

ESSAY

Stop Counting (Or At Least Count Better)

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ABSTRACT

For American legal scholarship to fulfill its purpose, it must have an impact on the development of the actual law as it is enacted and interpreted in the United States. However, legal scholarship broadly—and law review articles in particular—has become less influential on judges and members of the practicing bar over time. This short essay argues that the decline is partly attributable to the open reliance on metrics that primarily represent influence within the legal academy when measuring the value of a scholar's work. In particular, I argue that a focus on metrics with only a tenuous connection to non-academic usage of a new scholar's work, such as download counts, law journal citation count-based rankings methodologies, and article placement, incentivizes new legal writers to write for other academics rather than for judges, attorneys in practice, or policy-makers.

INTRODUCTION

It is no secret that for those interested in pursuing a career in legal education the production of new legal scholarship is a necessary condition to securing a faculty position and, for those lucky enough to find themselves on the tenure-track, to advancing towards tenure. It is also the prevailing wisdom among the bench and the bar that academic legal scholarship—particularly law review articles—is, to put it bluntly, largely useless.

Both judicial self-reports¹ and empirical studies of citation counts² have shown an overall decline in citations to law reviews among state and federal

* This essay represents the views of the author only. It does not necessarily reflect the opinions of anyone else, including, but not limited to, his current employer, former or future employers, friends, neighbors, or pets.

I am grateful to Chelsea Cerutti, Caitlain Devereaux Lewis, and Elie Salamon for their assistance in preparing this essay. Thanks are further owed to Elizabeth Woods for showing patience with the author during the late-night and weekend-consuming writing process. The architects of the Washington & Lee Law Review Rankings also deserve significant credit. This article would not have been possible without the transparency, manipulability, and free public access to the underlying data of that excellent system.

Information on my background can be found at <https://www.linkedin.com/in/patrickawoods>. Citations to internet content (*e.g.*, cites to blog posts and other internet-published works) have generally been saved at web.archive.org to prevent link rot. For access to the underlying data of my own research referenced at points in the essay, please e-mail me at patrickawoods@gmail.com.

courts.³ Coupled with the decline in citations is an increase in articles published over time, leading to the current state of affairs where, by this author's count, for every eight law review articles published in a given year, only one judicial citation is generated.⁴ This eight-to-one overall ratio does not, of course, mean that one-in-

¹ See, e.g., Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES, Oct. 21, 2013 (quoting United States Chief Justice Roberts and U.S. Court of Appeals for the Second Circuit Judge Dennis Jacobs); Adam Liptak, *When Rendering Decisions, Judges are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007 (reporting on a Cardozo Law School symposium attended by seven Second Circuit judges); Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J. L. BLOG (Apr. 7, 2010, 7:20 PM), <http://blogs.wsj.com/law/2010/04/07/chief-justiceroberts-on-obama-justice-stevens-law-reviews-more>; Hon. Thomas L. Ambro, *Citing Legal Articles in Judicial Opinions: A Sympathetic Antipathy*, 80 AM. BANK. J. 547 (2006).

² See, e.g., Brent Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399 (2012); Whit D. Pierce & Anne E. Reuben, *The Law Review is Dead; Long Live the Law Review: A Closer Look at the Declining Judicial Citation of Legal Scholarship*, 45 WAKE FOREST L. REV. 1185 (2010) (updating a 1998 study that found declining citation to law reviews and finding that the overall trend was ongoing); Louis J. Sirlco, Jr., *The Citing of Law Reviews by the Supreme Court: 1971–1999*, 75 IND. L.J. 1009, 1010 (2000) (“We find a continuing decline in number of times the Court cited legal periodicals and a noticeable decrease in citations to the top tier of law journals.”).

It is worth noting here that there are studies arguing that judicial reliance on law reviews is increasing or that meaningful judicial citation is roughly the same when the data is parsed correctly. See generally David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345 (2011) (pointing to an increase in the rate of citation to legal scholarship in the federal courts of appeals when comparing two twenty-year periods); Pierce & Reuben, *supra* (arguing, among other things, that citations remained static in cases of first impression). To the extent that these studies show what they hope to (a question beyond the scope of this short piece), they do not consider one important ratio: the number of articles published in a given period when compared to the number of judicial citations to legal scholarship generated in the same period. Based on my own informal research (done by taking the number of articles in the WestlawNext database dated in each calendar year going back to 1950), the annual number of law review articles published each year has skyrocketed to nearly ten times what it was in 1950. What that ratio shows is that, even in the most generous studies, and assuming my numbers to be significantly overstated due to gaps in the Westlaw database for older years, the per-article rate of law review citation has declined. In other words, even if the number of citations to law review articles in the two periods was the same, because there are many more articles published each year in the later period, the per-article utility of law review articles greatly declined from the earlier to the later period.

³ I am not aware of any serious study of the citation to law review articles in practitioner's briefs or administrative materials. Such a study should be undertaken and, it seems to me, would not be much more difficult to conduct than current academic and judicial citation studies.

⁴ This number was calculated by taking the aggregate number of articles in the WestlawNext database for the period 2006–2013 and comparing it to the aggregate number of judicial citations reflected in the Washington & Lee Law Review Rankings data for the same period.

eight law review articles are cited in a judicial opinion. Some articles generate more than one judicial citation; some generate many more than one.⁵

The reasons given for the decline vary from alleging that there is too great a focus on legal theory in academic scholarship,⁶ to arguments that certain types of legal scholarship are not susceptible to judicial citation,⁷ to the invocation of Sturgeon's law.⁸ There are also those who argue that the disconnect between theory and practice, at least as evidenced by the decline in court citations, is not a problem and that the best legal scholarship should be distanced from courts and practicing attorneys.⁹ Who is right in that particular fight is beyond the scope of this essay.

No one, however, seriously denies that there is a disconnect between much of the legal scholarship published and what is directly useful to courts, practicing lawyers, and policy-makers.¹⁰ Even those who support heavily theoretical and interdisciplinary work do not generally go so far as to claim that there can or should

See Law Journals: Submissions and Ranking, 2006–2013, WASHINGTON & LEE UNIVERSITY SCHOOL OF LAW, LAW LIBRARY, <http://lawlib.wlu.edu/LJ/> (last visited Sept. 14, 2014).

⁵ For example, Richard Nagareda's article, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009), has been cited in 184 judicial opinions at the time of this writing. For each article like that, there are 1,472 other law review articles that go entirely without judicial citation.

⁶ Mitchell H. Rubinstein, *Chief Justice Roberts Comments on Legal Scholarship Today*, ADJUNCT LAW PROF. BLOG, <http://lawprofessors.typepad.com/adjunctprofs/2011/07/chief-justice-roberts-comments-on-legal-scholarship-today.html> (last visited Sept. 14, 2014).

⁷ Eugene Volokh, *How Much Should Legal Scholarship Aspire to Being Cited by Judges?*, THE VOLOKH CONSPIRACY, <http://www.volokh.com/posts/1174321336.shtml> (last visited Sept. 15, 2014). It has not escaped my notice that this essay falls into the category of articles that (I hope) still have merit but that are essentially uncitable by the bench or practicing bar.

⁸ Daniel Solove, *Why Are Judges Citing Fewer Law Review Articles?*, CONCURRING OPINIONS, http://www.concurringopinions.com/archives/2007/03/why_are_judges.html (last visited Oct. 3, 2014) ("The reality is that most law review articles aren't all that great. This is to be expected. In nearly any field much of what is written isn't all that great. We'd be lucky if 10% is really good."); *see also Sturgeon's law*, WIKIPEDIA, http://en.wikipedia.org/wiki/Sturgeon%27s_law (last visited Sept. 15, 2014) ("Sturgeon's law[] is an adage commonly cited as 'ninety percent of everything is crap.'").

⁹ *E.g.*, Ilya Somin, *Why We Should Not Care that Judicial Citations of Law Journal Articles are Decreasing*, THE VOLOKH CONSPIRACY, http://www.volokh.com/archives/archive_2007_03_18-2007_03_24.shtml (last visited Sept. 15, 2014); BDG, *Who Should Be the Audience for Legal Scholarship?*, PRAWFSBLAWG, <http://prawfsblawg.blogs.com/prawfsblawg/2011/06/who-should-be-the-audience-for-legal-scholarship.html> (last visited Sept. 15, 2014).

¹⁰ *See generally* BRIAN TAMANAHA, *FAILING LAW SCHOOL* 55–9 (2012).

be a complete divorce between legal scholarship and the practice of law.¹¹ The arguments are really about the appropriate degree of separation between the ideas generated by an article of legal scholarship and a judicial opinion or legislative reform. This essay proceeds on the assumption that a closer and more direct relationship between legal scholarship and the bench and bar is a good thing that should be encouraged and fostered.¹²

The scope of the disconnect is not surprising when one considers that the most common ways of evaluating the quality of a legal scholar (short of actually reading that scholar's work, of course) all incentivize academic legal writers to target the academic audience. These methods take three general forms: citation-based faculty rankings, rankings based on other metrics such as downloads of papers on the Social Science Research Network ("SSRN"), and the rankings of the law journals in which an author has been able to place his or her articles. As explained below, each of these metrics involves a considerable bias toward recognition by the academy rather than by the bench and bar. Law professors, as rational actors who seek and hope to retain tenure in an increasingly difficult hiring environment,¹³ then, are incentivized to work with these metrics and, thus, to write toward the academy rather than the practicing legal community. If the legal academy wants to move toward greater judicial and practitioner reliance on law reviews, it should lower the prestige value it places on these metrics, revise them, or discard them.

ACADEMIC CITATION-BASED RANKINGS

The major problem with relying on citation-based rankings is the universe of citations used by the most widely recognized ranking methodologies. The most commonly proliferated and copied law faculty ranking methodology is that of Professor Brian Leiter,¹⁴ which has mostly been taken over by Professor Gregory

¹¹ *BDG, supra* note 9.

¹² I am obviously not alone in this view. *See, e.g.*, David Hricik & Victoria Salzmann, *Why There Should Be Fewer Law Review Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFF. L. REV. 762 (2005).

¹³ *See* Tracey George & Albert Yoon, *The Labor Market for New Law Professors*, J. OF LEG. STUD. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332073&download=yes (last visited Oct. 3, 2014).

¹⁴ Brian Leiter, *Faculty Quality Based on Scholarly Impact, Corrected Version April 2006*, BRIAN LEITER'S LAW SCHOOL RANKINGS, http://www.leiterrankings.com/faculty/2005faculty_impact_cites.shtml (last visited Oct. 3, 2014).

Sisk.¹⁵ While there are other methodologies that incorporate citation counting to greater or lesser degrees, some of which have substantially adopted Leiter's methodology,¹⁶ because of their more limited visibility to the legal community, Leiter's indisputably well-known rankings are the elephant in the room.

Loosely speaking, Leiter and similar studies rank faculties as a whole based on median or mean citations of eligible faculty members, and rank individual law professors based on total number of citations.¹⁷ With one notable exception that is only tangentially relevant to this discussion,¹⁸ the essential characteristics of the ranking system have remained unchanged over time. The rankings seek to demonstrate "scholarly impact" and have been subject to extensive critique and discussion.¹⁹ However, whether or not they succeed in that task is probably

¹⁵ Brian Leiter, *Top Law Faculties in Terms of Scholarly Impact, 2007 through 2011*, BRIAN LEITER'S LAW SCHOOL REPORTS, <http://leiterlawschool.typepad.com/leiter/2012/07/top-law-faculties-in-terms-of-scholarly-impact-2007-through-2011-1.html> (last visited Oct. 3, 2014).

¹⁶ E.g., James Phillips & John Yoo, *The Cite Stuff: Inventing a Better Law Faculty Relevance Measure*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140944&download=yes (last visited Oct. 3, 2014) ("This study takes no issue with [Leiter's] basic procedure, and, in fact, duplicates it, except in one important way."); Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. OF LEG. STUD. 373 (1998).

¹⁷ Brian Leiter, *Top Ten Law Faculty (by area) in Scholarly Impact, 2009–2013*, BRIAN LEITER'S LAW SCHOOL RANKINGS, http://www.leiterrankings.com/faculty/2014_scholarlyimpact.shtml; Brian Leiter, *Top 25 Law Faculties in Scholarly Impact, 2005–2009 (And Highest Impact Faculty in 13 Areas of Specialization)*, BRIAN LEITER'S LAW SCHOOL RANKINGS, http://www.leiterrankings.com/new/2010_scholarlyimpact.shtml (last visited Oct. 3, 2014) (listing the most cited scholars in thirteen fields and by gender).

¹⁸ Over time, exactly which professors at a school are eligible to be included in the list of faculty members whose citations will be counted has changed. *Compare Leiter, supra* note 14 ("We looked only at the top quarter of each faculty, largely for logistical reasons."), *with* Brian Leiter, *Top 35 Law Faculties Based on Scholarly Impact, 2007*, BRIAN LEITER'S LAW SCHOOL RANKINGS, http://www.leiterrankings.com/faculty/2007faculty_impact.shtml (last visited Oct. 3, 2014) ("[T]his study looked at citations for all tenure-stream members of the academic faculty (for 2007–08) from 2000 to the present."), *and* Leiter, *supra* note 17 ("The methodology is the same as used in the 2007 study, though now excluding, per suggestion from many colleagues and as we did last year, untenured faculty from the count, since their citation counts are, for obvious reasons, always lower. The study also excludes judges who still do some teaching (like Guido Calabresi at Yale and Richard Posner at Chicago)."). These changes are relevant to this essay in the limited sense that, logically speaking, rankings-conscious faculty promotion committees may care more about citations at different stages of a candidate's career. In other words, under the 2010 rankings, a committee may not care about citation count in considering pre-tenure promotion where it may have under the 2007 method. Either way, though, citations will matter to any committee that cares about its Leiter ranking as an overall faculty at some point during a candidate's road to tenure.

¹⁹ See, e.g., Phillips & Yoo, *supra* note 16; Kaimipono D. Wenger, *On Rankings Bias; or, Why Leiter's rankings make Texas look good—and why that's not a bad thing*, CONCURRING

irrelevant²⁰ to the effect of the rankings themselves on the environment that new legal scholars face.

Rather, it is the absence of what the Leiter rankings do not seek to capture that creates an environment that encourages prospective legal scholars to write for the academy.²¹ In all of its iterations, Leiter's rankings have used Westlaw's JLR database as the universe of citations. The JLR database comprehensively covers law reviews, bar journals, and continuing legal education materials. Notably, though, it does not cover citations by courts, citations in briefs (some of which are carried by Westlaw), citations in legal treatises, or citations in administrative materials.²² Using JLR makes sense for Leiter's system as that system, admittedly, seeks to capture "scholarly impact" rather than overall influence on the legal profession. Still, as others have recognized, that the system does not cover these other types of materials is a shortcoming.²³ More problematic for my purposes, it is a shortcoming with a feedback effect.

What does it tell aspiring scholars when the most influential ranking of law faculty *completely ignores* citations from sources outside the academy? It tells us

OPINIONS, http://www.concurringopinions.com/archives/2005/11/why_leiters_ran.html (last visited Oct. 3, 2014).

²⁰ I say "probably" because it is not clear to me whether there is a correlation between citations to law review articles and citations by courts and practicing attorneys to those same articles. If there is a strong correlation, one might expressly and legitimately use one as a proxy for the other. The extant empirical research, however, relies on sample sizes that make me leery. *E.g.*, Gregory Crespi, *Judicial and Law Review Citation Frequencies for Articles Published in Different "Tiers" of Law Journals: An Empirical Analysis*, 44 SANTA CLARA L. REV. 897, 902 (2004) (examining two years of citations from fifteen journals); Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871, 872 (1996) (noting the study's small sample size and calling for "more extensive comparisons of citation patterns in judicial opinions and scholarly journals"). My own woefully poor and incomplete research into the topic indicates that among the academic "rock stars" identified by Leiter's studies there is a moderate-to-strong correlation with judicial citations. However, that same research also appears to show that once you get outside of the "rock star" group, the correlation between judicial and academic cites wanes to almost nothing.

²¹ *Phillips & Yoo, supra* note 16.

²² If you think it odd to consider citations in legal administrative materials to be important in determining the value of legal scholarship, see generally *Chevron v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and its progeny. Under the *Chevron* line of cases, an administrative agency's interpretation of a statute is often given controlling weight by the courts. Thus, scholarship highly influential on an agency interpretation may be even more reflective of an author's influence on the development of the law than, for example, citation in practitioners' briefs. See Karen Petroski, *Does it Matter What We Say About Legal Interpretation?*, 43 MCGEORGE L. REV. 359, 383–86 (2012) (discussing the legal academy's response to *Chevron*).

²³ *Phillips & Yoo, supra* note 16.

that if we want to be respected, or perhaps even employed at all, we had better publish in a way that will be cited in law reviews. It also tells us that citations from courts, attorneys, and administrative agencies may be nice, but they are not at the core of the work we are expected to undertake as scholars. That there is no comparably well-known ranking system based on any of these other forms of citation to law review articles, even though such systems could be constructed with relative ease by searching a different Westlaw database (*e.g.*, the databases for cases, briefs, or administrative materials), helps to drive this point home.

SSRN RANKINGS AND ALTMETRICS

The use of SSRN-based²⁴ and other alternative metrics (I'll generally refer to these as "altmetrics")²⁵ is similarly problematic. While the incentives are somewhat different in that authors are incentivized to write for downloads or page-views, rather than citations in academic journals, the focus of these metrics is just as much directed away from courts, practicing attorneys, and policy-makers as academic citations.²⁶ There may be ways to use certain altmetrics to encourage new legal scholars to write toward the bench and bar but those metrics are not, to my knowledge, in use at present. The problem with relying on altmetrics as a measurement for aspiring scholars is two-fold.

First, the kinds of measurements currently being used (*e.g.*, page-views, download counts) either do not track to the publicly available measures of use by courts and practicing attorneys or we have no idea whether they do or not.²⁷ For example, citations to articles on SSRN appear to be infrequently made outside of legal periodicals. A WestlawNext search of the term "ssrn!," for example, yields only 150 citations by cases and 715 in briefs, but 9,242 citations in law reviews and

²⁴ See Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 IND. L.J. 83 (2006).

²⁵ See Katie Brown, *Are the Scientists on to something with altmetrics? New tools for assessing and tracking scholarly impact*, presentation at Conference for Law School Computing, available at <http://conference.cali.org/2014/sessions/are-scientists-something-altmetrics-new-tools-assessing-and-tracking-scholarly-impact> (last visited Oct. 4, 2014); Paul Caron, *Using Altmetrics to Measure the Impact of Faculty Scholarship*, TAXPROF BLOG, http://taxprof.typepad.com/taxprof_blog/2014/06/using-altmetrics-.html (collecting presentations on altmetrics).

²⁶ This is not to say that these methods have no place in evaluating faculty scholarship. There are clear benefits to using altmetrics, not least of which is that they encourage scholars to write on recent legal developments. Indeed, the contents of legal blogs may be of great use to the bench and the bar.

²⁷ As with citations to law review articles in briefs and administrative materials, I am aware of no comprehensive study of citations to legal blogs or SSRN materials.

journals.²⁸ If SSRN papers were regularly consulted by courts and practitioners, I, at least, would expect to see a better ratio of court citations to law review citations (it is approximately 1:61). Because courts operate on shorter publication timelines than law reviews, if courts were looking at SSRN papers, particularly useful new articles would regularly find themselves cited to before they were available through a journal. As you can see, that does not appear to be happening.²⁹ More, SSRN download rankings appear to correlate strongly with the existing rankings methodologies, at least across the full spectrum of law reviews.³⁰ The logical take-away from this is that the type of article likely to generate academic citations is also likely to generate downloads, again pushing new scholars in the direction of writing toward the academy rather than the bench and bar.

As with citation-based rankings, that SSRN downloads seem to correlate more with academic activity than with judicial or practicing attorney activity does not seem to have generated much discussion. The lack of dialogue, compounded with the disjunction, is another “heads up” to aspiring legal scholars as to which audiences they should be directing their scholarship if they want to succeed.

The second issue is that the prestige factor associated with altmetrics is highly unclear. The routing-around-gatekeepers function of publication through electronic media does not eliminate the highly-important prestige factor that other metrics, like citation counts, provide, and it is difficult to know which altmetrics, if any, will be recognized by the academy as legitimate measures of scholarship and to what degree.³¹ Certainly high page-views alone, for example, will not transform a legal blog from tabloid status to that of scholarship.³² The status value of their work obviously looms large for aspiring legal academics. Uncertainty as to the value of doing well on altmetrics is, itself, an incentive to “play it safe” and publish with the academy in mind.

²⁸ By way of comparison, a search of the term “en.wikipedia!” yields 1,058 citations in cases and 4,048 in law reviews and journals.

²⁹ In fairness to SSRN, this kind of comparison is off to the side of SSRN’s purpose, which is to aid in the dissemination of articles among scholars rather than to judges and lawyers.

³⁰ See generally Theodore Eisenberg, *Assessing the SSRN-Based Law School Rankings*, 81 IND. L.J. 285 (2006).

³¹ See Paul Horwitz, “Evaluate Me!”: *Conflicted Thoughts on Gatekeeping in Legal Scholarship’s New Age*, 39 CONN. L. REV. (ONLINE SUPPLEMENT) 38 (2007), <http://connecticutlawreview.org/files/2012/04/HorwitzFinal.pdf> (“Like many young scholars who have established a presence on the Internet, I am a champion of the new regime . . . but I am also eager to receive status in the old regime. And I’m not only talking about myself.”).

³² This is probably to the good. See generally, e.g., ABOVE THE LAW, <http://www.abovethelaw.com>.

LAW REVIEW ARTICLE PLACEMENT

Perhaps even more important than citations or altmetrics is the effect of the prestige associated with placing articles in highly-ranked legal publications. Studies and received wisdom both indicate that the ranking of the journal in which a scholar is published has a measurable effect both on law faculty hiring³³ and promotion.³⁴ Aspiring legal academics know from their own journal service that the methodologies by which law reviews and journals are ranked incentivizes the publication of academy-oriented articles. As a result, those new scholars are pushed in the direction of writing for the academy if they want to increase their chances of a good placement.

Unlike the Leiter rankings, the two major methods for ranking law reviews both incorporate judicial citations as well as citations in other legal periodicals. However, they do so in a manner that essentially renders those citations meaningless in the overall ranking calculation. The currently prominent rankings for law reviews are the Washington & Lee Law Review Rankings (“W&L”) and the Google Scholar Rankings.³⁵ The two ranking methodologies have important

³³ See George & Yoon, *supra* note 13; Richard E. Redding, “Where did you go to law school?” *Gatekeeping for the Professoriate and its Implications for Legal Education*, 53 J. LEG. EDUC. 594, 602 (2003) (arguing that law school and law review membership have the largest effect on hiring, but noting the hiring impacts of publication in journals of different ranks).

³⁴ Alfred Brophy, *The Signaling Value of Law Reviews: An Exploration of Citations and Prestige*, 36 FL. STATE L. REV. 229, 231 (2009) (“For purposes of job placement and pay increase, it is not unreasonable to assume that articles placed in more prominent journals are more useful, as a general matter, than articles placed in less prominent journals. . . . This is because evaluators use journal placement as a proxy for article quality.”); Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige and Open Access*, 10 LEWIS & CLARK L. REV. 901, 908–909 (2006) (“As authors, they get the prestige of branding by the schools whose reviews publish their work. That branding further feeds branding by their own institutions, which validate this form of publishing via tenure and promotion reviews. Both forms of prestige circulation feed and are fed by colleagues in other schools, who recognize and respond to scholarship by praising publication in ‘higher quality’ law reviews.”).

³⁵ These two are not the only rankings for law reviews, only the most visible. Two other notable systems are Robert Anderson’s tweak of the Google Scholar metrics and the newly-minted ExpressO rankings, which are based on the number of submissions to each journal. Robert Anderson, *Google Law Review Rankings 2014*, WITNESSETH: LAW, DEALS, & DATA, <http://witnesseth.typepad.com/blog/2014/08/google-law-review-rankings-2014.html> (last visited Sept. 15, 2014); *Law Review Submission Guide 2014–15*, at 5, EXPRESSO, http://law.bepress.com/assets/images/expresso/ExpressO_Submission_Guide_2014-15.pdf (last visited Sept. 15, 2014). Many faculty members also (incorrectly) assume that the ranking of the law school that publishes the journal is equivalent to the ranking of the journal on the various journal rankings methodologies. On any of these metrics, some law reviews are ranked significantly higher or lower than the law school housing them is ranked by U.S. News. See generally Alfred Brophy, *The Relationship between Law Review Citations and Law School Rankings*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=868541 (discussing the correlations and lack thereof between U.S. News rankings criteria and law review citations).

differences,³⁶ but they share the same bias toward recognition by the academy rather than the practicing community. Both methodologies rely on an aggregate number of citations to determine ranks. Aggregation creates a bias toward academia-friendly articles because the number of citations to law review articles by other law review articles dwarfs the number of citations to law review articles by judicial opinions (or, I suspect, any other kind of source). According to my calculation, based on the underlying W&L data, that ratio is roughly forty to one (40:1).³⁷ The effect of this ratio is that citations from courts have little to no effect on the overall rankings of a journal.

Take the ranking of *New York University Law Review* as an example. That journal dominates the total case citations ranking in the 2006–2013 W&L rankings with 296 citations in cases. The second place journal on that metric, *Columbia Law Review*, is more than one hundred citations behind at 178. Yet, *New York University Law Review* does not even crack the top ten in the overall rankings under either W&L or Google Scholar's methodology.

The *New York University Law Review* is not an outlier. A comparison between the W&L overall rankings (with impact factor reduced to zero so that the metric is really all citations) and the journal citations-only ranking shows that citations in cases have almost no impact on the meat of the rankings. Consider what happens to the overall rankings when all citations by courts are removed. The answer is: nothing other than tie-breaks for identically ranked journals for the first seventy-five rankings. For rankings 75–100 there is also very little movement with only one journal (*The Harvard Law & Policy Review*) moving more than three places. Put another way, this comparison demonstrates that the citations by journals so outnumber those by courts that removing citations by courts from the rankings methodology entirely has no real impact on a journal's ultimate rank.

Competent law review editorial board members are aware of this disconnect. I certainly was. That articles are often selected partly on the basis of how well they will likely be cited to should come as no surprise to anyone.³⁸ For a journal

³⁶ The Washington & Lee methodology uses a combination of aggregate citations in cases and law journal articles, adjusted by an impact factor. See *Law Journals: Submissions and Ranking Explained*, WASHINGTON & LEE UNIVERSITY SCHOOL OF LAW, LAW LIBRARY, <http://lawlib.wlu.edu/LJ/method.asp#methodology> (last visited Sept. 14, 2014). By contrast, Google Scholar ranks law reviews using an *h-5* index with *h-5* median as a tie breaker. *Top publications—Law*, GOOGLE SCHOLAR, http://scholar.google.com/citations?view_op=top_venues&hl=en&vq=soc_law (last visited Sept. 15, 2014); see also *h-index*, WIKIPEDIA, <http://en.wikipedia.org/wiki/H-index> (explaining the basics of *h*-indexing) (last visited Sept. 15, 2014).

³⁷ It is notable that this ratio is actually *better* than the citation ratio for SSRN publications mentioned earlier.

³⁸ In the currently contracting legal education market, many journals may become even more focused on rankings improvement and, thus, on how citation-friendly the articles they select

concerned about its ranking, an article's utility to the bench and bar is frequently a secondary concern or, rather, a competing concern. An editor who selects an article that he or she knows is unlikely to be of interest to the legal academy but which will be of use to the bench and bar is knowingly taking a risk with the journal's ranking.³⁹

All of this boils down to the proposition that articles perceived to be more likely to have larger total citation counts are also more likely to be selected for publication, and to place in higher ranked journals.⁴⁰ Prospective academics know this because, as luck would have it, most aspiring legal academics just happen to have been law journal members when they were in law school.⁴¹ Knowing how the selection process works and how important a good placement can be, provides an incentive to aspiring academics (and established academics) to shape their scholarship to increase the chances of a good placement.⁴²

COUNTING BETTER

Obviously, discarding these metrics entirely and evaluating law faculty members solely on the basis of having read their work would be the ideal way to handle faculty hiring and promotion. I hope that most faculty already do this when

are. Fewer students and lower tuition revenues means less funding to go around, and student-edited legal periodicals can be easy targets for funding cuts or outright elimination. Being able to point to a strong ranking for a journal—especially by a secondary or tertiary journal—is one of the few arrows in the quiver of an editor-in-chief in the unenviable position of having to defend his or her journal's budget, or indeed, its continued existence.

³⁹ That there is significant clustering around higher-ranked journals is some circumstantial evidence for my thesis that potential citations matter to editors selecting law review articles for publication. *E.g.*, James Chen, *Modeling Law Review Impact Factors as an Exponential Distribution*, JOTWELL, (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=905316.

⁴⁰ I am not arguing that student editors are great at making predictions as to how citable an article will be, only that they *are* making decisions partly on that basis and that they are doing so because they know that citations affect journal rankings. *See generally Brophy, supra* note 34 (discussing how placement of individual articles in prestigious journals is no guarantee those articles will garner citations). I am also not arguing that it is the *only* factor; local pressures, personal connections, and the actual quality of a submitted article also play a role. *See generally* Albert Yoon, *Editorial Bias in Legal Academia*, 5 J. LEG. ANALYSIS 309 (2013) (arguing that professors frequently place their weaker articles with journals associated with their own academic institutions).

⁴¹ *See George & Yoon, supra* note 13; *Redding, supra* note 33.

⁴² *Brophy, supra* note 34, at 231 (“And law review editors exercise enormous (perceived) power over the process, even over the form of scholarship. When many of the leading law reviews agreed in 2005 to limit the size of articles published, there was an immediate shift in the behavior of authors.”).

addressing tenure and promotion decisions, rather than relying on the proxies for quality discussed above, as the more cynical articles and blogs seem to believe they may.⁴³ An effort on the part of the legal academy to visibly depart from reliance on these proxies would remove some of the incentives that push aspiring faculty members in the direction of writing to an academic audience rather than for the bench and practicing bar.

More generally speaking, in the internet age these sorts of proxies for quality can be replaced by actual recommendations. There are now other, better ways to determine which law review articles are worth reading than journal placement or citation count. JOTWELL, the online journal publishing this essay, as well as many of the major legal blogs (e.g., TaxProf Blog) regularly provide recommendations, commentary, and evaluation on the best of new legal scholarship. Indeed, they do so very quickly, often before a paper has been published in a law review.

I recognize, however, that the metrics I have discussed above probably are not going anywhere. So, I offer the following observations and suggestions about how these metrics can be shaped to eliminate or minimize the bias toward an academic audience:

To start, academic citation-based systems are not wholly invalid. There is a lot of truth to the position that certain types of articles are still useful despite not really being susceptible to citation by anyone outside of the legal academy. As such, including academic citations in a citation-based faculty ranking system or law review ranking system is not only appropriate, but necessary. The trick is including them in a manner that neither excludes other types of citation in the manner of Leiter's system, nor drowns out other types of citation in the manner of the law review rankings.

Obviously, step one in this regard is the inclusion of judicial citations, citations in administrative agency materials, and citations in appellate briefs to the universe of citations counted in the various ranking methodologies. Because of the citations ratios I discussed above, however, mere inclusion will probably not be enough to cure the bias. Step two is, therefore, to consider weighting the scarcer but highly valuable types of citation. In particular, citations in judicial opinions should not only be weighted, but weighted heavily. Even on a theoretical level, no one can plausibly argue that a citation by a student note is an equivalent signal of

⁴³ Stephen Bainbridge, *Revisiting the case for self-publishing legal scholarship*, PROFESSORBAINBRIDGE.COM, <http://www.professorbainbridge.com/professorbainbridgecom/2014/07/revisiting-the-case-for-self-publishing-legal-scholarship.html> (last visited Oct. 5, 2014); Kyle F. Graham, *Lies Law Professors Tell Each Other, Some of Which I May Have Said Myself*, CONTINUING NUISANCE, <http://continuingnuisance.com/?p=36> (last visited Oct. 4, 2014); DAVID SCHMIDTZ ET AL., SCALING THE IVORY TOWER: THE PURSUIT OF AN ACADEMIC CAREER 51 (2d ed. 2005) ("What makes a tenure case easy? If someone else has already done the hard work of evaluation for you!").

influence to a citation by a federal circuit court, state supreme court, or the Supreme Court of the United States. Yet, that is precisely what any methodology that does not use citation weighting does (including the current law review rankings methodologies).

Figuring out exactly how much more weight a citation from a court deserves is a tough business and one that has not been given appropriate academic attention. Nevertheless, I believe that citation weighting, at least with regard to judicial opinions, can be done on a principled basis. For example, a rankings methodology could weight citations from a court on the basis of how many other judges its opinions bind. Such a method would have its problems, but it would be a move toward a more balanced rankings system as well as a clear signal to aspiring law professors that, yes, judicial and practitioner use of legal scholarship is not only important but highly important.⁴⁴

In the case of altmetrics, page-views offer some hope to the degree that the type of page-view can be discerned. Many courts and large law firms have, broadly speaking, identifiable IP footprints. Tracking the number of page-views from IP addresses known to be associated with court systems, for example, strikes me as a viable method for determining whether a piece of scholarship is having an impact on the bench and bar in a way that page-views writ large would not be. Similarly, views of articles on Westlaw or Lexis that are associated with a particular type of account (*e.g.*, viewed under the federal judiciary's plan) would provide an indication that an article is being used by the courts even though it may not be cited.⁴⁵ Given that some courts are actively discouraged from citing large numbers of secondary sources and only cite to these types of sources if support for the proposition cannot be found in primary legal authority,⁴⁶ these types of metrics would potentially be very useful for determining what scholarship is having an influence in those areas.

⁴⁴ In fairness to the W&L system, performing an additional analysis of judicial citations that parses them by type of court would have been an extremely onerous task when those rankings began a decade ago. However, with improved legal research technologies that break out cases by court now available (I am thinking of WestlawNext), an undertaking of this type has become far more practicable.

⁴⁵ When I was in law school I inquired of both Lexis and Westlaw whether such information was available, but was told in each case that those services did not maintain page-view information of this type. I remain skeptical of that representation. Regardless, it seems obvious that if Lexis and Westlaw wanted to keep track of this information and share it in a manner that adequately preserved the confidentiality of the viewers, those services could do so.

⁴⁶ *E.g.*, *Judicial Writing Manual: A Pocket Guide for Judges* 18, FEDERAL JUDICIAL CENTER (2013); *Judicial Writing Manual* 18, FEDERAL JUDICIAL CENTER (1991).

CONCLUSION

It should not be a shock that practicing attorneys and judges have come to rely less and less on legal scholarship. As shown, the legal academy's most discussed and employed proxies for the value of legal scholarship—academic citation-based faculty rankings, altmetrics such as SSRN downloads, and article placement—all give either no value or minimal value to the influence of legal scholarship on the practicing legal community.

Aspiring legal scholars are not deaf to the messages being sent by the use of those metrics. They tell us that success as a law professor flows from publishing articles that appeal, first and foremost, to the legal academy. They hint that articles designed to be of use to judges, practicing attorneys, or policy-makers will not help your career unless they also capture the attention (and the citations) of legal academics. And, because we want to succeed, aspiring legal scholars listen to and internalize those messages.

Other options exist. The legal academy does not need to give status on the basis of metrics that encourage new scholars to write primarily for the academy itself. A good start toward increased relevance for legal scholarship would be the visible abandonment of these metrics in favor of individual assessments or ranking systems that place significant value on scholarship relevant to judges, practicing attorneys, and policy-makers.