three dependent variables: citation by courts, citations in secondary sources, and total citations. The independent variables were the rank of the law review at which the article was published, the rank of the school employing the author at

78. It is important to remember that the tenth group of 10 includes only 3 reviews.

79. We did not produce similar charts for student notes. The numbers of citations involved, especially judicial cites, were miniscule. In addition, citation rates to student notes, whether high or low, would likely not have implications for law school investment in scholarship.

the time the article was published, and the rank of the school from which the author received his or her J.D. degree. For purposes of the second two independent variables, the schools were classified as elite or non-elite, and a “dummy” variable was used. The top 15 schools were assigned a value of 0 and the remaining schools a value of 1. Obviously, with respect to student notes, only the rank of the review could be used.

We feel certain that other variables affect citation rates. The omitted one that concerns us most is subject matter.⁸⁰ For example, one would expect articles in constitutional law, criminal law, or civil procedure to be cited more often than articles on legal history. It is, however, very difficult to precisely define subject matter categories and then classify an article as fitting into one category or another. In addition, it is possible that some areas are cited more frequently simply because there are more articles in that area.

As noted above, the complete sample was subdivided into three smaller samples. The first was composed of 198 articles published in 2003. Two articles were selected from each of the principal publications of the top 100 ranked reviews. The analysis revealed that the rank of the review and the rank of the school from which the author graduated were positively correlated with the number of total cites and secondary cites. These correlations were statistically significant.⁸¹ In the case of judicial citation, none of the variables performed as well. More specifically, based on this sample, we could not accept or reject a hypothesis that a correlation existed between judicial citation and the rank of the review, the rank of the author’s employment, or the rank of the school from which the author graduated.

The same set of dependent and independent variables was applied in the case of 93 articles found in specialty journals. Here, it is again important to note that the independent variable was the rank of the school. Since many schools have more than one specialty journal, this meant selecting one of those journals. Further, unlike principal law reviews, the rank of which closely tracks the rank of the school, the same cannot be said with any confidence about specialty reviews.

80. Michelle M. Harner & Jason A. Cantone, *Is Legal Scholarship Out of Touch? An Empirical Analysis of the Use of Scholarship in Business Law Cases*, 19 U. MIAMI BUS. L. REV. 1 (2011) (reporting the results of an empirical study that looked at 200 business law decisions rendered by the Delaware courts from 1997–2007 and found consistent citation of legal scholarship by courts).

81. They were significant at a 95% confidence level, meaning that that we are 95% sure that the citation rates were positively influenced by the rank of the journal and the school from which the author graduated. Measures of collinearity indicated that it was not a factor.

With respect to total cites the regression coefficient on journal rank was -.58 with a standard error of the estimate of .08. The coefficient on the rank of school graduated from was 9.84. The standard error was 4.85. With respect to secondary cites, the regression coefficient on journal rank was -.55 with a standard error of .081. The coefficient on rank of school graduated from was 8.83 with a standard error of 4.64.

Here the three independent variables had the predicted direction of influence, but the levels of confidence, although high in some cases, were not quite as high as in the case of principal reviews. Both the rank of the law schools publishing the journal and the rank of the school from which the author graduated played a role in determining the total and secondary source citations to these works.⁸² An interesting aspect of this is that, since we did not rank the secondary reviews independently of their publishing schools, “branding” alone appeared to play a role in citation frequency. We could not conclude that judicial citations correlated with any of the variables in the model.

The results associated with student works were similar. The actual number of cites was quite small, and there was no correlation between judicial cites and the rank of the law review. There was, however, a statistically significant relationship between citations to student works and the rank of the review in which they were published.⁸³

4. What it Means to be Cited: Judicial

As noted at the outset, we are deeply suspicious of citation counts as measures of impact. Consequently, we decided to examine what it means to be cited. More specifically, we posed the question: “To what extent does citation mean influence?” To determine this, 100 instances in which a *court* cited an article were examined.⁸⁴

The sample of 100 was chosen by examining one instance of citation for the first article in the sample that was cited by a court and then continuing down the list of articles that were cited by courts. Student works were not included. The list of 300 was exhausted before 100 judicial citations were found, which meant returning to the top of the list and finding second instances of citation for some articles. In effect, some of the citations examined in the sample of 100 were to the same articles.

Determining how to classify an article in terms of its impact is highly subjective, and it was first assumed that the ranking would be along a relative scale ranging from influential, to moderately influential, to not influential. By actually examining citations, another more specific method of assessing impact was discovered. As it turns out, citations seemed to fall into one of three categories. In some instances,

82. For “total,” the regression coefficient for rank of school was .09 with a standard error of .05. The t-value was 1.92, meaning there is a 6% chance that the relationship found in the sample would not hold for the population generally. For the rank of the school from which the author graduated the same statistics were 5.2, 2.97, 1.76, and 8%, respectively. For citation in secondary sources, the statistics were (in the same order) as follows: (1) rank of school: -0.085, 0.047, -1.812, and 7%; and (2) rank of school from which author graduated: 4.66, 2.69, 1.73, and 8.7%.

83. The regression coefficient on rank of review was 9, and the standard error was 1.7.

84. Fifty additional cites were examined as part of a “control group.” See *infra* Section III.A.6.

a court was actually responsive to the theme or reasoning of an author. In other cases, the court relied solely on the descriptive elements of an article. In other words, the analysis of the author was beside the point. Finally, in some cases an article was cited in a string citation and it was not clear that the court relied on the reasoning or any specific information in the article. In these instances it appears that the citation was merely to indicate the author was among a group of people writing on the topic.

Of the 100 citations examined, there were 18 instances in which the author's reasoning appeared to be influential. Fifty-four citations were to the descriptive elements of the article cited. Specifically, the court in no way referred to the author's reasoning or thesis. Finally, in 28 instances the citation did not appear to influence the opinion or serve as a source of information.

Examples are useful in understanding how these classifications were made.⁸⁵ An article falling in the first category was Einer Elhauge's *Why Above-Cost Price Cuts to Drive out Entrants Are Not Predatory—and the Implications for Defining Costs and Market Power*.⁸⁶ In a 2004 antitrust decision, the Ninth Circuit Court of Appeals wrote:

On the other side of the scale, the costs from antitrust intervention might be significant. Prohibiting a seller from eliminating arbitrage can diminish consumer welfare and allocative efficiency in the long run under some circumstances. For instance, a seller may charge different prices to favored and disfavored consumers in order to recover the common costs of serving both sets of consumers. See Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants are not Predatory—and the Implications for Defining Costs and Market Power*, 112 *YALE L.J.* 681, 732–33 (2003). If the seller cannot eliminate arbitrage, its sales to the disfavored (and higher-paying) consumers might be significantly—if not completely—undercut by the reseller to the extent that the seller can no longer recoup its common costs. As a result, the seller might choose not to incur common costs that are necessary for the development of economically beneficial facilities.⁸⁷

It may be generous to regard this article as influential in that what the author describes is both logical and a simple economic reality. However, in our classification of articles, an effort was made to be as generous as possible.

85. These examples are only of specific instances. The same articles may have been cited in other opinions and received a different classification if those cases had been part of the sample.

86. Einer Elhauge, *Why Above-Cost Price Cuts to Drive out Entrants Are Not Predatory—and the Implications for Defining Costs and Market Power*, 112 *YALE L.J.* 681 (2003).

87. *Metronet Servs. v. Qwest Corp.*, 383 F.3d 1124, 1136 (9th Cir. 2004).

An example of an article in the second category is Orin Kerr's *Internet Surveillance Law After the USA Patriot Act: The Big Brother that Isn't*.⁸⁸ Here the court writes:

The Stored Communications Act is part of that legislation and allows authorities to obtain a court order compelling disclosure of noncontent records, including subscriber information and connection data, that are "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(c), (d); see Orin S. Kerr, *Internet Surveillance Law after the USA Patriot Act: The Big Brother that Isn't*, 97 NW. U. L. REV. 607, 611 (2003).⁸⁹

As noted, the last category involved instances in which there did not appear to be specific reasoning or information found in the article that the court found useful. In these cases, the citation seemed more to be along the line of a typical law review citation in which readers are directed to a source, sometimes among many, that is consistent with the court's view. An example is Ronald J. Sievert's *War on Terrorism or Global Enforcement Operation?*,⁹⁰ which is cited in the following excerpt:

Public issues certainly include fomenting revolution in neighboring countries, the invasion of foreign nations, the assassination of enemy leaders, and preserving the freedom of speech in this nation with which to continue advocacy for the above. See Charles Krauthammer, *Essay: Should the U.S. Support the Contras?*, TIME, Mar. 2, 1987 ("Guerrilla war is always morally problematic . . . but is it wrong to support a resistance seeking to overthrow the rule of the comandantes? Americans value freedom in their own country. They would not tolerate the political conditions that Nicaraguans must suffer."); Ann Coulter, *This is War*, NATIONAL REVIEW ONLINE, Sept. 13, 2001 ("We should invade their countries, kill their leaders and convert them to Christianity."); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation*, 78 NOTRE DAME L.

88. Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother that Isn't*, 97 NW. U. L. REV. 607 (2003).

89. *United States v. Thousand*, 558 F. App'x 666, 670 (7th Cir. 2014). Similar to this is the following:

This sort of comparison is foreign to most sentencing regimes. In the wake of *Payne*, the federal government, the military, and thirty-three of the thirty-eight states with the death penalty have authorized the use of victim impact evidence in capital sentencing. John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 267 (2003).

Humphries v. Ozmint, 366 F.3d 266, 274 (4th Cir. 2004), *rev'd en banc*, 397 F.3d 206 (4th Cir. 2005). An overzealous defender of the status quo may interpret this to mean the cited work was without value. That is hardly the case. Efforts that involve counting can be valuable, but whether they justify the relatively high salaries of law professors is another matter.

90. Ronald J. Sievert, *War on Terrorism or Global Enforcement Operation?*, 78 NOTRE DAME L. REV. 307 (2003).

REV. 307, 313–17 (2003) (discussing academic and political endorsements of the United State’s [sic] use of assassination).⁹¹

The frequency of influence can be put into a different perspective. When principal law reviews are combined with secondary reviews (a sample of 291 articles) a total of 126 judicial cites were found. This does not mean that 126 articles were cited in cases. In fact, 64 of the nearly 291 articles were responsible for all of the judicial cites. In effect, an article had roughly a 20% chance of being cited for any reason at all over the time period examined. Of the 100 actual citations examined, about 20% were instances in which a court appeared to have been influenced by the work it cited.⁹²

Surely, this understates the actual impact. Courts (hopefully) do not cite everything that is influential. Indeed, an attorney may discover an argument in a law review article and use it to influence a court without the source of the argument ever being revealed. Moreover, judges may have learned something in law school that their teachers learned by reading law review articles. No doubt a full accounting for usage and citation would exceed the relatively modest levels presented here. In addition, as noted earlier, we suspect that the topic or subject matter of the scholarship is important in determining its impact.

5. What it Means to be Cited: Scholarship

An effort was also made to assess the ways in which scholarship was relied upon in other scholarship. To this end, 100 instances of citation of the articles in the sample by other authors were examined.⁹³ One citation to the first article in the sample that was cited in another article was examined and so on down the list. One hundred cites were found before exhausting the list of 98 articles. The actual cite examined was usually the one found in the center of the list when arranged by date. Thus, if an article had 20 citations, the tenth citation was selected. There were exceptions to this when that citation was not in a traditional law review or when the citation was a self-citation.

Classifying the use of the citation in a scholarly work was more difficult than in the case of judicial cites. It is impossible to determine with confidence to what extent the author of the citing work actually relied on what was found in the cited work. Law review articles have excessive citation and this may mean much of the influence is revealed. This is complicated, however, by the possibility, even likelihood, that some citations are inserted by law review editors themselves or by authors simply to appease law review editors who

91. *United States v. White*, No. 7:08-CR-00054, 2010 WL 438088, at *14 (W.D. Va. Feb. 4, 2010), *aff’d in part, vacated in part*, 670 F.3d 498 (4th Cir. 2012).

92. It is important to remember that this probability reflects only the first eight to ten years of an article’s life.

93. Fifty additional cites were examined as part of a “control group.” See *infra* Section III.A.6.

are wedded to the notion that even the most obvious statements require support.

For purposes of this study, there was no alternative other than to assume that all of the cites were included by the authors or with the authors' permission. Ultimately, three imprecise categories were selected. First, were the instances in which the cited work is actually mentioned or discussed in the text in a manner that makes it clear that the author was responding to or building on the prior work. For convenience, this is called "substantive reliance." Second, there were instances in which a cited work was noted because it included a factual statement or an opinion and was referenced by the author, but the cited work did not appear to play a role otherwise. Many of these cites constituted a version of hearsay in that the author was asserting a fact or an opinion and supported it by noting that someone else had made the same assertion.⁹⁴ It is hard to view these cites as true authority for the statement made by the author, but the practice is common among legal scholars. The final group was composed of instances in which it was difficult to connect the citation in any substantive way to the work of the author or to any specific assertion for which the citation was authority. "Casual notation" is an accurate label for this classification.

In the survey of 100, two citations fell in the "substantive reliance" group. The 98 remaining citations fell evenly within the second two categories. The line between these two categories was difficult to draw, and another person analyzing the data or even a second analysis by the current researchers could result in a different count. Nevertheless, virtually all of the citations examined fell into the hearsay or casual notation categories. It was rare to find an author who engaged the material found in the cited work.

The difficulty of classification and the general conclusion that law professors are not consistently building on the works of others can be illustrated with some examples. As noted, only two works were viewed as having been seriously influenced by the existence of the work they cited. One of these is *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, by Oren Gross.⁹⁵ The citing work is *Entering Unprecedented Terrain: Charting a Method to Reduce*

94. *But cf.* Barton, *supra* note 42, at 201 (arguing that law review articles are less likely to publish "false information" because of student editors' demands that every statement have support and concluding that "at a minimum, whatever an author says [in a footnoted statement in a law review] is extremely likely to be true"). *But see* Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167, 167-72 (2004) (arguing that legal scholars and law review editors do not possess sufficient expertise to evaluate the accuracy or reliability of empirical research). Possibly the most egregious example of this, or at least the most ironic, is supporting the notion that citations equal impact by noting that others have made the same statement. *See* Sisk et. al, *supra* note 59, at 12 n.17.

95. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003).

Madness in Post-9/11 Power and Rights Conflicts, by Mario Barnes and F. Greg Bowman.⁹⁶ In their work, Barnes and Bowman quote Gross extensively,⁹⁷ refer to his article several times,⁹⁸ and rely in their discussion on his view of the implications of emergency measures in the wake of 9/11.

An example of the “hearsay authority” citation is found in *Golden Gate and the Ninth Circuit’s Threat to ERISA’s Uniformity and Jurisdiction*.⁹⁹ Here the cited article is Miriam R. Albert, *Common Sense for Common Stock Options: Inconsistent Interpretation of Anti-Dilution Provisions in Options and Warrants*.¹⁰⁰ The citation to this article follows this statement and quotation in the text: “In a common law system, ‘the misapplication of the principles of [a law’s] interpretation can create bad precedents.’”¹⁰¹ While classified as a “hearsay” citation, it could just as easily be viewed as a casual or completely unnecessary cite but for the fact that it was a quotation.

The idea of casual notation may be better captured by a citation found in Michael Moffitt’s *Customized Litigation: The Case for Making Civil Procedure Negotiable*.¹⁰² The article cited is David Frisch’s *Contractual Choice of Law and the Prudential Foundations of Appellate Review*.¹⁰³ The citation is to the following excerpt: “The modern trend is for courts to enforce most choice-of-law provisions in contracts.”¹⁰⁴ This is followed by the following note:

Id. at 317. For a historical analysis of the enforcement of choice-of-law provisions in the United States, see David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 58–65 (2003); Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1165–68 (2000); Ribstein, *supra* note 117, at 370–71.¹⁰⁵

Again, the reference to the Frisch article *supra* may be useful to the reader and properly included, but it would be another step to conclude that Frisch’s work influenced the thinking or analysis of Moffitt. If it did,

96. Mario L. Barnes & F. Greg Bowman, *Entering Unprecedented Terrain: Charting a Method to Reduce Madness in Post-9/11 Power and Rights Conflicts*, 62 U. MIAMI L. REV. 365 (2008).

97. *Id.* at 383 n.82, 393 n.127.

98. *Id.* at 382 n.75, 383 n.82, 384 n.84, 393 n.127, 407 n.187.

99. Landon Wade Magnusson, Note, *Golden Gate and the Ninth Circuit’s Threat to ERISA’s Uniformity and Jurisdiction*, 2010 BYU L. REV. 167.

100. Miriam R. Albert, *Common Sense for Common Stock Options: Inconsistent Interpretation of Anti-Dilution Provisions in Options and Warrants*, 34 RUTGERS L.J. 321 (2003).

101. Magnusson, *supra* note 99, at 180 (alteration in original).

102. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461 (2007).

103. David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57 (2003).

104. Moffitt, *supra* note 102, at 493.

105. *Id.* at 493 n.119.

given law review conventions, it seems likely that it would be cited more frequently and for specific points or statements made in the article. These types of citations are similar to book recommendations that Amazon makes based on customers' prior purchases.

6. What it Means to be Cited: Double Checking

The foregoing results showing that most citations are not substantive and that few signify engagement with the cited article's thesis were significant because citations are often advanced as a valid measure of an article's "impact." The results raised a question whether the sampling of 200 citations might have somehow produced an anomalous result. For this reason, a smaller set of citations were examined to double check the initial results. The year 2001 was chosen and every other review in the top 100 was selected. The first article published by that review in the first volume in 2001 was identified. Citations in law review articles to the selected articles were determined, and one citation was selected in the manner described above. Citations to judicial opinions were generated in the same manner.

The study of these citations replicated the results of the prior studies. Of the 50 cites to articles in cases, 5 (or 10%) were substantive. Among the 50 cites to articles in law review articles, only 1 was substantive. Not only were the overall results similar, but the disparity regarding the frequency of substantive citation between the law review articles and cases surfaced again.¹⁰⁶

B. Summary of Findings

Possible implications of these findings are discussed below, but it makes sense to summarize the results. Depending on the perspective of the reader, the results may or may not be surprising and may or may not call for considering an alteration in the way scholarship dollars are spent. Although we have our own views on these matters and express them below, our principal purpose is to invite consideration and debate.

1. Publishing in a top-15 law review did not correlate at a statistically significant¹⁰⁷ level with *judicial* citation. In addition, judicial citation was not found to correlate with the school from which the author graduated or the school at which he or she was employed.
2. Publishing in a top-15 law review correlated at a statistically significant level with citation in a *secondary* source. In addition, the

106. Interestingly, these findings are consistent with a supposition made by Professor Deborah Rhode almost fifteen years ago. Rhode, *supra* note 5, at 1331.

107. At a 95% confidence level.

- rank of the school from which an author graduated correlated at a statistically significant level with citation in secondary sources.
3. Among *specialty* journals, none of the variables examined influenced citation rates by courts.
 4. Among *specialty* journals, the rank of the school publishing the journal and the rank of the school from which the author graduated correlated with both total and secondary citations. These results were significant at a 90% or higher level of confidence.
 5. Citation of student works in secondary sources was influenced by the rank of school publishing the work.
 6. Of a sample of 100 citations by courts to articles in the sample, approximately 20% of the citations seemed to indicate that the work had influenced the court's opinion.
 7. Of a sample of 100 citations by scholars to articles in the sample, the number of instances in which the cited work was considered as a substantive matter by the author was de minimis.
 8. Of a sample of 50 citations by courts to articles in the backup sample, approximately 10% of the citations seemed to indicate that the work had influenced the court's opinion.
 9. Of a sample of 50 citations by scholars to articles in the backup sample, the number of instances in which the cited work was considered as a substantive matter by the author was 2%.

In sum, and as a broad generalization, authors of secondary sources are more inclined to cite authors who either graduated from or were published by highly ranked schools. But it does not appear that the substance of what was said in the cited works was of great consequence to the authors who cited them in secondary sources. On the other hand, courts cite them less frequently but tend to be more attentive to the substance of a work and less influenced by the status of the author or of the journal in which an article is found. Ironically, in law reviews the *appearance* of authority is far more important than *actual* authority. In addition, an author publishing in a specialty journal who attended a highly ranked school is more likely to be cited in secondary materials than the graduate of a lower ranked school.

Equally important as summarizing our findings is a statement of what we are not claiming and did not find. First, correlation and causation are different matters. That legal scholars cite high-ranking journals far more regularly than others does not mean that rank causes citation. Another explanation is that these journals may simply contain more useful articles. As was noted above, there is little doubt that editors at higher ranked journals have greater access to articles.

To repeat a qualification already noted, we have not allowed for differences in subject matter. It may be that subject matter explains why an article is cited by courts and by legal scholars. This is an obvi-

ous subject for further research, but there are serious challenges to determining the impact of subject matter in a systematic way.

We also note that much of the analysis offered here is highly subjective. Obviously, the choice to use the 100 top ranked schools as opposed to top ranked reviews is an example. We doubt that the difference would affect the findings. The classification of the use of the articles is also highly subjective. In response to that, we would invite and be delighted if someone would reexamine the issue to see if we have under- or overstated the impact of legal scholarship.

We know that as a general matter this analysis does little to establish the overall impact of legal scholarship and, perhaps, not even of a specific article. For example, we have not accessed citations in works other than those reported by Westlaw. In addition, we are aware, as reflected in some of the comments above, that legal scholarship can and does have an impact without any citation at all—perhaps without any recollection by someone who has been impacted of where he or she read something.

With respect to this point, we know of no way to assess the reliance on legal scholarship unless that use manifests itself in writing. It is possible, however, to make inferences about what legal scholarship is relied on even when it is not cited. For example, people download works from Social Science Research Network (“SSRN”) but in many (or perhaps most) instances, they do not cite those works. They may work in an administrative agency and be highly dependent on legal research. In a 2006 study, Professor James Chen examined SSRN downloads and found that the number of downloads was highly dependent on the rank of the law review in which a work was ultimately published.¹⁰⁸ While hardly conclusive, this seems to cut against the belief that infrequently cited articles are, nevertheless, widely relied on by the broader range of legal professionals.¹⁰⁹

Finally, nothing reported here bears on the quality of legal scholarship in terms of the analysis and originality. No doubt most works are the result of hours, days, and months of painstaking efforts. Authors often draft and redraft articles, present them at workshops, and hone them until the author is satisfied. More specifically, we do not equate citation rates with the relative quality of the work. An article placed in the ninety-ninth-ranked law review in 2003 would likely have many more cites if it were in a top-15 review. Plus, it may be of equal or better quality than more highly cited articles. Especially in the context of reviews that are not peer reviewed and editors who are susceptible

108. Chen, *supra* note 55, at 39–47.

109. Rhode, *supra* note 5, at 1331 (“[I]t seems unlikely that articles that leave no ripple in legal scholarship [in the form of citations] are having a substantial influence in the world outside it.”). Empirical support for Professor Rhode’s view can be found at Wise et al., *supra* note 26, at 71 (finding that judges and lawyers read law reviews infrequently).

to symbols of institutional authority, any inference about quality and its relation to citations is dangerous.

IV. JUSTIFICATIONS REVISITED

As previously explained, some of the common rationales for the current state of legal scholarship may be discounted because they are unrealistic or illogical. We postponed a full discussion of two other more plausible justifications until presenting the empirical data because we believe a final assessment of those rationales should be informed by the study's results. Those two arguments were that: (1) the status quo is producing legal scholarship that has a beneficial effect; and (2) legal scholarship is a "public good." As the following reassessment explains, we actually agree with these rationales for legal scholars, but the analysis does not stop there. A deeper examination reveals that the current system misses the mark with respect to both of the rationales.

A. *Reassessing the Benefits of Legal Scholarship*

Without question, legal scholarship can and does produce benefits—and ultimately, this is the only important rationale for its existence. The idea that those benefits then justify current levels of investment in scholarship is seriously flawed. The most obvious indication of this flaw is the unfortunate reality that some legal research may actually create little or no benefit to anyone other than the authors and a small handful of others. Articles about film directors¹¹⁰ or the infield fly rule¹¹¹ may be clever and imaginative, but almost certainly those willing—or forced—to fund legal research can find better ways to be entertained. Highly theoretical articles are also likely to be read or relied on by very few.¹¹²

The problem, however, is not limited to clever, witty, and theoretical articles. The fact is that some articles, though well meaning, are just not relevant. The empirical results show that many articles in a ten-year span are not cited by any court or author, and many that are cited serve no useful function in helping the citing author advance or articulate a new idea, theory, or insight. This would be of no consequence if the production of this scholarship did not give rise to direct expenses in terms of salaries and implicate opportunity costs in terms

110. See Jeffrey L. Harrison & Amy R. Mashburn, *Jean-Luc Godard and Critical Legal Studies (Because We Need the Eggs)*, 87 MICH. L. REV. 1924 (1989) (comparing French New Wave cinema and Critical Legal Studies).

111. See Howard M. Wasserman, *The Economics of the Infield Fly Rule*, 2013 UTAH L. REV. 479 (2013).

112. There are examples of brilliant people writing complex pieces that are very difficult to understand and are rarely, if ever, cited. There appears to be no utility in providing examples, but this can be verified by simply selecting several articles with long or grand titles and then subjecting them to a Westlaw search.

of other uses for the funding and professors' time. If one agrees that the benefits (however defined) of some articles do not exceed their costs, then in technical terms there exists a surplus or oversupply of legal scholarship.¹¹³

Based on statistics found in this Article and other places,¹¹⁴ one might conclude that this oversupply is found in the scholarship published in lower ranked journals. The unfortunate truth is that, regardless of their quality, it is unlikely that articles in those publications would be missed. This observation is more compelling when one recalls that this study considered only the top 100 reviews.

The problem is that, even if there were fewer journals, there is little reason to believe that law professors, as a consequence of natural inclination or institutional pressure, would not simply compete for those fewer outlets. So, yes, some of the expense of scholarship would be saved by not incurring the cost of making available unlikely-to-be-read articles.¹¹⁵ But that does little to harness the more expensive side of the equation, which deals with producing the scholarship. Moreover, such a measure would be vastly under-inclusive. High placement does not always mean high citations,¹¹⁶ and high citation counts do not mean the article has any demonstrable value.¹¹⁷

If the focus is switched from too many reviews to too many writers or writing, the issue becomes one of "false positives" and "false negatives." An article that is published but has little meaning or usefulness is a "false positive." On the other hand, it is possible that limiting the investment in legal scholarship would mean some very useful articles would not be written at all. This is the case of "false negatives." Any rational approach to the problem of excessive investment would strive to limit both false positives and false negatives.

One might take this to mean that, since false positives are more likely to be found in lower ranked journals, there is further support for discontinuing or limiting publications from lower ranked schools. This argument ignores the circularity built into the system of assessing impact. Both "false positives" and "true positives" (defined as published articles that receive citations) may not be a function of anything related to actual value. For example, the fact that an article is a false positive may be a function of where it is published as much as the subject matter and execution of the article itself. Placed in a higher ranked journal, the very same article may not be a false positive at all

113. Rhode, *supra* note 5, at 1331 ("Baldly stated, the uncomfortable truth is that too much of legal scholarship now produced is of little use to anyone.").

114. *See, e.g.*, Chen, *supra* note 55.

115. The various means of making articles available online may mean many, if not all, printed journals will eventually become obsolete.

116. *See supra* Section III.B. Although high placement was correlated with higher citation rates, overall citation rates—even among articles in top-level reviews—were meager.

117. *See supra* discussion within Sections III.A.4–6.

but appear to be hugely positive. Somehow, labeling an article as a false positive—which may result from poor or biased editorial decisions based on the status of the author and where the article was published—seems unlikely to advance the goal of making the best possible investment decisions. Ironically, the system itself determines which articles will be false positive by virtue of its robotic tendencies.¹¹⁸ In reality, controlling false positives requires better choices by authors and better choices by editors, whether they are students or not.

Alternatively, some true positives are actually false positives in disguise. The publication and citation of an article does not mean it should have been published from the standpoint of a rational allocation of resources. An article may appear to be a positive simply because of where it was published. In a ninety-ninth-ranked journal, the same article might not have been cited at all. Plus, even in a top 10 and widely cited journal, it may not actually be of much use.

Richard Posner attempts to defend legal scholarship by using an analogy that compares the thousands of law review articles written to thousands of salmon swimming upstream to spawn. Many salmon, like many law review articles, will fail. But we cannot know which ones in advance; and the process, involving substantial losses along the way, is necessary to perpetuate the species.¹¹⁹ In this sense, Judge Posner seems to view all articles as if they were individual experiments by laboratory scientists, mixing various compounds in an effort to find a cure for a dread disease. The idea, of course, is that some of these experiments will fail; but, once in a while, one will succeed, and thus, failure is properly viewed as a necessary cost of eventual success. Judge Posner's view is so flawed that it borders on silly and, we assume, was offered to be provocative or tongue-in-cheek.¹²⁰ Nevertheless, there may be those who have such a starry-eyed view of legal scholarship.

For those who agree with Judge Posner's argument and believe law professors are either like salmon or scientists, it is important to keep a couple of qualifications in mind. For the most part, scientists build from the failure of others to formulate their new experiments. This is, at best, a small part of legal research. There is also a cost when both law professors and scientists do research. Those costs could be less time for teaching, counseling students, or working in a clinic. Salmon, on the other hand, have few options as they start their upstream strug-

118. For an argument that because of the "footnote fetish" of legal scholarship, an article's failure to receive citations is "damning," see Rhode, *supra* note 5, at 1332.

119. Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1928 (1993).

120. Professor Rhode responds to Judge Posner by pointing out that Posner's approach would condone any degree of inefficiency and arguing, instead, that legal scholarship should not receive an economic dispensation unavailable to other endeavors. See Rhode, *supra* note 5, at 1332–33.

gle, and pesky opportunity costs can be put aside. Something, however, may be learned from Judge Posner's salmon: they get one try and then most die. In the case of law professors, writing one article in a lifetime is an attractive option. In sum, some articles are not beneficial at all; others—upstream swimming salmon aside—are beneficial but cannot be justified based on the direct and opportunity costs.

More troubling is Judge Posner's sense that the strongest articles—like the strongest salmon—will make it to the top. There is no proof that this is the case. The current standard for assessing impact—citations—is subject to a circularity problem and is misleading to the actual value of an article to the user. The biggest problem may be the tail-wagging-the-dog impact that citation count has on legal scholarship as a whole. The citation obsession may mean that works are overlooked that have the capacity to help the consumers of legal services, reform the law, or be otherwise helpful or transformative. Beyond this, it is possible that the widespread pursuit for high citation numbers has the collective effect of reinforcing the production of certain types of scholarship (theoretical pieces that appeal to law professors) and discouraging others (research that might be helpful to judges, legislatures, clients, etc.).

B. *Reevaluating Whether Legal Scholarship is a "Public Good"*

However one feels about the benefits of legal scholarship, the oft-repeated justification that the current level is justified under a "public good" rationale is weak. In fact, the public good argument breaks down at two points. First, the fear with respect to legal scholarship is that if law professors did not do it, it would not be done. In truth, this would only be the case when private producers of the scholarship could not internalize enough of the benefits to make the effort worthwhile. Defenders of today's huge investment levels have yet to show that this is always the case. In antitrust and other areas, for example, there are huge *private* benefits associated with changing the law. It is true that the benefits cannot be fully captured and that free riding would exist, but all that is necessary for the work to exist is that producers internalize enough of the benefit to offset the investment. When hundreds of millions of dollars are on the line, even a modest level of internalization would be enough.

The second place where the public good rationale breaks down concerns demand. The typical public good argument is based on the assumption that a demand exists but is not reflected in the market. In other words, people do actually value the service and, if they were somehow forced to exhibit their demand in the market, the result would justify efforts by suppliers to produce it. Defenders of legal scholarship have yet to exhibit or, it seems, even address the issue of what the "hidden demand" for legal scholarship would be if it were somehow "revealed." Since *ex ante* demand cannot be determined, an

indirect way of approaching the question is to examine how much legal scholarship is relied on *after* it is produced. The results of this study suggest that much of it is not regarded as useful. In effect, there was no demand, hidden or otherwise. The public good proponents are likely engaged in wishful thinking. More pointedly, if legal scholarship is analogized to the construction of public roads, most of these roads lead to nowhere.

Of course, this *ex post* look at usage does not equate to *ex ante* demand, but this discrepancy means the news gets even worse for those relying on the public good rationale. In a real market, people would be required to pay. In fact, the data presented here was gathered from scholarship that was given away. More directly, if it cannot be given away once produced, it is hard to imagine the existence of a powerful but hidden *ex ante* demand. In short, the public good rationale does support unquestionably some measure of legal research, but the casual use of that rationale—one that asks tuition and tax payers to foot the bill for a very expensive endeavor—is symptomatic of the deficits of legal research itself.

V. RECOMMENDATIONS

We fully expect many if not most law professors to resist the findings of this research. The implications are threatening and the tendency to rationalize the status quo when it favors our own self-interest is almost universal. Some of that resistance may be well founded. We have attempted to note the limits of our empirical efforts and are confident that we have not identified them all. On the other hand, we also believe that many if not most law professors at some level agree that the law review system falls well short of an appropriate way to assess and publicize scholarship and that much of what law professors produce has very little use. Perhaps even some doubters will join us in debating the merits of various solutions we propose next.

In thinking about solutions, it makes sense to refer back to the comparison between legal research and medical research discussed in the Introduction and ask whether incorporating aspects of research and publication practices from other disciplines could improve legal scholarship. We are mindful that other disciplines have their own issues and controversies,¹²¹ but legal scholarship seems to be singularly lacking in substantive evaluation and accountability at any level post-tenure. Informed by this perspective, we have identified several measures that are responsive to the particular problems highlighted by the results of the empirical study.

Recommendation A echoes our previously stated desire to encourage critical reconsideration of the investment in scholarship as part of any effort to reform legal education and to open a debate

121. *See supra* note 2.

where all assumptions may be challenged. Recommendations B–E address the circularity problem revealed in the empirical study by introducing mechanisms to offset the effects of institutional authority and the unthinking attribution of meaning to citations. Recommendations F–H focus on remedying the overproduction of legal scholarship created solely for consumption by other law professors and the lack of quality control over the investment of resources. Most importantly, Recommendation G is a radical and original suggestion that law schools fund at least some portion of legal scholarship through a grant proposal process modeled after those in medicine and the sciences. We believe the amount of money invested in legal scholarship, coupled with the current lack of accountability of law professors and the demonstrated limited utility of most legal scholarship, warrant such measures.

A. *Encourage Critical Debate*

At a time when many of the “givens” of legal education are on the table for reconsideration, the justification for the existing investment in legal scholarship should be among the issues under consideration. That debate should be informed by the results of this study and others suggesting that the existing system is seriously flawed and that its primary beneficiaries are tenured law professors. Decision-making should be recalibrated to ensure that the interests of other constituents are represented and advanced. We should resist subjecting critics to ad hominem attacks, especially when they are giving voice to the concerns and interests of those without the power and influence to shape the future of legal education.

B. *Resist the Use of Raw Citation Counts*

This study shows that when it comes to the use of (or attribution of meaning to) citations, law professors have been co-opted by a system that is not only based on the mostly-faulty attribution of substantive meaning to citations, but also ensures that most scholars will not succeed in the numbers game. The number of publication placements in law reviews associated with top-ranked law schools is very limited, given the number of law professors and the production of approximately 8,000 articles a year. Most legal scholarship will not get this elite placement boost, and those authors will be highly unlikely to catch up, even if the quality of their scholarship is high and its substance beneficial to the consumers of legal services. Law professors’ scholarly reputations with other law professors are not irrelevant, but we have no reason to believe that raw citation numbers are an accurate measurement of merit. Our bottom line is that law schools, as professional schools, ought to be figuring out a way to determine and measure the impact of legal scholarship on agencies, legislatures, courts, attorneys, and clients. Because their investment in legal schol-

arship is considerable, law schools should not be relying on speculation, self-promotion, and numbers that have little or unclear meaning.¹²²

C. *Increase Reliance on Peer Review*

The most obvious and frequently discussed solution is some form of peer review.¹²³ Scholars who are subject to peer review already express concerns about bias and arbitrariness.¹²⁴ It is, however, difficult to believe that even a flawed system of peer review would not be superior to students relying on institutional authority as a substitute for quality.¹²⁵ The bigger problem with peer review is that it would be in the context of multiple submissions. Thirty or more law reviews may be asking to have the very same article reviewed. It is not an exaggeration to expect scores of peer reviewers to all be examining the same article. A modified version of peer review may be simply to ask faculty to spend more time vetting articles, at least with respect to the importance of the subject matter and the methodology employed.

Peer review would be more practical if each review adopted an exclusive submission policy. It is possible, however, that under such a system, lower ranked reviews would have very few or no articles to review as authors worked their way down the review ranking. It is hard to imagine such a radical shift in policy, but using incentives could advance an exclusive submission policy. This incentive could be in the form of faster response times, greater communications between the reviews and authors, and an express policy that students would not rely on institutional authority.¹²⁶ Such a policy would also tend to

122. For an example of an effort to determine a method of evaluating the quality of citations in another discipline, see Aragón, *supra* note 2.

123. *E.g.*, Day, *supra* note 23, at 581–82, 584–86.

124. Lawrence B. Solum, *Blogging and the Transformation of Legal Scholarship*, 84 WASH. U. L. REV. 1071, 1079–80 (2006) (asserting that peer review is flawed because, among other things, it is blind only “in theory” and that bias and professional affiliations inform the assessments of manuscripts).

125. *But see Problems with Scientific Research: How Science Goes Wrong*, *supra* note 2 (advocating for changes in the peer-review process in scientific research after a prominent medical journal failed to spot obvious mistakes in a publication, declaring that because “[t]he hallowed process of peer review is not all it is cracked up to be,” physics and mathematics have moved from peer review to a system with “post-publication . . . appended comments”); *see also* Mitchell, *supra* note 94, at 168 (“We portray peer review to the public as a quasi-sacred process that helps to make science our most objective truth teller. But we know that the system of peer review is biased, unjust, unaccountable, incomplete, easily fixed, often insulting, usually ignorant, occasionally foolish, and frequently wrong.”); *id.* at 176 (advocating that, instead of peer review, law reviews adopt “stringent disclosure requirements” designed to foster critical review and replication of empirical legal research).

126. Obviously, this would not be attractive to all law professors; however, it would likely be attractive to a majority.

eliminate what amounts to a law review placement frenzy each spring and fall.¹²⁷

D. *Implement Blind Submissions and Review*

As noted, a complement to peer review is blind submission and review. This removes from the process the number of times an author has been cited, the school from which he or she graduated, and similar types of information. The process would also ignore long, name-dropping acknowledgments. Unfortunately, in the small world of legal scholarship, even these steps may not assure true blind review. Excessive self-citations or references to prior works will identify the author. Efforts to eliminate all of these sources of information in hundreds of articles would create a heavy burden on editors. Nevertheless, even adopting a policy of blind submission and review—if not wholly successful—would sensitize reviewers to the need to assess articles based on their substance.

E. *Ensure Greater Administrative Oversight of Law Journal Management*

Some have argued that law reviews should be professionally edited.¹²⁸ We believe that, at a minimum, law school administrators should ensure that the students managing the journals associated with their institutions are not relying heavily on the institutions at which authors teach or the schools from which authors graduated as a means of filtering manuscripts for publication. Students should also be cautioned against relying on the number of citations as a factor in determining whether to make an offer of publication. If the law school has implemented blind submissions, obviously these measures will not be required. In any case, faculty should routinely assist in the screening and review process. This could take place by having multiple law review advisors from different subject matter specialties who could assist in screening articles for originality and the importance of the topic to those outside the confines of legal education.

F. *Gather Information from Constituents about Helpful Scholarship*

Law school administrators should reach out in a meaningful way to broader audiences for legal scholarship. They should endeavor to find and fund ways to obtain useful information from those constituents.¹²⁹

127. Because many reviews fill up, even acceptable articles may be rejected. As a result, professors tend to think of deadlines for spring and fall submissions. Exclusive submission would lower the number of manuscripts competing at any one time for a spot in a review.

128. Day, *supra* note 23, at 584–86.

129. Hricik & Salzmann, *supra* note 19, at 761, 773–79 (advocating “as a matter of necessity” increased productivity of what the authors defined as “engaged scholarship” and detailing its benefits).

These efforts should be directed at determining what their scholarship preferences are and why. They should be asked whether they have read and used law review articles in the past, and if not, why not. The inquiries should not, however, be limited to the past habits of these readers. Potential readers should be asked what type of scholarship they would like to see and, in particular, whether empirical research would be helpful. Other suggestions include seeking diverse sources to fund more engaged or practical research.¹³⁰ One possible alternative avenue for making scholarship responsive to the needs of non-law professor consumers and inexpensively available to those without unlimited access to Westlaw (a subsidy for law professors), would be to expand and use the law library's online article posting system to make unpublished—but potentially more helpful—articles by faculty available and accessible.

G. *Create a System that Incentivizes More Helpful Scholarship*

Whatever its merits, peer review in any form falls well short of a purpose- or task-oriented approach to legal research and may do very little to influence the supply side of the legal scholarship “market.” The onus for that falls on law professors and law school administrators who have permitted an incentive structure to develop and persist that at times seems only tangentially related to assisting those who actually practice and make decisions about law.¹³¹ Law professors, knowing that tenure, status, and salary are a function of impressing other law professors, strive to do just that.¹³² The challenge is to alter the reward structure so that even the most self-interested law professor will find writing for identifiable needs more attractive. By “needs” we do not mean only those topics that have immediate relevance for practitioners. There are, for example, more general needs that may lead to testing hypotheses and theories in a scientific way. A corollary is to encourage productivity in a greater range of beneficial activities other than legal scholarship.¹³³

An element of the problem is that law professors are unaccountable for their decisions about how to spend scarce research dollars. A release from teaching of one-fourth time or more may be conditional on actually producing something, but the release seems unconditional on whether what is produced makes a difference. In effect, release time is

130. Rhode, *supra* note 5, at 1359.

131. Professor Larry Catá Backer has suggested, in a related context, that the law professor “putting forward some contribution to the scholarly enterprise should bear the burden of articulating, *in a specific way*, the means or methods by which it can be measured.” Larry Catá Backer, *Defining, Measuring, and Judging Scholarly Productivity: Working Toward a Rigorous and Flexible Approach*, 52 J. LEGAL EDUC. 317, 329 (2002).

132. Rhode, *supra* note 5, at 1342.

133. *Id.* at 1333, 1358–59 (stating that the academy should “reward[] a diverse range of contributions”).

comparable to a grant to do research in a medical field. By contrast, in legal education that grant is made without an application or proposal, without identifying the purpose of the research, without a methodology, and without identifying the relevant audience.¹³⁴ Given this discretion, law professors write for those who can do the most for them personally—other law professors.¹³⁵ They are not held accountable if their efforts to impress other law professors are successful in the form of citations to their articles and other tangible manifestations of that “impact,” including speaking invitations, etc.

Although the change would be radical, one way for legal research to become more focused is for funding to be made available on a project-by-project basis after a proposal is submitted, reviewed, and approved.¹³⁶ Ideally, that proposal would require all of the elements listed above. General proposals like “I think I will write about the Fourth Amendment” would be rejected. Very theoretical works likely to appeal to only a few would be given lower priority. Works designed to identify pressing problems and seek solutions would be given priority. It is not clear that shifting the incentive structure this way would curb the excesses of those writing persistently about “efficient

134. *Id.* at 1347 (noting that legal scholarship is “seldom calculated to reach the public”).

135. *Id.* at 1342 (“[P]rofessors write mainly for each other, [and] they face little pressure to address the problems that practitioners or the public find most urgent or to identify solutions that have some realistic chance of adoption.”).

136. In an article defining what factors a law school should consider before giving a publication credit as meeting an institutional requirement for scholarship, Professor Larry Catá Backer provides guidance on the information that such proposals might contain. He proposes that scholarship:

- (1) *must be consciously directed, and [the] anticipated value must be articulable with some specificity.*
- (2) must be measurable in some articulable way.
- (3) must be part of an effort that is transparent
- (4) must demonstrate substantial personal effort
- (5) *must be directed outward from the particular law school to the academy, legislature, bar, or other constituency* as well as inward for the benefit of the school.
- (6) must in some clearly articulable way . . . help to fulfill the obligations of teaching and service.
- (7) must not strive [to create or contribute to] a monopoly of knowledge. . . . [and]
- (8) must serve as the basis for a consistently applied system of review.

Backer, *supra* note 131, at 328 (emphasis added).

Professor Backer also recommends a set of matching questions that faculty, as part of a review process, should have to answer about their scholarship. These include: “Specify[ing] the standard for measuring your scholarly activity and explain[ing] how it should be applied”; and “Explain[ing] how your scholarly activity has been directed outward to the academy, the legislature, the bar, etc. How exactly have your scholarly efforts benefited the school and your colleagues?” *Id.* at 340.

breaches,”¹³⁷ “skyhooks,”¹³⁸ and other imaginary things, but at the margin it may make a difference.¹³⁹

H. *Educate Peer Reviewers*

These changes are a significant departure from the culture and tradition in legal education. Untenured faculty who opt to write articles that appeal to an audience broader than other law professors might be vulnerable to negative peer reviews and challenges by tenure and promotion committees. It will be important to be transparent about the deliberateness of the change in direction and to protect vulnerable faculty in this process.

VI. CONCLUSION

However one reacts to these proposals for change, one should concede at the very least that the burden of maintaining the status quo must be on those who favor continuing it. Massive expenditures, which mean larger classes, fewer courses, and heavier burdens on tax and tuition payers, cannot be justified by faith-based observations that we just “know” our work is useful. Nor can it be justified by writing solely for other law professors. Finally, the status quo cannot be justified by a system of scholarship dissemination that depends on institutional authority and efforts to enhance the ranking of law reviews. Obviously, ultimate impact cannot be quantified, but responsible law professors and administrators are able to and should justify subsidization in clear terms rather than connect expenditures to identifiable needs.

The state of legal scholarship could be otherwise, but the existing system is strongly self-perpetuating, and change will be difficult. Our goal is to encourage legal educators to strive harder to make the substantial investment in legal scholarship more meaningful from the perspective of someone other than a law professor. Making this type of directional change now will be particularly difficult because tenured law professors feel besieged by attacks on legal education from all directions and their reaction may be to become entrenched in defensive rationalizing. We believe, however, that most law professors, with

137. See Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939 (2011).

138. See generally Monroe H. Freedman, *A Critique of Philosophizing About Lawyers' Ethics*, 25 GEO. J. LEGAL ETHICS 91, 104 (2012) (comparing “philosophical theorizing about lawyers’ ethics, based upon unrealistic facts and the omission of critical authorities” to structural engineers debating “whether using skyhook cables that drop magically from the sky would be a better way of building bridges than the present suspension method”).

139. Some may regard this as a matter of academic freedom. It is doubtful that professors would be free to write anything and to use law school resources to do so. See *supra* text accompanying notes 136–38.

proper incentives, would be willing to rethink their scholarship if law school administrators made this a priority.¹⁴⁰

140. Wise et al., *supra* note 26, at 18–19, 65 n.245 (reporting the results of a survey showing that law professors are dissatisfied with their failure to meet the needs of attorneys and judges).