

PRIVILEGING SCHOLARSHIP AND LAW SCHOOL COMPENSATION DECISIONS:  
IT'S TIME TO SHINE SOME LIGHT

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*“So law schools care more about what people on the outside think than the experience of students on the inside?” – Emily, my then 19-year-old daughter, on hearing a summary of this article.*

INTRODUCTION

This piece of scholarship challenges legal academia's focus on, and privileging of, scholarship over other aspects of faculty responsibilities.<sup>1</sup> The triad of faculty responsibilities is often explained in the now-clichéd “three legs of a stool”—scholarship, teaching, and service.<sup>2</sup> As these responsibilities are valued in practice, this is a stool that doesn't function. Anyone sitting on it would fall over.

Law schools over-privilege scholarship in numerous ways.<sup>3</sup> Summer research grants support the writing of scholarship during the summer.<sup>4</sup> The amounts vary widely, from \$4,000 to \$25,000.<sup>5</sup> Schools provide substantive help with research, often through librarians<sup>6</sup> or research fellows who might

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\*Professor of Law, Villanova University Charles Widger School of Law. Thank you to Villanova University for the summer research stipend. I'm grateful to the faculty of Penn State Law School for their helpful comments during a workshop on this paper, my Villanova colleagues for their feedback during the summer workshop series, the Villanova Law students who participated in the Teacher-Scholar workshop and provided comments, and to Robert Hegadom for tracking down sources. I'm even more grateful to Gabrielle Talvacchia and Domenica Tomasetti for their excellent research assistance. Finally, thank you to my family for listening (more than once) to the rants which led to this article. My daughters may be the most knowledgeable teenagers on earth on the subject of the teaching v. scholarship conflict.

<sup>1</sup> I do recognize the irony of producing scholarship about the problems surrounding the production of scholarship.

<sup>2</sup> *Bylaws*, ASS'N OF AM. L. SCHS. (Jan. 2022), <https://www.aals.org/about/handbook/bylaws/>. (Core values under § 6-1 include “excellent teaching” and “excellent scholarship.” Under § 6-4, a faculty's competence will be judged by: “(i) Quality of teaching and attention given to law students both as individuals and as a group; (ii) Faculty training and experience; (iii) Scholarly interests and performance; and (iv) Responsible participation in the self-governing and deliberative processes of the law faculty.”)

<sup>3</sup> Most of the support discussed in this paragraph is most likely available at most law schools. Citations here are to those law schools which list faculty research and scholarship support on their public-facing websites.

<sup>4</sup> See Soc'y of Am. L. Tchrs., 2021 SALT EQUALIZER 1 (June 2021), <https://www.saltlaw.org/wp-content/uploads/2021/06/SALT-salary-survey-2021-final.pdf>.

<sup>5</sup> *Id.* at 1-4 (information in the SALT Salary Survey is reported on a voluntary basis and many schools do not respond to the survey).

<sup>6</sup> See, e.g., *Reference Librarian Services*, U.C. DAVIS SCH. OF L., <https://law.ucdavis.edu/library/about/ask-a-librarian> (last visited Feb. 7, 2023) (“Every faculty member is assigned a research librarian to assist with their research, scholarship, and teaching.”); *Ask a Librarian/Research Assistance*, WASH. & LEE L. SCH., <https://law.wlu.edu/library/services> (last visited Jan. 18, 2023) (“The Reference Team assists faculty members in identifying and locating resources to support academic and scholarly interests”).

provide “broad and substantive research, detailed citation checking, and editing for style and format.”<sup>7</sup> Many schools provide each faculty member with a library liaison who serves as their personal resource for all law library services.<sup>8</sup> Support in the form of student research assistants is also commonly provided.<sup>9</sup> Often, faculty receive a reduced teaching load in exchange for the production of scholarship.<sup>10</sup> Finally, as discussed *infra*, compensation decisions weigh the production of scholarship far more heavily than other aspects of faculty responsibilities.<sup>11</sup> The argument of this piece is not that scholarship should not be a pillar of faculty responsibilities, a key element in the tenure process, or a factor in a salary determination. Rather, this article challenges the system that makes scholarship the most important factor in such determinations. As Professor Park questioned, “Why should research be the primary criterion for tenure and promotion?”<sup>12</sup>

Most schools give greater weight to scholarship in merit compensation decisions than to teaching or service.<sup>13</sup> “At most schools, the stated formula for evaluation is 40% scholarship, 40% teaching, and 20% service.”<sup>14</sup> Despite stated formulas, this may overstate the actual role of teaching and

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<sup>7</sup> *Research Tools*, UNIV. OF MD. FRANCIS KING CAREY SCH. OF L., <https://www.law.umaryland.edu/Faculty-and-Staff/Research-Tools> (last visited Jan. 18, 2023).

<sup>8</sup> See, e.g., UNIV. OF UTAH S.J. QUINNEY COLL. OF L., <https://law.utah.edu/library/services-for-law-faculty/faculty-liaisons/> (last visited Feb. 7, 2023); *Research Assistants and Librarian Liaisons*, B.U. SCH. OF L., <https://www.bu.edu/law/libraries/faculty-services/research-assistants-and-librarian-liaisons/> (last visited Feb. 7, 2023).

<sup>9</sup> See, e.g., *Research Assistants*, WASH. & LEE L. SCH., <https://law.wlu.edu/admissions/tuition-and-financial-aid/research-assistants> (last visited Feb. 7, 2023); *Graduate Financial Aid & Scholarships*, TUL. UNIV. SCH. OF L., <https://law.tulane.edu/admissions/graduate/financial-aid> (last visited Feb. 7, 2023); *Research Assistant Hiring Process*, PEPP. CARUSO SCH. OF L., <https://community.pepperdine.edu/graziadio/services/academic-affairs/academic-support/research-assistant-hire-process.htm> (last visited Feb. 7, 2023); *Student Research Assistant Positions*, LEWIS & CLARK COLL. NORTHWESTERN SCH. OF L., <https://law.lclark.edu/live/files/28802-student-research-positions> (last visited Feb. 7, 2023).

<sup>10</sup> This results in a self-fulfilling prophecy, as faculty members with fewer teaching and service responsibilities then have the time to produce more scholarship, while those with greater teaching responsibilities have less time. As my colleague, Ruth Gordon, named the problem: “other people are supporting the people writing the scholarship.”

<sup>11</sup> See discussion *infra* Section III.

<sup>12</sup> Shelley M. Park, *Research, Teaching, and Service: Why Shouldn't Women's Work Count?*, 67 J. HIGHER EDUC. 46, 50 (1996).

<sup>13</sup> Paula A. Monopoli, *The Status Gap: Female Faculty in the Legal Academy*, UNIV. OF MD. FRANCIS KING CAREY SCH. OF L. (2014), [https://digitalcommons.law.umaryland.edu/fac\\_pubs/1624?utm\\_source=digitalcommons.law.umaryland.edu%2Ffac\\_pubs%2F1624&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://digitalcommons.law.umaryland.edu/fac_pubs/1624?utm_source=digitalcommons.law.umaryland.edu%2Ffac_pubs%2F1624&utm_medium=PDF&utm_campaign=PDFCoverPages) [hereinafter Monopoli, *The Status Gap*]. Professor Monopoli provides an excellent summary on the gendered nature of the idea of the “scholar” in another article and discusses merit systems “to the extent that teaching is valued at all.” Paula A. Monopoli, *The Market Myth and Pay Disparity in Legal Academia*, 52 IDAHO L. REV. 867, 872 n.23 (2016) [hereinafter Monopoli, *The Market Myth*]. See also Melissa Hart, *Missing the Forest for the Trees: Gender Pay Discrimination in Academia*, 91 DENVER U. L. REV. 873, 877 (2014) (“The mix of scholarship, teaching, and service that generally defines the academic job privileges scholarship significantly over the other facets of the job . . .”).

<sup>14</sup> Hart, *supra* note 13, at 878.

service. In other words, without a substantial piece of scholarship during the evaluation period, one cannot merit the highest level raise.<sup>15</sup> The inverse is not true: outstanding work in teaching without a piece of scholarship does not warrant a high level raise.<sup>16</sup>

In contrast, teaching and service rarely receive these benefits. At most institutions, faculty members cannot spend time on sabbatical solely on teaching.<sup>17</sup> There are few grants for summer projects focused on teaching.<sup>18</sup> Although some law schools do allow teaching assistants in doctrinal classes, these students do not grade assessments; rather, they organize review sessions and provide one on one support to students (thereby freeing up the faculty member to spend more time on other tasks, such as research).<sup>19</sup> Faculty do not receive reduction in scholarship or service requirements based on greater teaching loads or for providing multiple assessments in classes.<sup>20</sup>

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<sup>15</sup> Monopoli, *The Market Myth*, *supra* note 13, at 887 (“... scholarship alone has become the singular measure of value in terms of faculty compensation.”).

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., *Faculty Resources*, COLUM. L. SCH., <https://faculty-resources.law.columbia.edu/content/sabbatical-research-and-other-leaves> (last visited Jan. 18, 2023) (Columbia Law School’s statement on sabbaticals: “[t]he primary objective of the University’s leaves policies is to temporarily relieve its academic officers from their teaching duties to conduct research, write, or otherwise engage in scholarly or professional activity.”).

<sup>18</sup> Several universities offer teaching grants over the summer or offer “mini-grants.” See, e.g., *VITAL Minigrants*, VILL. UNIV. OFF. OF THE PROVOST, <https://www1.villanova.edu/villanova/provost/vital/programs/callforproposals.html> (last visited Jan. 18, 2023) (“The purpose of these internal grants is to support full-time Villanova faculty members in fostering advances in undergraduate and graduate teaching and learning at Villanova, implementing the teaching-learning sections of the University’s and Colleges’ strategic plans, and exploring the use of new instructional strategies.”). However, these grants are typically a lower amount (\$5,000, for example) than summer research grants. See Soc’y of Am. L. Tchrs., *supra* note 4.

<sup>19</sup> See, e.g., *Academic Support*, CHI.-KENT COLL. OF L., <https://kentlaw.iit.edu/law/student-experience/student-support/academic-support> (last visited Jan. 18, 2023) (“TAs hold weekly office hours, so you can obtain personalized one-on-one tutoring and guidance. TAs also provide at least two review sessions open to all students in the class (typically before a midterm and/or final exam)”); *Teaching Assistant Hiring Guidelines*, NW. PRITZKER SCH. OF L., <https://www.law.northwestern.edu/staff/hr/student-hiring/teaching-assistants/> (last visited Jan. 18, 2023) (“In general, TAs attend class meetings and hold review sessions and office hours. We encourage faculty to consider having a TA attend each online class meeting, provide technical support, and act as a backup if the faculty member should encounter problems with Internet connectivity during online instruction. TAs may not be involved in any way in grading that determines a student’s final grade.”); *Teaching Assistants*, N.Y.U., <https://www.law.nyu.edu/academicservices/academic-policies/non-classroom-credits/teaching-assistants> (last visited Jan. 18, 2023) (“In addition to attending class, teaching assistants will conduct several review sessions per semester. During these sessions, they usually review questions and provide model answers to problems that have been prepared under the supervision of the professor.”).

<sup>20</sup> A.B.A., 2014–2015 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 23 (2014) (“Standard 314. ASSESSMENT OF STUDENT LEARNING: A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.”).

Finally, a review of the websites of the “Top 60” law schools revealed just four schools with Chairs for Teaching.<sup>21</sup>

To be clear, this article does not seek to compare faculty who spend less time on their job responsibilities with those that spend more. Rather, it focuses on how law school administrations compensate faculty who spend more time on teaching and service and less time on scholarship. After briefly discussing the value of scholarship to the legal academic enterprise, this article turns to the detriments caused by the privileging of scholarship. These include the perpetuation of the gender wage gap, the creation of barriers to entry to legal academia, and incentivizing faculty to allocate their time to the detriment of students. It then discusses the possible reasons why law schools continue to privilege scholarship, addressing the belief that it is difficult to judge the other pillars of faculty responsibilities and the chasing of *U.S. News* rankings. Ultimately, this article proposes that the American Bar Association, the accrediting body for law schools, amend Standard 509(b) to require law schools to disclose their compensation metrics. In this way, law students will have access to information which signals the values held by law schools to allow them to vote with their dollars and their feet.

## I. THE VALUE OF SCHOLARSHIP

Scholarship, according to some, is the obligation of law schools as part of a university community.<sup>22</sup> It was not until the late 19<sup>th</sup> century that American law schools started to shift their focus “from teaching to scholarship.”<sup>23</sup> The advent of this shift was the adoption of the German model of *Wissenschaft*—“the systematic pursuit of knowledge, learning, and scholarship.”<sup>24</sup> This tradition came to the United States and grew slowly. In law schools, the emphasis of scholarship came about with the rise of the

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<sup>21</sup> See *Faculty Chairs & Awards*, TEMP. UNIV. BEASLEY SCH. OF L., <https://law.temple.edu/faculty/awards/> (last visited Jan. 18, 2023) (rotating position); *Our Faculty*, UNIV. OF TEX. SCH. OF L., <https://law.utexas.edu/faculty/> (last visited Jan. 18, 2023) (five University Distinguished Teaching Professors); *Daniel Abebe*, UNIV. OF CHI. L. SCH., <https://www.law.uchicago.edu/faculty/abebe> (last visited Jan. 18, 2023) (Walter Mander Teaching Scholar); *Laura A. Heymann*, WM. & MARY L. SCH., <https://law2.wm.edu/faculty/bios/fulltime/laheym.php> (last visited Jan. 18, 2023) (Kelly Professor of Excellence in Teaching—a two-year term).

<sup>22</sup> Fabio Arcila, Jr., *The Future of Scholarship in Law Schools*, 31 *TOURO L. REV.* 15, 15–16 (2014). See also ERNEST L. BOYER, *SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORATE 1* (1990) (“to weaken faculty commitment for scholarship... is to undermine the undergraduate experience . . .”) (quoting ERNEST L. BOYER, *COLLEGE: THE UNDERGRADUATE EXPERIENCE IN AMERICA* (1987)).

<sup>23</sup> Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 *N.Y.U. L. REV.* 615, 622–24 (1996) (providing a detailed description of the creation and rise of law reviews).

<sup>24</sup> Arcila, *supra* note 22, at 16; see also Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 *NEW ENG. L. REV.* 251, 277 n.152 (2005).

school-sponsored law journal, first successfully launched by Harvard.<sup>25</sup> Other law schools then began sponsoring law journals shortly thereafter.<sup>26</sup> As all other (non-Harvard) schools sought to signal their worth, they have also focused on scholarship. The emphasis on research and publication to the detriment of teaching and service did not take hold in academia until the late 1940s, after Harvard prioritized research in an “up-or-out” system.<sup>27</sup> The Association of American Law Schools (AALS) joined the scholarship bandwagon in 1959 by adopting a “Research Standard.”<sup>28</sup> Thus, scholarship became an integral part of legal academia.<sup>29</sup>

One argument for the imperative to support scholarship is the obligation to explain and promote legal reform.<sup>30</sup> There are certainly scholarly works that have led to actual changes in the law, impacting peoples’ everyday lives.<sup>31</sup> (Interestingly, a search for “most influential law review articles” results in lists of the “most cited” law review articles, which is not at all the same metric.) Defenses of the value of scholarship to our legal system reject the focus on citations, pointing out instead the “long game” for many scholarly ideas. Professors West and Citron assert that scholarship’s impact, particularly normative scholarship’s, is felt by the force of its argument on its readership, which includes students.<sup>32</sup> As to theoretical scholarship, West and Citron argue that its impact should not be measured in the present, as it does not seek to affect immediate court decisions or legislative enactments; rather, its impact is felt well down the road.<sup>33</sup> They conclude, “[e]veryone involved in the legal enterprise—law schools and students, the practicing bar and clients, courts and law clerks, lawmakers and staff, administrative agencies and others—would be the poorer without legal scholarship.”<sup>34</sup>

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<sup>25</sup> Hibbitts, *supra* note 23, at 627.

<sup>26</sup> *Id.* (“ . . . the rapid proliferation of law reviews in the late nineteenth and early twentieth centuries should not be considered as a mere instance of following the leader.”) (discussing the interaction of improved print technology with the rise of school-sponsored law reviews).

<sup>27</sup> Molly Worthen, *The Fight Over Tenure is Not Really About Tenure*, N.Y. TIMES (Sept. 20, 2021), <https://www.nytimes.com/2021/09/20/opinion/tenure-college-university.html>.

<sup>28</sup> Hibbitts, *supra* note 23, at 634–35.

<sup>29</sup> *See id.* at 617–35 (providing a description of the rise of the law review scholarship model alongside changes in the publishing industry).

<sup>30</sup> Arcila, *supra* note 22, at 15; Sherman J. Clark, *Drawing (Gad)flies: Thoughts on the Uses (or Uselessness) of Legal Scholarship*, 49 U. MICH. J.L. REFORM CAVEAT 63, 64 (2015).

<sup>31</sup> *See, e.g.*, CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (credited with helping to pave the way for courts to acknowledge sexual harassment as a violation of Title VII of the Civil Rights Act of 1964); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; *see also* Arcila, *supra* note 22, at 17 n.6 (collecting studies on the positive impact of scholarship on legal reform).

<sup>32</sup> Robin West & Danielle Citron, *On Legal Scholarship*, ASS’N OF AM. L. SCHS., <https://www.aals.org/current-issues-in-legal-education/legal-scholarship/> (last visited Jan. 18, 2023).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

Another classic defense of scholarship is its positive impact on teaching.<sup>35</sup> For example, some argue that the in-depth analysis that comes with engaging in scholarly work helps to teach subject matter.<sup>36</sup> “Research and scholarship are . . . central because they inform and therefore help fulfill the teaching mission by deepening law professors’ knowledge and thinking about the subject at hand.”<sup>37</sup>

## II. THE DISADVANTAGES OF PRIVILEGING SCHOLARSHIP

Scholarship can certainly carry out the laudable goals discussed above and in no way does this article seek to argue that scholarship should not be part of legal academia. What I seek highlight, however, are the detriments to elevating scholarship over the other vital aspects of the legal academic endeavor.

### A. *Privileging Scholarship Contributes to the Gender Wage Gap in Legal Academia*

It is uncontroverted that there is a gender wage gap and that progress on closing the gap has stalled.<sup>38</sup> In 2020, women earned 82 cents to the dollar overall to men.<sup>39</sup> The gaps widen for certain women when race is taken into account: Asian women earn 90 cents on the dollar, White women earn 79 cents, Black women earn 63 cents, American Indian/Alaska Native women earn 60 cents, and Latina women earn 55 cents.<sup>40</sup> The gender wage gap prevalent across all industries is equally in force for women with high educational levels, including academia,<sup>41</sup> and within academia, across faculty

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<sup>35</sup> Dan Subotnik & Laura Ross, *Scholarly Incentives, Scholarship, Article Selection Bias, and Investment Strategies for Today’s Law Schools*, 30 *TOURO L. REV.* 615, 620 (2014) (“ . . . law review writing *can* aid in teaching and serving various legal communities”).

<sup>36</sup> Arcila, *supra* note 22, at 18.

<sup>37</sup> *Id.*

<sup>38</sup> Elise Gould et al., *What is the Gender Pay Gap and Is It Real?*, *ECON. POL’Y INST.* (Oct. 20, 2016), <https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real>.

<sup>39</sup> *The Simple Truth About the Gender Pay Gap*, *AM. ASS’N OF UNIV. WOMEN*, <https://www.aauw.org/resources/research/simple-truth/> (last visited Jan. 17, 2023) (showing that women earn 83% compared to men, as of 2021; however, this is most likely due to the number of women who dropped out of the active workforce due to the pandemic); Helena María Viramontes, *Pay Inequity is Persistent, Shameful—and Still Widely Tolerated*, *NATIONAL GEOGRAPHIC* (Sept. 21, 2021), <https://www.nationalgeographic.com/magazine/article/pay-inequity-is-persistent-shameful-and-still-widely-tolerated/>; Robin Bleiweis, *Quick Facts About the Wage Gap*, *CTR. FOR AM. PROGRESS* (Mar. 24, 2020), <https://www.americanprogress.org/article/quick-facts-gender-wage-gap/> (referencing 2018 U.S. Census data).

<sup>40</sup> Viramontes, *supra* note 39.

<sup>41</sup> See Hart, *supra* note 13, at 874 (“[w]omen in academia . . . still make less than their male counterparts.”); Monopoli, *The Market Myth*, *supra* note 13, at 869 (“This wage gap in academia—even when controlling for rank—has been clearly documented.”).

ranks.<sup>42</sup> A recent empirical study of tenured law faculty found that white women and women of color earn “more than \$24,000 and nearly \$14,000 less than white men, respectively.”<sup>43</sup> The gender wage gap in law schools is “pervasive and persistent”<sup>44</sup> but lawsuits are beginning to challenge it. Since 2016, five suits have been filed against four law schools.<sup>45</sup>

As with many parts of our lives, the COVID-19 pandemic has made the gender wage gap worse.<sup>46</sup> Even if female academics did not completely drop out of the work force, the pandemic created immense problems in the areas of research and publications.<sup>47</sup> Several studies show a decrease in research and publications by women as compared to men across many academic fields.<sup>48</sup> For example,

We find that female academics, particularly those who have children, report a disproportionate reduction in time dedicated to research relative to what comparable men and women without children experience. Both men and

<sup>42</sup> Joshua Hatch, *Gender Pay Gap Persists Across Faculty Ranks*, THE CHRON. OF HIGHER EDUC. (Mar. 22, 2017), <https://www.chronicle.com/article/gender-pay-gap-persists-across-faculty-ranks>; see also Meera E. Deo, *Investigating Pandemic Effects on Legal Academia*, 89 FORDHAM L. REV. 2467, 2471 (2021) [hereinafter Deo, *Pandemic Effects*] (“... the most recent information available suggests that just about 7 percent of all law teachers are women of color, 8 percent are men of color, and 24 percent are white women.”).

<sup>43</sup> Christopher J. Ryan, Jr. & Meghan Dawe, *Mind the Gap: Gender Pay Disparities in the Legal Academy*, 34 GEO. J. LEGAL ETHICS 567, 598 (2021).

<sup>44</sup> *Id.* at 611.

<sup>45</sup> Stephanie Francis Ward, *Recent Equal Pay Lawsuits by Female Law Professors Has Shined a Light on Academic Compensation Process*, A.B.A. (Oct. 1, 2020), <https://www.abajournal.com/magazine/article/a-recent-spate-of-gender-discrimination-and-equal-pay-lawsuits-filed-by-female-law-professors-has-shined-a-light-on-the-otherwise-opaque-academic-compensation-process>.

<sup>46</sup> Greg Rosalsky, *How the Pandemic is Making the Gender Gap Worse*, NPR PLANET MONEY (Aug. 18, 2020), <https://www.npr.org/sections/money/2020/08/18/903221371/how-the-pandemic-is-making-the-gender-pay-gap-worse>.

<sup>47</sup> See Andrea Hsu, *Even the Most Successful Women Pay a Price*, NPR (Oct. 20, 2020), <https://www.npr.org/2020/10/20/924566058/even-the-most-successful-women-are-sidelining-careers-for-family-in-pandemic/> (describing the pandemic leading to missed grant opportunities; turning down collaborations; and not submitting papers, which is “something that’s going to ripple out through your entire career.”); Alessandro Minello, *The Pandemic and the Female Academic*, NATURE (Apr. 17, 2020) (“I expect that data on publication records over the next couple of years will show that parents in academia were disadvantaged relative to non-parents in 2020. Those data might also reveal the consequences for women.”)

<sup>48</sup> Jillian Kramer, *The Virus Moved Female Faculty to the Brink. Will Universities Help?*, N.Y. TIMES, (Oct. 6, 2020) <https://www.nytimes.com/2020/10/06/science/covid-universities-women.html> (linking to Brooke Peterson Gabster et al., LANCET (June 18, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7302767/> (“Early data show that COVID-19 significantly affects women’s publishing.”)); Megan Frederickson, *COVID-19’s Gendered Impact on Academic Productivity*, GITHUB (May 11, 2020), <https://github.com/drfrfeder/pandemic-pub-bias/> (“... during the pandemic, the number of male authors has grown faster than the number of female authors, both in absolute terms and as a percent change . . .”); Zeina Hasna et al., *Who is Doing New Research in the Time of COVID-19? Not the Female Economists*, VOXEU (May 2, 2020), <https://voxeu.org/article/who-doing-new-research-time-covid-19-not-female-economists>; Caroline Kitchener, *Women Academics Seem to Be Submitting Fewer Papers During Coronavirus. ‘Never Seen Anything Like It,’ Says One Editor.*, THE LILY (Apr. 24, 2020), <https://www.thelily.com/women-academics-seem-to-be-submitting-fewer-papers-during-coronavirus-never-seen-anything-like-it-says-one-editor/>.

women report substantial increases in childcare and housework burdens, but women experienced significantly larger increases than men did.<sup>49</sup>

In this way, already existing inequalities at law schools have been exacerbated by the pandemic, particularly for Black women and other vulnerable faculty.<sup>50</sup>

Many in academia have drawn attention to this issue,<sup>51</sup> calling out the gender inequities in the legal academy and noting the inequities caused by the focus on scholarship to the detriment of teaching and service. Privileging scholarship, in fact, creates a double privilege that exacerbates the “caste” system in legal academia between tenure track faculty and all other faculty.<sup>52</sup>

Why does privileging scholarship contribute to the pay inequity? For one, the determination of the value of a piece of scholarship is subject to gender bias.<sup>53</sup> “[V]alue judgments about scholarly impact and quality are distorted by bias.”<sup>54</sup> How should scholarly excellence be defined? One measure, of course, is to judge simply by the placement of the scholarship in question.<sup>55</sup> This provides an “objective” measure of excellence. Here again, studies have shown a significant gender disparity in placement by women in

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<sup>49</sup> Tatyana Deryugina et al., *COVID-19 Disruptions Disproportionately Affect Female Academics*, NAT'L BUREAU OF ECON. RSCH. (Jan. 2021), <http://www.nber.org/papers/w28360>.

<sup>50</sup> Deo, *Pandemic Effects*, *supra* note 42.

<sup>51</sup> Perhaps the foremost scholar on this issue is Professor Paula A. Monopoli. Professor Monopoli has written about the gender wage gap in academia many times and has specifically noted the problems of focusing on scholarship as a source of merit. See Monopoli, *The Market Myth*, *supra* note 13; Paula A. Monopoli, *Gender and the Crisis in Legal Education: Remaking the Academy in Our Image*, 2012 MICH. ST. L. REV. 1745; Paula A. Monopoli, *In a Different Voice: Lessons From Ledbetter*, 34 J. COLL. & U.L. 555 (2008). In these articles, she advocates for the passage of the Paycheck Fairness Act, a piece of legislation that seemed poised to become law but stalled in the Senate in the summer of 2021. I agree with Professor Monopoli in all relevant aspects of her work. In a different piece, I examine the defenses available under current structure of the Equal Pay Act and suggest that the Paycheck Fairness Act, while a significant improvement over the current law, still leaves a great deal of room for inequity to flourish. Similarly, Professor Melissa Hart has written on the gender pay gap in academia and challenged the law to remain focused on the structural issues in pay inequities rather than shifting to responding to every employee as an individual. See Hart, *supra* note 13. Professor Hart also challenges the focus on scholarship. Professor Hart writes about the University of Denver Sturm School of Law's pay inequity litigation prior to its settlement, and therefore, also before the raft of recent litigation. Professor Ann McGinley named this problem even earlier by identifying the gender norms replicating on law school faculties. See Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 150 (2009). See also Deo, *Pandemic Effects*, *supra* note 42, at 2476; see also Ryan & Dawe, *supra* note 43.

<sup>52</sup> Renee Nicole Allen & Alicia Jackson, *The “Pink Ghetto” Pipeline: Challenges & Opportunities for Women in Legal Education*, UNIV. DET. MERCY L. REV. 525, 527 (2019).

<sup>53</sup> Ward, *supra* note 45.

<sup>54</sup> *Id.*

<sup>55</sup> See Monopoli, *The Market Myth*, *supra* note 13, at 872 (merit is measured “in large part on the rank of the journal one publishes in and how often one publishes.”)



top 20 law journals.<sup>56</sup> “[T]raditional measures of scholarly productivity and output privilege men.”<sup>57</sup>

If scholarly worth is measured as a matter of output, women publish less than men for a wide variety of reasons: teaching more classes, teaching classes with more students in each class, more advising of students,<sup>58</sup> family obligations, and other external limits on their time.<sup>59</sup> There is abundant literature to show that female faculty engage in more teaching and service work than men,<sup>60</sup> sometimes referred to as “office housework.”<sup>61</sup>

“Law faculties tend to emulate the family’s gender divide. That is, women tend to do the housework—the committee work and other internal work at the law school—men tend to do the outside work—more scholarship, more travel, more self-promotion, more blog entries and other “scholarly” career work.”<sup>62</sup>

Committee work is not rewarded in the law school compensation structure, apart from a few elite schools which will provide a teaching load reduction for serving as Chair of certain (already prestigious) committees, such as Faculty Appointments.<sup>63</sup>

In sum, there is a different valuation of “women’s work in the legal academy”<sup>64</sup> such that “[f]acially neutral norms that measure merit in terms of metrics like quantity of one’s publications result in distorted outcomes for women faculty.”<sup>65</sup> Much of the non-scholarship work is invisible and thus not recognized in merit and compensation systems.<sup>66</sup> Again, this is exponentially true of female faculty of color.<sup>67</sup> Even when the work is visible

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<sup>56</sup> Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the “Top Ten” Law Reviews*, 31 *WOMEN’S RTS. L. REP.* 385, 386 (2010).

<sup>57</sup> Ryan & Dawe, *supra* note 43, at 586.

<sup>58</sup> As Professor Deo discusses in her most recent piece, “[s]tudents from all backgrounds tend to seek out women professors, and especially women of color, because they are known to be more accessible and available than their colleagues.” This additional work is both “emotionally taxing to have students crying in the office [and] also takes away time that could otherwise be spent on teaching, scholarship, or other pursuits.” Deo, *Pandemic Effects*, *supra* note 42, at 2475, 2480.

<sup>59</sup> See Monopoli, *The Status Gap*, *supra* note 13, at 7.

<sup>60</sup> *Id.* at 2; Hart, *supra* note 13, at 880.

<sup>61</sup> See Nancy Levit, *Keeping Feminism in its Place: Sex Segregation and the Domestication of Female Academics*, 49 *U. KAN. L. REV.* 775, 777 (2001); Allen & Jackson, *supra* note 52, at 526 (citing Linda Babcock et al., *Why Women Volunteer for Tasks That Don’t Lead to Promotion*, *HARVARD BUS. REV.* (July 16, 2018)).

<sup>62</sup> See McGinley, *supra* note 51, at 150–51; see also Deo, *Pandemic Effects*, *supra* note 42, at 2476.

<sup>63</sup> See McGinley, *supra* note 51, at 150 (describing how as women performed more previously important service work, the internal work became devalued).

<sup>64</sup> Ryan & Dawe, *supra* note 43, at 611.

<sup>65</sup> Monopoli, *The Status Gap*, *supra* note 13, at 10.

<sup>66</sup> Deo, *Pandemic Effects*, *supra* note 42, at 2480.

<sup>67</sup> *Id.*

and focuses on the heart of the enterprise—teaching our students—it is undervalued.

### B. Barrier to Entry to the Profession

Entry to legal academia typically begins with the AALS.<sup>68</sup> Applicants submit their Faculty Appointments Register (FAR) form during the summer in hopes of receiving interviews at the Faculty Recruitment conference, affectionately (or not) known as the “meat market,” which takes place in October in Washington, D.C.<sup>69</sup> Law schools search the FAR to filter for their particular hiring needs—someone to teach Property, perhaps, or maybe Secured Transactions.<sup>70</sup> Often, schools look to the “best available athlete.” More recently, legal academia expects an already proven record of scholarship by entry level faculty.<sup>71</sup> In fact, Yale Law School advises its graduates that “[a]t the majority of schools, the single most important factor in obtaining a tenure-track academic law teaching position is demonstrated scholarly achievement—that is, writing.”<sup>72</sup>

Expecting entry level candidates to have already produced scholarship, especially more than one piece, leads law schools to focus on applicants who have completed Ph.D.s and/or applicants in a teaching fellowship or Visiting Assistant Professor (VAP) program.<sup>73</sup> The AALS acknowledges the uptick in advanced degrees: “about 50% of the entry-level faculty hired in 2018 had either a Ph.D. or equivalent degree, a general increase from about 26% of candidates in 2011.\*”<sup>74</sup> Who are the individuals who seek an advanced

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<sup>68</sup> *Faculty Appointment Services for Entry-Level Candidates*, ASS’N OF AM. L. SCHS., <https://www.aals.org/recruitment/candidates/> (last visited Feb. 9, 2023).

<sup>69</sup> *See id.*; *see also AALS Recruitment Conference*, YALE L. SCH., <https://law.yale.edu/studying-law-yale/areas-interest/law-teaching/current-candidates/aals-recruitment-conference> (last visited Feb. 9, 2023).

<sup>70</sup> *FAR Information*, ASS’N OF AM. L. SCHS., <https://www.aals.org/recruitment/candidates/far-information/> (last visited Feb. 9, 2023).

<sup>71</sup> Robert L. Jones, *A Longitudinal Analysis of the U.S. News Law School Academic Reputation Scores Between 1998 and 2012*, 40 FLA. ST. U. L. REV. 721, 736 (2013) (“... law schools ... have increasingly focused on academic credentials in the hiring process”).

<sup>72</sup> *Legal Scholarship*, YALE L. SCH., <https://law.yale.edu/studying-law-yale/areas-interest/law-teaching/law-teaching-program/preparing-career-law-teaching/legal-scholarship> (last visited Feb. 9, 2023).

<sup>73</sup> MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* 14 (2019) (“... the expectation is that candidates ... ‘have the VAP and the fellowship checked.’”) [hereinafter Deo, *Unequal Profession*].

<sup>74</sup> *Advanced Degrees*, ASS’N OF AM. L. SCHS., <https://teach.aals.org/tenure-track/advanced-degree/> (last visited Jan. 18, 2023). The information denoted by the asterisk explains, “[t]hese data, which are self-reported by recently hired law faculty or, in some cases, their schools, were collected by Professor Sarah B. Lawsky for PrawfsBlawg. Professor Lawsky’s report is also provided as a downloadable spreadsheet. These data include “information for tenure-track, clinical, or legal writing full-time entry level hires.” *See also* COMM. ON THE PRO. EDUC. CONTINUUM, SECTION ON LEGAL EDUC. AND ADMISSION TO THE BAR, A.B.A., TWENTY YEARS AFTER THE MACCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE

degree in order to obtaining a career in academia? The AALS states “anecdotally” that it includes those who “have not the opportunity to publish any scholarly writing.”<sup>75</sup> The AALS sets forth the advantages of obtaining an advanced degree:

One advantage of earning an advanced degree, particularly a Ph.D., is that it provides the opportunity to produce a body of scholarly work. Although the number of years spent earning a Ph.D. depends on the program, it always will be longer than a one-year LL.M. program or a two-year fellowship or VAP; hence, there simply is more time to write and publish articles.<sup>76</sup>

The AALS does acknowledge that a disadvantage to seeking an advanced degree is that “not having the opportunity to teach can be a disadvantage, both in terms of the marketability of your candidacy and the practical impact of not having taught a law school course should you land a job.”<sup>77</sup> Thus, it is apparent that many candidates are hired without any teaching experience.

Another path to legal academia is a VAP or Law Fellow position. The AALS website states that “around 70% to 80% of entry-level faculty hired between 2011 and 2018 had either a fellowship or had been a VAP.\*”<sup>78</sup> The downside of VAP and fellowships is that they are often required to . . . teach.

A VAP often includes teaching a doctrinal course, often one each semester of the program. *This may leave less time for scholarship.* Fellows often teach legal research and writing, however, which is time intensive, and thus also can *impinge upon the time fellows have to produce their own scholarship.*<sup>79</sup>

For the 10% of entry level hires who do not fall into one of the above two categories (advanced degrees or VAP/fellowships),<sup>80</sup> the AALS recommends

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CHALLENGES FACING THE ACADEMY, BAR, AND JUDICIARY 11 (2013) [hereinafter *Twenty Years After the MacCrate Report*] (“Recently, law schools have placed increased value on hiring candidates who possess Ph.Ds with well-developed and often interdisciplinary scholarly research agendas.”).

<sup>75</sup> Ass’n of Am. L. Schs., *supra* note 74.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Law Fellowships & Visiting Assistant Professors*, ASS’N OF AM. L. SCHS., <https://teach.aals.org/tenure-track/fellowships-vap/> (last visited Jan. 14, 2023) (The information denoted by the asterisk explains, “These data, which are self-reported by recently hired law faculty or, in some cases, their schools, were collected by Professor Sarah B. Lawsky for PrawfsBlawg. Professor Lawsky’s report is also provided as a downloadable spreadsheet. These data include “information for tenure-track, clinical, or legal writing full-time entry level hires.”).

<sup>79</sup> *Id.* (emphasis added).

<sup>80</sup> *Work & Write*, ASS’N OF AM. L. SCHS., <https://teach.aals.org/tenure-track/work-write/> (last visited Jan. 14, 2023).

“publications—specifically those placed in reputable law journals— . . . as good evidence of a candidate’s commitment to the scholarly enterprise.”<sup>81</sup>

It is clear that the path to legal academia increasingly requires a scholarly record. To amass a scholarly record, a candidate needs the time, space, and resources to think and write. VAPs and fellowships are typically lower-paying positions.<sup>82</sup> Over-emphasizing scholarship is to privilege those applicants with the resources to take the kind of academic positions to allow for the creation of scholarship. Consider how one participant in Professor Deo’s study explained the issue:

“A lot of women and a lot of people of color cannot afford to spend a year [as a judicial clerk], then spending a year or two being a VAP where they have time and space to write and produce articles [but are paid little], then go out on a full market knowing they’re going to have to move again for their full-time [permanent] position.”<sup>83</sup>

By expecting all these credentials, law schools lose out on the opportunity to hire a wider variety of individuals as faculty. One study discussing how to increase diversity in the professoriate (although not focused on legal academia) recommended that “search committees, deans, and department chairs must make key decisions about what it means to be a ‘strong candidate,’ going beyond traditional metrics of reputation of doctoral institution and advisor or number of publications,”<sup>84</sup> noting also that while seemingly neutral, “narrow definitions of merit often miss the meaningful contributions of candidates from various racial and ethnic minority backgrounds.”<sup>85</sup>

It bears noting that both the AALS and the American Bar Association have declared diversity as an important goal of law schools. The ABA specifically requires law schools to demonstrate “a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.”<sup>86</sup> The AALS Handbook explicitly states that “[I]aw schools should embrace racial and ethnic diversity, including diversity

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<sup>81</sup> *Id.*

<sup>82</sup> See DEO, UNEQUAL PROFESSION, *supra* note 73.

<sup>83</sup> *Id.*

<sup>84</sup> Kimberly A. Griffin, *Institutional Barriers, Strategies, and Benefits to Increasing the Representation of Women and Men of Color in the Professoriate: Looking Beyond the Pipeline*, 35 HANDBOOK OF THEORY & RSCH. 277, 319 (2020).

<sup>85</sup> *Id.* (citing Jerlando F.L. Jackson, *Race Segregation Across the Academic Workforce: Exploring Factors That May Contribute to the Representation of African American Men*, AM. BEHAV. SCIENTIST 1004–29 (2008)).

<sup>86</sup> Memorandum from Leo Martinez, Council Chair & William Adams, Managing Director of Accreditation and Legal Education to Interested Persons and Entities (Dec. 16, 2021) (available at <https://taxprof.typepad.com/files/matters-for-notice-and-comment---dec-16-2021-1.pdf>).

among faculty, as a factor that strengthens the institution and its educational mission.”<sup>87</sup> Diversity in background experiences is also limited, as candidates with important experience in the practice of law may be overlooked for those who had the time to focus on scholarship.<sup>88</sup>

### C. Privileging Scholarship is to the Detriment of Students

How does incentivizing faculty to spend more time on research and scholarship than on teaching impact students? First, focusing on scholarship often leads to faculty teaching fewer classes so as to provide the time to write. In this way, faculty are literally in the classroom fewer hours. Or teaching smaller classes. Or both. As salaries increase (for producing scholarship) and course loads decrease (to allow faculty to produce scholarship), critics suggest this leads to an increase in tuition.<sup>89</sup> In the classes they do teach, faculty may be incentivized to assess students in a manner that creates the least amount of work during the semester, sticking with the one examination at the end of the semester.<sup>90</sup> As a Carnegie Report from 1990 stated, “[i]n the current climate, students all too often are the losers.”<sup>91</sup>

Best practices for student learning calls for the diametric opposite of the single examination. Rather, it calls for frequent and prompt feedback.<sup>92</sup> Frequent feedback allows students the “opportunity to gauge their progress as they acquire new skills.”<sup>93</sup> One of the most common sources of anxiety of first-year law students is a lack of feedback during the semester.<sup>94</sup> Students

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<sup>87</sup> AALS Handbook: Statement of Good Practices, ASS’N OF AM. L. SCHS. (amended July 12, 2017), <https://www.aals.org/about/handbook/good-practices/minority-law-faculty-members/>.

<sup>88</sup> See DEO, UNEQUAL PROFESSION, *supra* note 73, at 14 (discussing how current credentials sought by law schools focus on clerkships and Visiting Assistant Professor positions); see also TWENTY YEARS AFTER THE MACCRATE REPORT, *supra* note 74, at 11 (“. . . high priority traditionally given to academic pedigree rather than (and sometimes to the exclusion of) practice experience.”).

<sup>89</sup> West & Citron, *supra* note 32 (“Law schools’ legions of cost-conscious critics complain that paying high salaries to professors with low course loads drives up tuitions.”).

<sup>90</sup> For an argument that faculty scholarship benefits students’ private interests, see Arcila, *supra* note 22, at 18 n.8 (“. . . students can and do receive private benefits from faculty scholarship, such as in the classroom, in discussions with faculty members outside of the classroom, and through exposure to scholarly events at law school, at a minimum.”).

<sup>91</sup> BOYER, *supra* note 22, at xi.

<sup>92</sup> Herbert N. Ramy, *Moving Students from Hearing and Forgetting to Doing and Understanding: A Manual for Assessment in Law School*, 41 CAP. U. L. REV. 837, 837 (2013); Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 CAP. U. L. REV. 149, 178 (2012); see ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (1st ed. 2007).

<sup>93</sup> Ramy, *supra* note 92, at 837.

<sup>94</sup> Allison Monahan, *What No One Tells You Before You Go to Law School: You Actually Have to Teach Yourself “The Law,”* MS. JD (May 15, 2012), <https://ms-jd.org/blog/article/what-no-one-tells-you-you-go-law-school-you-actually-have-teach-yourself-%E2%80%9C-law%E2%80%9D>; *What Are The*

often say, “I don’t know how I am doing.” Prompt feedback allows students to adjust their approaches to learning as they continue to acquire new knowledge.<sup>95</sup> In fact, one empirical study of law students found that “students in sections that have previously or concurrently had a professor who provides individualized feedback consistently outperform students in sections that have not received any such feedback.”<sup>96</sup>

Further, the ABA Standards for the Approval of Law Schools require schools to utilize both formative and summative assessments.<sup>97</sup> The purpose of formative assessments is to “measure and improve student learning and provide meaningful feedback to students.”<sup>98</sup> Although the Interpretations to Standard 314 clarify that formative assessments are not required in every course, the existence of the Standard does evince a recognition of the importance of multiple assessments for student learning.<sup>99</sup> Incentivizing faculty away from teaching to scholarship redounds to the detriment of students.

Finally, a brief note on the impact on faculty from the privileging of scholarship. Faculty who join academia due to a love of teaching find themselves drawn away from their focus on teaching to research and publication.<sup>100</sup> “This conflict of academic functions demoralizes the professoriate, erodes the vitality of the institution, and cannot help but have a negative impact on students.”<sup>101</sup>

### III. WHY ARE LAW SCHOOLS PRIVILEGING SCHOLARSHIP?

Evidence is mounting that the audience for legal scholarship, whatever its origins, is shrinking. In other words, legal academics are writing for legal academics.<sup>102</sup> Or more relevantly for this article, the type of articles which

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*Differences Between Law School and College?*, JD ADVISING, <https://www.jdadvising.com/the-differences-between-law-school-and-college/> (last visited Feb. 9, 2023).

<sup>95</sup> Ramy, *supra* note 92; Niedwiecki, *supra* note 92; STUCKEY, *supra* note 92.

<sup>96</sup> Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance*, 67 J. OF LEGAL EDUC. 139, 139 (2017).

<sup>97</sup> A.B.A., ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2021–2022 24 (2021),

[https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure-chapter-3.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure-chapter-3.pdf).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (Interpretation 314–2 stating: “A law school need not apply multiple assessment methods in any particular course. Assessment methods are likely to be different from school to school. Law schools are not required by Standard 314 to use any particular assessment method.”).

<sup>100</sup> BOYER, *supra* note 22, at xii (“... teaching is not well rewarded, and faculty who spend too much time counseling and advising students may diminish their prospects for tenure and promotion.”).

<sup>101</sup> *Id.* at 2–3.

<sup>102</sup> In no way do I intend to denigrate student–run scholarly journals, neither the hard work that students put into the journals nor the experience that they gain in producing the issues.

are perceived under merit compensation systems to be the most worthy are primarily read by other legal academics. In fact, as Professor Clark has opined, “much scholarship is driven by career advancement rather than authentic inquiry. . .”<sup>103</sup>

Chief Justice Roberts notably remarked that law review articles are “more abstract” than practical and aren’t “particularly helpful for practioners and judges.”<sup>104</sup> Justice Breyer similarly noted, “[t]here is evidence that law review articles have left terra firma to soar into outer space. . .”<sup>105</sup> Numerous empirical studies have been conducted to determine courts’ use of legal scholarship and found it to be falling.<sup>106</sup> For example, one study found that almost half of articles and notes are never cited<sup>107</sup> and another study found that less than 1% of federal cases cite to law review articles in the top five journals.<sup>108</sup>

Why, if this results in pay inequity, barrier to entry to the profession, and harm to students, are law schools so wedded to privileging scholarship over teaching and service?<sup>109</sup>

#### A. *It’s the Easiest Part of the Job to Evaluate*

One argument in favor of weighting scholarship over teaching and service is that, when reviewing teaching and service, it is difficult to evaluate these obligations. As one argument goes, everyone teaches and everyone serves on committees—how can we differentiate between faculty on those grounds?<sup>110</sup> “[R]esearch performance is the only factor by which faculty members can be *objectively* evaluated, even if they are unequal in other

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<sup>103</sup> Clark, *supra* note 30; see also Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 44 (1936) (“The leading articles, and the book reviews too, are for the most part written by professors and would-be professors of law whose chief interest is in getting something published so they can wave it in the faces of their deans when they ask for a raise, because the accepted way of getting ahead in law teaching is to break constantly into print in a dignified way.”).

<sup>104</sup> Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J. (Apr. 7, 2010, 7:20 PM), <https://www.wsj.com/articles/BL-LB-27402>.

<sup>105</sup> David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 20, 2011), <https://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>.

<sup>106</sup> See, e.g., Derek Simpson & Lee Petherbridge, *An Empirical Study of the Use of Legal Scholarship in Supreme Court Trademark Jurisprudence*, 35 CARDOZO L. REV. 931 (2014); Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998).

<sup>107</sup> Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309, 336 (2007).

<sup>108</sup> John Doyle, *The Law Reviews: Do Their Paths Lead but to the Grave?*, 10 J. APP. PRAC. & PROCESS 179, 196–97 (2009).

<sup>109</sup> See Subotnik & Ross, *supra* note 35, at 620, 629 (asking “has reifying scholarly writing undermined larger values?” and “. . . 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?”).

<sup>110</sup> Park, *supra* note 12, at 50.

respects.”<sup>111</sup> Professor Paula Monopoli explains it as the “market myth”—that faculty compensation is tied to merit which is able to be objectively measured.<sup>112</sup> Further, counting articles (and I do mean, literally counting) and ranking the journals in which these articles are placed is easier than actually digging in to assess that scholarship. Even when there is an arguably objective measurement, there is still room for subjective bias to creep in as “men get[] . . . more respect for their research and writing, with little regard for the work’s quality and importance.”<sup>113</sup> Within scholarship, there is a push to publish “high impact scholarship,” which is generally defined as publishing in the general law reviews of top ranked schools (without any actual regard as to whether the article has any actual impact).<sup>114</sup> To support this push, some schools provide additional compensation when scholarship is published in a top 50 ranked journal.<sup>115</sup> By focusing on the prestige of the journal, compensation decisions then appear to have a myriad of objective factors in what remains, at bottom, a counting process.<sup>116</sup>

As Professors Allen and Jackson have argued, schools are able to review evidence of teaching just as schools review evidence of scholarship. “For example, a syllabus and a course page can show the number of assessments given in a course and assessments . . . a professor has graded or provided feedback on.”<sup>117</sup> In light of the well-known problems with bias in teaching evaluations, law schools would need to carefully develop a system to review student evaluations for bias and, more ideally, create a peer review system to complement the student evaluations. Many schools already have the

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<sup>111</sup> *Id.*

<sup>112</sup> Monopoli, *The Market Myth*, *supra* note 13.

<sup>113</sup> Ward, *supra* note 45.

<sup>114</sup> For a humorous take, see Associate Deans (@ass\_deans), TWITTER (Feb. 3, 2022), [https://twitter.com/ass\\_deans/status/1489333274778423298](https://twitter.com/ass_deans/status/1489333274778423298) (“Remember when we told you to be more productive and then you published a lot of articles but then we told you they weren’t in high impact journals and then you published in those high impact journals? Well, we decided those journals aren’t as good as they used to be. Sorry.”).

<sup>115</sup> For example, Villanova Law provides a \$1,500 bonus for publishing in a journal at a Top 40 school, \$3,000 for a top 25 placement, and \$5,000 for a top 14 placement. E-mail from Teresa Ravenell, Assoc. Dean of Vill. L. Sch. to author (Nov. 17, 2022, 1:21 PM) (on file with author).

<sup>116</sup> Empirical studies have demonstrated the existence of “letterhead bias” . . . and even within those journals, there are further hierarchies—certain substantive fields are more widely published in general law reviews than others. See Stephen Thomson, *Letterhead Bias and the Demographics of Elite Journal Publications*, 33 HARV. J.L. & TECH. 203, 203–04 (2019) (empirical study of 4,500 articles published between 2014–2018); see also Ryan & Dawe, *supra* note 43, at 572 (“. . . articles about constitutional law concepts are more widely published and cited than articles about family law principles”); see also BOYER, *supra* note 22, at 29 (“One reason research and publication loom so large is that published articles are relatively easy to measure, at least quantitatively.”).

<sup>117</sup> Allen and Jackson, *supra* note 52, at 548.



infrastructure to peer review teaching, as this is performed for tenure-track faculty as part of the tenure process.<sup>118</sup> The same is true for service.

### B. *Is it Just U.S. News Rankings?*

The current *U.S. News & World Report* rankings hit the scene in 1987.<sup>119</sup> It's a common juxtaposition for a law school dean to tout the school's *U.S. News* ranking while simultaneously speaking against the rankings game. And it is a game.<sup>120</sup> There are four main categories of factors that make out the overall ranking<sup>121</sup>:

- 1) Quality Assessment (peer reputation score and practitioner reputation score—total of 40%);
- 2) Selectivity Score (median LSAT, median undergraduate GPA, and acceptance rate—total of 21%);
- 3) Placement Success (employment rates at graduation and 10 months after graduation, bar passage rate, average indebtedness, and percentage of J.D. students incurring debt—total of 26%);<sup>122</sup> and
- 4) Faculty, Law School, and Library Resources (the average spending on instruction, library, and supporting services, and the average spending on all other items, including financial aid; the student-faculty ratio; and library resources and operations—total of 13%).<sup>123</sup>

Of these factors, the reputation among academics is the single most heavily weighted score (25% of the total).<sup>124</sup> *U.S. News* sends surveys to “law school deans, deans of academic affairs, chairs of faculty appointments

<sup>118</sup> *Id.* (“[E]vidence of teaching is available and similar to evidence of scholarship. For example, a syllabus and a course page can show the number of assessments given in a course . . . And law schools can create a culture of peer evaluation of teaching.”).

<sup>119</sup> See Jones, *supra* note 71, at 722 n.1 (explaining the history of the U.S. News rankings); see also Christopher J. Ryan, Jr., *A Value-Added Ranking of Law Schools*, 29 U. FLA. J.L. & PUB. POL’Y 285, 286 (2019) (stating that the first ranking was released in 1987).

<sup>120</sup> As this article went to print, over 20% of law schools have dropped out of the U.S. News rankings system. Kathryn Rubino, *U.S. News Lashes Out at Law Schools That Don’t Want to Play Their Silly Little Rankings Game Anymore*, ABOVE THE LAW (March 7, 2023), <https://abovethelaw.com/2023/03/u-s-news-lashes-out-at-law-schools-that-don-t-want-to-play-their-silly-little-rankings-game-anymore/>.

<sup>121</sup> Robert Morse et al., *Methodology: 2023 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 28, 2022), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>.

<sup>122</sup> See *id.* Previously, the Placement Success category was worth 25.25% of the total. However, *U.S. News* increased the bar passage metric from 2.25% to 3% for the 2023 rankings (released in March 2022). Further, the calculation of the bar passage score changed from the state in which the majority of the school’s first-time bar takers sat for the exam to all states in which the school’s first-time bar takers sat for the exam.

<sup>123</sup> See *id.* Previously, the weight for library resources was 1.75% with seven factors which weighted 0.25%. Now, there is one factor (full time equivalent professional librarian positions relative to students) weighted 1%; see also 2023 *U.S. News Law School Rankings Methodology*, SPIVEY CONSULTING GRP. (Mar. 15, 2022), <https://www.spiveyconsulting.com/blog-post/2023-us-news-law-school-rankings-methodology/>.

<sup>124</sup> Morse et al., *supra* note 121.

and the most recently tenured faculty members” who then rate a school’s overall quality on a scale of 1 (marginal) to 5 (outstanding), with the option of “don’t know.”<sup>125</sup> Approximately 70% of the recipients of the survey responded.<sup>126</sup>

Further, the reputation rating among practitioners is another 15% of the total.<sup>127</sup> “Legal professionals—including hiring partners of law firms, practicing attorneys and judges”<sup>128</sup> are sent surveys, using the same ranking system as academics. “A school’s score is the average of 1–5 ratings it received across the three most recent survey years.”<sup>129</sup>

Schools will allocate resources to those factors which matter the most in the ranking system.<sup>130</sup> If the factors shift, schools will shift their resources to those factors, often without consideration as to whether that allocation of resources improves legal education.<sup>131</sup> As Professor Stake has stated, “. . . schools can improve themselves on the criteria while doing nothing to improve the whole program, indeed while diminishing the value of the law school experience to their students.”<sup>132</sup>

Allocating (or misallocating) resources to the production of scholarship is one method schools use to seek to improve their reputation score among other schools.<sup>133</sup> This over-allocation of resources can take several forms. First, attempts to raise the academic score are directly responsible for the flood of promotional materials that law schools send every year.<sup>134</sup> Second, chasing the reputation score leads to the fight over star laterals to make a splash to their peers (which in turn helps to contribute to the gender wage

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> For an example specifically related to admission decisions, see Stephanie Hughes, *What Role Should College Rankings Play in Choosing a School?*, NPR MARKETPLACE (July 13, 2022) (quoting former University of Pennsylvania Law School Dean Colin Diver: “. . . the law school changed certain things with [the rankings] in mind. ‘We altered our admissions criteria . . . to give much more weight to an applicant’s LSAT score . . . because that was what U.S. News was using to rank law schools. And I always sort of regretted that.’”).

<sup>131</sup> Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Misperceive*, 81 IND. L. J. 229, 232 (2006). As mentioned *supra* in notes 122–23, *U.S. News* altered the rankings formula for the 2023 law school rankings. Given that the data on library resources is now focused solely on the number of research librarians per student, one could assume that law schools will begin to hire additional librarians and concentrate less on the number of books in the library.

<sup>132</sup> *Id.* at 245.

<sup>133</sup> See Jones, *supra* note 71, at 724 (“Law schools have expended substantial amounts of time and money over the last sixteen years to improve their academic reputation scores.”); Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493, 515 (2007) (“Collectively, law schools spend millions each year on attempts to influence survey outcomes.”).

<sup>134</sup> Stake, *supra* note 131, at 240 (stating that “[t]ons of money . . . [are] being spent on public relations now that [were] never spent before” in efforts by schools to raise their reputations).

gap).<sup>135</sup> Primarily, though, one can measure the cost in scholarship by the money expended for one article. Efforts to quantify the cost of an article place the cost anywhere from \$78,000 to \$108,000,<sup>136</sup> and that simply involves salaries. One article suggests that of the “billion or so dollars a year spent on law faculty salaries, approximately one quarter of that amount ‘can be attributed to the production of research.’”<sup>137</sup> Of course, as discussed above, schools also spend resources on “diminished class loads, sabbaticals, leaves, research assistantships, and travel allowances.”<sup>138</sup> Further, many schools provide a bonus for the publication of scholarship in high-ranking journals, with a bigger bonus for a higher ranked journal.<sup>139</sup>

In addition to allocating money (as described above) to the production of scholarship, faculty time is pulled from the classroom to research.<sup>140</sup> This could take the form of faculty teaching either fewer classes or smaller classes or both. There is an aura of performance involved in this hyper-focus on scholarship.

Do all of these efforts to change the reputation score work? It is generally accepted that the reputation score is “sticky”—that is, it’s extremely hard to move.<sup>141</sup> Professor Robert Jones engaged in an empirical study of *U.S. News* rankings for the years spanning 1998 to 2013, specifically the peer assessment scores.<sup>142</sup> His results showed that “approximately one half of the law schools . . . finished 2013 with academic reputation scores that were within .1 of the scores with which they began sixteen years earlier.”<sup>143</sup> In fact, only 33 schools in 2013 had scores that were higher (even by just .1) than 1998<sup>144</sup> and only eight of those increased by more than .3.<sup>145</sup>

In fact, the reputation scores are influenced by the already present rankings, which then influence the LSAT and GPA factors (as students chose

<sup>135</sup> See, e.g., Letter from Dean to Colleagues, [http://static.texastribune.org/media/documents/Letter\\_to\\_My\\_Colleagues.doc](http://static.texastribune.org/media/documents/Letter_to_My_Colleagues.doc) (cited in Monopoli, *The Market Myth*, *supra* note 13, at 877 n.58 (discussing loans made to entice lateral hires)).

<sup>136</sup> Subotnik & Ross, *supra* note 35, at 616 (estimating \$78,000 for an article at a “middling-pay” law school).

<sup>137</sup> Sherman J. Clark, *Drawing (Gad)flies: Thoughts on the Uses (or Uselessness) of Legal Scholarship*, U. MICH. J. L. REFORM CAVEAT (forthcoming 2023) (see Clark, *supra* note 30).

<sup>138</sup> Subotnik & Ross, *supra* note 35, at 617.

<sup>139</sup> See Subotnik & Ross, *supra* note 35, at 618; see also *Twenty Years After the MacCrate Report*, *supra* note 74, at 4 (discussing articles suggesting that the high costs of law schools might be reduced by “decreasing the value of scholarship, such as written law review articles by law professors”).

<sup>140</sup> See Subotnik & Ross, *supra* note 35, at 618 n.18.

<sup>141</sup> See Jones, *supra* note 71, at 726 (concluding that “academic reputation scores of most law schools did not change dramatically between 1998 and 2013); Richard Schmalbeck, *The Durability of Law School Reputation*, 48 J. LEGAL EDUC. 568, 586 (1998) (concluding that “law school reputations are extremely durable.”).

<sup>142</sup> See Jones, *supra* note 71, at 721.

<sup>143</sup> *Id.* at 727.

<sup>144</sup> *Id.* at 730.

<sup>145</sup> *Id.*

schools based on rankings), and so on and so on.<sup>146</sup> This has been termed by various scholars as the “echo effect” or the “echo chamber.”<sup>147</sup> One report from a popular site for law school applicants and students describes the practitioner score as:

“As a group, then, peers and lawyers/judges are not necessarily going to have much information to use in making their assessments. So where do they turn to form opinions? You guessed it—the very rankings they are informing. This leads to an echo-chamber effect in the ranking system that reinforces school positions and leaves most schools with little chances for upward mobility.”<sup>148</sup>

The fact that the *U.S. News* rankings are a zero-sum game seems to be forgotten in the decision to allocate resources to scholarship. That is, if law schools are spending money on all things scholarship in order to improve the peer assessment score, it is worth keeping in mind that the system is indeed a ranking as against each other system. If one school’s peer assessment score increases, and thus, the total score increases, then other schools’ overall rankings will decrease.<sup>149</sup>

Perhaps Professor Jones summarized it best: “The data certainly suggests that an obsession with academic reputation scores is counterproductive.”<sup>150</sup>

#### IV. REQUIRING DISCLOSURE

Often, when discussing this problem of over-privileging scholarship with others, I found myself saying, “at the very least, I wish the schools would own up to what they are doing and tell the students that writing articles is more important than teaching.” Then I realized the entity with the power to force law schools to do just this: the American Bar Association (ABA).

The time has come for the ABA to add compensation information to the list of required disclosures by law schools. By “compensation information,”

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<sup>146</sup> Stake, *supra* note 131, at 251 (“the U.S. News score was . . . a predictor of the new academic ranks”); Jones, *supra* note 71, at 766 (confirming “at least a slight echo effect between a law school’s academic reputation and its overall *U.S. News* rank.”); Ryan, *supra* note 119, at 289 (stating that the Echo Effect or Echo Chamber is “demonstrable” and that peer scores from 2008 correlate with 2014 peer scores “at an outstanding 0.948 rate.”).

<sup>147</sup> See Jones, *supra* note 71, at 759 n.86 (explaining the history of the term). Another impact of the Echo Effect takes place *within* article selection by law reviews. In one study, Professors Subotnik and Ross found that in-house authors account for 23% of articles in top-ten journals, 56% of authors in top-ten journals are from top-ten schools, and 77% of authors in top 25 journals are from top-ten schools. See Subotnik & Ross, *supra* note 35, at 628.

<sup>148</sup> *Dissecting the Rankings: The U.S. News & World Report*, TOPLAWSCHOOLS, <https://www.top-law-schools.com/dissecting-the-rankings-news-world-report.html> (last visited Jan. 16, 2023).

<sup>149</sup> See Jones, *supra* note 71, at 736 (“The academics who complete the surveys each year undoubtedly understand that the success of their institutions in the rankings . . . must ultimately come at the expense of its competitors.”).

<sup>150</sup> Jones, *supra* note 71, at 786.

I do not suggest that the ABA require schools to disclose individual faculty members' salary figures,<sup>151</sup> but rather, to disclose information as to how they determine compensation, specially focused on the weight of scholarship, teaching, and service in those decisions.

The ABA is the accrediting body for American law schools.<sup>152</sup> It first promulgated its Standards for Legal Education in 1921.<sup>153</sup> For years, law schools meeting the standards suggested by the ABA were published in the Review of Legal Education.<sup>154</sup> Beginning in 1952, the ABA became the official accrediting body for American law schools.<sup>155</sup> Specifically, the Council for the Section on Legal Education and Admissions to the Bar is recognized as the “national accrediting agency for programs leading to the J.D.” by the Department of Education.<sup>156</sup> To be an ABA-approved law school, the school must meet the Standards for Approval initially and then again every seven years through a Site Visit.<sup>157</sup> As part of the approval process, the ABA requires schools to make certain disclosures related to “Basic Consumer Information” pursuant to Standard 509.<sup>158</sup>

<sup>151</sup> Many attempts at gaining information concerning overall wages and any inequities therein is met with an argument about privacy. Schools suggest that they cannot release information because it would violate individual members' privacy rights. Of course, many public law schools already release salary information as required by state law and other schools now release information as required by settlement of Equal Pay Act litigation.

<sup>152</sup> The AALS is a membership organization with its own standards to be met to maintain membership. *Membership Review*, ASS'N OF AM. L. SCHS., <https://www.aals.org/member-schools/membership-requirements> (last visited Jan. 17, 2023) (“The AALS membership review process is meant to complement, not duplicate, the ABA’s accreditation process.”). Carl C. Monk & Harry G. Prince, *How Can an Association of Law Schools Promote Quality Legal Education*, 43 S. Tex. L. Rev. 507, 508, 511 (2002) (“... membership requirements are designed to achieve the same objective—that all of the Association’s member schools will offer quality instruction and support legal scholarship in an intellectually vibrant environment . . .”; although the AALS’s core values include teaching and research with a “somewhat stronger commitment to faculty research and scholarship than the ABA requires.”).

<sup>153</sup> A.B.A., STANDARDS FOR APPROVAL OF LAW SCHOOLS (1997), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/1997\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1997_standards.pdf).

<sup>154</sup> *Standards Archives*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/resources/standards/standards\\_archives/](https://www.americanbar.org/groups/legal_education/resources/standards/standards_archives/) (last visited Feb. 10, 2023).

<sup>155</sup> *Frequently Asked Questions*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/resources/frequently\\_asked\\_questions/](https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions/) (last visited Jan. 17, 2023).

<sup>156</sup> *Legal Education and Admissions to the Bar*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/](https://www.americanbar.org/groups/legal_education/) (last visited Jan. 17, 2023) (“All state supreme courts recognize ABA-approved law schools as meeting the legal education requirements to qualify for the bar examination; forty-six states limit eligibility for bar admission to graduates of ABA-approved schools.”).

<sup>157</sup> *Law School Site Visits*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/accreditation/law\\_school\\_site\\_visits/](https://www.americanbar.org/groups/legal_education/accreditation/law_school_site_visits/) (last visited Feb. 10, 2023).

<sup>158</sup> A.B.A., STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 49 (1996), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/1996\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1996_standards.pdf).

Originally added in 1996 as part of comprehensive recodification of the Standards, Standard 509 stated, “A law school shall publish basic consumer information.<sup>159</sup> The information shall be published in a fair and accurate manner reflective of actual practice.”<sup>160</sup> The categories now listed as required were included as an interpretation of Standard 509.<sup>161</sup> Law schools were given the option to publish this information in a publication designated by the Council or its own publication.<sup>162</sup>

Between 1996 and 2012, the ABA added various interpretations to Standard 509.<sup>163</sup> For example, in 1997, Interpretation 509–3 required that schools make publicly available a student tuition and fee refund policy.<sup>164</sup> In 1998, Interpretation 509–4 required schools choosing to publicly disclose its status as an ABA-approved law school to do so “accurately” and to include contact information for the ABA.<sup>165</sup> Similarly, the 2003–2004 Standards made clear that a law school must “fairly and accurately report basic consumer information” wherever and however that information is reported.<sup>166</sup> In 2006–2007, Interpretation 509–6 explained that listing course offerings with a “significant number” of courses that have not been offered during the past two years nor in the current academic year are not in compliance with Standard 509.<sup>167</sup> Publication of the academic calendar was added in 2007–2008 as a required item of consumer information.<sup>168</sup> Standard 509(b) was added in 2010–2011 to require schools to disclose information concerning the transfer of credits earned at another institution.<sup>169</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 50.

<sup>163</sup> See *infra* notes 164–68.

<sup>164</sup> A.B.A., STANDARDS FOR APPROVAL OF LAW SCHOOLS 55 (1997), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/1997\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1997_standards.pdf).

<sup>165</sup> A.B.A., STANDARDS FOR APPROVAL OF LAW SCHOOLS 60 (1998), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/1998\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1998_standards.pdf).

<sup>166</sup> A.B.A., STANDARDS: RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2003–2004 43 (2003), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/2003\\_2004\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2003_2004_standards.pdf).

<sup>167</sup> A.B.A., STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2006–2007 39 (2006), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/2006\\_2007\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2006_2007_standards.pdf).

<sup>168</sup> A.B.A., STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2007–2008 40 (2007), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/2007\\_2008\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2007_2008_standards.pdf).

<sup>169</sup> A.B.A., STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2010–2011 39 (2010), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/2010\\_2011\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2010_2011_standards.pdf).

In 2012–2013, Standard 509 was substantially revised.<sup>170</sup> It separated the information required to be disclosed into two categories: “(1) that for which the Council prescribes a particular form, manner and time frame of publication, Standard 509(b); and (2) that which schools must disclose in a readable and comprehensive manner, Standard 509(c).”<sup>171</sup> The revised Standard required schools to provide information concerning basic Standard 509 information, student scholarships, and employment information in a specified format.<sup>172</sup> It also required schools to publicly display this information conspicuously and in a readily available manner, ideally on the school’s website.<sup>173</sup> After a few other minor changes,<sup>174</sup> in its current form, Standard 509(b) requires:

- (b) A law school shall publicly disclose on its website, in the form and manner and for the time frame designated by the Council, the following information:
- 1) admissions data;
  - 2) tuition and fees, living costs, and financial aid;
  - 3) conditional scholarships;
  - 4) enrollment data, including academic, transfer, and other attrition;
  - 5) numbers of full-time and part-time faculty, professional librarians, and administrators;
  - 6) class sizes for first-year and upper-class courses; number of seminar, clinical and co-curricular offerings;
  - 7) employment outcomes; and
  - 8) bar passage data.<sup>175</sup>

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<sup>170</sup> See A.B.A., ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2012–2013 (2012),

[https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2012\\_2013\\_aba\\_standards\\_and\\_rules.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_2013_aba_standards_and_rules.pdf).

<sup>171</sup> Memorandum from Barry A. Currier, Managing Director, A.B.A. on Compliance with Revised Standard 509 (Aug. 2013), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2013\\_standard\\_509\\_memo.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2013_standard_509_memo.pdf).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> In the 2012–2013 version, employment outcomes and bar passage date were listed together as 509(b)(8). See A.B.A., *supra* note 170, at 39. They are now separated. The information concerning transfer credits was listed in 509(c) and employment outcomes were listed in 509(d). Employment outcomes and bar passage were separated into two categories and library resources was deleted in 2013–2014.

<sup>175</sup> *Managing Director’s Guidance Memo on Standard 509* (July 2014, Revised July 2016 and Dec. 2019), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/guidance-memo-509-december-2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/guidance-memo-509-december-2019.pdf).

The academic calendar, curricular offerings, and academic requirements must be disclosed pursuant to 509(c)(2).<sup>176</sup> Law schools must disclose this information on the school website “in a readable and comprehensive manner.”<sup>177</sup> Such information should include the law school’s academic attrition rate, bar passage rate, effectiveness of its academic support program, and the academic and admission test credentials of its entering students.<sup>178</sup>

Although specifically referring to the required employment statistics, the Subcommittee recommends the standardized disclosures because “[t]his new Standard will, if adopted, provide more meaningful and consistent . . . information to prospective students. We believe that this information will greatly assist prospective students in making informed decisions about whether to go to law school or which school to attend.”<sup>179</sup> Each category of information listed in Standard 509(b) provides that information—the information necessary to make informed choices about which law school to attend.

Requiring the formulas for further compensation decisions and further details to be disclosed will allow the consumers—the students—to learn information vital to their law school experience. Faculty are rational actors and, if able to do so, will divide their time among the three faculty responsibilities relative to the importance given to those responsibilities in compensation decisions. Students should have access to this information so that they may understand and compare what each law school values in its faculty.

Requiring disclosure of faculty compensation metrics provides students with relevant information without regulating what those metrics must be. It is the least restrictive form of regulation, leaving in place the deference to schools to do as they choose. Although I, and others, have argued for schools rebalancing scholarship and teaching on their own, requiring disclosure would allow each school to proceed how they choose. As with many things, required disclosure may lead schools to rebalance their priorities and stop

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<sup>176</sup> A.B.A., ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2021–2022 36 (2021),

[https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure-chapter-5.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure-chapter-5.pdf).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Paul Caron, *ABA to Change Employment Data Reporting; U.S. News to Adopt in 2013 Ranking*, TAXPROF BLOG (Mar. 18, 2011), [https://taxprof.typepad.com/taxprof\\_blog/2011/03/aba-proposes-changes.html](https://taxprof.typepad.com/taxprof_blog/2011/03/aba-proposes-changes.html) (citing the draft report of the Subcommittee on Consumer Information of the ABA Section of Legal Education and Admissions to the Bar Accreditation Committee).



privileging scholarship.<sup>180</sup> But whether or not this occurs, at the very least, the “consumers”—the applicants—will have full information.

Therefore, this article proposes that Standard 509(b) be amended to add: (9) *faculty compensation metrics*.

Similar to other required disclosures, the ABA should provide a more detailed explanation as to what information must be disclosed under proposed Standard 509(b).<sup>181</sup> For example, if the disclosures simply asked if scholarship, teaching, and service all factor into a merit raise system, every school could answer in the affirmative without revealing any of the nuances that truly impact salary. Instead, the 509(b)(9) disclosure should ask for the following information:<sup>182</sup>

- 1) Do faculty receive merit raises?
- 2) Does the law school use a set formula for scholarship, teaching, and service? If so, what is the formula?
- 3) Are summer stipends awarded for scholarship?<sup>183</sup> If so, what is the amount and how many were awarded?
- 4) Are summer stipends awarded for teaching? If so, what is the amount and how many were awarded?
- 5) Do faculty receive a reduced teaching load for the production of scholarship or service?
- 6) Do faculty receive a reduced scholarship obligation for increased teaching or service obligations (such as high enrollment classes, first year courses, or offering multiple assessments in courses)?
- 7) Is it possible to receive the highest level merit raise without receiving excellent teaching evaluations?
- 8) Is it possible to receive the highest level merit raise without publishing scholarship during the relevant year?

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<sup>180</sup> There is abundant literature on the impact of disclosure on the decisions of actors. For a corporate law specific example, see Jennifer O’Hare, *Corporate Governance Guidelines: How To Improve Disclosure and Promote Better Corporate Governance in Public Companies*, 49 FLA. ST. U. L. REV. 257, 271 (2022) (stating that “disclosure rules can also lead companies to change their behavior, and the SEC was quick to recognize that it could, in effect, regulate behavior by promulgating disclosure rules”).

<sup>181</sup> I apologize to all the Assistant Deans and other administrators who would face an additional data gathering burden.

<sup>182</sup> This information would be required for any faculty with a responsibility to produce scholarship. Although this is primarily tenure-track faculty, other faculty lines also have a scholarship obligation.

<sup>183</sup> This information is available from those schools who respond to the SALT Salary Survey. See Soc’y of Am. L. Tchrs., *supra* note 4.

With this information, students should be able to understand whether a law school privileges scholarship and decide where to spend their time and money accordingly.<sup>184</sup>

## V. CONCLUSION

As law schools chase the *U.S. News* rankings and incentivize faculty to spend more and more time on the production of scholarship, the gender wage gap continues; diverse applicants lose the opportunity to join the academic ranks; and students get the short end of the stick. The ABA is uniquely positioned to help attack this problem. By requiring law schools to acknowledge and disclose their compensation decisions, one could hope that they may take action to address the structural problems caused by these decisions. At the very least, law school applicants will understand the values of the schools to which they apply and, if so moved, seek change with their enrollment decisions. Hopefully, by forcing this issue into the light, schools will begin to take voluntary action and rebalance the legs of the stool.

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<sup>184</sup> An alternative, or additional, source of change in the area of disclosure could focus on the AALS as the body seeking this type of information and requiring standardized information to be reported in the areas of teaching, service, and compensation. By locating this requirement in the AALS, this would create more of a self-policing mechanism than a directive from the ABA. My thanks to Professor Margaret Hu of William & Mary Law School for this point.