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SCHOLARLY INCENTIVES, SCHOLARSHIP, ARTICLE SELECTION BIAS, AND INVESTMENT STRATEGIES FOR TODAY'S LAW SCHOOLS

*Dan Subotnik**
*Laura Ross***

“No man but a blockhead would ever write except for money,” the great sage Samuel Johnson announced on April 5, 1776.¹ Some 250 years before that, Martin Luther had taken the opposite position. The Reformation prophet and first translator of the Bible into vernacular German had famously suggested that authors need—deserve—compensation: “I got it for nothing, I gave it for nothing, and I desire nothing for it.”²

The soundest view on the subject surely lies somewhere in the middle. For on the one hand, much writing has always been inspired by such factors as talent, hunger for fame, and subject matter interest—not by payment.³ Even for academics today, writing is often

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** Laura Ross is a reference librarian and the digital archivist at Touro. She is grateful to all of her colleagues at the Gould Law Library.

¹ 3 JAMES BOWSELL, LIFE OF SAMUEL JOHNSON 19 (1791).

² See Martha Woodmansee, *The Genius and the Copyright: The Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425, 433 (1984) (quoting Luther, trans. by author Dan Subotnik). Is there a difference between the English and German theories of artistic creation? “That which you would call invention,” wrote composer Johannes Brahms, “that is to say, a thought, an idea, is simply an inspiration from above, for which I am not responsible, which is no merit of mine. Yea, it is a present, a gift.” GEORGE HENSCHEL, PERSONAL RECOLLECTIONS OF JOHANNES BRAHMS 22-23 (1907). Brahms goes on say that making the inspiration concrete is hard work. *Id.*

³ Recall that copyright is a historically recent invention. The first copyright statute in the world dates back to British Statue of Anne (1710). MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT app. 7[A] (Matthew Bender & Co., rev. ed. 2013) (providing a reprint of the Statute of Anne with commentary). In the United States, copyright was first en-

less a business than a calling.⁴ On the other hand, to put a fine point on it, the writer has to live.⁵

For better or worse, law school administrations today are increasingly tilting toward Johnson. Perhaps on a theory that writing law review articles is generally insufficiently self-gratifying, law schools—and universities more generally—feel compelled to pay a middling fortune for scholarship. The cost of an article by a professor at a well-paying law school has been assessed at \$100,000,⁶ and while this estimate could have been more fully developed,⁷ the cost is still alarming. In terms of allocated salary, the present authors calculate it at roughly \$78,000.⁸ If the current system is to survive, this

acted into law in 1790. *Id.* at 1-OV.

⁴ See RICHARD ARUM & JOSIPA ROSKA, *ACADEMICALLY ADRIFT* 10 (2011) (quoting ANTHONY KRONMAN, *EDUCATION'S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE* 111 (2007) (“the equation of scholarly specialization with duty and honor . . . makes the development of one’s place in the division of intellectual labor a spiritually meaningful goal, and not just an economic organizational necessity.”)). It is, adds Arum, a “moral imperative.” *Id.*

⁵ *Ain kemach ain Torah* goes an old Hebrew proverb (i.e., No bread [lit. flour], no learning) (trans. by author, Dan Subotnik).

That Johnson himself, at some level, understood the diversity of motives for writing is suggested by the hedge, “would ever write” (instead of “has ever written”). Thus, he must have meant principally to dispel the idea of writing as a labor of love, the product of irrepressible inspiration or exuberance. In effect, Johnson is saying, [we] writers pay close attention to incentives for [our] their work, that economics 101 is applicable to [us] them in much, if not entirely, the same way that it is to other rational sellers in the marketplace.

⁶ See Karen Sloan, *Legal Scholarship Carries a High Price Tag*, NAT’L L. J. (April 15, 2011) (citing the work of Richard Neumann, Jr.).

⁷ See, e.g., Robert Steinbuch, *On the Leiter Side: Developing a Universal Assessment Tool for Measuring Scholarly Output by Law Professors and Ranking Schools*, 55 LOY. L.A. L. REV. 87 (2011). One of Steinbuch’s critiques is that Neumann uses an unrealistic one-article-per-year standard. *Id.* at 119. Using the lower productivity of the University of Little Rock faculty, he finds that the actual cost per article ranges from \$22,000 to over \$1,000,000 and mean cost of over \$200,000. *Id.* at 121. Steinbuch ends up, however, with a median cost of \$108,000. *Id.*

⁸ We start with Suffolk, a middling-pay urban school in the Northeast whose median salary for tenured professors (who are supposed to be writing) is close to \$150,000. The following calculations are rounded off to the nearest thousand from The Society of American Law Teachers, *2012-2013 SALT Salary Survey*, SALT EQUALIZER (May 2013), available at <http://www.saltlaw.org/wp-content/uploads/2013/06/SALT-salary-survey-20131.pdf>. Fringe benefits add another 25%, or \$38,000, so that we reach a median salary of \$188,000. *Id.* At Touro, the modal pay for adjuncts (as best as we can determine) is \$3,000 per credit. Since full-time faculty generally teach four three-credit courses per year, it seems fair to say that providing instruction costs law schools \$36,000 per year. Let’s double it because adjuncts teach mostly at night, and law schools would have to pay more to get daytime instructors. That leaves \$116,000. Can we accept that school service makes up one-third of a faculty member’s responsibility? \$116,000 less \$63,000 (one-third of 188,000) comes to \$53,000. To this, we can add \$13,000, the median summer bonus at Suffolk, and an allocable share of

cost must, of course, be passed on to students in the form of increased tuition, a consequence that, because it heavily burdens current and future students, has led to much public breast-beating.⁹

Salaries make up only one part of the cost. Becoming de rigueur at many institutions, diminished class loads, sabbaticals, leaves, research assistantships, and travel allowances are compounding the problem. As have summer research grants that range on average from \$6,000 to \$25,000 per recipient.¹⁰

The felt need for faculty writing incentives seems uncontrollable in the brutal contemporary law school environment where raises for scholarly performance seem hard to come by.¹¹ The market for lawyers is drying up. Faculty compensation, critics bemoan, has already driven tuition to levels that cannot be justified by students based on expected law graduate salaries.¹² The golden age for law schools is over, and an all-against-all ethos now prevails.¹³ To further improve their competitive standing under today's cutthroat conditions, some law schools are coming up with new incentives for fac-

a half-year sabbatical every seven years, \$13,000 (1/14 of 188,000). *See id.* This leaves \$78,000 as the cost allocable to research each year. Since, as Neumann suggests, a one-article-per-year burden does not seem unfair, \$78,000 is the cost of a law review article. One can quibble with these numbers, but the message is clear: scholarship is expensive.

⁹ Report and Recommendations, American Bar Association: Task Force on the Future of Legal Education 1 (Jan. 2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

¹⁰ Of the sixty-eight schools reporting to SALT's 2012-2013 Salary Survey, all but three offer summer stipends. *See* SALT, *supra* note 8. This phenomenon flabbergasts academic colleagues in other fields who hold that law professors should understand that they too were hired to write at all times, not just during the academic year. Acknowledgment: the work on this article was supported by a summer grant.

¹¹ The only data available on salary raises imply that median salaries for tenured professors actually shrank during 2012-2013 from the preceding year. To arrive at our conclusion, we compared the 12 schools from the largest reporting region (Region III--Southwest and South Central) that appeared on both 2011-2012 and 2012-2013 reports. *Compare* SALT, *supra* note 8, with The Society of American Law Teachers, *2011-2012 SALT Salary Survey*, SALT EQUALIZER (May 2012), available at <http://www.saltlaw.org/userfiles/SALT%20salary%20survey%202012.pdf>.

¹² *See generally* BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 145-59 (2012). Critics have quarreled with Tamanaha, but, along with a drop in jobs, his take would appear to be a fair explanation for the precipitous decline in law school applications. *See, e.g.*, Charles Lane, *Book Review: 'Failing Law Schools' by Brian Z. Tamanaha*, WASH. POST (Aug. 3, 2012), <http://www.washingtonpost.com/opinions/book-review-failing-law-schools-by-brian-z-tamanaha/2012/08/03/e7054c9c-c6df-11e1-916d-a4bc61efcad8story.html>.

¹³ Personal experience reveals that law schools are now ruthlessly poaching students of other schools.

ulty.¹⁴ Until next year, our own law school, for example, provides a (one-time) bonus for faculty members who actually get their articles published; the bonus size increasing with the ranking of the law review.¹⁵

This brings us to the central issue: Does lavishing all these resources on scholarship make sense for law schools? Sure, some writing can enhance teaching. But colleagues often confess that they write to keep the dean off their backs.¹⁶ What is the value of any writing produced under these conditions? Paradoxically, new evidence suggests that salary is tied not to scholarly output but to disengagement with students.¹⁷ To further develop an answer, we need to go beyond the cost to the value of legal writing to stakeholders: lawyers, judges, professors, policymakers, law students, and the public. Here, the literature over many years suggests that the academy's emphasis on scholarship¹⁸ has been problematic.¹⁹

¹⁴ Part of the explanation for these special scholarly incentives, especially summer writing grants, is the availability of financially rewarding alternatives to law faculty scholarship implicit in the longstanding rule restricting private practice. A "Full-time faculty member" for AALS purposes, is a "faculty member who devotes substantially the entire time to the responsibilities of teacher, scholar, and educator." AALS Bylaw 6-4(a). This has become known as the one-day-a-week rule. Tenure, of course, allows professors to *sunlight*, as it eliminates concern about job retention and it often leads to sloth. According to an old study, 44% of faculty had no publications post tenure and almost two-thirds had only one. Michael J. Swygert & Nathaniel E. Gozanksy, *Senior Law Faculty Publication Study: Comparisons of Law School Productivity*, 35 J. LEGAL EDUC. 373, 375 (1985) (discussing a phenomenon that surely helps explain why tenure is under attack by the ABA). Karen Sloan, *ABA Panel Favors Dropping Law School Tenure Requirement*, NATIONAL L.J. (Aug. 12, 2013).

¹⁵ Bonuses start at \$400. A faculty member who publishes in a top 50 school can earn a bonus of \$5,000. However, it appears this program will not be continued. An analogous policy is in effect at Pace, according to its Dean of Research. TAMANAHA, *supra* note 12, at 50 n.72. It is unclear whether this policy is still in effect.

¹⁶ In his more cynical moments, one of the authors—Dan Subotnik—thinks that much of the emphasis can be tied to relations with the bar. Without academic writing, how could academics show a better claim to their jobs than those who are in the trenches full time?

¹⁷ See ARUM, *supra* note 4, at 8.

¹⁸ Under the American Bar Association's Standard 404, even ahead of responsibility to the legal community and the law school itself, faculty member are "Research and Scholarship." American Bar Association Standard 404(a)(2). Under the American Association of Law School's ByLaws 6-4, after faculty competence and experience, faculty quality is determined by "scholarly performance and interests." AALS Bylaw 6-4.

¹⁹ A substantial amount of literature, senior law faculty know, has long critiqued law review writing. See Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936) (writing on this topic as far back as almost eighty years ago). In terms of the contemporary scene, law reviews have been found not "particularly helpful for lawyers and 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-justice-roberts_-on-obama-justice-stevens-law-reviews-more. Roberts later—"perhaps hyperbolically"—added:

Academic articles, to be sure, are not commodities. Evaluators, moreover, have reached no consensus on specific standards of value or on representative texts to be evaluated. For these reasons and for those of space, we do not undertake our own study here.

But in excusing ourselves, we do not also defend the two accrediting organizations in legal education, the American Bar Association (“ABA”) and the Association of American Law Schools (“AALS”). Astonishingly, given the academy’s investment in scholarship, these powerhouses of influence have not even considered the matter of value, let alone examined it systematically and comprehen-

“Pick up a copy of any law review that you see, . . . and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.” Jonathan H. Adler, *Chief Justice Roberts and Current Legal Scholarship*, VOLOKH CONSPIRACY (July 23, 2011, 11:07 AM), <http://volokh.com/2011/07/23/chief-justice-roberts-and-current-legal-scholarship>. See Judge Harry T. Edwards, *Reflections (On Law Review, Legal Education, Law Practice, and My Alma Mater)*, 100 MICH. L. REV. 1999, 2001 (2002) (“[My] most serious concern . . . with legal scholarship is that too much of it is useless.”); see also Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309, 336 (2007) (noting that 43% of articles and notes are never cited in any case or article); John Doyle, *The Law Reviews: Do their Paths Lead but to the Grave?*, 10 J. APP. PRAC. & PROCESS 179, 196-97 (2009) (holding that less than one percent of federal cases cite to law review articles in the top five journals). Earlier critiques, ironically, had held that law reviews were “insufficiently theoretical.” Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L. J. 1, 13 n.45 (1986).

A flurry of commentary on law reviews has followed a recent piece by Adam Liptak; the author had condemned law reviews for not being useful to bench and bar, pointing out that 43% of articles are never cited in a law review article or judicial decision. Adam Liptak, *The Lackluster Reviews that Lawyers Love to Hate*, N.Y. TIMES (Oct. 21, 2013), http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?_r=0 (questioning how many are cited only by the author herself or friends). We should not indulge ourselves by thinking that the problem is limited to low ranking law reviews, adds Professor Frank Pasquale: “there is no way to around the fact that work that can only be described as ‘sophomoric nonsense’ appears with alarming frequency in the *Harvard Law Review*, *Yale Law Journal*, etc.” Brian Leiter, *Yet Another News Article Trashing Student-Edited Law Reviews*, BRIAN LEITER’S LAW SCHOOL REPORTS (Oct. 22, 2013), leiterlawschool.typepad.com/leiter/2013/10/22/yes-another-news-article-trashing-student-edited-law-reviews.html. Professor Will Baude responded to Liptak, among other ways, by citing one article that led to legislation though conceding his suspicion that “many articles are indeed bad.” William Baude, *In Defense of Law Reviews*, VOLOKH CONSPIRACY (Oct. 21, 2013, 1:59 PM), www.volokh.com/2013/10/21/in-defense-law-review. He goes on to defend the current system by reference to Sturgeon’s Law, according to which “90% of everything is crap.” *Id.* “Crap” sounds like a bubble-bursting characterization, but since 90% of everything is crap, the rationale seems to be, why worry about the law review crap? The answer is that we are not talking here about a would-be novelist who stays up all night after a day job to massage his oeuvre. Our artist here is getting paid, and those are resources that might be used more productively elsewhere.

sively.²⁰

In the absence of well-structured studies on the value of scholarly endeavor, can those who follow developments in our fields at least agree that investment in faculty law review articles is often wasteful?²¹ If so, how can we explain why law schools continue such extravagant practices as paying professors to teach three or at most six hours per week to allow time for scholarship?

The answer for many law schools seems to lie in their effort to ratchet up the all-important U. S. News & World Report (“USN&WR”) ranking system²² which, among its various metrics, assigns the highest weight—25%—to “prestige.”²³ This, in turn, is understood to mean scholarship²⁴ and since, again, scholarship quality does not lend itself easily to comparison, scholarship often comes to be defined as that which appears in high ranking journals.²⁵

Playing by the ranking rules undoubtedly allows some law schools to gain a competitive edge in fundraising and attracting top students. But while acknowledging that law review writing *can* aid in teaching and serving the various legal communities, does it make sense for law schools in the third and fourth tiers, schools with fewer financial resources, to be so heavily invested in a system where articles and especially placement are the summum bonum?²⁶ Does it make sense for their students?

²⁰ Perhaps this is not surprising given the huge influence that academics have with accreditors. The case against the ABA should not be overstated. A recent ABA task force acknowledged complaints about schools devoting “excessive resources” to scholarship. ABA REPORT, *supra* note 9, at 7. However, it provided no detail whatsoever on the substance of the charge. *Id.*

²¹ Is this article, for example, worth \$75,000?

²² *Best Law Schools*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited May 2, 2014).

²³ See Cramton, *supra* note 19, at 14 (“academic prestige seems to be the only game in town”).

²⁴ Scholarship has been considered the key to prestige. Olufunmilayo Arewa, Andrew P. Morriss & William Henderson, *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. (forthcoming 2014), and Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 246 (2006).

²⁵ In his proposed rating system for law schools and professors, Robert Steinbuch gives four times as much weight to an article in the top fifty ranked journals as to one in a fourth tier school. See Steinbuch, *supra* note 7, at 105.

²⁶ Reference is to a four-tier system previously in formal use by U.S. News & World Report. The system is still used informally with each tier referring to a group of fifty law schools. See, e.g., *Schools of Law: Top 100 Schools*, U.S. NEWS & WORLD REP., Apr. 9, 2007, at 92-94.

One of us began an answer to this question fifteen years ago after experiencing a few high-end rejections. Considering published articles in top rated law reviews, which curiously had never been done before, *Deconstructing the Rejection Letter: A look at Elitism in Article Selection*²⁷ (“Deconstructing”) reported that for the top nine law reviews during the period from 1993 up until 1998:

- a) 17% to 43% of the articles were written by in-house writers, an average of 25%;
- b) 35% to 65% of the articles were written by authors at the top nine schools, an average of 47%;
- c) 55% to 88% of the articles were written by authors at the top 26 schools, an average of 69%; and
- d) 0% to 12% were written by faculty at tier three and four schools, an average of 6%.

By way of contrast, a much more favorable acceptance rate, 25%, was experienced by tier three and four school authors in the *Journal of Legal Education* (“JLE”), a faculty run journal.²⁸ The article went on to recommend blind reading, a reform proposal that has had some traction.²⁹

Anecdotal evidence supplied by authors suggested that article acceptance by law reviews was based to a significant extent on the affiliation and prestige of the author.³⁰ The implication for readers was that most law professors could not expect a fair reading and that, indeed, those from 3rd and 4th tier schools had only the feeblest pro-

²⁷ Dan Subotnik & Glen Lazar, *Deconstructing the Rejection Letter: A Look at Elitism in Article Selection*, 49 J. LEGAL EDUC. 601 (1999). I have since regretted the word “elitism” in the title; the best articles *should* be published. I would substitute “favoritism” were I writing the same article today. The article was picked up, more or less, wholesale, in AFFILIATIONS: IDENTITY IN ACADEMIC CULTURE 54 (Jeffrey R. DiLeo, ed. 2003).

²⁸ Subotnik, *supra* note 27, at 608. It is not suggested here that submissions to JLE are proportional to submissions to other journals. JLE occupies specialized territory. Nevertheless, since JLE issues are sent to all AALS schools, it arguably has the greatest readership. That should make it a particularly attractive venue for authors. To make the comparison more useful, an esteemed colleague suggests that we analyze submissions relative to acceptances at JLE. That would, however, require going through not only JLE records but also those of other schools. We must beg off.

²⁹ See, e.g., Ann Nowak, *Comparative Scholarship: Should Law Students Serve as Gatekeepers for the Academy?*, 1 EUR. ACAD. RES. 1665, 1676 (2013).

³⁰ *Id.* at 1673. It is worth noting that JLE does not ask for authors’ Curriculum Vitae. *Submissions*, J. LEGAL EDUC. (2014), <http://www.swlaw.edu/jleweb/submissions> (last visited May 2, 2014).

spects of cracking the top tier.³¹ With many aspects of employment tied to law review placement—*e.g.* faculty recruitment and tenure³²—law professors could understand the need to tamp down career expectations. And law students could begin to see the small benefit they got from law review production.

The years since *Deconstructing* have yielded enough evidence on article selection to obviate reliance on anecdote and subjectivity of individual critics in linking publication to outright discrimination. A law review article by Jason P. Nance and Dylan J. Steinberg is most informative.³³ These authors, articles editors at the University of Pennsylvania Law Review in 2006, did not try to evaluate articles themselves but sent questionnaires to colleagues around the country asking them to rank fifty-seven specified factors they used in article selection.³⁴ The unqualified conclusion: “editors use author credentials extensively to determine which articles to publish.”³⁵ The analytical quality of the article seemed not to matter.

To be sure, “[t]he article fills a gap in the literature” emerged as the second most important factor in reported article selection. For this purpose, however, editors would have to read the outside literature as well as the article submitted. One has to wonder, then, especially given the above findings of *Deconstructing*, whether Nance and Steinberg actually *understated* the significance of an author’s employer as a measure of authorial talent.

³¹ JLE editors, by contrast, could be expected to know the literature better and be more self-confident than students about making a publication decision in favor of an author from a lower-ranked school.

³² See Arewa, *supra* note 24, at 2 (“The legal academy places . . . overly great—weight on institutional prestige in everything from article placement decisions (by both editors and authors) to hiring, promotion, and tenure.”); see also Nancy Levit, *Scholarship Advice for New Law Professors in the Electronic Age*, 16 WIDENER L.J. 947, 949 (2007), and Tracey George & Albert Yoon, *The Labor Market for New Law Professors* (VAND. L. & ECON. RES., Working Paper No. 13-27, 2014).

³³ Jason P. Nance & Dylan J. Steinberg, *The Law Review Selection Process: Results from a National Survey*, 71 ALBANY L. REV. 565 (2008).

³⁴ Among the factors, the five rating highest in importance (in descending order of importance):

[(1)]The author is highly influential in her respective field . . . [(2)] The article fills a gap in the literature . . . [(3)] The topic would interest the general legal public . . . [(4)] The author has published frequently in highly ranked law reviews . . . [and; (5)] The author is employed at a highly ranked school.

Id. at 583. Of far less importance were factors such as that the author has an endowed professorship, had a graduate degree, or was female or a member of a racial minority. *Id.*

³⁵ *Id.* at 584.

Let us explain. Nance and Steinberg try to comfort readers from low tier schools by emphasizing that working for such a school proved to be only a “weak negative” factor for respondents.³⁶ But what does this mean? It is not clear, but perhaps this: an author from a high tier school gets five extra points but one from a low tier school loses only two points. But in an environment of where Yale Law Journal receives over 2,000 submissions per year and can publish only, say, thirty, a plus for high pedigree authors together with any minus for authors at low-tier authors will almost surely work to crowd out the latter.³⁷

Perhaps more important, it seems unreasonable to expect editors to be honest with themselves, much less with others, about such matters as whether they favor in-house professors, whose recommendations they may depend on. Or whether they penalize authors from low-tier schools, a factor which would cut sharply against the egalitarian grain. Just imagine, for example, the public relations fallout from an explicit University of California policy limiting admissions to graduates of the top twenty high schools in the state.

Also using surveys of law review editors, a 2007 article by professors Leah M. Christensen and Julie A. Osleid confirmed the importance of author status in article selection.³⁸ Seemingly mitigating this finding, however, respondent editors reported that they rated “thoroughness” as even more important than “author credentials.”³⁹ But here again, as where editors claimed to value “filling the gap,”⁴⁰ given the notable shortage of authors from lower ranked schools, one wonders about the respondents’ honesty. In order to evaluate an article’s thoroughness, one has to carefully read it. Maybe that happens.⁴¹ But the correlation of school rank and thoroughness seems awfully suspicious.

The current selection system in which preference is (openly) given by law review editors to authors at high status schools has had consequences, and not only the ones that might be expected. Some scholars now rank law reviews themselves in accordance with the sta-

³⁶ *Id.*

³⁷ See Doyle, *supra* note 19, at 193.

³⁸ See generally Leah M. Christensen & Julie A. Osleid, *Navigating the Law Review Article Selection Process: an Empirical Study of Those with All the Power—Student Editors*, 59 S.C. L. REV. 175 (2007).

³⁹ *Id.* at 201.

⁴⁰ See *supra* note 34 and accompanying text.

⁴¹ “No way,” says a managing editor friend of ours.

tus of the authors they publish.⁴² Under this standard, a law review would have an even greater incentive to *not* publish the work of an author from a low ranked school.

Article selection, in short, is far from ideal. Is favoritism for those at elite institutions a serious enough problem to require reform? One could argue that in a world of on-line publishing it matters not whether a journal accepts an article; cyberspace is always all-embracing and all-accessible. One could argue, moreover, that articles of authors at high ranked schools are overwhelmingly better;⁴³ indeed—though this is hardly the kind of proof that would qualify as scientific—a study of the most cited law review articles shows the complete dominance of such authors.⁴⁴

Responding to the question of whether the law review system needs reform, a law school dean, professor, and six psychologists conducted a survey of interested parties—law professors, attorneys, student editors, and judges.⁴⁵ Among the most important findings: none of the groups believed that the current system is doing a “good job meeting the needs of attorneys and judges.”⁴⁶

Law professors felt strongly, and student editors themselves agreed, that law reviews “place too much emphasis on author reputa-

⁴² Robert M. Jarvis & Phyllis Coleman, *Ranking Law Reviews by Author Prominence—Ten Years Later*, 99 L. LIB. J. 573 (2007). To illustrate the importance of author and thus journal ranking, consider that in this scheme the United States President gets 1,000 points; a United States Supreme Court Justice 975; a United States Senator 850; and a law professor at a top 25 school 625, a top 50 school 475, a top 100 school 400, and a fourth-tier 225. *Id.* at 584. How is one to compete?

⁴³ Mark Tushnet, a Harvard Law professor, tells of reading a “terrific” article in the Utah Law Review by two authors, one at Cumberland and one John Marshall (Atlanta). Paul Caron, *Tushnet: The Underplacement of Law Review Articles by Faculty at Lower-Tier Schools*, TAXPROF BLOG (Aug. 8, 2013), http://taxprof.typepad.com/taxprof_blog/2013/08/tushnet-the-.html [hereinafter *Tushnet*]. He was apparently so struck by its “underplacement” that he felt it needed highlighting in a blogpost. *Id.* Implied in Tushnet’s response is that most articles in lesser journals are fairly placed. Tushnet’s advice to scholars writing from second- and third-tier law schools: “Flood the heavy hitters with drafts, on the Nigerian scam e-mail theory that there’s some chance that you’ll get something back, and then you can put the heavy hitter’s name[s]—plural if you’re lucky—in the star footnote.” *Id.*

⁴⁴ Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489-92 (2012). Scientific proof would, of course, require evaluation of published works on a “blind” basis. Any other study would be vulnerable to the critique that authors at high ranked schools get published in higher ranked journals, where their articles get more attention, and are, therefore, cited more.

⁴⁵ 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 (2013). We deal with this important article briefly because much of its focus is on solutions, while ours is on the problem.

⁴⁶ *Id.* at 52. Law professors and practitioners held this view most strongly. *Id.*

tion and institutional affiliation.”⁴⁷ All four groups agreed that law reviews should both train editors better and institute blind and peer review processes.⁴⁸

Where does this leave us? Law reviews are not serving the interests of the larger community well, and favoritism for high placed authors⁴⁹ is contributing to the problem.⁵⁰ Are law reviews at least trying to liberalize article selection?

Modeling ourselves on *Deconstructing*, the present authors evaluated publications during the period 2008 through 2012. Here are the results:

Table 1
Percentage of Articles by In-House Faculty

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	5-Year Ratio
Yale Law Journal	11.76	14.29	37.50	19.05	18.75	20.24%
Harvard Law Review	46.67	56.25	33.33	16.67	23.53	36.00%
Stanford Law Review	22.22	13.04	22.22	17.65	41.18	22.58%
Columbia Law Review	14.29	36.84	36.36	40.00	14.81	27.52%
Chicago Law Review	33.33	35.00	23.08	36.36	23.08	30.56%
NYU Law Review	12.50	0	13.33	12.50	33.33	13.70%
Pennsylvania Law Review	22.22	7.69	21.74	11.54	26.09	17.60%
Virginia Law Review	50.00	31.58	15.00	25.00	23.53	29.17%
California Law Review	20.00	10.00	20.00	11.11	4.76	13.13%
Michigan Law Review	7.14	22.22	12.50	18.75	14.29	15.38%

⁴⁷ *Id.* at 40, 42 Table I. Not surprisingly, professors at top tier schools agreed less enthusiastically with this notion. *Id.* at 40-41. To the extent that this relative disagreement reflects a vision that employment at a top tier school by itself carries entitlement to top tier placement, a boycott of these law reviews by third and fourth tier authors is suggested. The current system in which sops are thrown to the latter groups allows the inference that the entitlement is deserved.

⁴⁸ Wise, *supra* note 45, at 71.

⁴⁹ See *supra* note 43 and accompanying text.

⁵⁰ See Paul Horwitz, “Evaluate Me”: *Conflicted Thoughts on Gatekeeping in Legal Scholarship’s New Age*, 39 *CONNtemplations* 38, 52 (2007) for an argument that on-line publishing is “breaking down old hierarchies.” Accessibility, however, is not the same as validation.

Table 2
Percentage of Articles from Top 10 Schools

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	5-Year Ratio
Yale Law Journal	29.41	50.00	75.00	76.19	75.00	61.90%
Harvard Law Review	93.33	75.00	73.33	58.33	76.47	76.00%
Stanford Law Review	55.56	56.52	72.22	52.94	76.47	62.37%
Columbia Law Review	66.67	73.68	81.82	60.00	51.85	66.06%
Chicago Law Review	66.67	50.00	69.23	72.73	61.54	62.50%
NYU Law Review	31.25	35.71	53.33	25.00	75.00	42.47%
Pennsylvania Law Review	51.85	34.62	39.13	46.15	47.83	44.00%
Virginia Law Review	70.00	68.75	50.00	55.00	58.82	58.33%
California Law Review	25.00	40.00	50.00	55.56	38.10	41.41%
Michigan Law Review	35.71	38.89	50.00	56.25	42.86	44.87%

Table 3
Percentage of Articles from Top 25 Schools

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	5-Year Ratio
Yale Law Journal	70.59	71.43	81.25	80.95	75.00	76.19%
Harvard Law Review	100	87.50	93.33	91.67	94.18	93.33%
Stanford Law Review	83.33	69.57	88.89	70.59	88.24	79.57%
Columbia Law Review	95.24	89.47	90.91	85.00	70.37	85.32%
Chicago Law Review	100	80.00	76.92	81.82	61.54	80.56%
NYU Law Review	62.50	71.43	60.00	37.5	83.33	61.64%
Pennsylvania Law Review	81.48	57.69	65.22	65.38	82.61	70.40%
Virginia Law Review	80.00	94.74	70.00	80.00	94.12	83.37%
California Law Review	45.00	85.00	90.00	83.33	57.14	71.72%
Michigan Law Review	71.43	55.56	62.50	75.00	71.43	66.67%

Table 4
Percentage of Articles from Schools in School Ranking
Above 100

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	5-Year Ratio
Yale Law Journal	11.76	7.14	6.25	0	0	4.76%
Harvard Law Review	0	0	0	0	0	0%
Stanford Law Review	0	0	0	5.88	0	1.08%
Columbia Law Review	0	0	4.55	0	7.41	2.75%
Chicago Law Review	0	5.00	15.38	0	0	4.17%
NYU Law Review	12.50	0	0	18.75	0	6.85%
Pennsylvania Law Review	0	3.85	8.70	0	4.35	3.20%
Virginia Law Review	5.00	0	5.00	0	0	2.08%
California Law Review	0	0	0	5.56	4.76	2.02%
Michigan Law Review	7.14	5.56	0	0	0	2.56%

Tables 1-4 deal with articles and essays in the main law reviews of the top 10 law schools according to USN&WR. The articles and essays included in these tables are at least 30 pages in length and were written by Professors from ABA accredited law schools. Book Reviews and Tributes to individuals were excluded from the calculations. In Table 1, an in-house article is defined as one written, alone or jointly, by at least one author affiliated (within two years prior to publication) with the university publishing the article. An article in Table 2 is one written, alone or jointly, by at least one author affiliated (within two years prior to publication) with one of the top 10 law schools. An article include in Table 3 is one written alone or jointly, by at least one author affiliated (within two years prior to publication) with one of the top 25 law schools. To be included in Table 4, an article cannot have an author affiliated (within two years prior to publication) with a law school in the top two tiers.

The bottom line: in-house authors now make an average of 23% of articles in top-ten journals as opposed to 25% in *Deconstructing*;⁵¹ 56% of articles in top-ten journals were by authors at those schools versus 47% in *Deconstructing*; 77% of articles in top 25 journals were by authors at top-ten schools versus 69% in *Deconstructing*; only 3% of articles in top-ten schools were by third and fourth tier authors versus 6% in *Deconstructing*.⁵² By comparison, 35% of the articles published in JLE were by authors at tier three and four schools versus 25% in *Deconstructing*.⁵³

The message should be clear. It is measurably harder than it was fifteen years ago for the law faculty at some 100 American schools to get into the top ten or even into the top 25 journals. It would increasingly difficult for authors at top 25 schools to break into top tier journals as well. JLE, which probably has the largest readership among law faculty, is obviously the best bet for authors from all but the top schools.⁵⁴

CONCLUSION

The wide gap between big decanal dreams and on-the-ground realities raises some questions: Are deans at third and fourth tier schools succumbing to obsessive and fruitless competition in article sweepstakes? Are they buying into values set by an academic establishment that offers them little voice?⁵⁵ Does it make sense when half of professors at America's two hundred plus law schools cannot

⁵¹ In a brand new article, the author, Albert H. Yoon, found that virtually all law reviews publish house faculty articles disproportionately and, not surprisingly, that these articles are cited less often than those of outside authors. Albert Yoon, *Editorial Bias in Legal Academia*, J. LEG. ANALYSIS (Sept. 13, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336775.

⁵² See *supra* note 28 and accompanying text.

⁵³ The authors are not suggesting that JLE articles are of the same genre as those in general law reviews but only that in the light of JLE determinations, general law reviews, particularly the high ranking ones, should perhaps be looking more broadly at submissions.

⁵⁴ The point seems especially important because JLE does not allow simultaneous submissions to other journals.

⁵⁵ Highlighting the power of the hierarchy in the law school world is the fact that in the last 25 years not one AALS president has come from the third and fourth tiers. For a list of AALS presidents from 1900-2012, see AALS Directory, ASSOC. OF AM. LAW SCHOOLS (2012), available at <http://0-www.heinonline.org.polar.onu.edu/HOL/Index?collection=aals&index=aals/aalsdl>, and for the current president, see *Presidents' Messages*, ASSOC. OF AM. LAW SCHOOLS, http://www.aals.org/services_newsletter_pres.php (last visited May 2, 2014). Only three have come from the second tier. So much for any idea that the interests of all its members are represented, such that the AALS is community of law schools.

get their articles into top schools that their law schools are investing so heavily in faculty scholarship?

Professors and administrators know that “academic reputation numbers appear to be highly correlated [*i.e.* consistent] over time for most schools.”⁵⁶ Fourth tier schools, moreover, are not even ranked in USN&WR, so gaining a few points will not help. Since it is clear that much publishing is not being used by stakeholders and that publishing outside the top journals accomplishes little, if anything, in terms of rankings of tier three and four schools, would these schools not be better served by redirecting *some* resources from scholarly endeavors to more productive purposes *for themselves*, *e.g.*, clinics, distinguished lectureships, writing courses, and student scholarships? Or, contrariwise, by applying savings from increasing faculty teaching loads to cutting student tuition? These strategies might not help in national reputational surveys, but they might well help schools in their own markets.

In sum, have law schools absorbed Dr. Johnson’s message too well? Has reifying scholarly writing undermined larger values? Should law schools continue to play a game they are losing?

⁵⁶ See Arewa, *supra* note 24, at 26.