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Applying Universal Design in the Legal Academy*

Matthew L. Timko**

Too often barriers to access in the form of physical, technological, and cognitive environments play a large role in keeping many people out of law school. While federal and state laws address these barriers, universal design provides the clearest policy change for law schools to remedy these issues.
Introduction

¶1 Universal design (UD) didn’t start as a higher or legal education concept. The term was coined by architect Ronald Mace for “the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.”¹ Over the last 30 years, this concept has extended its reach, moving from architecture to many other facets of daily life: automatic doors at grocery stores, audio prompts at crosswalks, road-level curb entryways on sidewalks, closed captioning for television programming, and so on. Businesses and organizations have realized that planning for everyone is less expensive and more efficient than hastily changing an original design later to accommodate groups who were not initially considered.

¶2 Unfortunately, UD has been relatively slow to take hold in legal education. Because law schools serve as testing grounds for future attorneys, they are one of the lynchpins of the entire legal profession. Law schools’ missions and environments play large roles not only in attracting students but also in introducing what values students take into the legal profession. The practice of UD in law schools must gain ground in order to make the legal profession more equitable and to take advantage of the tremendous amount of brain power that otherwise might be barred from entering the legal profession.

¶3 This change logically should begin in law school libraries, for several reasons: First, academic law libraries (hereafter law libraries) are the intellectual and cultural centers of law schools. They serve as the central hub of information gathering, processing, and reproduction, representing a direct access point to the legal information that students, professors, and lawyers need to understand and use, regardless of patrons’ existing legal knowledge or physical limitations. Second, law libraries provide myriad settings in which to apply and test UD principles. And third, the results of testing these principles are readily determined; specifically, research and information instruction through the law libraries, assessed through information literacy outcomes, would reveal the utility or failure of UD practices relatively quickly.

¶4 As a way to introduce UD into law schools, the law library is the ideal testing ground, implementing various physical and technological changes to assist student comprehension of the vast legal materials available to show utility, equity, and cost efficiencies. By injecting these practices initially into law library services, their value will become apparent to all stakeholders, ultimately spreading throughout the legal academy and into every aspect of the legal education process and legal profession.

¹. About the Center: Ronald D. Mace, Ctr. for Universal Design: Env’ts & Prods. for All People (2008), https://projects.ncsu.edu/ncsu/design/cud/about_us/usronmace.htm [https://perma.cc/ZM85-3Y62].
This article provides theoretical and legal frameworks for applying UD principles to the entire legal academy. The first two sections discuss the principles of UD generally and the legal standards supporting its use. The third section provides examples of general UD applications and how they can be implemented into the legal academy.

Universal Design Principles

The Center of Universal Design (CUD), founded by Ronald Mace and located at North Carolina State University, brings together advocates and practitioners from all areas, including architecture, education, and product design. CUD endeavors to create, improve, and disseminate best practices for UD implementation; it is joined in this work by like-minded groups such as the University of Washington’s Center for Universal Design in Education (CUDE). Since 1997, UD practitioners have used the seven principles model developed by CUD: equitable use, flexibility in use, simple and intuitive use, perceptive information, tolerance for error, low physical effort, and size and space approach and use. Different groups in different settings have applied these seven principles to their own specialized interests, but we focus here on how these principles apply in higher education generally and to law schools more specifically.

Equitable Use

Equitable use requires that any “design [be] useful and marketable to people with diverse abilities.” Simply put, this means that any student or faculty member is able to use an available service at the institution, whether it be something as common as getting to an advisor’s office or as specific as participating in an internship. Beyond an individual’s ability to use the service, the general usability must be equitable, meaning it should be designed so that any user can get the full benefit of the product. Here UD highlights a recalibration of equity understanding: equal access is not the same as equal value, as UD values the latter as much as the former. Universities who apply UD principles ensure that all students and faculty are able to get the same academic benefit from...
any product on campus, enhancing the effectiveness of the product and the overall learning experience for the vast majority of students.

**Flexibility in Use**

¶8 A design must accommodate “a wide range of individual preferences and abilities.”8 The emphasis on abilities is synonymous with disability accommodations defined under federal and state laws, but UD stresses personal preferences as equally important as personal ability, allowing those who do not need accommodations to choose the best option suited to their own tastes and strengths. Ultimately, UD generates choices rather than pigeonholing users into singular or discrete styles. By creating a flexible learning environment, higher education is now able to reach more students in a more thorough way, without having to spend extra time in modifying existing spaces to achieve the same result. Effectiveness and efficiency are other aspects of UD’s value to higher education, and what the seven principles aim to achieve.

**Simple and Intuitive Use**

¶9 While understanding the importance of personal abilities and preferences, to make environments more generally usable, UD aims to transcend these personal traits. Part of the UD philosophy requires that a design is “easy to understand, regardless of the user’s” personal traits including “experience, knowledge, language skills, or… concentration.”9 This may seem antithetical to a fundamental goal of higher education, specifically to challenge students to excel, but when considered carefully, this principle aims to focus those challenges along pedagogical lines as opposed to technical lines. With a simple and intuitive design, students will spend less time learning how to access the information and more time learning the information itself. Therefore, this principle enhances the goals of higher education by focusing attention on the important elements of learning, something that all UD principles strive for in any environment.

**Perceptible Information**

¶10 The goal of legal instruction is to get the substantive legal knowledge to the student as efficiently and effectively as possible. To aid that endeavor, UD creates conditions whereby this information may be disseminated “regardless of ambient conditions or the user’s sensory abilities.”10 Students have many different learning styles, and professors are responsible for conveying the information to students in a way that is understandable. Traditionally, accommodations have been a one-on-one transaction, where a single professor is required to make one or more accommodations available to a single student. Through UD, the content is presented and made available in a manner where the need for accommodations moves away from the professor and spreads the responsibility to the university (or law school) as a whole, which in turn disseminates the

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9. *Id.* at 15–16.
10. *Id.* at 16.
responsibilities and benefits to the entire institution, improving every student’s experience. By applying UD principles, the need for professors to navigate what accommodations are reasonable is vastly minimized; instead, an environment is created where new accommodations have already been considered and easily implemented. Just as the principle of simple and intuitive use allows greater focus on substantive knowledge for students, providing perceptible information by the university allows professors to focus less on restructuring their curriculum and more on delivering the subject matter to students; and these benefits are provided to the student body as a whole.

**Tolerance for Error**

¶11 Tolerance for error does not mean lowering standards but rather refocuses attention away from technical errors toward a prioritization of addressing errors in substantive knowledge or understanding. Specifically, part of the learning process in higher education is to allow, and then correct, mistakes made by students throughout the course of their studies. As with all UD principles, a built-in tolerance for error reduces the time and effort of students and professors to focus on technical, or tertiary, processes, and instead get to the heart of a subject. Building in tolerance for errors allows all users who make a technical mistake (e.g., clicking the wrong link on a website or going through the wrong entrance to a building) to easily correct the mistake and move on to other things. By minimizing “hazards and the adverse consequences of accidental or unintended actions,” the environment allows all students to easily correct these mistakes so the substantive learning can continue.

**Low Physical Effort**

¶12 Students learn best when physically comfortable and able to concentrate rather than when tired or distracted through physical exertion. Unfortunately, many students expel tremendous energy while doing typical learning tasks, such as reading, writing, and taking notes. Therefore, environments should be designed to “be used efficiently, comfortably, and with minimum of fatigue” so that any student can go into a situation fresh and in the best position to learn. This can be particularly true for large lecture halls seating hundreds, where often a student who fatigues easily has only two seat choices: the very front or the very back, explicitly segregating them. The basis for this

11. See Raymond Chen, *Nested Fly-Out Menus Are a Usability Nightmare*, OLD NEW THING BLOG (Aug. 23, 2007), https://devblogs.microsoft.com/oldnewthing/20070823-00/?p=25443 [https://perma.cc/WFL5-EH2T] (a problem for all users, nested, or drop-down, menu options “ha[ve] turned into one of those mouse dexterity games where you have to guide your character through a maze without hitting any of the walls or you die and have to start over,” which becomes compounded when students don’t have complete muscle control); *see also* Susan David deMaine, *From Disability to Usability in Online Instruction*, 106 LAW LIB. J. 531, 546–47, 2014 LAW LIB. J. 39, ¶ 48 (this is particularly true for students with a lack of dexterity or difficulty with muscle control when it comes to navigating websites; oftentimes these sites require textually small links that must be clicked on with precision, making it very difficult for a student who has tremors to follow the link).


13. *Id.*
principle presumes that students who have less endurance or physical stamina should be provided resources and environments where they will not have to physically exert, and potentially exhaust, themselves just to get to a point where they can learn the substance. While learning is an endurance trial in many aspects, UD ensures that it is mentally exerting rather than physically exhausting as well.

Size and Space for Approach and Use

¶13 Focusing on providing “appropriate size and space...for approach, reach, manipulation, and use regardless of the user’s body size, posture, or mobility”\(^\text{14}\) ensures that participation is not implicitly discouraged. Maneuverability between tables, desks, book stacks, and study carrels provides the primary challenges in any academic setting, but this principle also applies when developing signage, whiteboard location, computer terminal layout, website design, and even book spacing on library shelves. UD presents a solution by incentivizing and supporting law school administrators to consider these matters initially so that costly and time-consuming changes won’t need to be addressed later.

¶14 It is important to understand that these principles provide a guide for individuals and institutions to implement UD rather than a criterion mandated on institutions. All seven of these principles may be implemented in accordance with the best practices and abilities of every university and law school, but they must be implemented in law schools if the values of equal access to justice are ever to be truly realized. While access to justice traditionally has been characterized as public access to legal needs, it is impossible to facilitate this access on the back end of the legal profession (i.e., emanating from the bench and bar) if the value of access is not instilled both theoretically and practically at the front end, specifically at all stages of the legal education process.\(^\text{15}\) The next part of this article defines the legal standards and litigation outcomes that face all practices and procedures that do not take UD into account.

Legal Standards of Universal Design

¶15 UD articulates an overlooked but integral American civil right: access to information and education for people with disabilities.\(^\text{16}\) Without question, recognition of

\(^{14}\) Id.

\(^{15}\) Michael Iseri, How Universal Design Principles Can Improve Legal Accessibility, Am. Bar Ass’n (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/how-universal-design-principles-can-improve-legal-accessibility/ [https://perma.cc/3UTD-A3RW] (Improving legal information to the public invariably makes it more accessible, i.e., understandable. Synthesizing the UD principles to create documents that are clear, visible, and follow a logical structure will help members of the public understand legal documents and therefore the legal process to a greater extent.).

\(^{16}\) See About UD: Universal Design History, Ctr. Universal Design (2008), https://projects.ncsu.edu/ncusu/design/cud/about_ud/udhistory.htm [https://perma.cc/FUT7-ATXG]; see also Economic and Social Council Res. 2014/6 (June 12, 2014) (“Convinced that addressing the profound social, cultural and economic disadvantage and exclusion experienced by many persons with disabilities, promoting the use of universal design...will further the equalization of opportunities and contribute to the realization
these rights was driven by the work and advocacy of the civil rights movement and began in earnest with passage of the Rehabilitation Act of 1973. This and several other federal statutes identified the legal standards with which universities and law schools must comply so that people with disabilities are able to exercise these rights within institutions of higher education and the workplace. These federal laws create the floor, not the ceiling, by which UD success is measured: while all universities must comply with these laws, UD aims to extend past what is legally required, to measures that will be most beneficial for each unique individual at the institution, as well as for the institution itself.

Unfortunately, the literature and case law addressing these statutes focus primarily on employment, so there is limited analysis of the application of these laws within higher education. However, since higher education offers the pathway to employment, it becomes necessary to review the relevant statutory authority, as well as focus on the recent legal challenges to law school and law admission accommodations. This review brings into clearer focus how legal education institutions act as gatekeepers to employment by creating or removing barriers within legal education. This review further demonstrates how UD resolves many legal and equity problems before they begin.

Statutory Authority for Accommodations

Other authors have delved into the relevant statutes that allow students with disabilities to access law school resources. The following summaries, however, review the principal laws with an eye toward higher education and legal studies, making them necessary for any substantive analysis or discussion of the utility of UD within the legal education process.

The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (the Act) introduced the category of disability as a protected class:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
Furthermore, section 504(b)(2)(A) of the Act specifically defines “a college, university, or other postsecondary institution, or a public system of higher education” as an eligible program or activity requiring compliance with the Act.19 Since almost all colleges and universities, as well as attached or independent law schools, receive some sort of federal funding, legal academies were then required to apply the protections of the Act to the law school admissions process,20 which acts as the first “gate” toward legal employment.

¶19 The Act explicitly sought to allow individuals with disabilities to work within the public sector; outlawing discrimination against people with recognized disabilities, and enabled them to seek and keep employment based solely on their work product. To facilitate participation, institutions and employers were required to provide reasonable accommodations for existing design flaws, including allowances for physical assistance, auxiliary aids for comprehension, and modification of existing practices.21 The scope of these accommodations was meant to be relatively limited, but ultimately it rested on the answer to the question of what constituted “reasonable” in regard to accommodations. While the advocates of these rights felt the standards set out in section 504 were clear, the real-world application of the Act went down a much different path, creating ambiguity for institutions and individuals, ultimately leading to completely opposite interpretations than those intended.

¶20 Predictably, challenges to the requirements of the Act allowed courts to frame the Act far from the intentions of the framers.22 While the Act called for administrative actions to protect individuals with disabilities, litigants often had to sue institutions to force implementation of the requirements, which meant the courts had major influence over the application of the Act. Unfortunately, this led to further disappointment for the plaintiffs and activists who were regularly ruled against in cases before the U.S. Supreme Court.23 The Supreme Court read ambiguity within the statute and determined (much to the horror of disability advocates) that the Act did not remove disability as a factor in consideration as long as it was not the sole consideration.24 These rulings led advocates and members of Congress to draft new legislation to achieve what the Act was meant to establish: making discrimination against those with disabilities illegal.

“to maximize opportunities for individuals with disabilities,” id. § 701(b)(2), as well as “to ensure [that] students with disabilities . . . have opportunities for postsecondary success,” id. § 701(b)(5).

19. Id. § 794(b)(2)(A).


23. See Susan Gluck Mezey, Disabling Interpretations: The Americans with Disabilities Act in Federal Courts 18–20 (2005) (reviewing Supreme Court decisions for 10 years after passage of the Act and determining that “for the most part the Court narrowed the parameters of the nation’s disability rights laws” including, but not limited to, § 504).

24. Se. Cmty. Coll. v. Davis, 442 U.S. 397, 406 (1979) (“An otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his handicap.”) (emphasis added).
Americans with Disabilities Act of 1990

¶21 Rather than replace the Act, legislators sought to revitalize and clarify the law to perform as intended. A new and empowered core of social and legislative advocates led efforts to pass additional legislation to provide enhanced standards for protecting citizens’ rights, as well as to reinforce the standards codified in the Act itself. In response, Congress passed the Americans with Disabilities Act (ADA) in 1990. Congress’s refusal to repeal the Act, along with recognition of the Act within the statutory language of the ADA, ensured that existing judicial interpretation of the Act would survive the new ADA law, thereby maintaining the jurisprudential relevance of 15 years of established precedents while superseding the rulings antithetical to the Act. It is therefore unsurprising that the ADA requires public and private organizations to provide “reasonable accommodations” to allow citizens with disabilities to participate in work, education, and any other activity where barriers have traditionally been erected. Significantly, the ADA includes an undue burden clause that allows many organizations, including law schools, to refuse some of the most important accommodations: specifically, changes to the physical and technological environments.

¶22 Written in response to the perceived ambiguity of the Act, the ADA strove to create clear definitions and concrete requirements for employers and educators to provide inclusive environments to individuals with disabilities. Because the ADA is a product of the late 1980s, it fails to take into consideration any online or digital environment. Similarly, the ADA has been hindered by federal courts interpreting the protections for physical spaces as limited in scope and application. Creating further turmoil,


28. 42 U.S.C. § 12182(b)(2)(A)(iii) (discrimination occurs “unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden”); see also 28 C.F.R. § 36.104 (2018) (“undue burden means significant difficulty or expense” that will factor in the nature and cost in relation to the financial resources of the institution; since physical or technological upgrades incur exorbitant costs, these will fall under the undue burden exception to accommodations).

29. Rothstein & Izyk, supra note 20, § 3.1.

30. Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 952–53 (N.D. Cal. 2006) (citing Ninth Circuit precedents, supported by Third and Sixth Circuit precedents, that define places of “public accommodation” as physical spaces only); see also Young v. Facebook, Inc., 790 F. Supp. 2d 1110 (N.D. Cal. 2011) (denial of rights online does not rise to the level of discrimination proscribed in the ADA). But see Nat’l Fed’n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 572–73 (D. Vt. 2015) (reading the ADA to exclude enforcement on businesses simply because they don’t have a “physical place open to the public,” i.e., online-only businesses, “would lead to absurd results”).
a circuit split emerged where some jurisdictions applied the ADA to physical spaces, or those places with a “nexus” to a physical space, while other jurisdictions refused to limit the ADA’s protections merely to physical spaces and required digital spaces (e.g., websites) to comply with the ADA’s requirements.

**ADA Amendments Act of 2008**

Just as the intention of the Act was subverted by the courts, leading to the ADA, the ADA was similarly undermined by the judiciary. The U.S. Supreme Court interpreted “the ADA’s coverage [as] restricted to only those whose impairments are not mitigated by corrective measures,” that is, only those whose disability persisted through interventions to accommodate the disability. In passing the legislation that would become the Americans with Disabilities Act Amendments Act of 2008, the U.S. Congress identified two specific cases (including the case above) that epitomized the judicial efforts to narrow the meaning of the word “disability,” necessitating further legislation to clarify (again) Congress’s intent of who must be protected under federal law.

This renewed legislative effort coincided with advances in medical understanding and social acceptance of what constituted a disability, so that the articulation of disability under the ADA was recognized to have failed to appropriately encompass millions of Americans who should qualify for protections under the spirit of the law but were omitted from the ADA. To remedy this, the Amendments focused on broadening the definition of disability beyond the narrow parameters set by the ADA and constricted further by the courts. Instead, the Amendments incorporated the ADA (and by extension the Act) while expanding opportunities for accessibility to disabled persons.

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31. See Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000) (no right to access since the insurance provider is a third party and not subject to the company’s obligation to meet the ADA requirements); see also Ford v. Schering Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998) (plaintiff had physical access to her employer but not to the insurance company hired by her employer; therefore discrimination by the insurance provider did not violate the ADA); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997) (benefit plan is not a good offered and therefore not subject to the physical space definition in the ADA).

32. See Carparts Distrib. Ctr. v. Auto. Wholesaler’s Ass’n, 37 F.3d 12, 19 (1st Cir. 1994) (public accommodations are not limited to physical spaces); see also Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (facilities solely in electronic spaces are covered by the ADA); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32–33 (2d Cir. 1999) (ADA was meant to guarantee more than merely physical access to physical goods).


34. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4) & (5), 122 Stat. 3553, 3553 (along the way, Congress was unabashed in its criticism of the U.S. Supreme Court when citing Sutton, 527 U.S. at 471, and Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184 (2002), as narrowing the “broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect”).
by explicitly closing the gaps revealed in the previous laws, and predicting possible gaps that could be revealed in the near future.

**Litigation Involving Law School Accommodations**

¶25 Unfortunately, as the history of the federal statutes demonstrates, litigation has driven much of the interpretation and application of federal disability law. In recent years, legal education has been subject to such litigation as potential and graduating students have made claims of discrimination based on disability within the full legal education process. Myriad examples show where law schools have been culpable in sustaining existing (and sometimes erecting new) barriers to knowledge and education, and these cases demonstrate how the courts have interpreted the law in such instances. While the dispositions of these cases are important, they are cited here as case studies for how costly and lengthy litigation could have been avoided through use of UD principles.

**Accommodations During the LSAT**

¶26 The case of *Law School Admission Council v. California* arose from a California law making it illegal for the Law School Admission Council (LSAC) to notify schools that the LSAT (Law School Admission Test) score was “obtained by a subject who received an accommodation.” LSAC sued for injunctive relief claiming violations of several constitutional rights, including equal protection of the law. The Third District California Court of Appeals reversed the order of injunction, finding that no constitutional violations existed and that any harm done to LSAC was outweighed by the potential harm to “law school applicants with disabilities,” ruling the intention of the statute meant to address “undue burdens on [law school] applicants with disabilities. Stated

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35. *Id.* § 7 (explicitly changing the definition of disability so that employability was no longer a factor, but rather the existence of a disability governed; this was in response to the narrow application the courts gave to disabilities and technical employability).

36. *Id.* § 4 (adding definitional requirements for aids and services to include “modification of devices”, “other effective methods of making visually delivered materials available...”, and “other similar services or actions” to provide a catchall for any technical innovations needed in the future that were not presently accounted for in the Act).

37. The legal education process begins when a person decides to apply to law school and ends upon taking the bar exam. Therefore, the legal process includes sitting for the LSAT, the application process to all law schools, the law school curriculum and facilities, graduation, and sitting for the bar exam(s) in any and all states. While cases claiming discrimination from undergraduate (or even secondary education) institutions could also be applicable, for the purposes of brevity, a delineation between the decision to attend law school and any time prior is made while still recognizing that discrimination earlier in a person’s education can have long-lasting and deleterious effects on any opportunity to attend and complete a legal education.

38. 166 Cal. Rptr. 3d 647, 652 (Ct. App. 2014) [hereinafter LSAC].

39. CAL. EDUC. CODE § 99161.5 (West 2017) (defining the process for requesting an accommodation and all procedures that LSAC must perform to ensure all test takers are given due consideration for LSAT accommodations).

40. 166 Cal. Rptr. 3d at 656–57 (LSAC “alleged the newly-enacted statute: (1) violated LSAC’s right to ‘equal protection of the laws’ … (2) abridged its ‘liberty of speech’ … (3) constituted an invalid ‘special statute’ … and also (4) amounted to a prohibited ‘bill of attainder’”).

41. *Id.* at 675.
broadly, the purpose is to prevent discrimination.” Supporting its decision, the court cited the American Bar Association (ABA) Commission on Disability Rights and a report on the effects on students with disabilities from flagged test scores, identifying the professional and academic costs that flagged scores create.

¶27 In *Binno v. American Bar Association*, the plaintiff claimed that his visual disability made it impossible to perceive the “spatial relationships or perform[] the necessary diagramming to successfully complete the logic-games questions on the LSAT at a competitive level” and that the resulting distress he experienced “negatively impacted his overall performance on the exam.” In the decision, the court identified that there was an actual injury-in-fact when Binno and other similarly situated applicants were forced to take a test that “discriminates against blind and visually impaired persons.” While the case was dismissed for other reasons, the ABA did concede that the LSAT was not designed for applicants with visual impairments to be on equal footing with visually abled applicants, recognizing the implicit biases present in the test itself.

¶28 In *Hanrahan v. Blank Rome LLP*, a law student with Asperger’s syndrome and a “concomitant non-verbal learning disability” sued several law firms for not hiring him as a summer associate on the basis of his disabilities. Hanrahan’s cause of action against the law firms originated with the LSAC’s failure to give him accommodations on the LSAT (which he never requested). This discriminatory action, he claimed, caused him to get into a lower-quality law school (Drexel, rather than Temple or Penn), which ultimately led to his failure to be hired by the defendant firms. It was this tenuousness between the stated discrimination (against LSAC) and Hanrahan’s failure to receive a summer position that led the court to dismiss the suit. Yet the court implicitly recognized that the failure of the LSAC to provide accommodations could result in a successful claim of discrimination against the Council, while not necessarily against the

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42. *Id.* at 662.
43. *Id.* at 662–63 (the legislature had a “more narrow purpose, the prevention of discrimination in the law school admissions process. Throughout the legislative history, the support of the American Bar Association (ABA) is noted.” (emphasis in original)).
44. *Id.* at 670 (citing the report addressing SAT scores, “The Flagging Test Scores of Individuals with Disabilities Who Are Granted the Accommodation of Extended Time” by Gregg, et al. The report highlighted that flagged scores (1) led to disabilities being outed and contributed to the under-enrollment of students with disabilities while at the same time (2) not providing any clear predictive value of college success when compared with unextended time on the test).
45. 826 F.3d 338, 342–43 (6th Cir. 2016).
46. *Id.* at 344.
47. *Id.* (the ABA also recognized the existence of this discrimination).
48. *Id.* at 348–49 (in affirming dismissal, “we are left puzzled by Binno’s failure to litigate against the LSAC, rather than the ABA…. Unless Binno is seeking to be relieved altogether of the obligation of taking the LSAT, a more practical approach to achieving admission to law school than years of fruitless litigation against a remote accrediting body might well be to take advantage of the consent decree that the DFEH and the USDOJ have entered with LSAC.”).
50. *Id.* at 352–53.
51. *Id.*
Accommodations for Admission into Law School

¶29 While it is difficult to prove discrimination in any field, let alone the competitive, subjective, and complicated law school admissions process, at the bare minimum, an applicant must identify (1) a documented disability and (2) that discrimination based on this disability led to denial of admission to a law school. In Jackson v. Northwestern University School of Law, the plaintiff suffered from some claimed, yet undisclosed, disability. Failing to get into any law school, she subsequently sued every law school in northern Illinois, claiming discrimination based on her disability resulted in her failure to be admitted. The Northern District of Illinois found the claims without merit since “neither the ADA nor the Rehabilitation Act requires a law school to alter its acceptance standards as an accommodation for a disabled person,” and even if those standards were different, the plaintiff failed “to adequately allege that she is disabled.” Jackson identified that admission to law school is inherently difficult, and while accommodations will be made for disabilities, failure to get into law school by itself is not evidence of discrimination.

Accommodations During the MPRE and Bar Exam

¶30 In Jones v. National Conference of Bar Examiners, Deanna Jones, a blind law student in her third year, requested accommodations on the MPRE specific to her vision impairment, including a laptop “equipped with ZoomText 9.12,” which is a magnification program, “and Kurzweil 3000 v. 11.05,” which is text-to-speech software that simultaneously highlights words and sentences. The NCBE (National Conference of Bar Examiners) offered Jones a choice of the exam in the mediums of “Braille, as an audio CD, in enlarged print, the use of a CCTV, and the provision of a human reader.” After an attempt to explain her needs and the NCBE’s refusal to reconsider, Jones moved for a preliminary injunction against the NCBE to require use of her preferred accommodations.

52. Id. at 355–56.
54. Id. at *2 (“Plaintiff also fails to adequately allege that she is disabled. She does not plead what her disability is...”).
55. Id. at *2 (“Plaintiff has filed virtually identical complaints against six other law schools located in northern Illinois, all of whom denied her admission,” including DePaul University, Loyola University Chicago, Chicago-Kent College of Law, John Marshall Law School, University of Chicago, and Northern Illinois University).
56. Id. at *2.
57. Id. at *3.
59. Id. at 278.
60. Id.
¶31 The U.S. District Court for the District of Vermont ruled in favor of the injunction, claiming that what is “accessible’ to one disabled individual may not render it ‘accessible’ to another” and that providing accommodations that “have worked for other visually impaired test takers (but not for ones who also suffer from Plaintiff’s learning disorder) … is wholly inconsistent with the plain language and underlying objectives of the ADA.” Explicit in the court’s ruling was the meaning of equal access: the standards of the ADA and other statutes is not mere access to any accommodations but access to accommodations that allow for equality in information comprehension, limited only by the individual’s intelligence and capacity to answer the questions.

¶32 Bonnette v. D.C. Court of Appeals involved a blind student who requested an accommodation to use a screen reader on the bar exam. Cathryn Bonnette had been legally blind for 30 years by the time she attended law school, and she sat for the bar exam in California and then the District of Columbia. Although legally blind, she did have very limited vision but was unable to read standard print documents. During her time in higher education (which included multiple postgraduate degrees), she had used the screen reader system Job Access With Speech (JAWS) to provide written information available on a computer screen. After failing the California bar exam multiple times using a human reader, Bonnette requested an accommodation to use JAWS on the DC bar exam and was denied by the NCBE. Bonnette sought an injunction to compel the Bar Examiners to provide her with the JAWS accommodation.

¶33 The D.C. Circuit Court of Appeals granted the injunction on the basis that the potential harm to Bonnette far outweighed the burden placed on the NCBE. Specifically, simply providing any accommodation is not enough; any alternative accommodations must be “as effective” as another, and Bonnette provided sufficient evidence that the offered alternatives were not as effective to her as JAWS. Also weighing against the NCBE were its previous offers of screen reader accommodations (in other states) and the strong public policy interests in ensuring that the antidiscriminatory elements of the

61. Id. at 285.
62. Id. at 289.
63. Id. at 285–86 (“The ADA mandates reasonable accommodation of people with disabilities in order to put them on an even playing field with the non-disabled”); id. at 291 (“The ADA serves the important function of ensuring that people with disabilities are given the same opportunities and are able to enjoy the same benefits as other Americans.”).
65. Id. at 169–70 (according to an expert witness at the trial, JAWS allows “greater efficiency, proficiency, automaticity, privacy, and independence than the use of a human reader,” and the common practice for people with limited visual ability is to use a screen reader since both Braille and human readers require extensive training for efficient use).
66. Id. at 172 (the D.C. Committee of Admissions to the Bar offered the use of an “audio CD, live reader, and Brailled or large print version” of the exam, which Bonnette refused since she had no ability to understand the Brailled or large print versions, and she felt that the audio versions had harmed her ability to pass the California bar exam).
67. Id. at 187–88.
68. Id. at 183–86 (citing Burkhart v. Wash. Metro. Area Transit Auth., 112 F.3d 1207, 1213 (D.C. Cir. 1997)).
69. Id. at 188.
ADA were properly applied. Finally, the court refused to accept that the additional costs incurred by the NCBE were sufficient to deny Bonnette the only reasonable accommodation possible.

¶34 Enyart v. National Conference of Bar Examiners72 addressed similar situations. Here, Stephanie Enyart wished to use JAWS and ZoomText (a program that can magnify, enlarge, and adjust color of screen text) for both the MBE and the MPRE. Similar to Jones and Bonnette, the NCBE refused to allow the ZoomText and JAWS accommodations for both the MPRE and MBE, which prompted Enyart to withdraw from both exams.73 Enyart moved for an injunction to allow her to use both ZoomText and JAWS on the next MPRE and MBE portions of the California bar exam, and the U.S. District Court for the Northern District of California granted the injunction based on the evidence proffered by Enyart that the NCBE’s offered accommodations were not reasonable as they would not make the test any more accessible.74

¶35 Upon review, the Ninth Circuit affirmed the injunction on the same grounds, reasoning that the proposed accommodations would severely impede Enyart’s ability to perform her normal work product on the exam, “‘which is clearly forbidden both by the statute and the corresponding regulation.’”75 Furthermore, the Ninth Circuit joined the D.C. Circuit by recognizing the potential harm to the test taker as being far more detrimental than the possible burden to the NCBE in providing the accommodation, as well as favoring the public policy of eliminating discrimination toward individuals over any argument (not made in Enyart) that accommodations may reduce the reliability of test results.76

¶36 Echoing the lawsuits brought in Bonnette and Enyart, in Elder v. National Conference of Bar Examiners,77 Timothy Elder sought an injunction to use JAWS on the entire California bar exam. Similar to Bonnette, the NCBE refused to allow Elder to use JAWS for the MBE, prompting the motion for an injunction. Similar to the previous cases, the District Court of the Northern District of California ruled that any accommodation is not adequate if that accommodation does not reasonably assist the test taker to perform up to the typical standards of that individual on the test (based on existing examples of test results with the specific accommodation) and that public policy weighed in favor of eliminating discrimination over any burdens the NCBE might face.78

70. Id.
71. Id. at 186.
72. 630 F.3d 1153, 1156–57 (9th Cir. 2011).
73. Id.
74. Id. at 1157.
76. Id. at 1167.
78. Id. at *10–12.
The Cumulative Effect

¶37 The cases discussed above show litigants’ varying success in securing accommodations at three stages of the legal education process: LSAT, application, and bar exam. But although discussed separately, these interrelated stages form one continuous process for those moving through the legal education system. This fact makes the inconsistent judicial outcomes especially problematic or harmful, as individuals might receive accommodations at one stage but not another. The results would be the same as if the individual had received zero accommodations at every stage. The case law certainly showcases this dilemma. Litigants, for example, have found tremendous success in procuring accommodations for the bar exam, and these rulings have been definitive and federally applicable. Unfortunately, these successes come to those individuals who have reached the end of their legal education. The lack of similarly definitive federal rulings on appropriate accommodations during LSAT exams means that hosts of individuals, unable to use an accommodation most suited to their needs at the entry point to legal education, are essentially cut off from any meaningful access to a legal education. These individuals are excluded from expanding their knowledge, legal institutions are deprived of the brain power these individuals would have contributed, and other applicants with disabilities are discouraged from even attempting to join the legal profession at all.

Ethical and Professional Standards

¶38 Supplementing the legal standards are ethical and professional standards that support accommodations to students within law schools. As discussed in the case law section above, accommodations often provide tremendous benefit to individuals with only menial burdens placed on the institutions providing the accommodation. In addition, professional requirements within the legal community support implementation of a more accommodating legal education system. The ABA Commission on Disability Rights strives to advocate and support “persons with mental, physical, and sensory disabilities and to promote their full and equal participation in the legal profession.”79 Similarly the ABA and other legal institutions are committed to the ideal of providing access to legal services and information for all people.80 Clearly the law school community understands the need for inclusive policies,81 and yet the legal requirements often provide cover for institutions that, for financial or other reasons, are forced or


81. See also James Forman, Jr., et al., “Report of the Committee on Diversity and Inclusion” 4 (Yale University Law School 2016) (all students and faculty “must be able to take advantage of the full panoply of professional and intellectual opportunities that Yale provides”); Diversity, Equity, Inclusion and Engagement, Nw. Pritzker Sch. of L., https://www.law.northwestern.edu/diversity/ [https://perma.cc/2G7S-LCDB].
choose to do the bare minimum to meet legal compliance. The ultimate goal of higher education is to create a diverse and inclusive environment to promote and generate ideas, and yet people with disabilities are often left out of this environment.82

¶39 Unquestionably, federal law has made important advances for inclusiveness and demonstrated the federal priority for inclusion. But uncertainty about whether laws will be applied as designed, as well as where and how they will be applied, leaves institutions and individuals in a state of limbo. Deferring to legal standards similarly limits what institutions can and will do to create a more inviting and universal environment for their students, faculty, and visitors. This is why UD is so vital to legal institutions: pushing for universal inclusion not only meets the legal standard but also goes above and beyond to set an example for all of the legal profession and other institutions. This is essential for a profession that proclaims the need for ethical competencies in the practice of law.

Accommodations vs. Universal Design

¶40 While disability law is no doubt essential for improving accessibility and promoting inclusivity, the reality is that providing accommodations after the fact as the primary method of remedy is insufficient. For one, the full extent of public and private accommodations for people with disabilities is constantly in flux. The definition (and society’s understanding) of the term “disability” has grown substantially since 1973, yet the statutory language has been slow to respond. Courts have further restricted the definition of “disabled,” limiting who is allowed to receive accommodations under the law. The failure to align the promise of providing accommodations with the practice has ultimately led to further legislation, but with limited results (as discussed in an earlier section).

¶41 While litigation has successfully fulfilled some of the promise of disability laws, it too is far from a perfect vehicle. First, lawsuits require affirmative action from those individuals unfairly discriminated against, revealing the ineffectiveness of the statutes that were meant to codify these rights as a matter of course.83 Second, as discussed above, the courts’ inconsistent application of statutory standards to various stages of the legal education process creates a tiered rather than a uniform system. Finally, this same inconsistency leaves those individuals who need accommodations on very shaky legal ground until after a cause of action is concluded. And since these cases often take years to be resolved, even when litigants are successful, the newly removed barriers have

83. See also H.R. Rep. No. 101-596, at 66 (citing decisions interpreting the Act as the impetus for passing the ADA); ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4) & (5), 122 Stat. 3553, 3553 (citing decisions interpreting the ADA as the impetus for passing the Amendments Act).
84. About half of the cases discussed above took more than one year from the moment of denied accommodation to the disposition of the district court case; contra, the remaining cases took at most two months since many of the tests for which an accommodation was sought were time sensitive.
already effectively barred the applicants or students from achieving their goals, at least in any kind of timely manner.

¶42 Herein lies the promise of UD. UD seeks to look beyond the legal standard toward what is possible and equitable and forces the academy to rethink the entire academic environment to best provide opportunities for all individuals—with and without disabilities—to achieve success in ways impossible within the traditional paradigm. Under the current standards, allowing individuals to participate is reactive: individuals (may) ask for and (should) get an accommodation. This creates a process by which bureaucracies need to work toward allowance, which takes time, requires money, and creates redundancies every time a request is made. Under UD, allowance is proactive, and environments are designed for ready or for easily adaptable use. This requires time, money, and redundancies at a single starting point and then allows for usability without constant efforts.

¶43 UD offers a way out of the current convoluted and problematic process discussed above by shifting the paradigm of legal education toward equality of usability, regardless of individuals’ traits. Instead of designing for one group and accommodating for all others, UD takes all known groups into account and designs resources that are easily adjusted when new usability needs become apparent. Rather than requiring individuals to push for accessibility, the impetus for accessibility moves to the institution as a whole, spreading out the responsibilities to make the transition more manageable. Law schools, while representing only a part of the entire legal education process, represent the preeminent environment for which UD principles can be applied and disseminated throughout the entire legal education process.

Applying Universal Design in the Law School

¶44 Law schools’ position within legal education can do much to influence and push the other actors—the LSAC and NCBE, for example—into better compliance with the intentions of the disability laws. Ideally, such a group effort will lead to more equitable outcomes at all levels in the legal profession and contribute to increasing access for individuals traditionally left out of the law school community, allowing them the chance to attend, participate, and excel within legal education. In turn arise tremendous opportunities to change the legal profession from within and for the better.85

¶45 The path to law schools becoming models and incubators for UD in the legal profession starts with showing how UD can work within the law school setting itself. Ideally, law schools going through current and future remodeling (either physical, technological, or pedagogical) incorporate the seven principles into their plans.86 Unfortunately,

85. Jennifer Jolly-Ryan, Bridging the Law School Learning Gap through Universal Design, 28 Touro L. Rev. 1393, 1396 (2012) (“UD of instruction will help more than students with disabilities, who are legally entitled to accommodations …. Adult learners, part-time law students, ESL students and students with varying learning styles, who are not legally entitled to education accommodations, will be better served as well.”).

86. See Jennifer Bard, Universal Design in the Law School Classroom—A Few Thoughts, A Place to
budget constraints paired with the historical practice of granting accommodations only on request suggest that such wholesale modifications to existing environments will be slow to manifest. To circumvent these barriers to change, UD should be introduced into the law school environment in a relatively discrete setting to serve as a low-cost example of the utility and equity UD provides. It is therefore appropriate and sensible that the law library serve as the incubator within the incubator: introducing UD into the law school gradually so that such changes can take root and expand throughout the entire institution and eventually the legal profession.

\(\S 46\) Within law library services, three areas exist where UD should be applied: physical spaces; legal research instruction; and information services, which encompass several modern aspects of library operations, including all print materials, digital resources, and information technologies used to assist in legal research and knowledge management. The example of technological advances in legal research is especially informative in understanding how libraries have historically and successfully disseminated new practices into the law school and legal profession.

**Physical Spaces**

\(\S 47\) The first real introduction to law school for almost every student is its physical spaces. Here students are introduced to the campus, buildings, classrooms, library, study spaces, and any other areas within the law school that they will inhabit over the next three to four years. This first impression will speak volumes about the values, character, and people of the law school, oftentimes unintentionally. Basic considerations should be apparent: if a student has difficulty using stairs, are there elevators available? If a student is in a wheelchair, are there computers that the student can access? If a student is too short to reach high into library stacks, are stools available? If a student is visually impaired, are there signs with physical details? Often, those with no physical or

Discuss Best Practices for Legal Ed. (Jan. 24, 2020), https://bestpracticeslegaled.com/2020/01/24/universal-design-in-the-law-school-classroom-a-few-thoughts/ [https://perma.cc/H97F-4NYF] (provides insights into traditional thoughts about legal education, and how there is not much curiosity about whether these practices are sensible on their face and specifically when presented to students with disabilities or impairments).


89. ALA, Implementing Library Technologies: Home, https://libguides.ala.org/librarytech [https:// perma.cc/3JU6-WCBZ] (summary and descriptions of the ways libraries have historically used and continue to use technology to help patrons access information).
cognitive limitations will overlook not-fully-accessible physical spaces; however, to anyone with physical or cognitive limitations, the law school spaces will be seen as unwelcoming and adding another burden to the otherwise burdensome first semester of law school. Already the physical space is working against some students as opposed to fostering the full utility of the space for student success.

¶48 Beyond the first appearances, students will be spending the majority of the legal education within the physical space of the law school. Even as online instruction is becoming more common, in-person instruction remains the norm; this is especially true in law schools since the majority of law courses must be in person. Therefore, the space should not just reflect the current student and faculty populations but also provide a supportive venue for all populations. A clear example where requirements for accommodations have led to UD acceptance is wheelchair accessibility in buildings. Immediately, the presence (or absence) of wheelchair accessible entrances will indicate to students whether those in wheelchairs are implicitly welcomed into the building. Furthermore, ramped walkways are designed so that those with wheelchairs can easily move within a space with multiple levels but also allow others to use the feature; this example of UD demonstrates how a fundamental change in the physical space not only addresses the legal requirements of the disability statutes but also provides everyone with a different option that is often easier to navigate.

¶49 These built-in design features require thought and money at the beginning of the project and will provide ease of use to all users, enhancing in a minor but essential way the experiences of the students, faculty, staff, and visitors of the law school. Contrast this example with a design that fails to consider those in wheelchairs, and the cost-benefit analysis becomes obvious. Either the building will need to be remodeled or classrooms reorganized to include these features, or other alternatives, such as stair chair lifts, will need to be added. The former accommodation will cost a tremendous amount of money (arguably more since any ramp will need to be built into a design not intended for a ramp) and involve work noise, hallway closures, and other general inconveniences for the entire law school. The latter alternative may be more cost-effective but adds a feature that will be usable only by those in wheelchairs, limiting the

90. Thomas D. Snyder et al., National Center for Education Statistics, Digest of Education Statistics 454 (2019) (as of fall 2016, 68.3% of undergraduate students and 63.2% of postbaccalaureate students had all of their courses on campus, while only 15% and 27.5%, respectively, had online courses only).

91. Standards and Rules of Procedure for Approved Law Schools § 306(e) (Am. Bar Ass’n 2018) (the ABA allows only one-third of a student’s total course requirement to be done online, requiring the students to be on campus to attend regular courses the rest of the time).

92. Edward Steinfeld, Jordana Maisel & Danise Levine, Universal Design: Designing Inclusive Environments 21 (2012) (wheelchair accessibility is the most relevant example for law schools, yet there are many other real-world examples such as unigendered bathrooms, physical barriers blocking dangerous areas, and closer parking demand beyond “handicapped” parking).

access and value to only a specific population. Faced with these alternatives, a building with UD principles in mind serves the entire population toward the fullest possible utility, limiting costs and expanding access.

¶50 Meaningful access to physical spaces means they also need to be navigable, which requires adequate signage. Signage is an essential tool for any library visitor and requires consideration of users with visual impairments, spatial awareness issues, dyslexia, or special needs in following directions. In many ways, the need for accurate and accessible directions in the library is more than just an opportunity to test universal signage design but a necessity for library policies to accurately direct their patrons to the location of various resources, including elevators.94 The easiest way to apply UD principles to signage is to install digital signage, which is easy to change, manipulate, and (in some cases) interact with.95 However, it is important to remember that UD principles need not be overly complicated: signage with text, pictorial, Braille, and digital options allows multiple users multiple options to access the sign. Regular signage around the library with arrows pointing to important resources is ideal.96 QR codes97 can be placed on signs to allow users with reading disabilities, such as dyslexia, to access an audio direction; while there are audio directions integrated into the physical sign in other venues,98 the QR code offers a simple solution to the particularly noiseless library environment. Three-dimensional signage options now exist that present a more realistic context for those with visual impairments99 and that provide (increasingly)


97. Bruce E. Massis, What’s New in Libraries: QR Codes in the Library, 112 NEW LIBR. WORLD 466, 468 (2011) (analogizing the audio options as guided tours of museums; alternatively, allowing users to view digital signage and directions from their smart devices rather than installing the devices within the library).


cost-effective options for signage that achieves the dual goals of being universally accessible as well as attention grabbing.

¶51 The most obvious, but at times most egregiously overlooked, design feature for those with mobility problems is the availability of elevators.100 Almost all buildings with more than one floor have elevators, which serve both those with mobility issues and those without, making getting to upper floors much easier. Unlike the previous two examples, elevators require constant upkeep and maintenance to ensure usability. It is true that UD cuts down most costs, but it is not free. Yet this small cost highlights the value of UD: proactive evaluation of environments helps ensure the utility of those spaces for all people, rather than a select few.

Instructional Services

¶52 As instruction relies more and more on technology, the need for consideration of UD principles when applying technology becomes even more pronounced. Beyond the technological components, law libraries often house the professors and staff members who instruct students in the substance of the law, and these instructors must teach with UD principles applied throughout their courses and lessons. A subset of UD is a focus on universal design of instruction (UDI).101 An aspect of UDI is to use as little UD jargon as possible while explaining the UD principles to educators, understanding that simplistic changes are the easiest and most practical to implement.102 While UDI is instructor based, it is keyed toward creating an environment compatible with universal design for learning (UDL).103 UDL identifies the fundamental learning networks that

100. See Vivian Wang, Students in Wheelchairs Find Campus Inaccessible, YALE DAILY NEWS (Feb. 24, 2015), https://yaledailynews.com/blog/2015/02/24/wheelchair-accessibility-leaves-much-to-be-desired/ [https://perma.cc/Z6E7-JUEW] (often, the mere presence of an elevator is considered suitable, overlooking the effect that broken, slow, or locked elevators, as well as those inconveniently located, has on students who rely on the elevators to attend classes); see also Alejandra Velazquez, Inaccessible Buildings and Campus Culture Hurts Students with Disabilities, GW HATCHET (Mar. 8, 2018), https://www.gwhatchet.com/2018/03/08/inaccessible-buildings-and-campus-culture-hurts-students-with-disabilities/ [https://perma.cc/G4SB-VSFT] (elevators may be a convenience for most but are a requirement for others, and the failure of universities to provide adequate elevator service undermines a student's ability to succeed in school).

101. UDHE, supra note 5, at 39–41 (developed by the DO-IT Center, UDI explains UD principles to educators and provides best practices and checklists for creating a UD-based form of instruction, identifying specific learning environments and applying accommodations where the UD instruction “does not fully address the needs of a specific student”); see also id. at 38–39 (Universal Design for Instruction (UDforI) was developed by the Center on Postsecondary Education and Disability (CPED) at the University of Connecticut and added two UD principles that were narrowly tailored toward instruction in higher education; UDI took the suggestions of UDforI and fit instruction into the existing seven UD principles).

102. Teaching Engagement Program (TEP) at the Teaching and Learning Center, Universal Design in College Instruction, University of Oregon (2017), http://www.uco.es/aforac/media/recursos/Universal_Design_in_College/Instruction.pdf [https://perma.cc/JF9Z-5GDV] (UDI is meant to teach the faculty and instructors to effectively use UD to benefit the students, by creating a “framework to encourage faculty members to actively utilize and embed inclusive instructional practices into their courses”).

all students have to varying degrees, so that instructors are able to create courses that present information adequately for every student to understand and apply. By breaking down instruction in this way, instructors identify the what, how, and why of the information and create different formats by which that information is presented to students so that they can apply the information to their unique situations.

§53 Certain aspects of UDI are quite common and currently used in instruction. Recording lectures allows students with slower processing capabilities to reacquire the information enough times to understand it. Videos with closed captioning provide students with poor or no hearing with the text of the video, while the text and video together benefits visual learners. Allowing personal technology in the classroom has allowed all students to type notes and access documents digitally, as opposed to handwriting (a much slower process for almost all students) and bring all relevant materials in a digital rather than physical form (adding to weight and size of bags, which can be stressful for physically weaker students). Similarly, the increased ubiquity of e-textbooks has reduced the need to carry around heavy and awkward textbooks. Other aspects are not common but easily implemented: a specific agenda for each class helps students focus on the important parts of the lecture, modifiable assignment text can allow students to increase the text if needed, and nonwritten forms of assessment all have the capabilities (albeit with obvious, possible problems) to provide different and novel methods of reaching students’ differing network capabilities.

§54 Outside of the class, various impediments are beyond the instructor’s (and perhaps the law school’s) control. Classroom setup is often fixed, meaning that students with mobility issues may be unintentionally segregated due to their inability to reach certain seating. Acoustics and microphone capabilities will dictate how much students with hearing issues will be able to take in. Alternatively, a room without microphones is unlikely to have a voice-to-text translating capability, which would mitigate the audio concerns. These impediments stress that technology within the classroom must be sophisticated enough to provide different media options to reach different learning networks, as well as the obvious benefits of designing physical spaces with these and other UD considerations in mind. What should be clear by now is that UD does not present an all-cases solution but creates a flexible environment in which options are available so that students with various conditions or considerations will have the option to participate in the educational process.

104. Id.

105. See Kateri David, With No Alternative, In-Class Presentations Restrict Anxious Students, Daily Texan (Nov. 3, 2018), https://www.dailytexanonline.com/2018/11/03/with-no-alternative-in-class-presentations-restrict-anxious-students [https://perma.cc/2LW6-CFTJ] (most-common alternative to written projects are oral presentations, which require physical presence, projection, mental organization, and physical exertion, creating problems with students who fatigue easily, have speech impediments, or have anxiety concerns).
Informational Services

¶55 The transition to a more technological world invariably means movement toward a more digital world, which offers benefits and detriments unique to the forum. While the law school cannot ensure that all modes of information are accessible, digital materials are already more flexible for design changes than the physical or instructional venues. On the other hand, the ever-changing nature of technology means more vigilance is required to ensure new resources for information are usable for all those in the law school.

¶56 Computers have offered a tremendous opportunity for students with and without disabilities because of the flexibility and innovativeness inherent in computer programming. Resources discussed above (such as screen readers and text magnification) demonstrate how computer technology allows users to access information where previously such access was not allowed. Unfortunately the flip side of these tools are the expanding costs of integrating technology, exacerbated by the frequency with which technology is updated. Similarly, universities have been trending away from stationary computer labs because more students have their own portable computers. While this may place the burden back on the student to secure an accommodation, many institutions have taken UD principles to heart when reevaluating their computer options on campus or redesigning computer lab spaces. Without a strong computer presence at the law school, equitable access to information is all but impossible.

¶57 Regardless of how many computer labs or what other technological tools are available within the library, technology resources present two unique opportunities for the library staff. First, the library as holder of the law school’s technology has a tremendous amount of influence over what technology is purchased and used. Second, librarians are often the most knowledgeable about the technology and how to use it. The fact that much of the law school’s technological presence and knowhow reside in the law library means that law schools have a leg up on how to maximize the use of these tech-

nologies through UD principles applied to the library in a broad and culturally pervasive way. Furthermore, providing UD technology to the students through the library further perpetuates this culture throughout the legal education process, creating enhanced returns for years to come.

§58 Similarly, the law school’s website design must be useable for students to gain any benefit from the information available on the sites. Unfortunately, too many websites do not comply with the ADA, nor do they comply with best practices as outlined by UD organizations. While many websites fall short, the benefits of an accessible website mirror many of the benefits of accessibility in other areas discussed, but they more uniquely spread the law school’s resources and information to a far greater group of people. Not only does this help current students, but the accessibility of the website also ensures that potential students have an easier time accessing information, potentially expanding the pool of applicants. Many times, the website is the initial point of contact between a person and the law school, further demonstrating the benefits of increased accessibility for all users.

Conclusion

§59 While UD removes physical, digital, and instructional barriers so that all individuals are allowed to participate in a law school education, it does even more. UD as a term connotes inclusivity and comradery as opposed to the “otherness” implied in the current terminology—terms such as “accessible,” “accommodating,” and “compliant.” Universal design offers the key to not only increased access to legal education and legal knowledge but also a more fundamental shift in the perceptions and thinking that have plagued disability laws and design habits over the last 30 years.

§60 The types of UD features discussed throughout this article can be introduced into the law library gradually and in cost-effective ways. Such an approach allows more flexibility in implementing design features to see what works best for an institution’s library, which then can be applied to the institution itself. As this article demonstrates, there are tremendous legal, financial, and moral incentives to applying UD principles in the law school, and the law library provides the best venue for law schools to find what works best for the entire institution. It is vital that law schools and the larger legal community adopt UD to make the entire legal education process a model for the legal profession.


113. See Benefits of Web Accessibility, U.C. Berkeley, https://webaccess.berkeley.edu/web-accessibility-uc/benefits [https://perma.cc/3FMV-L95Z] (University of California at Berkeley demonstrates how universities have adopted and applied the benefits of an accessible website policy to benefit users and the institution).
Advancing Student Learning Experience: Peer Assessment in Advanced Legal Research Classes*

Dajiang Nie**

Peer assessment is widely used in K–12 and college education because of its important pedagogical benefits in improving student learning, but current advanced legal research courses lack this element. The inclusion of peer assessment in advanced legal research courses is a necessary and practical way to improve student learning.

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Introduction

¶1 K–12 and higher education have used peer assessment extensively over the past decade to improve student learning.1 While educators widely recognize the distinct pedagogical values of peer assessment, the nature of peer assessment and the unique environment of law schools make it difficult to integrate traditional peer-assessment activities into advanced legal research (ALR) courses. However, the substantial impact on student learning of peer assessment and the recent shifts in learning goals across law schools have prompted instructors to explore new ways to incorporate peer assessment into ALR curricula.

¶2 This article argues that a genuine need exists for embedding peer assessment in ALR courses. It presents a new approach to accomplishing this goal, offers a possible framework for implementing peer assessment in ALR courses, and discusses several practical considerations for its application.

¶3 This article begins by defining peer assessment for use in ALR courses. After next discussing why ALR courses should include peer assessment, it proposes a framework for peer assessment that can be incorporated into an ALR course. The next part of the article analyzes four key aspects in applying peer assessment in ALR courses. In particular, ALR instructors need to prepare with comprehensive rubrics and tailored questions so that students can participate in a small group anonymously at each peer assessment. The article concludes by encouraging instructors to diligently design peer-assessment activities in ALR courses to improve student learning.

Peer Assessment

¶4 Scholars have defined peer assessment in various ways over the past two decades. Some define the term broadly. For example, Keith Topping defines peer assessment as “an arrangement for learners to consider and specify the level, value, or quality of a product or performance of other equal-status learners.”2 A more recent definition of peer assessment is “students judging and making decisions about the work of their fellow students against criteria.”3

¶5 Under those broad definitions, peer assessment is an “umbrella term”4 that typically includes a set of peer-assessment activities.5 These activities vary depending on the

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level of student involvement and responsibility, assessed products, and instructors’ learning objectives. As a result, peer assessment is a learning process that includes three main activities: peer feedback, peer grading, and peer evaluation.

Peer feedback, or peer review, is when “students engage in reflective criticism of the work or performance of other students using previously identified criteria and supply feedback to them.” Peer feedback focuses on learning from peers’ work and providing feedback under the guidance of faculty.

In peer grading, or peer marking, learners review and grade fellows’ work against related criteria, usually generating a numeric grade. These grades are later merged into a single consensus and eventually become part of students’ final grades. The theory of peer grading in education has been abundantly developed to date. Although peer grading focuses on scoring, it often includes the component of feedback.

Peer evaluation takes a step further by requiring students to create criteria for peer feedback and peer grading, in addition to engaging them in peer-feedback and peer-grading activities. It is the most sophisticated peer-assessment activity since students do not merely exercise evaluation skills by checking and critiquing peers’ work. Instead, participating students create new rubrics. However, peer evaluation is not discussed in this article because it is less feasible in most ALR courses. Creating rubrics is time-consuming and may distract students’ attention from the practice-based legal research skills. Though it may be a valuable option in K–12 and college education, it is not a solid choice in ALR programs in law schools.

Note that some researchers treat the term “peer assessment” as a synonym for both peer grading and peer review. Other scholars equate peer assessment with peer-

7. Topping, supra note 2, at 21.
8. Tara Storjohann et al., Evaluation of Peer-Graded Assignments in a Skills-Based Course Sequence, 5 Currents in Pharmacy Teaching & Learning 283, 283 (2013).
15. Luo et al., supra note 12.
17. See Benjamin S. Bloom et al., A Taxonomy for Learning, Teaching, and Assessing: A Revision of Bloom’s Taxonomy of Educational Objectives 31 (Lorin W. Anderson et al. eds., 2001) (creating and evaluation are the two final cognitive steps of learning process).
grading.\textsuperscript{19} However, peer grading and peer review are subset concepts of peer assessment, and we should not confuse one term for another.\textsuperscript{20}

\textsuperscript{¶}10 This article adopts Topping's broad definition of peer assessment,\textsuperscript{21} and limits the peer assessment-activities to peer grading and peer feedback. It further interprets “peers” as equal-status learners. In other words, “peers” are students in the same ALR class.\textsuperscript{22} Therefore, the term “peers” excludes peer tutors who often have advanced knowledge and skills,\textsuperscript{23} yet are not currently enrolled in the ALR course.

\textbf{Reasons for Adopting Peer Assessments in ALR Courses}

\textbf{ABA Standard 314}

\textsuperscript{¶}11 ALR instructors can use peer assessment to meet the formative assessment requirements of American Bar Association (ABA) Standard 314.\textsuperscript{24} The American Bar Association states, “[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.”\textsuperscript{25} It also explains that a law school instructor “need not apply multiple assessment methods in any particular course.”\textsuperscript{26} Consequently, ABA Standard 314 requires instructors to use at least one of the formative and summative assessment methods in ALR courses\textsuperscript{27} to measure student learning, to improve student learning, and to provide meaningful feedback to students.

\textsuperscript{¶}12 ABA Standard 314 defines formative and summative assessments this way:

Formative assessment methods are measurements at different points during a particular course or at different points over the span of a student's education that provide meaningful feedback to improve student learning. Summative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student's legal education that measure the degree of student learning.\textsuperscript{28}

The fundamental difference between formative assessment and summative assessment


\textsuperscript{20.} Lu & Law, \textit{supra} note 18.

\textsuperscript{21.} Topping, \textit{supra} note 2.

\textsuperscript{22.} \textit{Id.} at 21.


\textsuperscript{24.} See Ross & Donahoe, \textit{supra} note 9, at 672–73.


\textsuperscript{26.} \textit{Id.}

\textsuperscript{27.} \textit{ABA, Managing Director’s Guidance Memo: Standards 301, 302, 314 & 315}, at 5 (2015) [hereinafter Managing Director’s Guidance Memo].

\textsuperscript{28.} ABA \textit{Standards}, \textit{supra} note 25.
is that they have different goals. Formative assessment seeks to improve student learning by offering students intermediate feedback during the learning process. Summative assessment concentrates on certification by testing and measuring whether students can apply knowledge and skills to satisfy learning outcomes. Formative assessment is generally either low-stakes or no-stakes. Formative assessments can be any activities involving frequent tests and timely and meaningful feedback to improve student learning. Examples of formative assessment include weekly assignments and feedback on students’ paper drafts. In contrast, summative assessment is typically high-stakes assessments, such as final exams. Summative assessment usually dominates higher education, including traditional law school curriculums. Peer assessment can be summative or formative, depending on the purpose of assessment designed by faculty. If a faculty asks students to grade peers’ work to contribute substantially to students’ final grades, this is summative peer assessment. More specifically, it is summative peer grading because this peer grading is a one-time assessment rather than assessments “at different points of” the course. Also, because students grade colleagues’ final exams, it is a high-stakes measurement of student learning at the “culmination” of the course. Due to the high-stakes nature of summative assessment, it is unlikely to be incorporated into law school ALR courses.

Peer assessment is recognized as one of the primary activities of formative assessment. Peer assessment is a formative assessment if a faculty uses low-stakes and

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40. *Id.*

41. See discussion *infra* pp. 381–84 (A Framework for Peer Assessment in ALR Courses).

frequent peer-assessment activities with the intent to “provide meaningful feedback to students,” 43 “identify their strengths and weaknesses,” 44 “develop metacognitive and professional skills,” 45 and ultimately measure and improve student learning. 46 Examples of formative peer assessment include peer grading of weekly assignments and peer feedback on research journals. Therefore, instructors can use formative assessment within ALR courses, 47 and should use it as a primary assessment tool. 48

¶ 14 Since peer assessment can be a formative assessment method, academic law librarians can use it as an assessment tool in ALR courses to comply with ABA Standard 314.

Pedagogy Benefits

¶ 15 Many studies have demonstrated the benefits of peer assessment in improving student learning, showing that “[p]eer assessment can be successful in any discipline area and at any level.” 49 Peer assessment centers on boosting student learning through offering feedback in peer-assessment activities. 50 Feedback, which is also the core component of formative assessment, generally serves five functions: to confirm learned information, to add new information, to correct wrongful information, to tune information, and to restructure learning information when necessary. 51 In peer assessment, both assessors and assessees can benefit: 52 assessors learn by providing qualitative feedback to assessees and may compare assessees’ work in grading activities, 53 and assessees receive feedback from assessors.

¶ 16 In addition to these feedback functions from formative assessment, peer assessment offers extra unique educational merits to support student learning. 54 First, students become responsible for their own learning. 55 Producing feedback is not easy, 56 because offering feedback in peer assessment requires that assessors have a deeper

43. ABA Standards, supra note 25.
44. Topping, supra note 2, at 20.
45. Id.
46. ABA Standards, supra note 25; Ross & Donahoe, supra note 9, at 672–73.
48. Id. at 256.
50. See Lu & Law, supra note 18, at 260–61.
52. Yun Xiao & Robert Lucking, The Impact of Two Types of Peer Assessment on Students’ Performance and Satisfaction Within a Wiki Environment, 11 Internet & Higher Educ. 186, 186 (2008).
55. Ross & Donahoe, supra note 9, at 672–73.
understanding of learned knowledge and skills. Simply remembering, understanding, and applying learned skills are not enough to deliver feedback to peers. Peer assessment asks students to critique and comment on the work of others to engage in those cognitive skills, so that assessors are more involved in the learning process.

¶ 17 Second, peer assessment can improve students’ awareness of learning objectives. Students need to clearly understand “where to go” and “where they are” in the learning process. The question of “where to go” indicates the learning outcomes of a specific course. The question of “where they are” denotes students’ current performance. ABA Standard 302 lists the requirement of learning outcomes for a law school class. In addition, ABA mandates that the learning outcomes of a specific course should have “clear and concise statements” of knowledge, skills, and values. Even though modern pedagogy has well-developed theories of drafting learning outcomes, the carefully polished learning objectives on a course syllabus may still be too abstract for students. Peer assessment makes abstract learning outcomes more concrete, as students evaluate peers’ work in terms of various qualities. They become able to identify the differences between low-quality and high-quality work. This process, in turn, helps assessors to gain a better understanding of learning outcomes and their own performance.

¶ 18 Peer assessment also helps students to develop analytical and evaluative skills. A basic expectation of attorneys is that they can effectively analyze their own work and other lawyers’ work. Feedback in peer assessment is more than merely marking right and wrong answers because assessors need to justify the grading by generating corresponding explanations. Therefore, an assessor needs to use the vehicle of analysis and criticism in peer-assessment activities to produce feedback to an assessee. Those skills learned in peer assessment provide lifelong benefit to learners because the skills transfer to future professional law practice settings.

¶ 19 Finally, peer assessment promotes self-learning. In peer assessment, students have the opportunity to assess and provide meaningful feedback on both poor and good work. By assessing poor work, students may identify errors that they have not experienced. By evaluating qualitative work, students gain a more intuitive sense of good work. After assessing peers’ work, the assessing skills learned from peer assessment also help assessors evaluate their own work.

57. See Bloom et al., supra note 17.
58. Ross & Donahoe, supra note 9, at 665.
59. ABA Standards, supra note 25, at 17.
61. Garcia-Martinez et al., supra note 18.
62. See Reinholz, supra note 4, at 306.
66. Topping, supra note 2.
67. Elizabeth M. Bloom, A Law School Game Changer: (Trans)formative Feedback, 41 Ohio N.U. L.
No Violation of FERPA

¶20 When students access and review peers’ work by participating in peer-assessment activities, a potential Family Educational Rights and Privacy Act (FERPA) issue arises. Under FERPA, if an educational institution has a “policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information…) of students without the written consent of their parents,” the federal funds to this institution will be terminated. Even if the non-disclosure provisions of FERPA “create no rights enforceable,” any educational agency or institution that receives federal funding is subject to FERPA regulation. FERPA defines educational records, with some exceptions, as “records, files, documents, and other materials which contain information directly related to the student and are maintained by an educational agency or institution or by a person acting for such agency or institution.” As a result, it is necessary to examine whether materials of peer grading and peer-feedback activities are the education records protected by FERPA before applying peer assessment in ALR courses.

¶21 When properly arranged, peer grading does not violate FERPA. In Owasso Independent School District No. I-011 v. Falvo, the U.S. Supreme Court held “grades on students’ papers would not be covered under FERPA” before teachers collect and record them because peer-graded papers are not “maintained” within the definition of education records, nor are the student graders “acting for” the school. Consequently, federal regulations reflect this decision by adding “grades on peer-graded papers before they are collected and recorded by a teacher” as an exception of FERPA education records. Because of the Court’s explicit ruling, even though the Court refused to decide whether FERPA protects grades from peer-grading activities right after grades are returned to teachers, peer-grading activities do not violate FERPA. Even if the instructor later shares peer-graded work with students after the instructor records those grades, as long as the papers are properly de-identified, such release does not breach FERPA either.

¶22 Peer feedback does not violate FERPA either. Peer feedback and peer grading are similar in some respects. Both of them require students to exchange and review

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68. 20 U.S.C. § 1232g(b)(1).
70. 20 U.S.C. § 1232g(a)(3).
73. Id. at 436.
74. Id. at 433.
75. Id. at 433–34.
76. 34 C.F.R. § 99.3.
77. Falvo, 534 U.S. at 436.
78. 34 C.F.R. § 99.31(b)(1).

their work with each other. Also, in many cases, peer grading includes elements of peer feedback. However, the products of peer feedback and peer grading are different. In a peer-grading activity, students grade the work of others, while in a peer-feedback activity, students provide feedback on the work of others. Such a distinction leads to an inherent difference between them in the sense of FERPA. The grades from peer grading ultimately become educational records protected by FERPA because those grades are eventually “maintained” by the institution in “a single central custodian, such as a registrar” or “in a filing cabinet in a records room at the school or on a permanent secure database.” In contrast, an institution or instructor is unlikely to maintain the student-generated feedback of peer-feedback activities in such a manner. Also, like peer grading, assessors are not “acting for” the law school in peer-feedback activities because assessors are simply “follow[ing] their teacher’s direction” to provide feedback to peers, which is also part of the homework. Peer feedback is therefore unlikely to become an education record protected by FERPA.

Because both peer grading and peer feedback are not violations of FERPA, the superordinate term used in this article, peer assessment, does not violate FERPA either.

Current ALR Courses Lacking Peer Assessment

Legal research is a fundamental lawyering skill. However, because legal research is “highly complex,” conducting legal research generally plagues law students and new attorneys. Even though students learn the legal search in the first year of law school education, they have acquired only “survival skills” rather than “real legal research” skills because of the limited time in 1L legal research instruction. Therefore, ALR courses are the only genuine vehicle to enhance students’ legal research skills, and this is why most law schools offer ALR courses. More important, 2L and 3L students have spontaneous incentives to learn legal research in ALR courses. They have already had

79. Falvo, 534 U.S. at 435.
80. Id. at 433.
81. Id. at 433–34.
82. Id. at 433.
84. Brooke J. Bowman, Researching Across the Curriculum: The Road Must Continue Beyond the First Year, 61 OKLA. L. REV. 503, 538 (2008).
87. Id. (1L legal research usually has less than 10 hours of instruction).
88. Berring & Vanden Heuvel, supra note 64, at 441.
firsthand legal research experience in the real legal professional settings in their summer jobs, where they saw their incompetence in legal research.90

¶25 However, many ALR instructors fail to advance students’ legal research learning by offering them the opportunity to solve practical problems and assess their own performance.91 ALR instructors should naturally and routinely use formative assessments to lead students through the legal research learning cycle by explaining the content of legal research materials, demonstrating the utilization of materials, and having students exercise learned skills through exercises and assignments.92 However, only slightly more than half of the ALR courses employ frequent homework assignments.93 Summative assessment still dominates ALR courses. Twenty percent of ALR courses use formal exams, most of which weigh at least 50 percent of the final grades of students.94 Most ALR courses have major projects, which account for more than 50 percent of students’ final grades.95 Similar to formal exams, even if those major projects’ formats vary,96 they are still the traditional law school summative assessments focusing on measuring rather than learning. In addition, those ALR assessments are scored and commented on by ALR instructors rather than by peer students. As a result, students lack opportunities to review, evaluate, and compare peers’ work, thereby losing the valuable opportunity to enjoy the pedagogical benefits of peer assessment as they progress through the ALR curricula.

¶26 Traditional peer grading has never been an option for law school curricula, including ALR courses. The reason for this is simple: grades mean too much for law students. Grades are a “snowball” for law students because they open and close the door of so many valuable opportunities for law students within the law school.99 Grades also dominate hiring decisions in the legal profession.100 Because grades carry such a high stake to law students, students naturally expect the grades are fair and accurate. Legal employers have the same expectation for law school grades because grades “define marketability.”101
As a result, students’ grades in law school must have two attributes: reliability and validity. It means grades should meet consistent standards and accurately reflect student performance. It can be challenging for law faculty to achieve both of these two goals in the grading process, let alone having students grade peers’ work. Peer grading essentially asks students to grade each other’s work for learning purposes. Consequently, the absence or inadequacy of reliability and validity is the primary ground for law students and faculty to resist peer grading. Moreover, when law schools have a tradition in which experts assess and grade, law students will inevitably question the credibility and expertise of peers in peer grading. A similar argument is that peer grading is not operational because weaker students are not qualified to grade top students.

Another issue regarding grade accuracy and reliability is that peer grading can be influenced by bias and unfairness coming from law students. Students have to compete in these courses when grades are important, especially when many ALR courses have a mandatory grade curve under the law school grading policy. When assessors grade peers’ assignments, they know that such grades will eventually affect their own final grades due to the mandatory curve. Thus, besides grading fairly and strictly complying with the grading rubric provided by the instructor, assessors have an incentive to choose other grading strategies to increase the possibility of getting a high score themselves in a peer-grading activity. For example, they may deliberately inflate the grade and expect other graders will return the favor in the future. They may also deliberately lower others’ grades to increase their own advantage on the grading curve. Or they can choose tit for tat. Even if these actions are patently violations of the honor code, it is difficult for an ALR instructor or the honor council to verify the cause of such unethical grading strategies. Some students may intentionally choose those grading strategies to increase their own advantage on the grading curve.

104. Luo et al., supra note 12; García-Martínez et al., supra note 18.
108. See Stefano Baiti et al., Peer Review and Competition in the Art Exhibition Game, 113 PNAS 8414 (2016) (in an experiment, each reviewer graded peers’ work, and the work with the highest grade was selected for publishing; most reviewers followed a similar grading strategy by assigning the lowest grade to each peer’s work).
109. Alfaro & Shavlovsky, supra note 13, at 5, 8.
111. Id. (the honor council will make decision based on “clear and convincing evidence” and may find a violation based on a student’s mental fault).
strategies for the purpose of unfair academic advantage.\(^{112}\) In contrast, others may inadvertently give universal high grades or low grades to peers simply because they are not good at peer grading.

\(^{29}\) All those factors potentially undermine the reliability and validity of peer grades, so law school has a strong preference favoring ALR instructors to grade students' work, thus preventing instructors from applying peer grading as a supplemental assessment tool. There are many studies in the past decade focusing on improving the validity and reliability of peer grading. These studies broadly take several directions: to grade peers anonymously,\(^ {113}\) to offer an incentive for excellent peer grading,\(^ {114}\) to apply rigorous faculty-supervised peer grading,\(^ {115}\) and to take the median grade from multiple peer gradings.\(^ {116}\) These techniques may be effective in undergraduate and graduate education, but each of them leads to other issues. For example, faculty have to spend significant time outside the classroom to closely monitor peer grading or simultaneously manage multiple peer grading. Awarding extra points for good peer grading, in turn, raises the issue of fairness, which is also sensitive in law schools. More important, none of these measures address the core issue of peer grading in law school, whereby grades are too important to law students. Because of this fundamental reason, ALR instructors do not enthusiastically embrace traditional peer grading even if those peer-grading techniques are available. Such reality essentially places all responsibility for grading student work on the law faculty, so peer grading is naturally excluded from the ALR assessment.

\(^{30}\) ALR courses also lack peer-feedback elements. ALR courses are fundamentally one of the skill-based courses, so many ALR courses use in-class exercises and out-of-class assignments to reinforce students' acquired knowledge and skills.\(^ {117}\) However, these exercises and assignments focus on remembering, understanding, and applying learned skills. They do not go further by asking students to critique and evaluate each other's legal research.\(^ {118}\) Even in popular flipped ALR courses that use a large portion of class time to require students to do in-class exercises,\(^ {119}\) the peer-feedback element is similarly lacking in these exercises. A more realistic reason is law students expect to find "the easiest and quickest path" to complete their legal research tasks.\(^ {120}\) Therefore,

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112. *Id.* (those actions are "unfair academic advantage").
117. See ALL-SIS SURVEY, *supra* note 89, at 25 (in-class exercise and assignments out of class are the top two assignments in ALR).
118. See BLOOM ET AL., *supra* note 17.
120. Bowman, *supra* note 84, at 540.
they take for granted that the answer and the feedback from instructors is the only way to meet such an expectation.

¶31 It is true when students practice in-class exercises in ALR courses that they share each other’s research paths. However, sharing information about the research is not peer feedback because students do not evaluate the strengths and weaknesses of each other’s work. Instead, students simply check to see whether they have taken similar approaches to find the same resources. Furthermore, it is unreasonable to ask students to comment on their peers’ research at this premature stage when students have just learned the relevant research knowledge and skills, especially when some may not even fully understand these skills.

¶32 The structure of current ALR courses also discourages peer feedback on homework assignments. Primarily, ALR students cannot access peers’ out-of-class assignments, share their answers to them, or comment on their answers. When students work on out-of-class assignments, even talking about the research with classmates without the instructor’s authorization may violate the honor code. In addition, if an ALR instructor allows students to comment on peers’ research within the classroom, these activities will inevitably take up valuable class time.

¶33 In a nutshell, the current ALR curricula do not favor peer grading and peer feedback, even though peer assessment holds great potential for improving student learning. Therefore, to apply peer assessment in ALR courses, it is necessary to adjust the traditional structure of peer assessment and ALR courses accordingly.

A Framework for Peer Assessment in ALR Courses

¶34 This article proposes a new framework for peer assessment in ALR courses: outside the classroom and with the instructor’s support, assessors use out-of-class assignments completed by asseeseees to provide feedback on peers’ research process, supplemented by exercises of peer grading. The peer grading here is a process of ranking peers’ work based on the quality of the research process, rather than assigning a numerical grade to each peer. The instructor assesses the quality of the feedback and rank provided by assessors, which eventually become part of the assessor’s participation grades, not the assessee’s grades.

Instructor Support

¶35 This framework requires faculty to provide support for peer-assessment activities. Teachers usually “scaffold” peer-assessment activities, first modeling the activities themselves and then gradually offering less and less support as students become familiar with these assessment tools. Faculty, at a minimum, should provide assessors with

121. See Falchikov, supra note 10.
122. E.g., TTU Honor Code, supra note 110 (it defines those actions as “improper collaboration”).
123. Reinholz, supra note 4, at 303.
the necessary training,\textsuperscript{124} explain in detail the rationale and usage of rubrics,\textsuperscript{125} and timely answer questions during the process of students’ practicing peer assessments.

**Out-of-Class Approach**

\textsuperscript{¶36} Peer-assessment activities occur outside of the classroom for several reasons. First, such an approach leaves valuable class time undisturbed. Second, instructors avoid course-time management problems stemming from different assessors spending different amounts of time on the same peer assessment. Such a scenario is easily imagined given that assessors could find peers’ answers different from those provided by the instructor, making it necessary to test peers’ research process before giving meaningful feedback. Third, working outside the classroom gives students a more “psychologically safe” environment to engage in peer assessment,\textsuperscript{126} assessors are not distracted by “assessor anxiety” when evaluating peers’ work.\textsuperscript{127}

\textsuperscript{¶37} Basing peer-assessment activities on out-of-classroom assignments makes sense when we consider in-class versus out-of-class learning goals. Because students have just learned new legal research skills, the primary educational goals of in-class exercises focus on the lower-level cognitive skills in the learning process, including memorization, comprehension, and application of learned skills.\textsuperscript{128} The in-class exercises are not designed to improve students’ higher-order cognitive skills, such as analysis and evaluation.\textsuperscript{129} Since out-of-class assignments are usually longer and more complex than in-class exercises, completing such assignments reinforces students’ lower-level cognitive skills. Therefore, it makes more sense to engage students in peer assessment to improve their higher-level cognitive skills in the learning process only after they are well prepared with lower-order cognitive skills.

**Peer Feedback**

\textsuperscript{¶38} Peer feedback is the center of peer assessment in ALR courses. The peer assessment offers all of the benefits of formative assessments.\textsuperscript{130} It also has unique and extensively positive pedagogical impacts on students’ learning.\textsuperscript{131} These make peer feedback a key player in peer assessment in ALR courses.

**Peer Grading**

\textsuperscript{¶39} Peer assessment in ALR courses should include peer grading. Research suggests peer feedback that incorporates elements of peer grading has a positive impact on

\begin{thebibliography}{99}
\bibitem{124} Lu & Law, \textit{supra} note 18, at 272; see discussion \textit{infra} pp. 384–88 (Effective Rubrics).
\bibitem{125} Ross & Donahoe, \textit{supra} note 9, at 682; Alfaro & Shavlovsky, \textit{supra} note 16, at 5; Bloom, \textit{supra} note 67; see discussion \textit{infra} pp. 24–29 (Effective Rubrics).
\bibitem{126} Nanine A.E. Van Gennip et al., \textit{Peer Assessment for Learning from a Social Perspective: The Influence of Interpersonal Variables and Structural Features}, 4 EDUC. RSCH. REV 41, 43 (2009).
\bibitem{127} Cartney, \textit{supra} note 67, at 555.
\bibitem{128} See \textit{Bloom et al., supra} note 17.
\bibitem{129} See \textit{id}.
\bibitem{130} See discussion \textit{supra} at pp. 374–75 (Pedagogy Benefits).
\bibitem{131} See \textit{id}.
\end{thebibliography}
student learning. Assessors can develop a more conscious perception of their own performance in the process of peer grading. As a result, although faculty and students in ALR courses may spontaneously resist peer grading, peer assessment in ALR courses should not eschew peer grading, in order to optimize the student learning experience. Of course, peer grading should be carefully accommodated to fit into the ALR curricula.

¶40 The peer grading in this framework includes elements of both ordinal grading and cardinal grading. The traditional peer grading is cardinal grading, where the final product of an assessor is a numerical score of a peer’s work. The ordinal peer grading recently proposed by researchers goes a step further by asking students to rank the work of their peers. It means assessors in ordinal peer grading will rank peers’ work in order as the final product of peer-grading activities, based on the cardinal grades. Students will spontaneously spend additional time checking the best work and the worst work during the ranking process. This approach highlights the component of “comparison,” thereby giving assessors a second chance to “see the strengths and flaws” of the different research processes to the same legal research task. Moreover, such a ranking approach places no extra burden on assessors because they already have the numerical scores needed for ranking.

¶41 The peer grading here, along with peer feedback, affects only the participation grades of assessors, not the scores of assessees. It is common that students lack interest in actively participating in peer-assessment activities, while the least-motivated students may benefit most from such assessments. Therefore, peer assessments in ALR courses should carry a more pragmatic incentive to direct students to treat these activities seriously. It is not enough to motivate them by merely explaining the positive educational benefits of peer assessment. The key incentive is the assessor’s own grade. It gives an assessor an intrinsic incentive to perform diligently in grading and providing feedback when her grade is contingent on her performance in peer-assessment activities.

¶42 Because peer assessment affects only assessors’ grades, this framework mitigates the competitive nature of regular peer grading. More specifically, it eliminates the

133. Liu & Carless, supra note 19, at 287.
135. Holston & Wilkins, supra note 19, at 1–2.
138. Liu & Carless, supra note 19, at 287.
141. See Angelo & Cross, supra note 139; see also Silverstein, supra note 100, at 561.
incentive of assessors to deviate from the grading rubric by intentionally giving a peer an unreasonably high or low grade.\footnote{142} Additionally, since participation grades in ALR courses usually constitute a small percentage of students’ final grades,\footnote{143} such a framework would not significantly affect an assessor’s own final grade either, unless the assessor was severely uninvolved in peer-assessment activities. Such low-stakes assessment focusing on promoting learning guarantees its formative assessment nature. This framework reduces the workload of ALR instructors as well because they do not have to explore and test existing research to find a superior approach that can improve the validity and reliability of peer grading for ALR courses.

\textbf{Instructor Grading and Feedback}

\footnote{144} It is important to note that this framework is not a substitute for grading and feedback provided by ALR instructors.\footnote{145} Instead, the purpose of this framework is to provide ALR instructors an alternative assessment tool with which to advance students’ legal research learning. Instructors are still responsible for marking and providing authoritative feedback on regular out-of-class assignments to each student. Instructor-generated grades, not student assessor-produced grades, still determine students’ final grades. After all, the competitive nature of law schools forbids ALR instructors from delegating these sensitive and important responsibilities to students.

\textbf{Implementing This Framework in ALR Courses}

\footnote{146} Having established the framework for peer assessment in ALR courses, it is necessary to polish the details of this framework for its successful deployment, including effective rubrics, tailored questions, timely small-group participation, and anonymity.

\textbf{Effective Rubrics}

\footnote{147} “[C]oncrete rubrics” are the soul of scaffolded peer assessment.\footnote{148} A rubric is a short document for an assignment that has “criteria and describes varying levels of quality, from excellent to poor.”\footnote{149} A good rubric is a teaching tool\footnote{150} that helps students understand the learning goals. It is also an assessment tool,\footnote{151} assisting students in

\begin{footnotes}
\item[142] Liu & Carless, supra note 19, at 287.
\item[143] ALL-SIS REPORT, supra note 94.
\item[144] See Andrew Noble, Formative Peer Review: Promoting Interactive, Reflective Learning, or the Blind Leading the Blind?, 94 U. Det. Mercy L. Rev. 441, 446 (2017).
\item[145] See Ross & Donahoe, supra note 9, at 680.
\item[146] Heidi Andrade & Anna Valtcheva, Promoting Learning and Achievement Through Self-Assessment, 48 Theory Into Prac. 12, 13 (2009).
\item[147] Id.
\item[148] Id.
\end{footnotes}
learning how to achieve those goals through peer assessment. Instructors can control peer assessments by designing evaluation criteria and instructions of the rubric.

Faculty plays a key role in improving students’ performance in the learning process, which is impossible without a clear performance standard. However, even though pedagogical theory provides well-structured guidance on the formulation of learning objectives, the complexity of teaching often makes it difficult for students to understand the carefully drafted learning objectives on the syllabus. Rubrics illustrate the abstract, overly broad learning objectives and give students concrete classifications to use in assessing work of varying quality. Failing to provide students with evaluation criteria potentially forces them to guess about the strengths and weaknesses of their peers’ work. Such “hid[ing] the ball” deprives peer assessment of its pedagogical advantage.

Peer-assessment rubrics also give assessors a clear picture of how an instructor evaluates student performance. In this peer-assessment framework, two types of faculty grading on student academic performance influence students’ final grades. One is instructors’ grading of the regular research assignments completed by every student, and the other is instructors’ grading of the performance of the assessor in peer-assessment activities. Faculty can use the same rubric to assess students’ performance in both activities. Even better, the rubrics used by faculty are exactly the same as those used by assessors in peer assessment. In this way, the same rubrics help students complete their peer-assessment activities and understand the instructors’ grading criteria.

For these reasons, rubrics of peer assessment should include learning objectives and the criteria for evaluating those objectives. The learning objects should describe “something students do.” The evaluation criteria should be specific enough so that “students’ performance can be monitored and measured,” meaning that peer-assessment rubrics should be “hot rubric[s],” rather than “cold rubric[s].” A cold rubric lists only learning objectives. These rubrics can help an instructor design an

150. Ross & Donahoe, supra note 9, at 681.
152. See generally Bloom et al., supra note 17.
153. Reinholz, supra note 4, at 303.
155. Shaw & Vanzandt, supra note 102, at 118; see Gerdy, supra note 91, at 76.
156. Gerdy, supra note 91, at 73–74.
158. Id. at 129.
159. See id.
160. Shaw & Vanzandt, supra note 102, at 118.
161. Id. at 141.
assessment, so they are useful tools for preliminary course design. However, a cold rubric does not include the different levels of achievement or a description of each level of achievement, which is necessary to evaluate learning outcomes. In contrast, along with evaluation dimensions, hot rubrics also “set forth the observable evidence that would establish each quality level for each dimension.”

¶49 The hot rubric for a self-assessment activity should be available to all students, including assesses who do not participate in peer assessment. “[M]erely providing the rubric to students” may help all, be they assessors or assesses. Once students learn how to use a rubric to evaluate a piece of work, they can improve self-learning by independently using rubrics to evaluate whether their own research meets the criteria of each learning objective.

¶50 To ensure the fairness and equitability of a peer assessment, the learning objectives and their criteria in the rubrics should be closely aligned with the peer assessment. For example, in a rubric for peer assessment about citators, one of the learning objectives is to validate a case using Lexis+ Shepard’s. The detailed criteria to assess this learning goal may include “locate Shepard’s report in Lexis+,” “explain the Shepard’s signal, if any,” “explain how this case is treated by other cases,” “select proper jurisdiction,” and “select proper publication status of citing cases.” In contrast, this rubric should not include irrelevant learning objectives and related criteria, such as designing a research plan or using Boolean search.

¶51 Rubrics of peer assessment should also give students clear instructions on how to provide peer feedback. It does not mean that instructors have to teach students to provide faculty-generated feedback because this rubric is designed for helping students to learn, not to teach. As a result, the rubric’s instruction should avoid “affective feedback” and instead focus on “cognitive feedback.” Affective feedback comments by using criticism, praise, or similar approaches. Affective feedback certainly contributes to student learning, but faculty feedback is the proper vehicle to deliver such feedback. In contrast, cognitive feedback focuses on identifying specific problems, providing suggestions and explanations, and pinpointing the sources. Students can improve their learning of legal research by providing cognitive feedback. The rubric criteria for peer assessments need not be as specific as asking students to use a template to organize sentences or meet

162. Id.
163. Id. at 118.
164. Id. at 142.
165. Field, supra note 149; Andrade & Valtcheva, supra note 146, at 14.
166. See Margaret Butler, Resource-Based Learning and Course Design: A Brief Theoretical Overview and Practical Suggestions, 104 LAW LIBR. J. 219, 241, 2012 LAW LIBR. J. 19, ¶ 56.
167. Reinholz, supra note 4, at 307.
169. Id.
170. Id. at 380–81.
a certain word count when providing feedback. Short on-point cognitive feedback can ensure that students find a balance between providing meaningful feedback and investing a reasonable amount of time in peer assessment.

¶52 When, for example, a peer assessor finds that an assessee has incorrectly identified the processing order of multiple connectors in a Westlaw Boolean search, the rubric should help the assessor respond to these errors by marking the incorrect answer, explaining the correct processing order, explaining the results of processing the respondent’s incorrect answer, and directing the respondent to course materials, such as “Slide 7 Page 7.”173 The rubric should not lead assessors to give didactic comments, such as “good job” or “you are so close.”

¶53 An instructor also needs to prepare model answers to help assessors use rubrics more effectively. Model answers indicate the best research process for the “best authority.”174 They help assessors more easily assess the work of their peers because assessors can easily identify assessee’s answers that differ from the model answers. Even peer answers that are identical to the model answers are more likely to include only a good-enough research process for only “good enough’ authority.”175 In response, assessors can make additional efforts to give feedback based on the guidance of rubrics.

¶54 Using rubrics effectively also requires training from ALR instructors prior to the start of peer-assessment activities.176 During the training, instructors can add more value to students’ learning process by using sample answers to illustrate how to use rubrics to evaluate peers’ work and provide meaningful feedback.177 It is a mistake to assume that the rubrics are self-explanatory or that law students do not need such basic training; inevitably some students, and sometimes most students, will need such training.178 Assuming that each out-of-class assignment will have a corresponding peer assessment, each assessor will participate in essentially two assessments: the traditional out-of-course assignment and the accompanying peer assessment.179 Such a situation is likely to arise: an assessor excelling in the regular assignment will also outperform others in the peer assessment, while an assessor struggling in the regular assignment is more likely to perform worse than others in the peer review. Training is the key to solving this challenge, as it helps most students become competent in evaluating peers’ work and offering feedback.180

¶55 As a result, instructors need to share sample answers of varying quality to show students how those answers meet or fail to meet evaluation criteria. Depending on the time commitments of instructors, there are different approaches to provide such training. Instructors can give a one-time short in-class demonstration to all students at

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173. See Nicol & Macfarlane-Dick, supra note 154.
174. Bowman, supra note 84, at 541.
175. Id.
176. Raman & Joachims, supra note 134, at 1044.
177. See Ross & Donahoe, supra note 9, at 681.
178. Gerdy, supra note 91, at 76.
179. Of course, the student assessee will not participate in the peer grading.
180. See Alfaro & Shavlovsky, supra note 13, at 5.
the beginning of the semester. They can also distribute those materials and ask students to review them on their own. Instructors can even conduct such training out of class in small-group meetings with students.

**Tailored Questions**

§56 ALR instructors should also adjust the out-of-class assignments by, at a minimum, “carefully crafting the prompt.” Instructors are responsible for leading students to achieve the designed learning objectives through carefully framed peer assessments. Skills courses focus on both process and final products. Legal research is not an exception, and it heavilyfocuses on the research process. The final legal research product is important; it is, after all, the ultimate goal of legal search. But when it comes to students’ legal research learning process, it is even more important to ensure that they have a sound search process. Therefore, many legal research instructors apply Rombauer’s method of legal research or a similar process-based legal research teaching framework. Nevertheless, many of the exercises and assignments in ALR courses require students only to provide a final research product, without focusing on students’ research process. This approach helps reduce the grading burden on ALR instructors because they need only to compare students’ answers against the standard answers. When students find the correct resources, they receive full credit for those responses, but they lose all points if they miss the correct resources.

§57 Instructors should tailor the questions of ALR out-of-class assignments to emphasize the research process rather than the research product. In other words, assignments should ask students to elaborate on the search process in detail, instead of merely asking them to answer questions such as “Does your client have an affirmative defense against the State?” or “Identify three cases that would be helpful.” The answers to such questions convey limited information about assesses’ performance because assessors cannot observe assesses’ efforts and strategies. If students can answer a question by just saying “yes or no” or providing a list of cases or statutes, the only thing an assessor can do in the corresponding peer assessment is to compare the standard answer offered by faculty with those of their peers. Such questions make it completely unnecessary for assessors to use rubrics in peer-assessment activities.

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182. See *id.* at 681.
183. *Id.* at 683; Field, *supra* note 149, at 439.
¶58 Also, with improperly designed questions, even if an assessor notices the incorrect or unnecessary research process and tries to provide feedback, it is an unduly tricky task due to the absence of concrete research steps. In this circumstance, assessors have two options to generate the detailed feedback that the instructor expects. They have to describe the correct research steps without focusing on any parts, which shifts the emphasis of the peer assessments from evaluation to recollection. Or they have to speculate on the assessees’ wrongful research steps based on the incorrect answers. Thus, students are essentially performing abductive inference.191 This is certainly beyond the learning objective of any legal research assignments and beyond even the instructors’ ability.192 Both of these options skew the peer feedback away from the rubrics on which assessors should rely. Because the process of offering feedback is the most valuable component of peer assessments,193 such questions nullify the pedagogical benefits of peer assessments in terms of checking and critiquing.194 Also, all the instructors’ efforts on rubric drafting and peer assessment planning will be wasted.

¶59 Questions of ALR assignments should also be specific enough and closely related to learning goals, which means the ALR instructors should avoid open-ended or overly broad questions. These questions may be effective for faculty grading and feedback but are not suitable for peer assessment. Because the answers to such questions may vary widely, assessors have to test each answer separately. As a result, such questions make peer assessment too complex and overwhelming for assessors. Breaking down such a question into multiple sub-questions with different conditions is a more reasonable option because it serves the learning goals better and lightens assessors’ workload. For example, if the intended learning goal of a research question is to understand the different content coverages of secondary sources, instead of asking, “Provide a title of secondary sources and explain why you chose it,” ALR instructors should break the question into smaller chunks, such as, “Question one: you are writing a law review article,” “Question two: you are a new associate,” and “Question three: you are a senior partner.” These specific conditions force both student assessees and assessors to focus on different secondary sources rather than just one of them. In addition, the answers to each question are likely to be similar, so it will be easier for assessors to provide feedback and rankings.

¶60 ALR instructors also should make assessees’ recording research process simple, as otherwise they may “find it time-consuming and difficult.”195 Such documentation

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192. For example, in one of my ALR assignments, I asked students to use ProQuest Legislative Insight to locate a committee report and provide research details. One of the students listed only a Bluebook citation, and it represented a different report. He lost all points for this question. However, I could not help him to improve, except for asking him to review slides and course materials, because I did not know at which point he made the mistake. Then I talked to him later after the next class, and he told me he just Googled it.
193. Nicol & Macfarlane-Dick, supra note 154, at 204–05.
194. See Bloom et al., supra note 17, at 83–84.
195. Angelo & Cross, supra note 139, at 309.
does not have to be in narrative paragraphs. Either outline or bullet points can serve the purpose of recording the research process. The bottom line is instructors should let students clearly understand how to record the research process when answering research questions.

¶61 Such tailored questions are necessary for regular ALR assignments as well, even without a peer assessment component. Just as short essay questions in doctrinal courses’ exams require students to write down their analysis and arguments in detail, questions of ALR assignments also should ask students to document the research process. In this way, ALR instructors, like peer assessors, can identify students’ legal research mistakes to provide targeted feedback.

**Timely Small-Group Participation**

¶62 To make the most of peer assessment, ALR instructors also need to carefully plan student participation, including its timing, frequency, and form.

¶63 A formative assessment and its feedback should be of a timely nature in the learning process since immediate assessment and feedback help improve student learning more than delayed assessment and feedback. Peer assessment, as a subset of formative assessment, should likewise be prompt. As a result, a peer assessment should be in the middle of learning a legal research subject before proceeding to the next subject. This has two implications. First, a peer assessment should occur after an instructor collects answers to a specific out-of-class assignment and before the instructor releases authoritative grades and feedback. This approach allows assessors to participate in a peer assessment at the earliest possible time, while not being distracted by expert feedback from the instructor. Second, students should participate in peer assessments on a unit-by-unit basis in ALR courses. Since each session of an ALR course commonly covers entirely different content, peer assessments attached to each unit, or even to each class, help students concentrate on assessing and evaluating the skills and learning objectives just covered in class.

¶64 ALR instructors need to determine whether to engage all students or only a few of them in a specific peer assessment. Although the answer varies depending on the unique structure of the ALR course, the general principles are to avoid overwhelming students with process-oriented peer assessment and to provide students with as many

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196. See id. at 136.
197. See id.
198. Shaw & VanZandt, supra note 102, at 117.
199. Angelo & Cross, supra note 139, at 309; see Nicol & Macfarlane-Dick, supra note 154, at 204–05.
201. Ross & Donahoe, supra note 9, at 684.
202. Black & Wiliam, supra note 42; Lu & Law, supra note 18.
203. See Field, supra note 149, at 378.
204. See Ross & Donahoe, supra note 9, at 684.
205. See id.
206. See id.
207. See Angelo & Cross, supra note 139, at 309.
peer assessments as possible. Ideally, every student can participate in every peer assessment, but this could place an unreasonable burden on students, squeezing the time they have for course preparation. After all, peer assessment is an additional assessment tool for ALR courses that cannot replace traditional formal assessments and readings.\textsuperscript{208} Depending on the size of an ALR course,\textsuperscript{209} having each student participate in three to five peer assessments throughout a semester of fifteen sessions seems to balance student participation and the extracurricular workload. It also reduces instructors’ workload in evaluating assessors’ performance on peer assessments.

\textsuperscript{¶}65 For instance, if an ALR course is a one-credit-hour course,\textsuperscript{210} students are expected to spend two hours weekly on out-of-class student work.\textsuperscript{211} However, class-wide participation in each peer assessment may force students to spend more than two hours on out-of-class student work, which is unfair for students. Or even worse, it may induce students to spend less time on other out-of-class work about this course, even if peer assessments are not required for each session. Thus, in a one-credit-hour course, it would make more sense for students to participate in small groups on a rotating basis in each peer assessment, regardless of the total number of peer assessments throughout the semester.

\textsuperscript{¶}66 On the other hand, if an ALR course carries two credit hours, students have more flexibility to participate in peer assessment because of the four out-of-class work hours.\textsuperscript{212} If an instructor designs a peer assessment for each ALR session, the instructor can rotate a few students to work on a peer assessment each time. It is also feasible to have the entire class participate in all peer assessments when the instructor chooses to offer peer assessments only in selected units throughout the semester.

\textsuperscript{¶}67 In non-ALR courses, group peer assessment is common because it reduces teachers’ administrative burden on peer assessment.\textsuperscript{213} Students can also develop metacognitive skills through negotiation in group work.\textsuperscript{214} However, since peer assessments in ALR courses ultimately affect the assessors’ grades, group peer assessments are not applicable in such a course. First, it is difficult for instructors to observe individual efforts and contributions in a group peer assessment.\textsuperscript{215} As a result, faculty must assign the same grade to each group member based on the group’s final product. It is an efficient system to relieve faculty burden, but it is not a fair mechanism for group members. It is not unusual

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\textsuperscript{208} See supra p. 384 (Instructor Grading and Feedback).
\textsuperscript{209} Posting of Mary Rumsey, mrumsey@willamette.edu, to mail@connectedcommunity.org (Nov. 12, 2020) (on file with author) (most ALR courses have a class size of 12 to 25 students).
\textsuperscript{210} This is common for most legal research courses focusing on a particular subject matter, such as tax legal research or energy law legal research.
\textsuperscript{211} ABA STANDARDS, supra note 25, at 22.
\textsuperscript{212} Id.
\textsuperscript{214} See Bloom, supra note 67, at 245.
\textsuperscript{215} See Ross & Donahoe, supra note 9, at 677; see also Kaela L. Phillips & Cristina De-Mello-e-Souza Wildermuth, Condoning Free Loafers: What Do Role, Care, and Justice Have to Do with It?, 17 J. ACAD. ETHICS 131, 134 (2019).
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for students to come to an ALR session without preparation, which results in them contributing less to group peer assessment than other team members. However, group peer assessment cannot help faculty to identify a free-loader and a major contributor, while each of them gets the same grades based on the quality of group-generated peer feedback and ranking. For a variety of reasons, group members are usually reluctant to report free-loader to faculty. It results in the free-loader receiving undeserved credit and the major contributor becoming more negative about peer assessment.

¶68 In addition, when students work on a group peer assessment, they usually assign each participant a small piece of the entire peer assessment internally and put each piece together as the final group product. Although pragmatic, this approach results in students unintentionally transforming the well-designed peer assessment from each participant having the opportunity to assess a sufficient number of peer answers to each participant having access to barely a few peer answers. When assessors lack adequate exposure to research answers of different quality, they miss out on the expected pedagogical benefits of peer assessment.

Anonymity

¶69 ALR students should participate anonymously in peer assessments. Since peer assessments are inherently social activities and affect law students’ grades, anonymous participation can reduce assessors’ prejudice and increase the fairness of peer assessment.

¶70 To create “a safe and supportive environment” for peer-assessment activities, both parties should remain anonymous (“bidirectional” anonymity). Keeping assessors’ identities hidden can improve the performance of assessors; instead of being distracted by who the assessee are, assessors can focus on their peers’ research.
process and provide them with more meaningful feedback. \(^{225}\) Likewise, keeping assessors’ identities hidden can mitigate the negative interpersonal factors in a peer-assessment process, \(^{226}\) such as peer pressure, \(^{227}\) threats to psychological safety, \(^{228}\) and the moral dilemma between loyalty and honesty to friends. \(^{229}\)

\(\S 71\) The anonymity in peer assessment in ALR courses does not cause common accountability issues of anonymous peer assessment. Holding the anonymous participants accountable is important. \(^{230}\) Otherwise, assessors cannot devote themselves to peer assessment. \(^{231}\) Under the peer-assessment model proposed in this article, instructors assess the feedback and rankings generated by assessors, which, as already discussed, affect only assessors’ grades. \(^{232}\) Such a grading structure not only motivates assessors to actively engage in peer assessment to get better grades but also holds them accountable for poor performance on peer assessments.

\(\S 72\) De-identifying ALR assignments is much easier nowadays with the help of learning management systems. In the past, faculty had to manually de-identify participants’ identities for each peer-assessment activity. \(^{233}\) In recent years, learning management technologies offer faculty a one-stop platform for peer-assessment management. Faculty can collect and anonymize completed out-of-class assignments submitted by assessees and then assign these submissions to designated or random assessors. \(^{234}\) Therefore, these instructional technologies have greatly reduced the administrative burden of anonymity in peer assessment for faculty.

\(\S 73\) A related issue concerns access to the peer-assessment products, including feedback and rankings produced by assessors. This article suggests that such access should be granted to only the instructor and the peer assessors themselves and not to the assessees. Why is this if FERPA allows peer-assessment activities that expose student identification? \(^{235}\) Several reasons explain this choice. The pedagogical value of peer assessments is minimal to peer assessees because they are not as substantially involved in peer assessments as assessors. \(^{236}\) Also, assessees receive feedback and grades of the

\(\footnotesize{225.}\) Id. at 1272.

\(\footnotesize{226.}\) Schee & Birritella, supra note 54, at 3; Keith J. Topping, Self and Peer Assessment in School and University: Reliability, Validity, and Utility, in Optimizing New Modes of Assessment: In Search of Qualities and Standards 55, 67 (Mien Segers et al. eds., 2003).


\(\footnotesize{228.}\) Gennip et al., supra note 219, at 282.

\(\footnotesize{229.}\) Phillips & Wildermuth, supra note 215, at 132.

\(\footnotesize{230.}\) Panadero & Alqassab, supra note 113, at 1274.

\(\footnotesize{231.}\) Id. at 1273–74.

\(\footnotesize{232.}\) See discussion, supra pp. 381–84 (A Framework for Peer Assessment in ALR Courses).

\(\footnotesize{233.}\) Liu & Carless, supra note 19, at 287.


\(\footnotesize{235.}\) See discussion, supra at pp. 377–81 (Current ALR Courses Lacking Peer Assessment).

\(\footnotesize{236.}\) Louis N. Schulze Jr., Balancing Law Student Privacy Interests and Progressive Pedagogy:
same assignments from their instructors. Assessees are unlikely to take the feedback and ranking from peer assessors seriously because they neither are authoritative nor affect the assessees' grades. Furthermore, students may question the necessity of peer assessment if the feedback from the peer assessments differs significantly from the instructor’s feedback. Finally, the process puts additional psychological pressure on peer assessors as they fear that their feedback will not be accepted by assessees.

Conclusion

¶74 Peer assessments are used widely in higher education, and their effectiveness as pedagogical tools is well established. As this article argues, they have an equal place in ALR courses. Through elaborate planning, peer assessment in ALR courses can not only provide students with an elevated learning experience but also avoid the common challenges associated with traditional peer-assessment activities.


237. See John Hattie & Helen Timperley, The Power of Feedback, 77 Rev. Educ. Rsch. 81, 102 (2007) (feedback should be “about how and what they understand and misunderstand, finding directions and strategies that they must take to improve, and seeking assistance to understand the goals of the learning”).

238. Topping, supra note 1.
Assessing HeinOnline as a Source of Scholarly Impact Metrics*

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This article explores law libraries’ responses to U.S. News & World Report’s proposed scholarly impact ranking, based on HeinOnline data. It details a study finding that HeinOnline’s ScholarCheck missed 14.6 percent of available citations. It closes with recommendations for raising scholarly visibility and improving the use of legal scholarly metrics.

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Introduction

In February 13, 2019, U.S. News & World Report announced it would “create a comprehensive scholarly impact ranking of law schools” and anointed HeinOnline its chosen metric source. As a result, debate about the merits of using citation counts as a way to assess scholarship suffused the legal academy. The litany of issues raised ranged from excitement about having a widely available, quantitative means to compare scholarly impact across schools to an array of concerns about fairness, such as the way documented biases in article publication offers might impact citation counts. Multiple


voices also worried that establishing such a high-profile ranking would change legal scholarship itself, incentivizing counterproductive or unethical behavior.

In addition to engaging in these overarching discussions, legal scholarship and law libraries began scrutinizing HeinOnline author pages, cited-by numbers, and citation-matching processes more closely than ever before. As Hein observed, “Since embarking on this project, HeinOnline and its ScholarCheck metrics have been put under a microscope for the very first time.” Among other efforts, law school librarians engaged in

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5. See, e.g., Adam Chilton & Jonathan Masur, What Should Law School Rankings Measure and How Should We Measure It: A Comment on Heald and Sichelman’s Rankings, 60 Jurimetrics 61, 62–63 (2019) (“[I]f rankings of academic impact based on citations are incorporated into U.S. News’s overall rankings of law schools, schools may try to maximize their ranking, even at the cost of other academic or social values. Decisions regarding how to construct rankings will thus directly impact the kinds of scholarship, and scholars, that are produced and rewarded. . . . If rankings are not adjusted for field, law schools might decide to hire fewer tax scholars and more constitutional law scholars, because constitutional law scholars generally earn more citations.”).

6. See, e.g., Andrew T. Hayashi & Gregory Mitchell, Maintaining Scholarly Integrity in the Age of Bibliometrics, 69 J. Legal Educ. 138, 149–50 (2019) (warning that a greater emphasis on citation counts might lead to abusive self-citation practices and “citation cartels (i.e., agreements among scholars to cite one another to inflate their citation counts”). In 2012, Morgan Cloud and George Shepherd warned that certain data manipulation techniques employed by some law schools in service of their rankings may surpass unethical behavior and constitute illegal actions. Morgan Cloud & George Shepherd, Law Deans in Jail, 77 Mo. L. Rev. 931, 1014–15 (2012). This alert may seem particularly prescient, rather than alarmist, given the 2021 federal indictments of a former dean, a professor, and a staff member from Temple University’s Richard J. Fox School of Business and Management; their charges related to reporting false data to U.S. News. Press Release, U.S. Attorney’s Off. E. Dist. of Pa., Former Temple Business School Dean Indicted for Fraud (Apr. 16, 2021), https://www.justice.gov/usao-edpa/pr/former-temple-business-school-dean-indicted-fraud [https://perma.cc/6QMV-3XUY].


8. Librarians conducted multiple studies assessing whether faculties that publish a considerable amount of law-related scholarship beyond law reviews are adversely affected by studies that include only limited interdisciplinary content. See J.B. Ruhl, Michael P. Vandenbergh & Sarah Dunaway, Total Scholarly Impact: Law Professor Citations in Non-Law Journals 69 J. Legal Educ. 782, 802–03 (2020) (measuring five years of citations in nonlegal scholarly publications to the work of legal scholars from 25 schools and finding some significant differences in rankings depending on whether law-only citations were used or interdisciplinary citations were also included); Margaret Kiel-Morse, Exploring Citation Count Methods of Measuring Faculty Scholarly Impact 16 (Ind. Legal Stud. Rsch. Paper No. 432, 2021), https://ssrn.com/abstract=3793131 (applying the Ruhl-Vandenbergh-Dunaway methodology to estimate an interdisciplinary impact score for the Maurer Law School faculty that estimated the interdisciplinary score would improve their scholarly impact ranking by 15 places); Bonnie J. Shucha, Representing Law Faculty Scholarly Impact: Strategies for Improving Citation Metrics Accuracy and Promoting Scholarly Visibility, 40 Legal Reference Servs. Q. 81, 88–89 (2021) (using the Ruhl-Vandenbergh-Dunaway methodology to assess University of Wisconsin Law School interdisciplinary scholarly metrics and finding the school would rank number one, with more than four times as high a weighted score than the top school in the original study). Other examples of librarian work include helping educate faculty on how HeinOnline metrics work and explaining the value of persistent digital identifiers. See, e.g., Faculty Publishing, “HeinOnline Author Tools,” Drake L. Libr., https://libguides.law.drake.edu/c.php?g=150977&p=7680907 (last updated Dec. 1, 2022); Why Heins ORCID Integration Could Be a Big Deal for the US News Law School Scholarly Impact Ranking, Wisblawg (Feb. 5, 2020), https://wisblawg.law.wisc.edu/2020/02/05/why-heins-orcid-integration-could-be-a-big-deal-for-the-us-news-law-school-scholarly-impact-ranking [https://perma.cc/ZW6Q-6SWT].
projects to ensure optimal HeinOnline representation of their faculty’s scholarly works and conducted research to assess the use of HeinOnline as a metric source for a study of this magnitude. In summer 2021, *U.S. News* abandoned its proposal.9 Yet, the lessons learned about HeinOnline’s scholarly metrics remain valuable—as does the further documentation of the way *U.S. News* influences law schools’ resource allocations.

¶3 This article explores what emerged from the critical examination of HeinOnline during the two-and-a-half years it was “under the microscope.” The first part reviews some of the post-announcement actions Hein and law school libraries undertook to improve HeinOnline data. It also considers the consequences of actions taken primarily to address *U.S. News* rankings. The second part first details a project the Drake Law Library undertook to ensure accurate representation of Drake Law faculty members’ citations in HeinOnline. It then presents data derived from that project, including the frequency of lost citations in HeinOnline, how correcting for missing citations affected faculty members’ HeinOnline ScholarRanks, the time spent identifying and reporting errors, and anecdotal observations about the kinds of citations HeinOnline misses. The article closes with recommendations for librarians and authors interested in ethically maximizing personal or institutional citation counts and for law journals interested in removing bias from article selection processes and improving citation matching.

### Data Cleanup Efforts

¶4 The announcement that *U.S. News* would use HeinOnline for its proposed scholarly impact study focused attention on the database’s accuracy, particularly two key characteristics: reliable data10 and an effective mechanism for linking cited and citing sources.11 Hein’s own quality control review led it to focus primarily on two aspects of these issues, writing, “After thorough review of the ScholarCheck feature, the Hein Company has uncovered two concerns to resolve before the project is complete—rightful author attribution and proper citation matching.”12

### Rightful Author Attribution

¶5 The first concern, rightful author attribution, relates to the HeinOnline Author Profile pages. Each profile page lists that author’s HeinOnline-available publications.

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10. See Ana Andrés, *Measuring Academic Research: How to Undertake a Bibliometric Study* 122 (2009) (“[I]t is essential that every possible effort is made to ensure that the data are error free.”).


and the associated ScholarCheck metrics. With the help of the law school library community, as further discussed below, HeinOnline spent many hours working to ensure the accuracy of author profile page listings and the links between these pages and each scholar’s affiliated institution. This work requires resolving ambiguities with published author names. Mark-Christoph Müller, Florian Reitz, and Nicolas Roy identify two types of name disambiguation issues: name variability and name homography. Name variability occurs when authors publish under more than one name, including minor changes, such as sometimes using a middle initial and other times including the full middle name. Name homography occurs when more than one person publishes under the same name. As such, name homography issues arise more frequently with common names. Not only does this problem affect some authors more than others, it also may disproportionately affect certain nationalities or ethnicities, such as Chinese and Vietnamese, where many people share the same surname.

When authors publish under different names, HeinOnline automatically creates separate profile pages, whether the name variability is significant, such as a legal name change, or minor, such as inconsistent inclusion of middle initials. HeinOnline’s initial work on rightful author attribution focused on accounting for name variations and fixing indexing mistakes. It also requested law schools identify citations available in HeinOnline but missing from an author profile.

Issues of name homography appear in HeinOnline when an author’s profile page includes articles written not by that person but by someone else with the identical name. Rectifying these issues requires either personal knowledge of author scholarship and affiliation or time-consuming checks against CVs or author footnotes indicating

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15. See HeinOnline & U.S. News & World Rep., supra note 7 (noting HeinOnline worked from the U.S. News law school survey data, which requested “the names and other details of [the law school’s] full-time tenured and tenure-track faculty for fall of 2018”).


17. Id.

18. Id.

19. Id.; see also Ronald Rousseau, Leo Egghe, & Raf Guns, Becoming Metric-Wise: A Bibliometric Guide for Researchers 113 (2018) (indicating that homonyms cause a more significant problem in some countries (e.g., India, China, Japan, and Korea) than others).


21. See id. The example of an indexing error Hein provides appears to be related to a metadata attribution error, an author name disambiguation challenge noted in Neil R. Smalheiser & Vetle I. Torvik, Author Name Disambiguation, 43 ANN. REV. INFO. SCI. & TECH. 287, 287 (2009).

institutional affiliation or other identifying detail. The Drake study, further described below, found 4 out of 29 faculty members (14%) who had between 1 and 21 articles incorrectly attributed to them rather than the actual author who shares the same name.

¶8 In the long term, Hein’s integration with ORCID (Open Researcher & Contributor Identifier) might provide a solution to name disambiguation problems. The widespread use of ORCID iDs, which provide registered users a free, unique, and permanent author identifier, can help ensure accurate attribution by establishing a way “for individuals to distinguish between researchers and connect them with their works, contributions, and organizational affiliations.” 23 However, legal publishing has not widely used ORCID iDs, 24 and implementing them requires some work. Authors first need to register for an ORCID iD, a relatively easy step. 25 They (or a designee who also has an ORCID iD) 26 then need to add a list of their publications to their ORCID record. Some databases can connect with ORCID and automatically add citation information, but many legal scholars will find they need to add citations in another (more time-intensive) manner. 27 HeinOnline currently displays linked ORCID publication lists but not citations to them. 28 However, Hein is exploring ways to count citations to sources listed in an ORCID profile. 29

Proper Citation Matching

¶9 The second issue Hein noted involves proper citation matching. HeinOnline provides image-based PDFs, and its searches rely on the optical character recognition (OCR) of the scanned text. 30 In addition, HeinOnline’s ScholarCheck utilizes a citation-based approach to connecting cited and citing sources. 31 The algorithm that matches

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24. See Why Hein’s ORCID Integration, supra note 8.
25. See id.
28. Are ORCID Works That Are Displayed on HeinOnline Author Profile Pages Being Used to Count Citation Metrics?, HeinOnline KNOWLEDGE BASE, https://help.heinonline.org/kb/are-orcid-works-that-are-displayed-on-heinonline-author-profile-pages-being-used-to-count-citation-metrics/ [https://perma.cc/QST8-JPS].
cited and citing references creates searches that combine the three basic components of the citation: volume number, journal title abbreviation, and initial page number. The two numeric components are pulled from article metadata. The journal title abbreviation comes from a Hein-created table that includes alternative abbreviations Hein personnel identify.

¶10 For each article listed on an author profile page, HeinOnline identifies citing sources through a full-text search for different variations of the article citation with source abbreviations derived from popular legal manuals, including Bluebook, Prince's Bieber Directory of Legal Abbreviations, and the Canadian Guide to Uniform Legal Citation (McGill Guide), as well as providing some allowance for minor citation mistakes. For instance, the search for an article published in the New York University Law Review seeks 10 title variations, including N.Y. Univ. L. Rev., NYU L Rev, and NYU L. Rev. This search displays at the top of the page after clicking on the in-line “Cited by” link, offering transparency in how HeinOnline matches citing and cited sources.

¶11 Yet, while allowing for some citation errors, this method of linking cited and citing sources still misses some citing works due to formatting variability beyond the scope of the search string; publication errors, whether in the source abbreviation or the identification of the starting page number; alternative citation styles, such as name-date; and OCR errors. In addition, the cite-matching algorithm encounters difficulties with at least two types of citations: those with Roman numeral pagination and nonconsecutively paginated journals. In the first case, the algorithm cannot correctly interpret the Roman numeral as a starting page number. In the second, multiple articles share these three citation elements because the searched citation string does not differentiate between issue numbers.

¶12 The HeinOnline citation-matching mechanism deviates from the author-name search used by many prior scholarly impact studies. After the U.S. News announcement, Hein stated it would investigate other methods of publication matching, including by author name. However, these experiments did not lead to improved accuracy but

33. Id.
34. See Hein & Marmion, supra note 31.
35. See id. at slide 23.
36. See id. (showing an example of the search string that appears).
37. Hein and law librarians recognize these issues. For instance, Mary Whisner provides examples of HeinOnline not picking up certain citing references because of citation form variations, publication errors, and OCR mistakes. Mary Whisner, My Year of Citation Studies, Part 1, 110 LAW LIBR. J. 167, 174, 2018 LAW LIBR. J. 7, ¶ 18. In addition, Hein acknowledges that “the use of citation pattern matching is not a perfect method for counting citations for many reasons such as OCR errors, proper citation rules not followed, etc.” Hein & Marmion, supra note 31, at slide 24.
38. Telephone Interview with Czopp, Daving & Boron, supra note 32.
39. Id.
rather increased the number of false positives.\textsuperscript{42} Just as matching publications by citation has some inherent weaknesses, matching by author name presents its own challenges. Problems include the issues of name homography and name variability, discussed above; publication errors, such as incorrectly identifying or spelling an author’s name;\textsuperscript{43} and citation rules that obliterate an author’s name by including them as part of an \textit{et al.} rather than individually naming them.\textsuperscript{44} When ranking schools at the faculty level, one relatively recent study shows a substantial (.88) correlation between the results drawn from HeinOnline ScholarCheck data and searching Westlaw using the Leiter-Sisk author-name search methodology.\textsuperscript{45}

\section*{Law School Efforts}

\textsuperscript{¶}13 As Hein tried to resolve these issues, law schools also started similar work. Law school librarians support faculty scholarship in myriad ways,\textsuperscript{46} including scholarly impact projects.\textsuperscript{47} The \textit{U.S. News} announcement clearly affected the prioritization of

\begin{footnotesize}
\begin{enumerate}
\item See Marmion, \textit{supra} note 14, at slide 28 (“Our development team has been experimenting with other methods to count citations such as searches by author name, as well as article title (and variants) to ensure completeness. This method showed too large a percent of false positives.”); \textit{see also} Email from Shane Marmion, Pres. of William S. Hein & Co. & HeinOnline, to Karen Wallace (July 5, 2021) (on file with author) [hereinafter Marmion email] (“We have yet to find a more accurate method to counting citations using title and author. We’ve continued to focus on improving our current citation counting methods.”).
\item For instance, the article Laurence A. Steckman & Adam J. Rader, \textit{Adverse Domination, Statutes of Limitations and the In Pari Delicto Defense—Application in Cases Involving Claims of Accounting Malpractice and Corporate Fraud}, 37 \textit{Touro L. Rev.} 697, 698 (2021), cites the article Matthew G. Doré, \textit{Statutes of Limitation and Corporate Fiduciary Claims: A Search for Middle Ground on the Rules/Standards Continuum}, 63 \textit{Brook. L. Rev.} 695 (1997). However, Touro inadvertently lists Doré’s first name as Michael. This is the kind of mistake that would cause a problem for an author-name search but is caught by HeinOnline’s citation-based matching.
\item See Gregory Sisk, \textit{Measuring Law Faculty Scholarly Impact by Citations: Reliable and Valid for Collective Faculty Ranking}, 60 \textit{Jurimetrics} 41, 51–52 (2019). Christine Anne George notes that a minority of law reviews have adopted the Fair Citation Rule that requires listing each author in a citation. Christine Anne George, \textit{A Modest Proposal Regarding Scholarly Impact: Burn It Down} (CARDozo LEGAL Stud. Rsch. Paper No. 650, 2021), https://ssrn.com/abstract=3860248 [https://perma.cc/5YFJ-R949]. The most recent ranking using the best-known author-name search methodology in law (the Leiter-Sisk model) explains its approach to credit authors represented by an \textit{et al.} cite, contributing 3772 citations to an overall count of 480,330 citations (less than 1 percent of the total). Gregory Sisk, Nicole Catlin, Alexandra Anderson & Lauren Gunderson, \textit{Scholarly Impact of Law School Faculties in 2021: Updating the Leiter Score Ranking for the Top Third}, 17 \textit{Univ. of St. Thomas L.J.} 1041, 1060 (2022). When assessing faculties as a whole, this work was deemed to make a “marginal” difference, whereas there was “a dramatic difference for certain individual law professors.” \textit{Id.} at 1061. Although unquantified, the time required to credit authors represented by an \textit{et al.} must have been significant based on the description of the steps involved. \textit{Id.} at 1060.
\item Paul J. Heald & Ted Sichelman, \textit{Ranking the Academic Impact of 100 American Law Schools}, 60 \textit{Jurimetrics} 1, 32 (2019).
\item For instance, librarians procure needed resources through collection development and interlibrary loan; offer training on effective research techniques, such as database searching; provide research services; educate authors on copyright considerations and effective promotion of scholarship; maintain scholarly repositories; and more.
\item See, \textit{e.g.}, A.J. Blechner, Christine Anne George, Rebecca Mattson, Jacob Sayward & Jason R. Sowards, \textit{Academic Law Libraries Special Interest Section of the American Association of Law Libraries Scholarly Communications Committee Report on Citation Metrics of Scholarly}
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this work, encouraging librarians to address HeinOnline metrics directly. Christine Anne George, Assistant Director for Faculty and Scholarly Services at Cardozo Law School, colorfully describes the effect of the proposed scholarly impact ranking on her work:

Overall, I thought that the [HeinOnline Author] Profiles were worthwhile to prepare for my faculty, and it was something that stayed on my to-do list to get to…you know, one of these days. Then on February 13, 2019 my priorities list experienced a massive reshuffle when U.S. News announced that they were going to be evaluating scholarly impact using Hein. If we were in a Peanuts strip, there would have been a very abrupt record scratch at that moment.

George was not alone. Many libraries reallocated resources, reprioritized current work, or created new initiatives specifically intended to improve their law schools’ scholarly impact scores in the announced ranking. Hein not only responded to librarians’ corrections, it actively encouraged law library assistance with data cleanup work. In addition, Hein implemented a change allowing authors, or authorized librarians at the same school, to edit their own HeinOnline author pages.

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50. See Allison N. Symulevich, Using Law School Faculty Author Profiles to Promote Impact: The U.S. News & World Report Saga Continues, 8 J. Libr. & Scholarly Commc’N 1, 2 (2020) (“Immediately [in the wake of the announcement], law schools across North America were forced to respond to this change to make sure that their faculty’s publications were counted.”); BOSTON UNIV. SCH. L. FINEMAN & PAPPAS L. LIBRS., COLLECTION SERVS. ANN. REP.: FY2020 at 4 (2020), https://www.bu.edu/lawlibrary/files/2020/09 /Collection-Services-Annual-Report.pdf [https://perma.cc/6T86-HU5F] (noting that to prepare for the scholarly impact ranking, the librarians worked on faculty name disambiguation, made sure profiles listed all faculty works in Hein, and created and linked ORCID iDs for faculty); Highlights, MALONEY MATTERS (Maloney Libr., Fordham Univ. Sch. of L., New York, N.Y.), Sept. 2019, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1017&context=maloney_matters [https://perma.cc/8ZXP-Z9LC] (indicating library staff worked on author profiles and scholarship lists and asked faculty to review in order to provide “crucial assistance in ensuring that Fordham Law is ranked as highly as it deserves in U.S. News’ new scholarly impact rankings.”).

51. See George, supra note 49 (“I have to give Hein credit for being extremely responsive to any issue that arose [when reporting citation or attribution errors]”); Shucha, supra note 8, at 98 (noting Hein has been responsive in correcting reported errors). Further confirming librarians’ impression of Hein personnel as responsive and accessible, when asked for his advice for librarians wanting to ensure the fullest possible representation of their faculty’s works in ScholarCheck, Shane Marmion offered the suggestion “to help us verify we have all the proper faculty setup and to contact us with any questions, comments, concerns, or fixes that may need to be addressed.” Marmion email, supra note 42.

52. Marmion, supra note 14, at slide 21 (indicating the HeinOnline data quality control processes included “Review & Assistance from law school library staff and faculty”).

¶14 The schools that invested in this kind of author and citation review yielded improvements in their institution’s ScholarCheck numbers. For instance, in the two years following the announcement of the scholarly impact rankings, the University of Wisconsin law faculty saw a 196 percent increase in their article citation statistics in HeinOnline, largely due to work their librarians conducted to correct problems with author attribution and missing publications.54 Similarly, a law librarian at the University of North Carolina at Chapel Hill (UNC Law) reviewed information for 42 UNC Law faculty, ensuring they all had author profiles that listed their scholarship accurately and comprehensively.55 This resulted in HeinOnline adding 119 articles to UNC Law’s author pages.56

¶15 Yet these types of actions also raise at least two significant problems. First, consider the opportunity cost of engaging in extensive efforts to clean up HeinOnline data. Librarians report these projects consume a great deal of time57 that they could otherwise spend more directly contributing to the law school’s mission.58 Related to questions of mission, some challenge the appropriateness of academic law librarians investing this much labor to improve the product of a for-profit company.59

¶16 Law schools have a history of reallocating resources to improve their rankings,60 including efforts to compile ranking data,61 a “time-consuming [task made] even more so as administrators scrutinize their numbers to make sure they cast the school in the best possible light and to ensure the accuracy of the submitted numbers.”62 What U.S. News chooses to measure may take on importance not due to inherent value but simply because of the rankings themselves. Library directors Amanda Runyon, Leslie A. Street, and Amanda Watson have expressed concern that the library metrics U.S. News

54. Shucha, supra note 8, at 95 (attributing much of the increase to librarians’ work between February 2019 and March 2021 to ensure HeinOnline author pages for University of Wisconsin faculty were as complete and accurate as possible).
55. Symulevich, supra note 50, at 8–9.
56. Id. at 9.
57. See id. at 10; BLECHNER ET AL., supra note 47, at 5 (noting methods of collecting citation metrics are "time and labor intensive").
59. Symulevich, supra note 50, at 11, 15.
60. See, e.g., Jeffrey Evans Stake & Michael Alexev, WHO Responds to U.S. News & World Report’s Law School Rankings?, 12 J. EMPIRICAL LEGAL STUD. 421, 427 (2015) (“Gaming often results in a substantial misallocation of law school resources. Rather than deploying assets to further the proper ends of improving the quality of the legal education, schools will invest in efforts that result in raising their rank. These resources spent on fooling students and others are wasted from society’s point of view.”) (footnote omitted) (citation omitted).
61. WENDY NELSON ESPELAND & MICHAEL SAUNDER, ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY 150–51 (2016) (reporting that some law school career development staff feel the time required to collect graduate employment statistics diminishes the time available to help students find jobs).
62. Id. at 121–22 (noting also, “One administrator told us that ranking stats are checked far more carefully than budgets.”).
introduced in 2021 may undermine the ways a library can meaningfully serve a law school's mission.

Specifically, we are concerned that the new metrics may erode the value of libraries and push libraries to focus resources on *U.S. News* data points, rather than on the services and outcomes that are most beneficial to our institutions. . . . A concerning long-term implication of these metrics is the pressure it places on law libraries and Deans to compete on measures that demonstrate no meaningful outcomes, and in many cases will be at odds with our law schools' mission.63

¶17 Ultimately, in the case of the scholarly impact ranking proposal, the time law schools spent on HeinOnline data cleanup will not directly affect anything published in *U.S. News & World Report*, given the project's abandonment. While the enterprise has certainly raised the profile of HeinOnline's citation metrics, it seems doubtful that many—if any—schools would deem these extensive efforts a good return on their investment, absent the *U.S. News* ranking. In other words, this experience documents that schools will direct resources not just to factors included in the ranking formula but also to factors that affect a proposed ranking that could, in turn, possibly affect the overall ranking. This underscores the power *U.S. News* rankings assert over law schools that may shift assets based on the publication's half-baked notions about modifying its rankings.

¶18 The second issue is whether these law school actions potentially turn presumably random errors related to name disambiguation and citation-matching problems into more troublesome systemic errors. Any kind of citation analysis requires the use of accurate data,64 and the work librarians have undertaken to ensure their institutional authors receive proper credit for their citations reflects this type of auditing function, rather than the gaming techniques academics warn could negatively impact legal scholarship.65 Nonetheless, if only some libraries engage in this work, their law schools may well enjoy an advantage over institutions forgoing such arduous projects. This could insert systemic bias into the process, which, in turn, could call into question the validity of ScholarCheck metrics.66

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64. Andrés, supra note 10.

65. See supra notes 5 and 6 and accompanying text.

66. See HENK F. MOED, APPLIED EVALUATIVE INFORMATRICS 83–84 (2017) (noting that citation count errors alone do not render comparative bibliometrics meaningless as long as the errors cancel out across comparison groups rather than systematically affecting some more than others).
Drake Citation Project and Study

Pilot Project

¶19 During the summer of 2020, a Drake Law School faculty member approached a law librarian to express concern that Google Scholar included citing references that HeinOnline omitted, even though HeinOnline contained the articles providing the citing references. (This article refers to these as HeinOnline-available citations (HOA)—citations that, under perfect matching procedures, HeinOnline would capture. This contrasts with citations missed because the citing article is not part of HeinOnline's content.) As a pilot project, the librarian compared the citations to the faculty member’s articles as captured by HeinOnline, Google Scholar, and Westlaw. She confirmed that HeinOnline was missing some HOA citing references. Adapting terminology from Henk Moed, we refer to these citing references that are available in HeinOnline but not caught by ScholarCheck as lost citations.67

¶20 The librarian shared her findings with her colleagues, and in November 2020, we developed a methodology to complete a citation analysis project for the entire Drake Law School faculty. The project aimed to review ScholarCheck citations against Google Scholar and Westlaw citations, identify any lost HOA citations, and ask Hein to link these missing citations. A summary of our approach follows.

Project Methodology

¶21 Based on the pilot project, we established a four-part process to identify citing references lost by ScholarCheck.

Checking ScholarCheck Citations Against Westlaw and Google Scholar

¶22 We created a spreadsheet for each faculty member who authored one or more HOA publications. Within each spreadsheet, we created a tab for each article listed on the faculty member’s HeinOnline Author Profile page. We then populated each tab with a column for citation references captured by Google Scholar, another for references captured by Westlaw, and a third for references captured by HeinOnline. Additional columns were set up to record further information about the citing references omitted by HeinOnline but captured by one or both of the other platforms, including an indication of whether the missing citations were HOA (lost citations that could have been captured based on database content).

¶23 We retrieved each article in Westlaw (if available), opened KeyCite, and then exported the article’s citing secondary sources in a CSV format. We then pasted those citing references into the appropriate column and tab of each faculty member’s spreadsheet. At the beginning of the project, we obtained HeinOnline citing references by pulling up each faculty member’s HeinOnline Author Profile page and clicking on the hyperlink to the right of the article indicating how many other articles had cited it. Clicking that link opened a new HeinOnline page listing all of the citing references to

the article, which we then copied and pasted into each faculty member's spreadsheet. Later in the project, we learned how to use MyHein Bookmarks to export citing references in a CSV format and adopted this far more efficient process.68

¶24 Next, we located each article in Google Scholar and retrieved the list of citing references to the article using the “Cited by” link. This was the most time-consuming step for several reasons. First, Google Scholar identifies many books, book chapters, interdisciplinary articles, dissertations, theses, and foreign language publications not found in the other two platforms. Second, Google Scholar citing reference lists contain numerous errors69 and duplicate entries.70 We used the quote marks accompanying each entry in the Google Scholar citing reference list to display and initially assess the citation information. This allowed us to exclude some invalid entries, while we verified others later in the process. We copied and pasted apparently valid citing references from articles into each faculty member's spreadsheet. We employed a broad conception of what constituted an “article,” including notes, comments, and bibliographies published in the HeinOnline Law Journal Library.

¶25 On each tab of the faculty spreadsheets, we allotted each distinct citation its own row. So, if a citation was found in more than one of the platforms examined, we pasted the citation into the same row under each applicable column. This made it quite easy to identify instances where a citing reference was missing from one of the platforms. In any instance where a citing reference appeared in the Google Scholar and/or Westlaw column(s) but not in the HeinOnline column, we copied and pasted the citing reference's citation into the fourth column, which indicated HeinOnline did not capture it and we needed to further investigate the omission.

**Verifying Citations that HeinOnline Apparently Missed**

¶26 Because our project focused on ScholarCheck’s lost citations, we checked two aspects of any citing references listed by Westlaw or Google Scholar but not by ScholarCheck: (1) availability in HeinOnline and (2) veracity of the reference. First, we determined whether the citing source was available in HeinOnline (HOA), coding a column on each tab of every faculty member’s spreadsheet either “yes” (HOA) or “no” (not HOA). Articles coded “no” most commonly fell into one of two categories. Either the journal that published the citing article was not included in HeinOnline’s digital collections,71 or, although the journal that published the citing article was part of HeinOnline’s collections, that particular issue was so recent it had yet to be added to

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69. For instance, the article simply did not cite the source material.

70. For example, Google Scholar often counts a publication more than once by including a repository version and then the final published version. It frequently also includes a reference to the table of contents of a journal as well as to the actual citing article in that issue.

71. External content for which HeinOnline provides a link also does not contribute to the ScholarCheck metrics. Telephone Interview with Czopp, Daving & Boron, *supra* note 32. The journal listing for these titles includes the note "(External to HeinOnline)." For an example, visit https://heinonline.org/HOL/Index?index=external-journals/hjotl&collection=journals.
HeinOnline. This means that we coded forthcoming articles not yet published and newly published content not yet available in HeinOnline as “no.” In contrast, for some journals, HeinOnline provides indexing only until a full-text embargo period has passed. Hein confirmed that its metrics include these indexed articles, so we coded them “yes.” In rare circumstances, we found (and coded as “no”) articles that were not in HeinOnline for some other reason, such as a missing issue in a volume otherwise available on HeinOnline or an article with text differing from what was available on Westlaw or other databases of published sources. (This excludes repositories like SSRN, which include working papers that often undergo changes between initial upload and final publication.)

¶27 Once we completed this first check, we took additional steps for any apparently lost citations to verify whether the citing reference truly cited the source in question. At times, either Westlaw or (more likely) Google Scholar made a mistake and listed erroneous citing sources that we did not catch in our initial review. We eliminated these false positives from the spreadsheets.

**Reporting Lost Citations and Other Errors to Hein**

¶28 When the citing articles ScholarCheck omitted truly referenced the cited source being checked, and both were available in HeinOnline, we considered these to be lost citations. In those instances, we added the citation information for the citing reference to a separate spreadsheet, linking each to its Drake-authored cited source, and reported this information to Hein for correction. As further described below, Hein made some of these changes quickly but others less so.

¶29 Between November 2020 and April 2021, we analyzed every article listed in Drake Law School affiliated HeinOnline Author Profiles. We included law library faculty, clinical faculty, legal writing faculty, academic success faculty, faculty on contract appointments, and tenured and tenure-track doctrinal faculty, and checked every article listed under the faculty member’s HeinOnline profile as of the date when we commenced our analysis of that individual faculty member. We discovered that some articles listed under Drake Author Profiles were not actually written by the Drake faculty member to which they were attributed. This happened in instances of name homography. We reported these inaccurately attributed articles to Hein for removal. In harvesting the citing references to Drake faculty members’ work, we captured all citing references regardless of the publication date of the citing article.

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73. Drake has a tenure track for doctrinal faculty, legal writing professors, law librarians, clinicians, and academic success program faculty.
Setting Up Search Alerts

§30 To ensure ScholarCheck includes future HOA citations, we created alerts in Google Scholar,74 HeinOnline,75 and Westlaw76 to notify us of additional citing references to the articles we checked. The usefulness of the alerts varies by product. We have found that HeinOnline does not consistently provide the information needed to follow up on the alert. While the alerts often work as intended, sometimes they include a dead hyperlink to the relevant HeinOnline content, and occasionally the information is incomplete and requires further investigation. Google Scholar alerts are broader in scope, covering journals unavailable in HeinOnline. This requires additional time to search for the title of the journal or article within HeinOnline. Westlaw alerts provide links to both the citing and cited articles, making them the easiest to decipher and check. We initially planned to reevaluate our use of alerts as we assessed their accuracy over time. However, because U.S. News abandoned its scholarly impact ranking, we have reprioritized our work and not followed up on the alerts.

Project-Based Research

§31 Given the significant resources devoted to this project, we wanted to assess our return on investment as well as enhance our understanding of HeinOnline mechanics. We posed the following research questions:

1. How many HOA citations were lost?
2. How did the citation project affect each faculty member’s ScholarRank?
3. How did the time invested in the project translate into quantifiable results?
4. Why did ScholarCheck miss some HOA citations?

1. How Many HOA Citations Were Lost?

§32 As far as we know, this study provides the first attempt to assess systematically the extent of lost citations in HeinOnline, although the phenomenon has been examined previously. In 2018, Mary Whisner conducted an informal review of citations to a single journal article that HeinOnline indicated had 158 citing references. Searching HeinOnline for author name within five of the article title, Whisner found 15 additional references not included in the original count. In other words, the ScholarCheck figure omitted (lost) 8.7 percent of possible citations.77 Our study compiled numerical data on

74. We recommended that each faculty member set up their own Google Scholar Profile and then followed them, opting to receive updates for both new citations to this author and new articles by this author.
75. We accessed the faculty member’s Author Profile page, clicked on the bell symbol, and selected the article citation alerts box.
76. We created a KeyCite alert for the article with a naming convention of author’s last name and article citation and a monthly alert frequency.
77. Whisner, supra note 37, at 174, ¶ 18. Note, too, that lost citations are not unique to HeinOnline. For instance, in 2002, a study found that the Science Citation Index lost an average of 7 percent of citations, with an upward range of 30 percent, due to problems like “sloppy referencing, editorial characteristics of scientific journals, referencing conventions in scholarly subfields, language problems, author-identification problems, unfamiliarity with foreign author names and ISI data-capturing conventions.” Moed, supra note 67, at 731.
the total HOA citing references to each of the 398 articles we reviewed, as captured by Google Scholar, Westlaw, and HeinOnline. The following summarizes our approach.

¶33 On each tab of each author spreadsheet, we filtered the column indicating whether the citing article was available in HeinOnline to show the total number of entries coded as “yes.” This provided the total HOA citation figure for each article. Then, to see the percentage available on each platform, we added filters one at a time. For example, we filtered the Google Scholar column to exclude blank cells (indicating that Google Scholar failed to capture the connection between the article in question and the citing reference), thus selecting only the HOA citing references that Google Scholar captured. After noting that total, we removed that filter before repeating the process with Westlaw and HeinOnline.

¶34 We entered these numbers (total HOA articles and HOA citing references found by each platform) into a separate spreadsheet along with the author, title, publication year, and citation of the Drake faculty article being cited. Using an Excel formula, we subtracted the HOA citing references in HeinOnline from the total HOA citing references available, thereby yielding the number of HeinOnline’s lost references for the article. To ensure the accuracy of this number, we cross-checked it against the separate spreadsheet of corrections we submitted to Hein to confirm the numbers were the same.78

¶35 When we began our project, ScholarCheck attributed 3,758 total citations to the 29 Drake Law faculty members reviewed. Of those 29, one person does not have HOA works, although his author page had works improperly attributed to him. We notified Hein of this error and removed this faculty member from our calculations, leaving 28 faculty members whose citations we reviewed.79 Based on our work, we reported 640 missing citations to HeinOnline, for a new total of 4,398 total citations to Drake Law faculty works. Overall, this suggests a lost citation rate of 14.6 percent: 640 missing citations / 4,398 HOA citations. The percentage of missed citations per faculty member ranged from 0 percent to 41.7 percent. A significant majority of faculty members (21 out of 28, or 75%) were missing 10 percent or more of the HOA references to articles listed on their HeinOnline ScholarCheck Author Profile. Table 1 shows the number of faculty affected at different ranges of HOA lost citations.

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78. In the course of verifying Hein had made all reported changes, a process described in the next section, we caught a few spreadsheet errors. In these cases, we double-checked all study data and made any necessary adjustments.

79. Three additional Drake authors also had works improperly attributed to them, and we notified Hein of these as well. However, they remained in our calculations because they also had works listed that they really did write.
TABLE 1

HOA Missing Citations as a Percentage of Total Faculty Member Citations

<table>
<thead>
<tr>
<th>Percentage of HOA citations missing from ScholarCheck</th>
<th>Number of faculty</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–9.9</td>
<td>7</td>
</tr>
<tr>
<td>10–19.9</td>
<td>13</td>
</tr>
<tr>
<td>20–29.9</td>
<td>6</td>
</tr>
<tr>
<td>30+</td>
<td>2</td>
</tr>
</tbody>
</table>

The number of citations submitted to Hein to add to an individual faculty member’s ScholarCheck metrics ranged from zero to 140. As table 2 shows, half (14 out of 28) of faculty members were missing 10 or more article citations.

TABLE 2

Number of Missing HOA Citations Reported to Hein

<table>
<thead>
<tr>
<th>Number of HOA citations added to ScholarCheck</th>
<th>Number of faculty</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–9</td>
<td>14</td>
</tr>
<tr>
<td>10–19</td>
<td>4</td>
</tr>
<tr>
<td>20–29</td>
<td>3</td>
</tr>
<tr>
<td>30–39</td>
<td>3</td>
</tr>
<tr>
<td>40–49</td>
<td>0</td>
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<td>70–79</td>
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<td>80–89</td>
<td>0</td>
</tr>
<tr>
<td>90–99</td>
<td>0</td>
</tr>
<tr>
<td>100+</td>
<td>1</td>
</tr>
</tbody>
</table>

The average number of lost citations per article was 1.6: 640 missing citations / 398 articles checked.

Given that our analysis focused on HOA articles, it is not surprising that HeinOnline captured more of these citing references than either of the other two platforms checked. However, the comparisons were rather close. HeinOnline identified 3758 or 85.4 percent of the overall HOA citations. Google Scholar identified 3,692 citations or 83.9 percent, and Westlaw identified 3,379 or 76.8 percent of the total HOA citations.
2. How Did the Citation Project Affect Each Faculty Member’s ScholarRank?

¶37 U.S. News had not planned to use HeinOnline’s ScholarRank methodology, relying instead on a never-announced ranking system.80 When we began this project, we assumed there would be some correlation between ScholarRank data and the U.S. News system. In addition, while we could not test an unknown methodology, ScholarRank was already operational, and Hein provides multiple resources that explain how it works.81 As such, we wanted to review how the HeinOnline corrections we identified affected the ScholarRanks of Drake Law faculty. This question has become arguably more pertinent given U.S. News’s reversal of its plans. Although there will be no U.S. News scholarly impact ranking in the near future, the proposal brought increased attention to HeinOnline and its ScholarRanks,82 which may increase use of this ranking.

How ScholarRank Works

¶38 ScholarRank creates an overall ranking through a combination of five different ScholarCheck metrics: cited-by articles published within the past five years, cited-by articles published more than five years ago, cited-by cases published within the last five years, cited-by cases published more than five years ago, and number of times HeinOnline users accessed the article within the last 12 months.83 A Z-Score (standard score) is calculated for each metric using the formula $Zx = (x-\mu)/\sigma$. The Z-Scores are averaged to produce a final ScholarRank.84 HeinOnline updates the raw data and ScholarRanks each month.85

When New Data or Corrections Appear in ScholarRank

¶39 New citing references may result from Hein processing user-submitted corrections or adding new content to its databases throughout the month. However, the ScholarRank numbers do not immediately appear for the end user. As new content gets added to HeinOnline, Hein indexes it to identify citation connections between cited references and their citing sources. These changes are immediately visible on the HeinOnline test site but do not appear everywhere in the live database until they are published as part of the monthly content release.


82. See, e.g., Hein’s presentations at the 2020 AALS Annual Meeting, Marmion, supra note 14, and the AALL Annual Meeting, Hein & Marmion, supra note 31. The session at AALS was that meeting’s best-attended program. Shucha, supra note 8, at 81 n.2.

83. See How is ScholarRank Determined?, supra note 81.

84. See id.

85. See id.
¶40 Each individual author’s profile page in HeinOnline lists that author’s HeinOnline-available publications, with the ScholarCheck data for the article (the number of times the article has been cited by cases or articles in Fastcase or HeinOnline) displayed to the right, as shown in figure 1.

FIGURE 1
ScholarCheck Data for the Article *Implicit Bias in the Courtroom* as listed on Drake Law Faculty Member Mark Bennett’s HeinOnline Author Profile Page on November 3, 2021

Users can also view ScholarCheck data from the article itself, through a small box that appears in the upper left, as shown in figure 2.

FIGURE 2
ScholarCheck Data for the Article *Implicit Bias in the Courtroom* as Listed on the Article View Page on November 3, 2021

Once you click on that small box, more detailed ScholarCheck data, and links, appear, as shown in figure 3.
In all three cases, this summarized ScholarCheck data does not pull from the test site and remains static throughout the month.86

However, from either the author profile page or the article view, once you actually click on the “Cited by # Articles” link, the ScholarCheck search that connects citing and cited sources runs. In this case, the data does pull from the test site and continuously updates throughout the month, so it may show numbers that differ from those seen for the article on the author’s profile page, as shown in figure 4.

Note that whereas the ScholarCheck statistics showed that 327 other articles had cited Implicit Bias in the Courtroom, the real-time data shown in the search string indicates there are 328 results (328 citing articles). HeinOnline’s monthly content release, which typically occurs in the third week of each month, includes the incorporation of up-to-date ScholarCheck and ScholarRank data into the numbers that appear in the ScholarCheck statistics boxes on the author’s profile page and article view. Corrections processed after the release occurs for the month do not appear in HeinOnline until after the subsequent month’s content release.87

86. Email from Brandon Wiseman, Adm’r, HeinOnline Dev., to Karen Wallace (Oct. 12, 2021) (on file with author).
87. Id.
The Drake Experience with ScholarCheck Correction Timing

¶42 In addition to the results of the initial pilot project, we reported corrections to Hein in batches on January 11, 2021, February 25, 2021, and April 14, 2021. We did not receive confirmation from Hein that it had completed the corrections on any of the spreadsheets we submitted, so we found it necessary to check ourselves. Although the corrections submitted in January 2021 were almost all made by April 2021, the February and April submissions took longer. At first, we attributed that to the number of corrections we submitted and the likelihood that Hein was receiving an increased volume of similar submissions from other institutions. Finally, we reached out to Hein again in August and learned that our February and April submissions had fallen through the cracks and not been corrected but would be completed by the end of September.88

¶43 Although Hein indicated that they had not heard from other institutions that they missed entire lists of corrections, as happened with us in these two cases,89 we do know we are not the only ones who experienced the need to submit some corrections more than once. In a blog post, Christine Anne George expressed both her gratitude to Hein for its responsiveness—a sentiment we echo—and her frustration with the need to double-check submitted corrections, summarizing the entire process: “[W]hen it comes to citation metrics, I am Charlie Brown with the football.”90

The Drake Experience with ScholarRank Changes

¶44 Assessing how the submitted ScholarCheck corrections affected ScholarRanks is complex. Our investigation did not isolate a single variable but looked instead at real-world changes to rank. Not only did Hein’s processing of the reported changes from our institution potentially affect rank, additional factors could also change rank, including changes Hein processed for other institutions, citing references found in newly added cases and articles, changing numbers of HeinOnline downloads, aging citations, and new authors joining the rankings. Additionally, the fact that it took Hein more time to process some of our submitted changes than others complicates the analysis. We cannot mathematically assess the impact on ScholarRank of each submitted change. What we can do is demonstrate that correcting lost citations will typically have a positive, but unquantifiable, effect on ScholarRank.

¶45 Our investigation compared ScholarRanks for specific Drake Law faculty members two to six months prior to Hein’s processing the majority of their corrections to the ranks post-corrections. We downloaded Drake’s institutional CSV spreadsheet from HeinOnline on specific dates before and after Hein processed corrections. For the faculty

89. Id.
90. George, supra note 49 (noting her back-and-forth communications with Hein to correct errors in linking articles to authors and citations to those articles: “As I typed that last sentence, my eye began twitching as it is wont to do whenever discussion of the Profiles arises. Through the spasms, I see many, many more spreadsheets and emails to Hein in my future. More checking, double checking, and just-one-more-final checking in the hopes that any errors can be found and corrected before the numbers are pulled.”).
member (A) assessed in the pilot project, we compared the May 2020 ScholarRank to the
November 2020 rank. For the next eight faculty members (B-I) whose corrections Hein
processed, we compared November 2020 and April 2021 ranks. For the remaining 19
faculty members (J-BB), we compared September 2021 and December 2021 ranks.

¶ 46 The ScholarRank for 24 of the 28 faculty members improved (at least temporarily), as shown in table 3.\(^1\) In the case of the four faculty members whose ranks dropped after we reported changes, one (Author N) is very likely a matter of reporting author name homography problems that removed 21 incorrectly attributed articles (and their corresponding citing references) from that person’s author page. Author T also had one article removed from his profile page and only dropped one place. We cannot explain the final two drops in rank (Authors D and W).\(^2\)

¶ 47 Table 3 also indicates the status (tenure-track/tenured or not) and classification (doctrinal, academic success, clinician, legal writing professor, or librarian) of each faculty member. After the U.S. News scholarly impact ranking announcement, considerable conversation revolved around the issue of who should be counted in a faculty scholarly impact ranking.\(^3\) This debate reflects the challenges of creating a fair ranking across schools despite the lack of uniformity in scholarship expectations for different classifications of employees (some of which may even be considered staff at one school and faculty at another), without discounting the work of some scholars while privileging others.\(^4\) Table 3 shows that as of December 2021, 4 of 10 (40%) Drake Law faculty members (G, J, Z, and AA) who fall outside the tenure-track/tenured status and doctrinal classification have ScholarRank rankings higher than the same month's average ranking for all Drake Law tenure-track/tenured, doctrinal faculty. This includes the author who has the highest ScholarRank among all Drake Law faculty (163 in December

\(^{1}\) Again, this is simply point-in-time data. The seismic shifts we witnessed may well erode significantly as HeinOnline processes another institution’s corrections. Although the work was undertaken to ensure accuracy, much of the immediate advantage surely stemmed from the fact that not all law schools invested the same time to scrutinize their faculties’ citation metrics. As Wendy Nelson Espeland and Michael Sauder write, “Innovation in gaming tactics is most useful before competition encourages broad diffusion of a new tactic and comparative advantage dwindles: once everyone is doing it, the premium is lost.” ESPELAND & SAUER, supra note 61, at 145. Yet, even if this type of work yields no competitive advantage, forgoing it may result in a competitive disadvantage. Inaccurate institutional ScholarCheck data could result in undercounted citations and, therefore, a deceptively low rank; of course, with sufficient (uncorrected) name disambiguation problems that provide a citation overcount, the errors could wash out (or even be advantageous) for some schools. See Author N for an example of how once we asked Hein to remove 21 incorrectly attributed articles, the rank significantly declined.

\(^{2}\) The results for Author D demonstrate the multitude of factors involved in the rankings, as our work alone could not have caused the rank to drop. As noted, other factors beyond our processed corrections influenced the ScholarRank number, such as HeinOnline’s adding new articles (and their citations) and almost definitely correcting mistakes for authors other than our own faculty members.

\(^{3}\) See Wallace & Lutkenhaus, supra note 2, at 147–48.

\(^{4}\) See id. at 176. Note that this challenge lies at the heart of bibliometrics. See Nicola De Bellis, History and Evolution of (Biblio)Metrics, in Beyond Bibliometrics: Harnessing Multidimensional Indicators of Scholarly Impact 23, 33 (Blaise Cronin & Cassidy R. Sugimoto eds., 2014) (“Understanding the conditions for unbiased comparisons of ‘like with like’ has been, over the past three decades, the internal puzzle-solving activity underpinning the paradigm of evaluative bibliometrics.”).
2021). This may well not be the case at all institutions, suggesting that not all schools would be equally affected by a faculty ranking that considered only those who fit a single status and classification.

§48 To underscore the fact that processed corrections do not directly translate into a discrete improvement in rank, consider the following examples. Table 3 shows we submitted five corrections for both Author BB and Author O. Author BB’s rank rose by 4,428 places (up to 37,525), while Author O’s rank rose by 2,393 places (up to 37,040). We submitted 12 corrections for both Author B and Author P. Author B’s rank rose by 1,420 places (up to 22,698), while Author P rose by 167 places (up to 6,204). In contrast, after Hein made 98 corrections for Author J, Author J’s rank improved by only 10 places (from 173 to 163). Two authors for whom we submitted zero changes (R and X) each had an increase in rank from November 2020 to December 2021.

§49 In all of these examples, lower-ranked authors experienced more significant swings than more highly ranked authors, who exhibited more stable rankings. Clearly, an extra citation at the lower ranks carries more weight than an extra citation at the higher ranks. Citation count distributions typically exhibit a significant skew, so while not unexpected, this phenomenon demonstrates that additional citations cannot be assigned a set value in terms of their effect on rank. It also calls into question how much meaning should be assigned to rank changes, especially at the lowest levels. If using ScholarRank to assess legal scholarship, it may make more sense to group scholars (or faculties) into categories of impact rather than evaluating each individual’s rank (or reranking by the precise average rank of an entire faculty).

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95. See Sichelman, supra note 3 (“Based on my own research, there appear to be no non-doctrinal faculty with recent citation counts over their school’s mean and median citation count.”). Remember, however, that ScholarRank figures include HeinOnline download data as well as citation data.

96. See Thomas A. Smith, The Web of Law, 44 San Diego L. Rev. 309, 336 (2007) (reviewing the distribution of citations to 385,000 law review articles identified by the Shepard’s citations database and finding 43 percent received zero citations and about 79 percent had 10 or fewer citations). This phenomenon occurs across different kinds of scholarship. See, e.g., Cassidy R. Sugimoto & Vincent Larivière, Measuring Research: What Everyone Needs to Know 79 (2018) (“Citation rates are highly skewed, with a few documents receiving the large majority of total citations.”).

97. We are not the first to suggest grouping faculties rather than ranking them to address the disproportionate impact of small citation rate differences. See Theodore Eisenberg & Martin T. Wells, Ranking and Explaining the Scholarly Impact of Law Schools, 27 J. Legal Stud. 375 (1998).
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<td>A</td>
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<td>15 Pilot: 4975 (5/20); 4034 (11/20)</td>
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<td>B</td>
<td>T, D</td>
<td>12 24,118</td>
<td>23,663</td>
<td>22,698</td>
<td>23,124</td>
<td>25,863</td>
<td>22,393</td>
<td>22,879</td>
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<td>T, D</td>
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<td>6,457</td>
<td>5,786</td>
<td>5,873</td>
<td>6,044</td>
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<td>D</td>
<td>T, D</td>
<td>14 4,148</td>
<td>4,398</td>
<td>4,552</td>
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<td>23,485</td>
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<td>4,787</td>
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<td>T, D</td>
<td>26 5,696</td>
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<td>44,133</td>
<td>44,373</td>
<td>29,376</td>
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<td>-1</td>
<td></td>
</tr>
<tr>
<td>U</td>
<td>T, C</td>
<td>1 32,705</td>
<td>32,619</td>
<td>33,098</td>
<td>36,021</td>
<td>21,609</td>
<td>35,088</td>
<td>35,777</td>
<td>+2,244</td>
<td></td>
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<tr>
<td>V</td>
<td>T, D</td>
<td>26 14,957</td>
<td>14,646</td>
<td>14,461</td>
<td>14,561</td>
<td>14,160</td>
<td>13,535</td>
<td>13,587</td>
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<tr>
<td>W</td>
<td>T, LW</td>
<td>7 21,188</td>
<td>21,933</td>
<td>22,355</td>
<td>22,374</td>
<td>28,205</td>
<td>15,739</td>
<td>16,391</td>
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<tr>
<td>X</td>
<td>NT, AS</td>
<td>0 46,260</td>
<td>46,548</td>
<td>43,166</td>
<td>45,756</td>
<td>28,734</td>
<td>44,847</td>
<td>46,240</td>
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<td>Y</td>
<td>T, D</td>
<td>7 4,819</td>
<td>4,736</td>
<td>4,964</td>
<td>5,381</td>
<td>5,365</td>
<td>4,908</td>
<td>5,117</td>
<td>+264</td>
<td></td>
</tr>
<tr>
<td>Z</td>
<td>T, L</td>
<td>1 8,680</td>
<td>7,500</td>
<td>7,755</td>
<td>8,299</td>
<td>5,043</td>
<td>7,989</td>
<td>8,111</td>
<td>+188</td>
<td></td>
</tr>
<tr>
<td>AA</td>
<td>T, LW</td>
<td>38 6,131</td>
<td>6,146</td>
<td>6,149</td>
<td>6,493</td>
<td>6,585</td>
<td>5,369</td>
<td>5,369</td>
<td>+1,124</td>
<td></td>
</tr>
<tr>
<td>BB</td>
<td>T, D</td>
<td>5 39,447</td>
<td>41,339</td>
<td>39,720</td>
<td>41,953</td>
<td>25,644</td>
<td>37,525</td>
<td>37,525</td>
<td>+4,428</td>
<td></td>
</tr>
</tbody>
</table>

**Table 3 Notes**


Figures in Bold: The two bold ranks represent the rank before and after the time when Hein made the majority of submitted changes. Thus, the chart omits some of the total 640 missing citations submitted. For instance, Hein processed 32 corrections for Author J between November 2020 and April 2021, in addition to the noted 98 processed between September and November 2021. If Hein processed our requests to remove inaccurately attributed articles at the same time the bulk of citation corrections were made, the chart notes that as well.

Totals: Rank change averages omit Author N whose profile originally incorrectly included 21 articles he did not write.
Originally, we intended to compare the October 2021 and November 2021 ranks, but, as table 3 shows, the Drake CSV for October had clearly inaccurate data. For instance, one faculty member (T), consistently ranked between 788 and 871, radically dropped in October to 5,745 before jumping to 771 in November. Another faculty member (BB), who had ranked between 39,447 and 41,953, inexplicably jumped to 25,644 in October before landing at 37,525 in November.

We later noted that not only did the ScholarRank data contain clear errors, so did the underlying ScholarCheck metrics. For instance, one Drake Law faculty member’s total article citations dropped between August 2021 and November 2021, going from a combined 106 to 99 citations in articles of all ages. Although ScholarRank numbers vary over time and can decrease, ScholarCheck metrics for cited-by articles and cited-by cases should almost never decline if the system is working properly. The only ways to lose citations would be (1) if content is removed from HeinOnline or (2) through corrections. The first case would be extremely rare, as almost all content Hein licenses includes a “no pull” contract clause, meaning a journal could choose to no longer allow HeinOnline to add new issues, but the content already in the database cannot be eliminated. The second case may occur at the author level after correcting name homography issues that had led to articles being incorrectly attributed to a particular author. At the article level, citations may decline if Hein can resolve problems with the citation-matching algorithm including false matches. These did not apply in this case.

In conversations with Hein personnel, we learned that these anomalies were not unique to Drake. In October 2021, due to both internal quality control mechanisms and emails from us and other HeinOnline users, Hein became aware of this pervasive problem. After investigation, they realized that the ScholarCheck matching algorithm no longer included the alternative (non-Bluebook) citations previously incorporated into citation search strings. These mistakes in the ScholarCheck metrics caused the ScholarRank problems. Hein was largely able to remedy the problem by December 2021 with ScholarCheck numbers once again including almost all previously identified citation forms.

Despite Hein’s transparency in providing the ScholarRank formula and CSVs for each institution, important aspects of the way in which Hein arrives at ranks remain obscured. When anomalies occur, such as the incomplete ScholarCheck metrics corrupting...

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98. On the institutional CSVs, Hein breaks article citations into two categories based on whether the citing article was published in the last five years or is older.
99. Telephone Interview with Czopp, Daving & Boron, supra note 32. This is also an important consideration for libraries considering weeding print journal collections and instead relying on electronic access.
100. See supra notes 38 and 39 and accompanying text and infra note 108 and accompanying text.
101. Telephone Interview with Czopp, Daving & Boron, supra note 32.
102. Id.
103. For Drake, all but one author appeared to have their missing citations restored by November 2021. The faculty member described supra at note 98 and accompanying text had six of his seven missing citations restored in the December release.
the October rankings, the end user first needs to notice the problem exists. Even then, absent communication with Hein, the user can only guess at what might have occurred. This issue suggests that anyone relying on ScholarCheck as even just one means for seriously assessing the value of legal scholarship needs to scrutinize data reliability over time.

3. How Did the Invested Time Translate into Quantifiable Results?

§54 During the project, the librarians tracked the total number of hours invested in citation checks, recording 278 hours spent checking for missing citations to 398 articles. We did not track the amount of time spent in meetings and creating the spreadsheets for every faculty member. However, it would be reasonable to estimate that our project required 300 hours of total work time. (Note, too, this figure omits the time spent following up on changes submitted to Hein to ensure they were made, as well as time spent culling data to answer our research questions.)

§55 As discussed in the section above, the multitude of factors affecting ScholarRank make it impossible to directly measure how the number of corrections submitted changes an individual’s ranking. It is also impossible to determine how the time spent checking for missing citations will translate into rank improvements beyond giving the classic law school answer: it depends. Still, it is understandable to want a sense of how time invested might result in rank changes. To that end, we provide that data from our project, with the caveat that it provides only an illustration of the potential impact on ScholarRank after corrections. Any law library that replicates our project methodology may have drastically different results with the ScholarRank changes at their institution.

§56 We assessed a sample group to illustrate how ranks changed based on a per-hour investment searching for corrections. We individually tracked time spent on nine Drake Law faculty members, spending a total of 74.25 hours identifying their missing HOA citations. Combined, this group increased 10,155 spots in ScholarRank, meaning that in this instance, each hour invested in cite checking increased the overall Drake faculty ranking by 136.8 spots, as table 4 illustrates. However, remember that not only might other institutions have vastly different results, but it is impossible to tell what an increase of 136.8 spots in rank actually signifies.
TABLE 4

ScholarRank Changes Related to Number of Corrections Made and Time Invested

<table>
<thead>
<tr>
<th>Faculty Member</th>
<th>Corrections Processed by Hein</th>
<th>Hours Spent Reviewing Citations</th>
<th>Rank Increase</th>
<th>Rank Change per Hour Invested</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>15</td>
<td>11.75</td>
<td>+941</td>
<td>+80.1</td>
</tr>
<tr>
<td>B</td>
<td>11</td>
<td>2.25</td>
<td>+1420</td>
<td>+631.1</td>
</tr>
<tr>
<td>C</td>
<td>67</td>
<td>11.0</td>
<td>+1459</td>
<td>+132.6</td>
</tr>
<tr>
<td>D</td>
<td>14</td>
<td>4.5</td>
<td>−404</td>
<td>−89.8</td>
</tr>
<tr>
<td>E</td>
<td>26</td>
<td>8.0</td>
<td>+1817</td>
<td>+227.1</td>
</tr>
<tr>
<td>F</td>
<td>8</td>
<td>4.0</td>
<td>+1774</td>
<td>+443.5</td>
</tr>
<tr>
<td>G</td>
<td>6</td>
<td>2.25</td>
<td>+379</td>
<td>+168.4</td>
</tr>
<tr>
<td>H</td>
<td>50</td>
<td>29.5</td>
<td>+626</td>
<td>+21.2</td>
</tr>
<tr>
<td>I</td>
<td>2</td>
<td>1.0</td>
<td>+2143</td>
<td>+2,143</td>
</tr>
<tr>
<td>Total</td>
<td>199</td>
<td>74.25</td>
<td>+10,155</td>
<td>+136.8</td>
</tr>
</tbody>
</table>

4. Why Did ScholarCheck Miss Some HOA Citations?

¶57 As noted above, some common technical problems can cause HeinOnline to fail to match citing and cited HOA publications. We did not comprehensively review each of the 640 lost citations to categorize the reasons they were missed. However, we did note examples of some offending citation format issues and OCR recognition errors, which appeared to account for most of the problems we reported. We cannot quantitatively how many problems arose from citation issues versus OCR. In some cases, both presented problems.

¶58 We encountered Bluebook citation format errors, such as author name misspellings, incorrectly abbreviated journal titles, citations to pinpoint pages rather than first pages of articles, and replication of others’ citation errors.104 We did not discern any pattern in Bluebook citation errors that affected one faculty member more than another.

¶59 Another category of citation issue involves publications that use an author-date format and concluding cited references bibliography rather than embedding citations in footnotes. While this problem represented a relatively small proportion of the overall

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104. We noticed significant citation errors in one article that were then duplicated by a later article, suggesting the subsequent author may not have actually consulted the original article being cited. The practice of citing without reading may be quite extensive in some disciplines. See Philip Ball, Paper Trail Reveals References Go Unread by Citing Authors, 420 Nature 594 (2002) (reporting on a study of citations to one seminal physics paper that concluded, based on identical citation errors, that only 22–23 percent of authors actually read the original paper, as opposed to simply lifting the citation from a different paper’s reference list). For student-edited law articles that intensively review footnotes, we suspect some of these errors may be caught and corrected prior to publication, making it more difficult to use replication of citation errors to assess whether an author actually read the work being cited.
lost citations, it does not occur randomly. Instead, it primarily affects references appearing in interdisciplinary journals, which are more likely to follow this citation style.105

¶ 60 The last type of citation issue occurs when authors cite alternatives to final publications, such as forthcoming or repository pieces. Content published in more than one outlet also could pose a problem. For instance, we found two citations to a book chapter that republished an article that ScholarCheck captured only after we reported the issue to Hein.

¶ 61 A variety of OCR errors led to lost citations. For example, HeinOnline’s OCR software sometimes converted the Envtl. abbreviation to ENrrl., Etn., or ENvn. Similarly, there were instances when OCR changed Chi. into Cm., Rev. into RF%‘, and Ohio St. into OH!OST. (eliminating the space between the words as well as changing one of the characters). The OCR also eliminated spaces in other cases, frequently around an ampersand (&). Apostrophes in an abbreviation, such as Pol’y, also occasionally posed an OCR challenge and were either missed altogether or misplaced. An accent mark over the “e” in two Drake authors’ names caused the OCR to convert the “e” into another letter in a number of instances.106

¶ 62 We also noted some miscellaneous OCR problems of interest. One Drake professor’s HeinOnline metrics omitted five citations from articles published in a single journal issue. This may be coincidental, or it could have an underlying cause, such as the journal’s font typeface. We also observed that citation length occasionally caused a problem. The OCR sometimes missed citations with long article titles and/or published in journals with lengthy names because the citation stretched over multiple lines. On occasion, the OCR introduced substantial errors, processing the citation as gibberish. For example, the article title Downward Adjustment and the Slippery Slope read as “Dow d’Amtnz’st and de Slipey Slqi.”

¶ 63 As noted earlier, the ScholarCheck algorithm cannot reliably identify page numbers presented as Roman numerals.107 We encountered this problem with an introductory in memorium piece authored by one Drake faculty member. This article was miscited several times as beginning on page 1, when in reality it began on Roman numeral i. As a result, ScholarCheck metrics indicate zero cites to the introductory article. Instead, ScholarCheck attributes those cites to the issue’s first article, the one


106. In addition to the issue discussed above (see supra note 19 and discussion), that name homography may be more pronounced among certain nationalities and ethnicities, other evidence suggests that matching by name may disproportionately affect certain groups. See Moed, supra note 67, at 731 (noting that lost citations more frequently impact authors with non-English (e.g., Chinese and Spanish) names). This may indicate an advantage of the HeinOnline citation-based matching approach, although it is unknown whether the accent mark issues we encountered are solely a function of searching against the OCR or could possibly have implications in other types of citation matching.

107. See supra note 38 and accompanying text.
that truly starts on page 1. If Hein fixes this problem, the cite count for the introductory article will increase, and the cite count for the first article in the issue will decrease. \footnote{Unlike many of the problems we encountered, this was not an issue Hein could fix. Therefore, at least as of this writing, the problem can still be seen on HeinOnline. From the main HeinOnline screen, search for the following: citation: (46 Drake L. Rev. i). Note that this brings up the first main article in the issue starting on page 1, written by Saunders, rather than the intended prefatory in memorium piece. Look at the cited-by articles for the Saunders piece. Note that several reference the prefatory article \textit{The Pulse of Life in Justice Brennan’s Jurisprudence}. Finally, from the main HeinOnline screen, search for “46 Drake L. Rev. i” (including the quotation marks); note that this search does return relevant results.}

\footnote{For considerations and advice for the legal academy as a whole, as it grapples with the spread of evaluative bibliometrics and its appropriate role in the discipline, see Wallace & Lutkenhaus, \textit{supra} note 2.}


\paragraph{64} Again, our analysis of why HeinOnline missed HOA citations simply reflects anecdotal observation and may not accurately capture the most pervasive issues. Classifying the categories of problems and assessing their relative frequency would require consistent, further assessment before errors are reported and corrected. A more systematic study might provide useful considerations for librarians or authors who want to spot-check their ScholarCheck metrics. For instance, if there really is a higher likelihood that the OCR might have problems correctly converting Envtl., then it might be worthwhile checking all articles published in journals with Environmental in the title.

\section*{Recommendations}

\paragraph{65} As noted in the introduction, the legal academy’s concerns with \textit{U.S. News}’ proposed ranking extended well beyond HeinOnline content and logistics. Larger issues related to the legal publishing landscape and the value of legal scholarship emerged. Through our review of the literature and our citation analysis experience, we developed a list of core—not comprehensive—recommendations and best practices related to the responsible promotion and evaluation of legal scholarship. The tips address the following constituencies: authors seeking to maximize exposure to their work, law journals publishing articles, and law librarians who facilitate scholarly communication or are considering undertaking a similar citation analysis project. \footnote{For considerations and advice for the legal academy as a whole, as it grapples with the spread of evaluative bibliometrics and its appropriate role in the discipline, see Wallace & Lutkenhaus, \textit{supra} note 2.}

\section*{Authors}

\paragraph{66} Some recommendations for authors:

1. Seize opportunities to discuss your scholarship in the developmental phase. Attending paper workshops or faculty exchanges or presenting a conference poster session can improve the quality of your final product (the most critical goal) \footnote{See Anne Wil-Harzing, \textit{The Four Cs of Getting Cited}, HARZING.COM (Nov. 12, 2020), https://harzing.com/publications/white-papers/the-four-cs-of-getting-cited [https://perma.cc/E5KE-6B5T] (“[I]mpact starts with competence: delivering high-quality work.”).} and also increase awareness of your work.

2. Be cognizant of your own potential bias in preferring a source based on who wrote it or the prestige of the journal in which it was published. Instead, cite the
scholarship that makes the best substantive contribution to the topic at hand. Such scholarship can be identified through well-crafted searches of electronic databases and catalogs. If you want to expand your search skills, ask your institutional librarians whether they can provide training.

3. Cite yourself when appropriate. Avoid superfluous citations to your own work, but do not hesitate to cite relevant, helpful scholarship using the same selection standards as for other works.

4. Make your scholarship as discoverable and easy to retrieve in full text as possible, preferably in a searchable PDF format\(^{111}\) accompanied by metadata.\(^{112}\) Articles freely accessible on the internet have a 53 percent citation advantage by subsequent law review articles.\(^{113}\)

5. Ensure you know your rights as an author and retain copyright of your work.\(^{114}\)

6. When posting drafts in online repositories, encourage others to cite the final published version of the article by adding a note on the first page of the draft. For instance, if posted without a placement citation, include something like *Please do not cite to this preprint without the express permission of the author.*

7. Replace drafts posted in a repository with the final version and edit the repository page to include complete citation information for the published article.

8. Digital Object Identifiers (DOIs) provide persistent, unique identifiers for your scholarship, thus facilitating discovery and retrieval.\(^{115}\) Although some of your work may already have a publisher assigned DOI, this is unlikely because law journals typically do not assign DOIs as part of their publication process.\(^{116}\) When you have an article accepted for publication, inquire whether the publishing journal will assign a DOI as part of the publication process. If authors consistently ask about DOIs, it will raise awareness and increase the likelihood that journals will integrate the assignment of DOIs into their workflow.

9. When you are citing a work, determine whether it has a DOI. If it does, incorporate the DOI into your citation, if supported by the citation rules you are following.

10. Regardless of the number of authors, name each individually in your citations rather than truncating credit by using *et al.*

11. Create an ORCID iD to take advantage of its HeinOnline integration\(^{117}\) and the benefits of a unique, persistent author identifier: preventing authorship

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\(^{111}\) Shucha, *supra* note 8, at 103.

\(^{112}\) *Id.* at 102.


\(^{116}\) *Id.* at 14.

\(^{117}\) See Kibler, *supra* note 23.
confusion and reducing the possibility of search algorithms missing citations to your work due to typographical errors.118

12. Improve your scholarly visibility by creating and curating your ORCID record and your HeinOnline, Google Scholar, and SSRN scholar profiles.119 Use the same email address across all platforms.120

13. Consider how factors such as article length, title length, and the use of colons in titles might affect citation to your articles.121 Include an abstract and table of contents, as these elements correlate with higher citation.122 Carefully consider the abstract wording to ensure it both represents key concepts and incorporates the terms other researchers use.

14. Promote your work effectively but not coercively. In addition to sharing work through preprints or open access repositories, communicate your publication news with colleagues through discussion lists,123 social media, conference presentations, and other suitable venues. Selective, personal emails to other scholars who publish in the same area can also be effective, but avoid spam.124

Journals

¶67 Some recommendations for journals:

1. Student-edited journals can eliminate problems with link rot125 and increase the discoverability126 of the articles they publish by assigning DOIs as part of their standard publication process. As more authors understand DOI benefits, journals who assign DOIs will also become more desirable placements. After implementing a process for creating DOIs for newly published articles, journals should consider retrospectively adding DOIs to previously published articles.127

118. Retteen & Hall, supra note 115, at 11.
123. Know your list’s audience and make an informed decision as to the suitability of such an announcement. Some forums might welcome these kinds of notices while others might receive them negatively.
125. See Retteen & Hall, supra note 115, at 8.
126. See id. at 9.
2. Journals should modify their in-house citation style to include DOIs in footnotes and check for these as part of the cite-checking process.  

3. Follow the Fair Citation Rule by listing each author in citations rather than using an et al.

4. Student journals should consider how the font they use works with current OCR technology. OCR has trouble distinguishing between characters that look similar, and one site recommends Tahoma as a good option. HeinOnline does not specify a single optimal font but suggests journals use fonts with crisp, clearly defined characters.

5. Employ a blind review process to assess articles “on their merits, including their quality, accuracy, originality, timeliness, and relevance.” This eliminates the risk that student editors may favor authors within their own institution or use an author’s reputation or institutional affiliation as “a surrogate for assessing the article on its own merits.” One study also suggests that blind review increases publishing opportunities for women.

6. Carefully train staff members to verify they use proper journal abbreviations. Inconsistencies and errors in this portion of the citation can significantly diminish citation statistics. The huge ScholarRank swings observed in fall 2021 when ScholarCheck temporarily omitted alternative citation formats demonstrates the importance of using standardized journal abbreviations.

Librarians Interested in Scholarly Communication

§68 Some recommendations for librarians generally:

1. Think strategically about how the library can best promote scholarly communication and support the institution’s mission. Finite financial and human resources require prioritizing efforts that will maximize faculty scholarship reach while also adequately supporting other law school goals.

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129. See George, supra note 44, at 6.


131. Email from Noah Short, HeinOnline Sr. Manager, Digital Prod., to Rebecca Lutkenhaus (July 16, 2021) (on file with author).


133. Id. at 221.

134. Id. at 210; see also Hayashi & Mitchell, supra note 6, at 151 (recommending a blind review process, in part, to increase the likelihood that editors base publication acceptance decisions on article quality rather than author prominence).

2. Participate in the broader conversation to establish bibliometric norms and guidelines in the discipline of law. The field of bibliometrics emerged from library science, and librarians bring a critical perspective to the discussion.
3. Offer training and create research guides on relevant topics, such as creating ORCID iDs or enhancing author profiles, to support faculty.
4. Educate journal staff on the importance of DOIs and assist them in integrating DOI assignment into their workflows.
5. Educate yourself about and monitor any data your institution uses to assess scholarly impact. With regard to HeinOnline, save the CSV files for your institution at the same time every month, preferably the first or second week of the month because Hein typically updates the cite count tables (ScholarCheck metrics) during the third week of the month. Subscribe to the HeinOnline Blog emails and use the monthly content release messages as a trigger to download your institution’s CSV.

Librarians Considering a Similar Citation Analysis Project

Some recommendations for librarians for similar projects:

1. Complete a pilot project to examine the citations of a single faculty member and track the time devoted to this effort. Upon completion of the pilot, scrutinize the return on investment to determine whether the benefits of correcting citations to improve ScholarCheck metrics or ScholarRank merit the time spent.
2. If you then decide to examine additional faculty members, continue to maintain good time records and weigh this against project outcomes, such as the number of citations added, as well as opportunity costs (i.e., work delayed or rejected to accomplish the citation project). By completing work in stages, initial input/output data can inform decisions about prioritizing such work. It can also help document library value to your law school administration.
3. Avoid multitasking and take breaks; this painstaking work requires focus to avoid errors.
4. Recruit students who you know to be detail oriented to complete or assist with the project. Much of this work is routine, particularly initially capturing the

136. Belgian Paul Otlet introduced the term bibliométrie in 1934 in one of his principal books about organizing information, *Traité de Documentation*. Otlet briefly practiced law before embarking on a groundbreaking career in information sciences. Alan Pritchard popularized the English version, bibliometrics, in a 1969 paper entitled *Statistical Bibliography or Bibliometrics?* and published in the information science title, *Journal of Documentation. See Karen Blakeman, Bibliometrics in a Digital Age: Help or Hindrance, 101 Sci. Progress 293* (2018); *Rousseau, Egghe & Guns, supra* note 19, at 1; Alex Wright, *Paul Otlet, in Encyclopaedia Britannica* (Dec. 6, 2020), https://www.britannica.com/biography/Paul-Otlet [https://perma.cc/MH5U-C66G]; see also Sugimoto & Larivière, *supra* note 96, at 7–8 (noting that early bibliometric methods were largely designed to serve library collection needs and that this, along with the inherent link between libraries and scholarship, “placed bibliometrics, and other quantitative approaches to measuring research, within the domain of library and information science throughout most of the twentieth century”).
citations, and lends itself well to research assistants. At the same time, it requires close attention to detail to avoid errors.

5. If you decide against conducting a thorough citation analysis project, consider spot-checking articles that seem to have low citation counts.137

6. Use bookmarks to download citations from HeinOnline.138

7. Compare Westlaw citations with HeinOnline citations first. Westlaw citations can be downloaded in a CSV sheet, and the data contain fewer errors and duplicates than Google Scholar data.

8. Check for missing citations in Google Scholar last as this step requires the most time due to the range of sources captured and potential errors and duplicates.139

9. Harzing’s Publish or Perish tool can be used to download Google Scholar citations, but “substantial deduplication may be required.”140

10. Be aware of false results. Verify all citations to confirm that they truly cite the publication under review.

11. Create alerts to receive notification of new citing references and then double-check that HeinOnline has captured them.

12. Regularly check Hein’s Author Profiles to confirm Hein has a current listing of faculty members and their articles, a step Drake completed prior to the work described in this article. Omissions here can have a tremendous impact on overall statistics.141 Moreover, these steps require considerably less time than looking for lost citations.142

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**Conclusion**

¶70 The now jettisoned *U.S. News* proposal to create a scholarly impact ranking spurred research testing assumptions about the relative impact of HeinOnline’s content limits, the accuracy of its data, and the extent of its ability to match cited and citing publications, providing valuable insights into the strengths and limitations of this platform. HeinOnline deserves commendation for striving to correct deficiencies and improve accuracy and for their responsiveness in addressing reported issues. However, our study shows a significant problem with lost citations, with an average rate of 14.6 percent of available citing references not accurately matched with the cited publication. Moreover, librarian efforts to uncover and report these issues divert resources from other work.

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137. See Shucha, *supra* note 8, at 100.
140. Shucha, *supra* note 8, at 100.
141. See *id.* at 95–98 (noting various reasons publications may not be properly credited).
142. See *id.* at 100 (noting that even after ensuring proper identification of authors and their works, citation comparisons can find more citations, but this latter step “is much more time-consuming and less broadly effective”).
¶71 Deficiencies in the citation-matching processes that lead to inaccurate data will likely persist unless something fundamentally shifts. The most promising way to minimize these lost citations involves integrating persistent identifiers into legal publishing practices. Authors should adopt ORCID iDs to help correct name homography and name variability problems. Journals should provide article DOIs, and *Bluebook* and *ALWD* should require their use, when available, in citations. ORCID iDs and DOIs could then be used to more accurately match citing and cited publications, avoiding the types of name disambiguation, publishing error/variability, and OCR problems that are largely responsible for HeinOnline’s lost citations.
Passion Projects in Law Librarianship: A Belated Tribute to Igor Kavass and His Personal Mission to Acquire and Organize U.S. International Agreements*

Loren Turner**

In December 2020, Oona Hathaway, Curtis Bradley, and Jack Goldsmith, law professors at Yale, Chicago, and Harvard, respectively, published their article, The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis, in the Harvard Law Review. The article reveals that the U.S. executive branch consistently fails to comply with federal requirements to report and publish the international agreements it makes with foreign countries. As a result, Congress and the American public regularly lack access to legal information to which they are entitled under federal law. Additionally, Hathaway, Bradley, and Goldsmith identify a particular time when our already-inaequate access to these agreements, which are binding under international law, further declined: in 2008, following the death of Igor Kavass.

This article pays tribute to Igor Kavass, a law librarian who pursued a professional passion to acquire and organize U.S. international agreements for researchers all over the world. It shows how one law librarian's passion project can lead to extraordinary advances in our access to legal information, but only so long as the individual creator remains active in the profession. The article seeks an association-level collaborative effort to identify and revive the passion projects of our predecessors that still have the potential in the modern era to fill a gap in our access to legal information, especially to primary source materials.

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Introduction

¶1 In December 2020, Oona Hathaway, Curtis Bradley, and Jack Goldsmith, law professors at Yale, Chicago, and Harvard, respectively, published their article, The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis, in the Harvard Law Review. The article reveals that the U.S. executive branch consistently fails to comply with federal requirements to report and publish binding international agreements it makes with foreign countries. As a result of this failure, Congress and the American public regularly lack access to legal information to which they are entitled under federal law. Additionally, Hathaway, Bradley, and Goldsmith identify a particular time when our already-inadequate access to these agreements, which are binding under international law, further declined: in 2008, following the death of Igor Kavass.

¶2 Igor Kavass was a law librarian who pursued a personal mission to acquire U.S. international agreements through Freedom of Information Act (FOIA) procedures, personal contacts, and exhaustive research in secondary sources. Kavass's passion project led to a collaboration with William S. Hein & Co. to provide indexing services for international agreements and, later, the text of international agreements through a database appropriately called the KAV Agreements database. From 1990 until his death in 2008, Kavass built the KAV Agreements database into the largest collection of published and unpublished U.S. international agreements in the digital era. It became a product so superior to U.S. government sources that even attorneys working inside the U.S. State Department, who theoretically should have had access to all U.S. international agreements through State Department internal records, paid subscription fees to access those agreements.

2. See id.
3. See id. at 667–68.
agreements through HeinOnline. Upon Kavass’s death, however, the flow of information from the U.S. government to the KAV Agreements database began to decrease, and the declining access to information went mostly unnoticed until Hathaway, Bradley, and Goldsmith published their work in December 2020.

This article pays tribute to Kavass as an example of how passion projects in law librarianship can lead to extraordinary advances in access to legal information, promoting democratic ideals. But it also details how such projects may become vulnerable to decline upon the retirement or death of an individual creator. The article’s ultimate purpose is to serve as a reminder of the importance of the work law librarians do and to initiate a broader conversation about how we, as a profession, can create a better system to identify, encourage, and maintain law librarian passion projects at an association level, so as to ensure consistent quality of access to legal information through the retirement or death of an individual.

The article first provides a brief overview of U.S. international agreements. It frequently references our colleague Ryan Harrington’s award-winning article, Understanding the “Other” International Agreements, published here in 2016. It next summarizes the Hathaway, Bradley, and Goldsmith article, particularly its analysis of the transparency regime surrounding international agreements and its discovery of Kavass’s legacy. The next section contains a belated tribute to Kavass, a paragon of our profession who has not yet been memorialized in this journal. It surveys his life and work, focusing on his personal mission to improve access to U.S. international agreements. The article concludes by recognizing remaining research gaps in the context of U.S. international agreements and calls on the membership to consider systemic ways to maintain consistent quality of access to the passion projects of law librarians beyond the retirement or death of an individual.

**A Brief Overview of U.S. International Agreements**

The U.S. executive branch is the only branch of the federal government with power to make international agreements with foreign countries. International agreements fall into two categories: those that are binding under international law and those that are nonbinding under international law. Nonbinding agreements, sometimes called “political agreements” or “political commitments,” are not regulated, which means that neither Congress nor the American public will know they exist absent...
voluntary government disclosure or leaks to journalists. On the other hand, U.S. international agreements that are binding under international law are regulated to allow Congress and the American public access within certain parameters. These binding international agreements fall into two subcategories: treaties, which require the advice and consent of the Senate, per Article II of the Constitution, and executive agreements, which are not mentioned in the Constitution but have been sanctioned by practice. The U.S. Department of State oversees the negotiation of international agreements through coordination with the various executive branch agencies making deals with their foreign counterparts and decides which form they take: binding or nonbinding, treaties or executive agreements.

The U.S. executive branch makes hundreds of binding international agreements each year. In the post–World War II era, though, only 6 percent of those agreements are treaties. The vast majority of binding commitments, 94 percent, are executive agreements.

7. See Harrington, supra note 5, at 349–50, 358–59 (explaining the difficulty of finding nonbinding agreements since the U.S. government does not (and is not obligated to) report or publish them); see also Bradley, Goldsmith & Hathaway, supra note 6 (explaining that the authors are in current FOIA settlement discussions with select executive agencies to acquire nonbinding agreements to test hypothesis that use of nonbinding agreements is becoming more prevalent).

8. See infra. The discussion about the government regulation of U.S. international agreements may be found in the subsections of this section, below. In particular, the subsections called “Executive Branch Reporting Duties” and “Executive Branch Publication Duties,” pp. 435-37.

9. See U.S. Const. art II, § 2, cl. 2 (the President “shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur… ”); see also Jean Galbraith, International Agreements and U.S. Foreign Relations Law: Complexity in Action, in OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 157, 160 (Curtis A. Bradley ed., 2019) (characterizing the treaty process as clear but also as historically difficult and increasingly impossible to complete given the bipartisan cooperation it requires).

10. See G. Edward White, From the Third to the Fourth Restatement of Foreign Relations: The Rise and Potential Fall of Foreign Affairs Exceptionalism, in THE FOURTH RESTatement and BEYOND 23 et seq. (2020) (tracing an increasing acceptance of expanding executive power in the context of foreign affairs such as to allow other ways of making international agreements outside what the U.S. Constitution provides). See also Hathaway, Bradley & Goldsmith, supra note 1, at 638–39 (stating the executive branch’s authority to make executive agreements is “undisputed” and tracing executive agreements all the way back to 1792). In addition, see Igor Kavass & Mark A. Michael, UNITED STATES TREATIES AND OTHER INTERNATIONAL AGREEMENTS CUMULATIVE INDEX 1776–1949, at vi–vii (1975) (stating that executive agreements have an “uncertain and constitutionally murky status”).

11. See, e.g., 11 FOREIGN AFFAIRS MANUAL § 723.1 (“The following considerations will be taken into account along with other relevant factors in determining whether an international agreement shall be dealt with by the United States as a treaty to be brought into force with the advice and consent of the Senate or as an agreement to be brought into force on some other constitutional basis… ”).

12. See Hathaway, Bradley & Goldsmith, supra note 1, at 666.

13. See Harrington, supra note 5, at 344 (characterizing treaties as a “microcosm” of all U.S. international agreements entered into by the United States and citing the exact figure at 6.2 percent); see also Hathaway, Bradley & Goldsmith, supra note 1, at 632–39 (describing the “near collapse of the treaty process” in the years after World War II and listing the dwindling number of treaties submitted to Congress over the last couple of decades: Trump (five treaties total in first three-and-a-half years in office); Obama (five treaties per year in office); George W. Bush (12 treaties per year in office); Clinton (23 treaties per year in office)).
agreements.\textsuperscript{14} From a researcher’s perspective, finding documents related to treaties is not very difficult given the small number of treaties being made and the significant amount of documentation produced during the Senate’s advice and consent process.\textsuperscript{15} Executive agreements, on the other hand, are much more difficult to find because, as Hathaway, Bradley, and Goldsmith reveal in their article, described in a section below, the executive branch is not reporting and publishing executive agreements as required under federal law.

\textbf{Executive Branch Reporting Duties}

\textsuperscript{¶}7 During the Nixon administration, Congress became increasingly concerned with the executive branch’s overwhelming tendency to conclude binding agreements with foreign countries without notifying Congress of their existence or contents.\textsuperscript{16} Congress believed that the executive branch’s enhanced reliance on executive agreements effectively undermined the system of checks and balances in U.S. foreign policy.\textsuperscript{17}

\textsuperscript{¶}8 In response, Congress enacted the Case-Zablocki Act (also known as the Case Act), a federal statute that requires the executive branch (via the State Department) to inform Congress about the international commitments it makes with foreign countries.\textsuperscript{18} As part of its duties under the Case-Zablocki Act, the executive branch is supposed to transmit the text of all executive agreements (including classified executive agreements) to authorized members of Congress within 60 days of those agreements entering into force.\textsuperscript{19} State Department regulations further require a background state-

\textsuperscript{14.} See Harrington, \textit{supra} note 5, at 344 (identifying three distinct types of executive agreements: sole executive agreements, \textit{ex ante} executive agreements, and \textit{ex post} executive agreements); see also Hathaway, Bradley & Goldsmith, \textit{supra} note 1, at 638 (adding a fourth category of executive agreements: executive agreements pursuant to treaty); Galbraith, \textit{supra} note 9, at 160 (“[f]oreign relations law scholars typically categorize these agreements based on whether and when Congress is involved in their making”).


\textsuperscript{17.} See \textit{id.} at 1.

\textsuperscript{18.} See Case-Zablocki Act, 1 U.S.C. § 112b; see also 22 C.F.R. § 181.7 (identifying State Department personnel as responsible for transmitting to Congress international agreements other than treaties); Hathaway, Bradley & Goldsmith, \textit{supra} note 1, at 649–50 (quoting Senator Case and Representative Zablocki’s arguments for more transparency in the context of executive agreements concluded by President Nixon and other executive officials); Harrington, \textit{supra} note 5, at 352 (explaining that Congress enacted the Case-Zablocki Act because it had difficulty keeping track of binding commitments the executive branch made outside of the Article II treaty process).

\textsuperscript{19.} See Case-Zablocki Act, 1 U.S.C. § 112b(a) (clarifying that the executive branch may transmit executive agreements designated as classified directly to the Senate Committee on Foreign Relations and the House Committee on International Relations under an appropriate injunction of secrecy); see also 22 C.F.R. §§ 181.1–181.9 (codifying the State Department’s duties in the coordination, reporting, and publication duties of international agreements); 11 FOREIGN AFFAIRS MANUAL §§ 720–727 (citing the State Department’s internal guidelines, known as the “Circular 175 procedures” or the “C-175 procedures,”
ment to accompany the text of each executive agreement transmitted to Congress. The background statement is a one-page cover memo attached to the agreement, which provides the title of the agreement, the date the agreement was concluded, a brief explanation of the agreement, and a precise citation of the legal authority that the executive branch claims gave it power to conclude the agreement. This reporting duty merely keeps Congress informed about the binding international agreements the executive branch makes with foreign countries after the fact; it doesn’t offer Congress any means to prevent the executive branch from making those agreements.

Executive Branch Publication Duties

¶ In addition to the executive branch’s reporting duties to Congress, the executive branch is also supposed to publish (for the public) the text of executive agreements within 180 days of those agreements entering into force. Unlike its reporting duties, however, the State Department’s publication duties are not systematic; the State Department chooses which agreements to publish and maintains a long list of agreements it exempts itself from publishing, including classified agreements.

¶ Over the years, the U.S. government has published binding international agreements in a variety of different sources: the U.S. Statutes at Large (Stat.), the Treaty Series (T.S.), the Executive Agreement Series (E.A.S.), the Treaties and Other International Acts Series (T.I.A.S.), and the United States Treaties and Other International Agreements which identify and encourage compliance with federal legislation regarding the “negotiation, conclusion, reporting, publication, and registration of U.S. treaties and international agreements…and maintenance of complete and accurate records on such agreements”); Ryan Harrington, A Remedy for Congressional Exclusion from Contemporary International Agreement Making, 118 W. Va. L. Rev. 1211, 1238–45 (2016) (arguing that Congress should amend the Case Act to apply to nonbinding international agreements).

20. See 22 C.F.R. § 181.7(c).

21. See Hathaway, Bradley & Goldsmith, supra note 1, at 650 (explaining that prior to their joint empirical project, no one outside of government (and few within government) knew these cover memos existed or had ever seen one); see id. at 651 (noting that the executive branch’s reporting duties to Congress are broader and more comprehensive than its publication duties to the public because of the extra information provided in the “background statements”).

22. See 1 U.S.C. § 112a (enumerating exceptions to publication when the Secretary of State determines that public interest is insufficient to justify publication, including in instances where publication would be “prejudicial to the national security of the United States”); see also 11 FOREIGN AFFAIRS MANUAL §§ 720–727 (citing the State Department’s Circular 175 procedures).

23. See, e.g., 11 FOREIGN AFFAIRS MANUAL § 725.3 (clarifying that classified executive agreements are not subject to public release); see also Hathaway, Bradley & Goldsmith, supra note 1, at 646–47 (noting the current list of 16 categories of agreements exempted from publication).


27. The Treaties and Other International Acts Series (T.I.A.S.) published treaties and executive agreements as early as 1945, and today it is the only official government source for international agreements. T.I.A.S. was created to merge T.S. and E.A.S. into one publication, which is why it began publication with the number 1501, which was the next sequential number after combining all 994 treaties published in T.S.
Today, the government maintains only T.I.A.S., and, as of 2006, T.I.A.S. is solely available in electronic format on the State Department’s website.29

¶11 In combination, these reporting and publication duties are supposed to create a “transparency regime” surrounding binding international agreements,30 which is supposed to reinforce transparency in government, one of the crucial indicators of a healthy democracy.31 Unfortunately, as explained below, the executive branch regularly fails to comply with its reporting and publication duties.32 The transparency regime on paper doesn’t reflect reality in practice.

The Hathaway, Bradley, and Goldsmith Empirical Project and Article

¶12 In 2017, Oona Hathaway, Curtis Bradley, and Jack Goldsmith, law professors at Yale, Chicago, and Harvard, respectively, embarked on a joint empirical project to analyze the transparency regime, particularly as it applies to executive agreements.33

The FOIA Litigation Settlement

¶13 On behalf of the Yale Law School Center for Global Legal Challenges, Hathaway, Bradley, and Goldsmith filed a FOIA request with the State Department for copies of all the one-page cover memos that had been attached to unclassified executive agreements reported to Congress during the presidential administrations of George H.W. Bush, William J. Clinton, George W. Bush, and Barack Obama.34

with all 506 executive agreements published in E.A.S.


29. See U.S. Dep’t of State, Office of Treaty Affairs, Finding Agreements, U.S. DEPT. OF STATE, https://www.state.gov/finding-agreements/ [https://perma.cc/HK98-78VS] (identifying T.I.A.S. as an official government source of treaties and executive agreements since 1945 and explaining its transition from a print to an electronic-only source); see also Hathaway, Bradley & Goldsmith, supra note 1, at 647 (noting that the State Department’s T.I.A.S. website does not distinguish between treaties and executive agreements and provides limited coverage for the years prior to 1996).

30. See Hathaway, Bradley & Goldsmith, supra note 1, at 645–57 (coining the phrase “transparency regime” to describe the legislative and regulatory framework set up to track use of executive agreements, describing it as “bifurcated,” and providing (in nifty tables): the chronology of the most important amendments to the reporting and publishing duties (table 1) and a comparison between the reporting and publication obligations (table 2)).

31. See Brigham Daniels, Mark Buntaine & Tanner Bangerter, Testing Transparency, 114 Nw. U. L. REV. 1263, 1267 (2020) (citing multiple legal scholars who deem transparency as “essential for democracy to function”); see also LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants . . . .”).

32. See Hathaway, Bradley & Goldsmith, supra note 1, at 633–54 (confirming, through empirical study, congressional fears of late reporting and nonreporting and blaming bureaucratic dysfunction as a cause).

33. See id. at 634–35 (citing shared interest in U.S. foreign relations law and consensus on the opacity surrounding U.S. government practice in the context of executive agreements).

34. See id. at 721 (detailing methodology in app. A).
¶14 When, after 224 days, the State Department still hadn’t responded to the FOIA request, Hathaway, Bradley, and Goldsmith sued in federal court. Eventually, the parties negotiated a settlement to end the litigation, and, under the terms of the settlement, the State Department produced well over 5,000 cover memos that met the requested criteria.

¶15 Hathaway, Bradley, and Goldsmith targeted cover memos in their FOIA request for several reasons. First, they knew the executive branch reported more executive agreements to Congress than it published in T.I.A.S., so they focused on gathering documents associated with the reporting duty to capture a more comprehensive dataset, even though they were limited to cover memos attached to unclassified executive agreements (for obvious reasons). Second, since every executive agreement was supposed to have a cover memo, Hathaway, Bradley, and Goldsmith’s request for cover memos helped them get a sense of how many executive agreements the executive branch was making every year, since that information was not publicly available. Third, and most obviously, Hathaway, Bradley, and Goldsmith wanted to know, through the cover memos, what these executive agreements were about. As mentioned above, each cover memo identified the title, conclusion date, description, and legal authority for each executive agreement. Hathaway, Bradley, and Goldsmith wanted to see that information to determine the breadth of subject areas covered by executive agreements and also to analyze the citations of legal authority provided for each executive agreement. Lastly, and more practically speaking, each cover memo is only one page long, which made analyzing its data a bit more manageable as an empirical project.

¶16 The most surprising, troubling, and validating revelation of the Hathaway, Bradley, and Goldsmith project is that even U.S. foreign relations scholars employed as chaired law professors at the very top U.S. law schools had to file FOIA requests and sue the government to understand the executive branch’s process for making, reporting, and publishing U.S. international agreements. Sometimes confronting roadblocks in research can feel like a personal failure, but in this context, the failures rest with the government and the absence of a crusader, like Kavass.

35. See id.
36. See id. at 635.
37. See id. at 651 (noting the executive branch’s reporting duties to Congress are broader since the executive branch had to report all international agreements to authorized members of Congress, even classified ones, and because the executive branch had to include a cover memo to accompany the international agreements and the cover memo provided extra information about the agreements, like “background statements”); see also Ashley S. Deeks, A (Qualified) Defense of Secret Agreements, 49 Ariz. St. L.J. 713, 724 (2017) (hypothesizing that the U.S. government has concluded roughly 1,000–1,800 classified agreements); Oona A. Hathaway, Secrecy’s End, 106 MINN. L. REV. 691, 767–78 (2021) (lamenting the overclassification of government documents and arguing overclassification is detrimental to efficiency and national security).
38. See Hathaway, Bradley & Goldsmith, supra note 1, at 666 (explaining that their dataset “provided valuable insight into the extensive use of executive agreements” and helped the authors realize that the executive branch was concluding “hundreds of executive agreements a year across a vast range of topics”).
39. See id.
The Dataset and Conclusions

¶17 Once they began receiving cover memos from the State Department pursuant to their FOIA request, Hathaway, Bradley, and Goldsmith and a team of research assistants began uploading each cover memo onto the Harvard Dataverse Repository.40 Hathaway, Bradley, and Goldsmith named their dataset the Executive Agreements Database41 and spent almost two years coding and analyzing cover memos.42 They also conducted interviews with current and former State Department employees to get context for the data they were gathering from the cover memos.43

¶18 After gathering, coding, and analyzing cover memos, Hathaway, Bradley, and Goldsmith described the transparency regime surrounding executive agreements as a system of “dysfunction and nonaccountability.”44 The executive branch makes hundreds of executive agreements a year on a variety of subjects based on questionable legal authority and regularly fails to comply with its reporting and publication duties set out under federal law.45 “Not only do the American people have no easy way to learn what binding international agreements have been concluded in their name, but Congress, too, seems to have been left out of the loop on thousands of international agreements in the last few decades.”46 Hathaway, Bradley, and Goldsmith blamed the executive branch for its incompetence, but also faulted Congress for failing in its oversight obligations.47

Inadequate Reporting of Executive Agreements

¶19 The State Department, pursuant to its FOIA litigation settlement, certified that its disclosure of cover memos to Hathaway, Bradley, and Goldsmith represented all the cover memos attached to unclassified executive agreements reported to Congress.48 When Hathaway, Bradley, and Goldsmith compared the cover memos they received to the executive agreements they discovered through independent research, however, they realized they were missing cover memos for over 2,000 executive agreements.49 Hathaway, Bradley & Goldsmith, supra note 1, at 658.

40. HARV. DATaverse REPOSITORY, https://support.dataverse.harvard.edu/ [https://perma.cc/JN6R-L32C] (“The Harvard Dataverse Repository is a free data repository open to all researchers from any discipline, both inside and outside of the Harvard community, where you can share, archive, cite, access, and explore research data.”).
41. See id. at Executive Agreements Database, https://dataverse.harvard.edu/dataverse/executiveagreements [https://perma.cc/P3X-6Z2U].
42. See Hathaway, Bradley & Goldsmith, supra note 1, at 658.
43. See id. at 658–59 (explaining that interviews were necessary since there is no public account of the process).
44. Id. at 635–36.
45. See id. at 691; see also Jean Galbraith, The Runaway Presidential Power over Diplomacy, 108 Va. L. REV. 81 (2022) (comparing the limited topics that negotiations between countries discussed in the 18th century with the vast array of topics that negotiations between countries discuss today).
46. Hathaway, Bradley & Goldsmith, supra note 1, at 691.
47. See id. (stating that Congress should do more to mitigate State Department dysfunction).
48. See id. at 671–72.
49. See id. (comparing cover memos received from the State Department with agreements available in T.I.A.S. or HeinOnline and finding that T.I.A.S. had 610 agreements for which they did not receive cover memos and HeinOnline had “a whopping” 2,027 agreements for which they did not receive cover memos).
Bradley, and Goldsmith inferred from this discrepancy that the State Department had failed to report at least 2,000 executive agreements to Congress. 50 This inference was further supported by interviews Hathaway, Bradley, and Goldsmith conducted with current and former State Department employees, who described the State Department as historically and persistently unorganized and understaffed. 51 One State Department employee told Hathaway, Bradley, and Goldsmith that, in addition to inadequate reporting of unclassified executive agreements, classified agreements hadn’t been reported to Congress for years, despite the plain language of the Case-Zablocki Act and related federal regulations. 52

¶20 Additionally, Hathaway, Bradley, and Goldsmith discovered that when the State Department manages to report executive agreements to Congress, the reporting is often late. 53 One of the reasons for late reporting is because the State Department is not the only executive agency making executive agreements; it is just the ultimate executive agency in charge of overseeing the negotiation of international agreements and of reporting all binding international agreements to Congress. 54 Under the Case-Zablocki Act and its regulations, executive agencies making deals with their foreign counterparts have 20 days to transmit the text of their agreements to the State Department and then the State Department has 60 days after the agreement comes into force to report the executive agreement to Congress. 55 According to Hathaway, Bradley, and Goldsmith, executive agencies are not communicating their activities to the State Department well or within these deadlines, and, by extension, the State Department is not reporting to Congress on time. 56

¶21 Finally, Hathaway, Bradley, and Goldsmith examined the legal authority cited in the cover memos they received. They determined that less than half (44.31%) of cover memos cited legal authority that actually provided clear and express authority to the executive branch to conclude the executive agreement. 57 On the other end of the

50. See id. (noting that many of the agreements for which they did not receive cover memos were “exceptionally important”).

51. Id. at 663 (explaining that the State Department’s Treaty Office did not have an archivist to properly store and manage its treaty collection until the Obama administration).

52. See id.; see also Galbraith, supra note 45, at n. 134 (analyzing OLC memos to demonstrate the executive branch’s claim of exclusive authority in the area of international negotiations and wondering whether the executive branch, today, dismisses its reporting duties under the Case-Zablocki Act because it believes that Congress exceeded its constitutional authority in imposing them).

53. See Hathaway, Bradley & Goldsmith, supra note 1, at 694–95 (noting that congressional complaints about late reporting extended all the way back to the 1970s).


56. See Hathaway, Bradley & Goldsmith, supra note 1, at 663 (maintaining that noncompliance is not intentional or malicious but an unfortunate result of decades of neglect and a system that needs repair).

57. See id. at 636–37.
spectrum, roughly one-fifth of the cover memos (17.28%) cited legal authority that gave no support whatsoever for the executive branch to conclude the executive agreement.58

Inadequate Publication of Executive Agreements

¶22 Though Congress receives incomplete, inaccurate, and late reporting of executive agreements, in violation of federal law, Congress still receives far more information from the executive branch than the public receives.

¶23 As mentioned above, the State Department is supposed to publish U.S. international agreements, including executive agreements, in T.I.A.S. within 180 days after they enter into force, subject to a list of exceptions.59 In their investigation, Hathaway, Bradley, and Goldsmith compared three databases that provide access to the text of executive agreements: T.I.A.S. (the government’s official publication source for international agreements); the Case Act Reports database (a short-lived and now-defunct database the State Department created for reporting purposes); and the KAV Agreements database (a private database created by Kavass, hosted on HeinOnline, and discussed in further detail below).60

¶24 Unsurprisingly to law librarians, though Hathaway, Bradley, and Goldsmith were taken aback, the KAV Agreements database had the most comprehensive collection among the three primary databases for executive agreements.61 It contained 82.93 percent of the executive agreements reported to Congress during the time period identified in the Hathaway, Bradley, and Goldsmith FOIA request.62 T.I.A.S., on the other hand, included only 31.42 percent of the executive agreements reported to Congress.63 And, though the State Department’s Case Act Reports database was more comprehensive than T.I.A.S., it existed for only eight years.64

¶25 To understand why the KAV Agreements database included such an extensive collection of executive agreements, Hathaway, Bradley, and Goldsmith reached out to HeinOnline and discovered Kavass’s legacy.65 Hathaway, Bradley, and Goldsmith summarize: “In other words, the United States government provided any agreements that it was reporting to Congress to a researcher working on behalf of the subscription-based HeinOnline, but published only about a third of those in the government-run public database, T.I.A.S.”66

58. See id.; see also id. at 662 (qualifying results by explaining that non-lawyer treaty analysts compose the cover memos, including the legal authority section of the cover memos, without attorney supervision).
59. See 1 U.S.C. § 112a(d); see also id. § 112a(b).
60. See Hathaway, Bradley & Goldsmith, supra note 1, at 667 (providing methodology for database content comparison).
61. See id. at 669.
62. See id.
63. See id. at 668 (describing coverage of international agreements in T.I.A.S. as “very far from comprehensive”).
64. See id. at 669.
65. See id. at 667–70 (describing Kavass’s work facilitating access to U.S. treaties and executive agreements as a “personal mission” and quoting a Hein representative that explained Kavass received unprecedented access to international agreements through FOIA requests filed with the U.S. State Department).
66. Id. at 670.
Though the KAV Agreements database has an extensive collection, it is not a complete collection. Hathaway, Bradley, and Goldsmith could not locate the text of 605 executive agreements for which they received cover memos, and they noticed a decline in the availability of executive agreements after the mid-2000s, which they hypothesized corresponded to Kavass’s death. They conclude: “In other words, the State Department effectively outsources—without any checks for quality or accuracy—the compilation of U.S. agreements on which it relies. This crutch is growing weaker, however, because HeinOnline’s ability to outpace the government declined after the death of Igor Kavass.”

A Belated Tribute to Igor Kavass: His Life and Work

Igor Kavass was a law librarian who spent much of his career improving access to U.S. international agreements for current and future researchers. This section pays tribute to Mr. Kavass, a paragon of our profession who has not yet been memorialized in this journal.

The Life of Igor Kavass

Igor Ivan Kavass was born on July 31, 1932, in Riga, Latvia. He was the first son born to Nicolas and Iraida Kavass; their second son, Juris (“George”), joined the family approximately six years later. When Igor was born, Latvia was a fledgling democracy, having established itself as the Republic of Latvia in 1922, following World War I. As Igor approached his second birthday, however, Latvia’s democratic government toppled in a coup d’état orchestrated by its prime minister, Kārlis Ulmanis. Over the next 10 years, Igor and his family lived under a variety of repressive political regimes, all jockeying for control of the small Baltic state in the tumultuous era before and during World War II.

67. See id. 667–70.
68. Id. at 700. But see Email from Daniel P. Rosati, Chief Resources Officer for William S. Hein & Co., to author (Feb. 25, 2022) (“[o]ver the years we worked with Igor on the indexes he taught us how to do the research and how to do the indexing. At the time of his death, we were doing those things with Igor overseeing our work. So, we were able to continue the publications without much effort. Of course, no one else at Hein had the depth of knowledge at the level of Igor. He was and still is sorely missed.”).
70. See NAT’L ARCHIVES AUSTL., KAVASS, Nicolas DOB 14 December 1905; Iraida DOB 21 May 1907; Juris DOB 11 February 1938; Ivars DOB 31 July 1932, Series No. A11628, Control Symbol No. 123-126, Item ID No. 4197858 (on file with author) [hereinafter Kavass Family immigration documents] (indicating date of birth for all family members and noting Nicolas Kavass’s employment as a lawyer in Latvia).
72. See id. at 24.
73. See ALLAN S. NANES & FRANKLIN GOLDING, CONG. RSCH. SERV., REP. NO. 83-154 F, LATVIA:
In October 1944, before the Soviet army reclaimed control of Latvia, the Kavass family escaped and moved to a displaced persons camp in Germany. Igor was 12 years old when his family moved to Germany. Four years later, when Igor was 16 years old, the Kavass family moved again, immigrating to Australia. They arrived on the SS *Shaugum* at the port of Melbourne on May 31, 1949. Igor’s future wife, Irene Dmitrijevs, another Latvian refugee, had arrived in Melbourne on the SS *Wooster Victory* one week earlier.

The Kavass family’s resettlement in Australia was made possible under a secret agreement the Australian minister for immigration, Arthur Calwell, made with the International Refugee Organization on July 21, 1947. Under the terms of the agreement, the Australian government promised to “provide regular employment for all persons coming under this Agreement,” and, in exchange, workers agreed “to remain for at least one year in [that] employment.” This section implies that Australia accepted only refugees physically capable of working and likely assigned them to jobs in unskilled labor, regardless of individual education, experience, or aptitude.

The record is spotty on the Kavass family’s activities in the first decade following their arrival in Australia, but in an article Igor wrote years later titled *Migrant Assimilation*, he described the isolation and prejudice that immigrants to Australia endured despite Background Information (Aug. 12, 1983).

74. See *Kavass Family immigration documents*, supra note 70 (citing the reason for escaping Latvia for Germany and the location of German displacement camp where family resided until immigration to Australia).
75. See id.
76. See id.; see also Heinrihs Strods & Matthew Kott, *The File on Operation “Priboi”: A Re-Assessment of the Mass Deportations of 1949*, 33 *J. Baltic Stud.* 1 (2002) (describing the country conditions of Latvia under Stalinist rule at the time the Kavass family fled to Australia).
77. See *Kavass Family immigration documents*, supra note 70 (identifying the family’s date of arrival and mode of transport to Australia); see also Museums Victoria, *Origins: Immigration History from Latvia to Victoria*, [https://origins.museumsvictoria.com.au/countries/latvia/](https://origins.museumsvictoria.com.au/countries/latvia/) (suggesting the Kavass family was among 19,700 Latvian refugees to arrive in Melbourne between 1947 and 1952).
80. Id. at art. 8a; see also Kelly Buchanan, On This Day: Establishment of the “White Australia” Policy, In Custodia Legis (Dec. 23, 2015), [https://blogs.loc.gov/law/2015/12/on-this-day-establishment-of-the-white-australia-policy/](https://perma.cc/7J4R-SWEX) (rightly criticizing the Australian government’s immigration policy in the years following World War II because of its blatant preference for white European immigrants).
their dogged efforts to learn the language and culture of their adopted nation.\footnote{82}{See I.I. Kavass, Migrant Assimilation, 34 Austl. Q. 54 (June 1962); see also Igor Kavass naturalization documents, supra note 69 (providing some insight on where the Kavass family lived from the time of arrival, listing addresses associated with the Bonegilla Migrant Reception and Training Centre, the Puckapunyal army base, and private housing).}

Without disclosing his own status as an immigrant to Australia, Igor argued:

\begin{quote}
[A]ssimilation is always a two-way process. In plain words it is a matter of getting used to. It is not dissimilar from the institution of marriage where each spouse must get used to his or her partner, learn to tolerate one another’s weaknesses and to admire one another’s virtues.\ldots Un fortunately, many Australians regard assimilation as not something akin to a marriage but to an unconditional surrender: it must be in their opinion an unqualified assimilation… [based on] amazing ignorance of the Australian public about the immigrants, their origins, cultures, and problems. (I would like to know, for instance, how many Australian readers of this article could tell me the whereabouts of Latvia, a country from which Australia has received more than twenty thousand immigrants, and whether it is a flat or a mountainous country.) This ignorance creates the wrong impression of the immigrants in the minds of Australians.\footnote{83}{See Kavass, supra note 82, at 64; see also I. I. Kavass, Assimilation Is Not as Easy of Achievement as It May Appear, Good Neighbour Council of S.A. News Letter, No. 9 (1961) (identifying himself as an immigrant and explaining the immigrant “feels helpless, lonely and embarrassed—a condition which may be natural for a small child but is tragic for a grown-up person”) (newsletter article on file with author).}
\end{quote}

\¶32 In 1961, when the above-quoted article was published, Igor was working as a lecturer in law at the University of Adelaide in South Australia.\footnote{84}{See Kavass, supra note 82, at 54.}

He had worked as a student and librarian at the Supreme Court Library in Melbourne before graduating with honors from the University of Melbourne Law School in 1956.\footnote{85}{See Obituary, supra note 69; see also Igor Kavass naturalization documents, supra note 69 (listing Igor’s job as student and librarian at the Supreme Court Library and also including character references from Australian lawyers).}

After a few years in private practice, Igor moved into academia in 1959, first at the University of Adelaide and then at the University of Melbourne.\footnote{86}{See Obituary, supra note 69.}

During the 1966–1967 academic year, Igor took a position as a visiting professor at the University of Alabama, and, while there, Igor demonstrated such an interest in the law library, particularly the library catalog, that the University of Alabama recruited him to be the director of the law library in 1968.\footnote{87}{See Daniel John Meador, The Transformative Years of the University of Alabama Law School, 1966–1967, at 34–35 (2012) (explaining the administrative burden of getting Igor cleared to return to the United States to accept the law library director position and describing Igor as an “unusual figure on the Alabama scene,” “shrewd,” and a “keen observer” who seemed to know what “others on the faculty were doing and thinking”).}

By then, Igor and Irene had welcomed three daughters: Kisa (January 1961), Biba (December 1963), and Dolly (April 1967).\footnote{88}{See Obituary, supra note 69; see also Lexis Advance, Public Records search conducted February 5, 2022 (providing dates of birth of Kavass children).}

\¶33 As the director of the law library at the University of Alabama, Igor was tasked with establishing a library “which would enable research projects of any reasonable
magnitude to be carried on...without too much reliance on materials held elsewhere.”89

With those objectives and an influx of funding from the dean of the law school, Igor made significant additions to the law library’s collection and personnel, assisted by Kathy Price, a law librarian who would later achieve her own renown and credit Igor for launching her career.90

¶34 In 1970, Igor joined the faculty of Northwestern University Law School as its library director. Tragically, however, shortly after the family’s move to Chicago, Irene Kavass died unexpectedly, leaving Igor and their three daughters alone in their new city.91 After only two years at Northwestern, Igor moved his family again, this time to Durham, North Carolina, to join the Duke law faculty as its law librarian, from 1972 to 1975.92 By this time, Igor had found love again, remarrying a woman named Elsa Severina Dorta.93

¶35 Igor’s next and final law library position was the director of Vanderbilt Law School’s library, a position he held for 22 years.94 While at Vanderbilt, Igor achieved incredible professional success. He was a prolific scholar, publishing numerous books and articles, many on U.S. international agreements, as discussed in further detail in the section below.95 He was active in the law librarianship profession, twice serving as the president of the International Association of Law Libraries (1977–1980; 1980–1983) and as the coeditor of the International Journal of Legal Information (1992–1995).96 He

89. Paul M. Pruitt, Jr. & Penny Calhoun Gibson, John Payne’s Dream: A Brief History of the University of Alabama School of Law, 51 J. LEGAL PROF. 5, 17 (1990) (citing Igor’s annual reports filed in the years 1968–1970, available in the Special Collections Department at the University of Alabama School of Law Library).

90. See MEADOR, supra note 87, at 35 (disclosing Igor’s reconnaissance missions to other university libraries to see how they were organizing their collections); see also Pruitt & Gibson, supra note 89, at 18 (highlighting policy failures during this period of unprecedented change); AM. ASS’N OF L. LIBRS. (AALL), M. Kathleen Price, 1942– , Hall of Fame Induction: 2011, https://www.aallnet.org/inductee/mkathleenprice/ [https://perma.cc/AWJ6-TM58] (honoring Price and her professional achievements); Frank G. Houdek & Edmund P. Edmonds, “Meet My Mentor”: A Collection of Personal Reminiscences, 91 LAW LIBR. J. 177, 240 (1999) (including section written by Price).

91. See Obituary, supra note 69.

92. See DUKE LAW, Igor I. Kavass, https://web.law.duke.edu/history/faculty/kavass/ [https://perma.cc/X5VS-XQXY] (noting Igor was the first member of the faculty to have the title of “Law Librarian” since 1947).

93. See Obituary, supra note 69; see also Lexis Advance, Public Records search conducted February 5, 2022 (providing marriage record).

94. See DUKE LAW, supra note 92 (stating that Igor left Duke in 1975 to become the law librarian at Vanderbilt); see also Obituary, supra note 69 (identifying 1997 as the year Igor retired from his position at Vanderbilt Law School).


earned a Fulbright scholarship, advised the U.S. State Department on issues involving extradition, spoke five languages fluently, and continued mentoring law librarians who later became the best and brightest of our profession. He earned the respect of his dean, who described Igor as “ingenious and engaging.” Unfortunately, however, in the midst of his professional success, Igor suffered another personal loss. His wife, Elsa, succumbed to cancer and passed away in early 1980, at the far too young age of 51. 

Nevertheless, Igor carried on. He married a woman named Carmen Boada and had two more children: a daughter named Veronica and a son named Nicholas. Upon Igor’s retirement from Vanderbilt, he worked as a legal consultant to countries seeking membership in the World Trade Organization. From 1998 to 2006, Igor and Carmen traveled the world together, living in Ukraine, Macedonia, Latvia, Azerbaijan, Belarus, and Uzbekistan. In 2006, they returned home to Tennessee, and on April 6, 2008, Igor passed away at the age of 75.

The Work of Igor Kavass (and Friends)

As noted above, Igor was a prolific scholar, but his dedication to improving access to U.S. international agreements is his greatest legacy. Primarily, Igor created access to U.S. international agreements through two vehicles: (1) indexes to help researchers locate the text of U.S. international agreements published in official and unofficial sources, and (2) a database called the KAV Agreements database, which published the text of U.S. international agreements before that text had been published in any official government sources.

98. See Obituary, supra note 69.
99. See HeinOnline An Oral History of Law Librarianship, Interview with Daniel L. Wade (interviewed by Patrick Kehoe, July 13, 2014) (remembering his first job as a law librarian at Vanderbilt and learning FCIL librarianship under the guidance of the “charming” Igor Kavass).
101. C. Dent Bostick, Dedication, 16 VANDERBILT J. TRANSNAT’L L. 519 (1983) (further describing the author as envious of Igor’s extensive travel throughout the world).
102. See Obituary, supra note 69; see also Lexis Advance, Public Records search conducted February 5, 2022 (providing death record).
103. See Obituary, supra note 69.
104. See id.
105. See id.
106. See id.; see also Memorials, AALL Spectrum, June 2008, at 26 (providing a short paragraph’s notice about Igor’s passing).
107. This article does not provide an exhaustive analysis of Kavass’s scholarly work. It focuses only on the specific titles identified.
Indexes of U.S. International Agreements

§38 As noted above, the U.S. government has selectively published binding international agreements in a variety of different sources.108 Prior to 1950, the U.S. government published U.S. international agreements in the *U.S. Statutes at Large* (Stat.),109 the *Treaty Series* (T.S.),110 the *Executive Agreement Series* (E.A.S.),111 and, in slip form, in the *Treaties and Other International Acts Series* (T.I.A.S.).112 In 1950, the government decided to condense publication of international agreements into one official serial publication: the *United States Treaties and Other International Agreements* (U.S.T.).113 The government continued releasing international agreements in slip form in T.I.A.S., but then those pamphlets were republished in bound volumes in U.S.T., which existed as the only source that provided legal evidence of the international agreements in a U.S. court.114 In 1982, the government ceased publication of U.S.T. and, as mentioned above, now publishes international agreements only in slip form in T.I.A.S.115

§39 Regardless of official source, when the U.S. government opts to publish its international agreements, it provides only basic information about the international agreement: the title, the foreign country counterpart(s), the date of conclusion. The U.S. government does not always provide a numerical citation to help researchers find the text of the agreement, and even when the government provides a numerical citation, it does not always publish its international agreements in sequential order. The U.S. government has never provided research tools like an index or (for the electronic age) a decent search function to improve accessibility to U.S. international agreements. Kavass recognized the limitations of government publishing and seized opportunities (and contracts with William S. Hein & Co.) to create indexes to help researchers identify and locate published and unpublished U.S. international agreements.

Indexes of U.S. International Agreements Published from 1776–1949

§40 While Kavass was the law librarian at Duke, he published, with Mark A. Michael, a Duke law student and presumably Igor’s research assistant, an index of U.S. international agreements that covered the years 1776 to 1949, which were the years the government published international agreements in a variety of sources before the creation of U.S.T.116 Kavass and Michael’s *United States Treaties and Other International Agreements*
Cumulative Index, 1776–1949, therefore, surveyed official publication of U.S. international agreements in the U.S. Statutes at Large (Stat.), the Treaty Series (T.S.), the Executive Agreement Series (E.A.S.), and the Treaties and Other International Acts Series (T.I.A.S.). Additionally, it surveyed unofficial sources for international agreements, which were published in compilations by individual researchers that covered the same period of time.

¶41 In the introduction to their index, Kavass and Michael explain that despite these various sources to find the text of U.S. international agreements, it “is highly probable that not all United States treaties were ever published.” As for executive agreements, which had “uncertain and constitutionally murky status,” a complete record or even a total number of pre-1946 executive agreements is impossible to ascertain.

Indexes of U.S. International Agreements Published in U.S.T.

¶42 In 1950, as mentioned above, the government created the United States Treaties and Other International Agreements (U.S.T.). The U.S.T. merely republished U.S. international agreements released earlier in slip form in T.I.A.S., but only U.S.T. served as the official source that provided legal evidence of the international agreements in a U.S. court. Unfortunately, like prior official government sources, U.S.T. was poorly organized and did not include any indexes.

¶43 In 1973, Kavass and his friend, Adolf Sprudzs, a law librarian at the University of Chicago, created the UST Cumulative Index, 1950–1970, which organized more than 5,000 U.S. international agreements published in U.S.T. between 1950 and 1970. In
the process of creating this index, Kavass and Sprudzs realized there were U.S. international agreements that had been released in slip form in T.I.A.S. but were mysteriously absent from later bound volumes of U.S.T. “for one reason or another.” So, for convenience sake, volume 1 of the *UST Cumulative Index, 1950–1970* also identifies those U.S. international agreements released in T.I.A.S., but still awaiting publication in U.S.T.

¶44 In 1977, Kavass and Sprudzs updated their index of the U.S.T. for the years 1971 to 1975. A year later, they created a looseleaf indexing service called the U.S. Treaty Indexing Service, which published regular updates to the index through supplements.

**Indexes of U.S. International Agreements Published in T.I.A.S.**

¶45 As Kavass and Sprudzs updated their indexes of U.S.T., they continued to notice a pattern of discrepancies in the government’s release and publication of U.S. international agreements. First, there were delays between when the government concluded U.S. international agreements and when it finally alerted the public about them through T.I.A.S. Second, there were delays between when the government published U.S. international agreements in T.I.A.S. and when the government finally republished them into the bound volumes of the U.S.T. Third, “for one reason or another,” many U.S. international agreements that were published in T.I.A.S. were not republished in U.S.T., as they should have been, so U.S.T. did not actually exist as a comprehensive source of published U.S. international agreements.

¶46 Again, recognizing opportunity, in 1982 Kavass and Sprudzs created a companion index to their *UST Cumulative Index*. This companion index, which was also published with Hein and updated through the U.S. Treaty Indexing Service, was called the *Current Treaty Index*. Its purpose was to index U.S. international agreements as they were released in slip form in T.I.A.S. without the expectation that the U.S. government would republish them later in U.S.T.
Indexes of U.S. International Agreements Referenced in T.I.F.

¶47 In addition to launching the Current Treaty Index in 1982, Kavass and Sprudzs also began their Guide to the United States Treaties in Force in 1982. This source was also an index published by Hein, but instead of indexing primary sources for the text of U.S. international agreements, the Guide indexed a U.S. government source called the United States Treaties in Force (T.I.F.), which lists, but does not provide the text to, U.S. international agreements in force in any given year.

¶48 Interestingly, in addition to indexing U.S. international agreements cited in T.I.F., Kavass and Sprudzs’s Guide took the additional step of including, as addenda to each edition, references to international agreements that had been listed in T.I.F. but that had not yet been published in any official government source. Kavass and Sprudzs referred to these U.S. international agreements as “unnumbered treaties and agreements” since they lacked both T.I.A.S. and U.S.T. citations, but yet were in force according to T.I.F.

Indexes of Unpublished and Unnumbered U.S. International Agreements

¶49 In 1986, Kavass and Sprudzs created the Unpublished and Unnumbered Treaties Index, which was a separate index for those unpublished and unnumbered treaties they discovered through their research. They published a few annual updates to this source before eventually merging its contents and updates into the Current Treaty Index (see section below).

Consolidation and Maintenance of All the Above Indexes, 1990 to Present

¶50 In 1990, Kavass took sole control over all the indexes mentioned above, consolidated them into three core indexes, and brought them into the digital era via HeinOnline.

¶51 For example, Kavass published the United States Treaty Index, 1776–1990, Consolidation, which combines into one source all of the indexes of U.S.T. that Igor had previously coauthored with Michael and Sprudzs, as well as all of the supplements to those indexes published in the U.S. Treaty Indexing Service through 1989. As noted above, the U.S. government stopped publishing the U.S.T. in 1982, so Kavass’s United States Treaty Index, 1776–1990, Consolidation was intended to be the definitive, comprehensive index of U.S. international agreements published in the U.S.T. The United States

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132. See id. at iii (explaining the need for a source that offered a variety of retrieval approaches to determining the status of U.S. treaties and executive agreements).
133. See, e.g., id. at 303.
134. See id. at 303; see also Harrington, supra note 5, at 358–59 (noting that at least some of the unnumbered international agreements were previously published in more modern, but still unofficial, sources such as International Legal Materials and American Foreign Policy Current Documents).
Treaty Index, 1776-1990, Consolidation was published in print and accessible electronically within HeinOnline’s U.S. Treaties and Agreements Library.137

¶52 Additionally, in 1990, Kavass expanded the Current Treaty Index to organize and cross-reference not only the U.S. international agreements released in slip form in T.I.A.S. but also the unpublished and unnumbered international agreements that he had previously monitored separately in the Unpublished and Unnumbered Treaties Index.138 Kavass christened these unpublished and unnumbered agreements as “KAV Agreements” and assigned to each a temporary KAV number, which acted as a stand-in citation until the U.S. government published the agreement in one of its official sources.139 Thus, the expanded version of the Current Treaty Index organized citations to U.S. international agreements that had been published in official government sources and also citations to “KAV Agreements” given a “KAV number.” Shortly after Kavass’s death, HeinOnline renamed this source Kavass’s Current Treaty Index.140 Today, HeinOnline editors maintain the currency of this source and provide access to it within HeinOnline’s U.S. Treaties and Agreements Library.

¶53 Lastly, for consistency and cross-referencing among indexes, starting in 1990, Kavass began including citations to KAV Agreements within the Guide to the United States Treaties in Force as well.141 When Kavass passed away, HeinOnline retitled this source Kavass’s Guide to the United States Treaties in Force.142 Today, HeinOnline editors maintain the currency of this source and provide access to it within HeinOnline’s U.S. Treaties and Agreements Library.

The KAV Agreements Database, 1990–2016

¶54 Kavass’s publication of indexes to help researchers around the world locate the text of U.S. international agreements in official U.S. government sources was a huge contribution to the field of law librarianship. Another significant contribution to our profession and the American public was Kavass’s initiative to track U.S. international agreements the government hadn’t yet published in official sources (agreements Kavass referred to as “KAV Agreements”) and to obtain and upload them into a database he created in collaboration with HeinOnline: the KAV Agreements database.

¶55 The question of how Kavass acquired the texts of KAV Agreements, which were by definition U.S. international agreements that hadn’t been published in official sources,

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139. See id. (noting that, in 1990–1991, there was approximately a five- to six-year delay between an international agreement coming into force and the time that international agreement was published in T.I.A.S.).
remains somewhat of a mystery. In his article United States Treaties and International Agreements: Sources of Publication and “Legislative History” Documents, Kavass cites a variety of unofficial sources for finding the text of international agreements, such as Bevans compilations, Department of State Bulletins, Digest of United States Practice in International Law, and International Legal Materials. He also suggests merely placing “a telephone call to the State Department,” which seems quaint today but perhaps sheds a revealing light on his persistence and vast access to unpublished and unnumbered international agreements.

¶56 Another explanation is that Kavass received the texts of many KAV Agreements from FOIA requests he filed. According to Daniel P. Rosati, Chief Resources Officer at William S. Hein & Co., Kavass sent FOIA requests to the National Archives, the State Department, and other U.S. executive agencies that made deals with their foreign counterparts, such as the U.S. Trade Representative. Additionally, Kavass set up an arrangement, perhaps through FOIA or perhaps through personal connections in the State Department, where the State Department would send Hein copies of international agreements that the State Department was reporting to Congress—including agreements that the government never intended to publish.

¶57 The description of the KAV Agreements database on HeinOnline states that the inclusion of actual texts of KAV Agreements made HeinOnline “the first source for locating the text of unpublished U.S. treaties and other international agreements in one location.” And, since HeinOnline also supports all the other indexes Kavass maintained (see paragraphs above) and provides access to official government sources, like U.S.T., T.I.A.S., and T.I.F., the publisher stands out among its competition as offering “the most complete collection of published and unpublished treaties and agreements in an image-based, fully searchable format.”

¶58 It is true that the birth of the KAV Agreements database, fueled by Kavass’s vision and supported by HeinOnline, did distinguish HeinOnline from its competitors. As Hathaway, Bradley, and Goldsmith explain in their article, HeinOnline’s collection of U.S. international agreements and its organization of those agreements lure attorneys within

144. See id. at 448; see also Charles I. Bevans, Treaties and Other International Agreements of the United States of America 1776–1949 (1968-76).
145. See Kavass, supra note 143, at 451.
146. See id.
147. See id.
148. See id. at 450.
149. See Email from Daniel P. Rosati, Chief Resources Officer for William S. Hein & Co. c/o Steve Roses to author (November 16, 2021) (on file with author).
150. See id.; see also Hathaway, Bradley & Goldsmith, supra note 1, at 669 n. 190 (suggesting that Igor may have received some nonbinding agreements within the mix of agreements he received from U.S. executive agencies).
151. See HeinOnline U.S. Treaties and Agreements Library, KAV Agreements, supra note 137.
152. See id.
the U.S. State Department to pay subscription costs to access HeinOnline, even though, theoretically, these attorneys have free access to all of these U.S. international agreements in their own institutions. And yet, as Hathaway, Bradley, and Goldsmith also explain, the comprehensiveness of HeinOnline’s collection declined in the mid-2000s following Kavass’s death. Additionally, HeinOnline stopped adding KAV Agreements to the KAV Agreements database in 2016, which means the database is no longer current. Moreover, the FOIA request that initiated Hathaway, Bradley, and Goldsmith’s empirical project requested information on U.S. international agreements concluded through January 2016. Without an updated KAV Agreements database or an extension of the Hathaway, Bradley, and Goldsmith FOIA request, the American public remains ignorant about hundreds of U.S. international agreements that likely were concluded after January 2016 but are still waiting to be released in slip form in T.I.A.S. This is an unacceptable gap in access to legal information.

Conclusion

59 In December 2020, with the publication of their Harvard Law Review article and corresponding dataset, Hathaway, Bradley, and Goldsmith revealed two truths. First, Congress and the American public are regularly lacking access to legal information to which they are entitled under federal law because the U.S. executive branch is not complying with federal requirements to report and publish international agreements it concludes with foreign countries. Second, our access to U.S. international agreements was better when Igor Kavass was alive, and it declined upon his death.

60 If law libraries are “knowledge institutions supporting democracy,” then we should pause to recognize examples set by individual law librarians, like Kavass, who dedicate their careers to passion projects that create knowledge and support democracy. Kavass did not just apply his expertise as a law librarian to facilitate access to legal information through his indexes. He also created access to legal information that was not available anywhere else through building a database of unique primary source material. He targeted U.S. government information that the government was supposed to be sharing with Congress and the public but was not sharing—both then and now. This helps explain why law professors at top U.S. law schools are still praising Kavass’s resourcefulness 23 years after he retired.

61 Kavass’s personal mission to index and acquire U.S. international agreements provides one example of a passion project in law librarianship that led to extraordinary advances in access to legal information and, in turn, reinforced transparency in

153. See Hathaway, Bradley & Goldsmith, supra note 1.
154. See id. at 671 fig.1 (providing visual graph to show HeinOnline’s loss of competitive advantage upon Igor’s death); see also Email from Daniel P. Rosati to author, supra note 68.
155. See Hathaway, Bradley & Goldsmith, supra note 1.
government, one of the crucial indicators of a healthy democracy.\textsuperscript{157} And yet, his contribution is bittersweet. His passing triggered a decline in our access to U.S. international agreements. Hathaway, Bradley, and Goldsmith's empirical project covers some gaps left following Kavass's passing, but their dataset includes documents through only the Obama administration.\textsuperscript{158} We have little information about binding international agreements, particularly executive agreements, made during the Trump administration and beyond.

\textsuperscript{¶}62 What can we do, as a profession, to prevent the decline or disappearance of law librarian passion projects, particularly those projects that gather and organize primary sources, before they are lamented years later within the pages of the \textit{Harvard Law Review}? What system can we create to prioritize and protect law librarian passion projects that create knowledge and increase transparency but are vulnerable to erosion upon the retirement or death of individual designers? These questions, unfortunately, persist within our profession. We take for granted extraordinary advances in access to information until, one day, we notice they have stopped being updated or have completely disappeared.\textsuperscript{159}

\textsuperscript{¶}63 We could create, at an association level, a body to (1) identify law librarian passion projects—past and present—that advance the highest objectives of our profession: knowledge creation and transparency in government; (2) develop succession plans for those passion projects, which may or may not involve partnerships with advocacy groups and vendors, to maintain consistent quality of access to materials beyond the retirement or death of individual librarians; and, most crucially, (3) determine a means of funding these passion projects with internal and external grants.

\textsuperscript{¶}64 But such an initiative requires buy-in from our membership. Do we want to take an accounting of law librarian passion projects, particularly those focused on improving access to primary sources, and find the means to sustain them at an association level rather than on an individual level? If not, we will continue losing access to legal information we previously took for granted, making false assumptions that algorithmic “editors” can possibly replicate our most important work.

\footnotesize{\textsuperscript{157} See Brigham Daniels, Mark Buntaine & Tanner Bangerter, \textit{Testing Transparency}, 114 \textit{Nw. U. L. Rev.} 1263, 1267 (2020) (citing multiple legal scholars who deem transparency as “essential for democracy to function”); see also Brandeis, supra note 31, at 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants ...”).

\textsuperscript{158} See Hathaway, Bradley & Goldsmith, supra note 1, at 721.

\textsuperscript{159} For example, the Electronic Information System for International Law (EISIL) was a platform for research guides built by law librarians for the American Society of International Law (ASIL). Its website is now defunct, and all research guides have vanished from public view: https://www.asil.org/coming-soon [https://perma.cc/M8T7-K9UF].}
The Unintentional Consequences of Unintended Datasets*

Amanda Bolles Watson**

U.S. News & World Report announced a potential new scholarly impact ranking in 2019 in partnership with HeinOnline. Many questions were asked about whether scholarly impact could or should be measured. This article contains a study of one issue, and the results show the questions posed about if U.S. News’s ranking had merit.

** Director of the Law Library, Assistant Professor, University of Houston Law Center, Houston, Texas. With overwhelming gratitude to Amanda Karel for sharing her knowledge and passion. As this article went to press, several schools announced decisions to withdraw from participation in the U.S. News Best Law Schools ranking. This article does not directly comment on these announcements due to the timing.
“Figures often beguile me…particularly when I have the arranging of them myself; in which case the remark attributed to Disraeli would often apply with justice and force: ‘There are three kinds of lies: lies, damned lies, and statistics.’”


Introduction

¶1 All around us, data is connected to communicate stories about our world. As a society we count everything from the number of steps we take in a day to how many people engage with photos of our meals. The quantification of data extends into the professional world, including legal academia. One such extension is the concept of measuring scholarly impact in law. Instead of the traditional practice of reading and comparing scholarly works, these measures seek to quantify scholarly impact by analyzing citation metrics.

¶2 U.S. News & World Report (U.S. News) announced a potential new scholarly impact ranking in 2019, in partnership with the existing data source, HeinOnline. The concept of measuring scholarly impact in law did not originate with U.S. News. Other legal scholars had studied the subject before. Those previous studies also relied on existing sources of data created for legal research, not quantitative study. The studies were open about their limitations but were quality examinations of the questions they presented. When the potential U.S. News ranking was announced, the legal academy’s interest in the study of scholarly impact pivoted. Many questions were asked about whether scholarly impact could or should be measured. One question raised was whether the use of a preexisting dataset could provide good, quantitative information. This article contains a study of this issue, and the results show the questions posed about if U.S. News’s ranking had merit.

¶3 Before the ranking could be published, U.S. News decided to withdraw its efforts. However, in the proposal’s wake, the potential ranking, questions raised, and resulting studies left lingering questions about successful measurement of legal scholarship through existing data sources. If U.S. News or another similar entity were to reenter the field, would law scholars again be reactive? Or can the community use the momentum created by U.S. News to improve our own field? Several steps should be taken to create positive momentum. First, it is important to understand legal scholarship’s existing sources of data, what is needed to form a quality quantitative study, and how these data sources might be used to inform meaningful studies. Then, as a community, legal scholars should do the necessary work to ensure their scholarship is properly measured moving forward. This work includes proper identification of authors and scholarship, honesty in the limitations of studies, and more quality measurements by scholars in the field. If these steps are given adequate attention, law scholars may decide for themselves who is...
impactful in their communities. Otherwise, the danger looms for an outside entity to seize the financial opportunity to produce a profitable ranking. The ramifications of non-scholarly entities impacting scholarly practices through such a ranking, whether those consequences are intentional or unintentional, are something we must all take seriously.

99 Problems and Data Is One

¶4 “People…operate with beliefs and biases. To the extent you can eliminate both and replace them with data, you gain a clear advantage,” Michael Lewis explains in his bestselling novel, *Moneyball*. It is certainly true that as a society, statistics have become increasingly popular. As early as the U.S. Civil War, statistics about death and survivals were recorded and published. During the COVID-19 pandemic, the number of cases and its variants appeared daily in news reports. These data are used to shape a narrative about the world around us.

¶5 Any assertion that beliefs and biases can truly be eliminated from data is absurd. Data analytics make information seem neutral because they have order, but by ordering them, they are more than just the information they present. Something, the imposition of order, has been added, and they are more than they were before. Data are, after all, created by people who make choices as they curate and present findings. Inevitably these choices sometimes create data that do not accurately depict their objectives. In his book *Damned Lies and Statistics*, Joel Best writes, “Bad statistics are potentially important: they can be used to stir up public outrage or fear; they can distort our understanding of the world; and they can lead us to make poor policy choices.”

Rise of Analytics

¶6 Data have become some of the world’s most valuable resources. Law is not immune to this trend. Law firms use data analysis for competitive intelligence and to analyze information. In a recent LexisNexis study, 75 percent of respondents saw use

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4. Id.
of data analytics in their organizations in the last year, and 92 percent planned to increase their use in the next year.\textsuperscript{10} Quantitative text analysis is being used to analyze everything from contract data to judicial opinions.\textsuperscript{11}

¶7 This trend extends to law academia. One concept in particular has become an integral part of the legal academy, for better and for worse: ranking, and in particular the\textit{U.S. News} Best Law School ranking. The power and influence of the Best Law School ranking is well documented.\textsuperscript{12} One law school dean said this about the ranking, “We can’t make them go away. We don’t control them. The bottom line on rankings is that they are here and you’ve got to deal with them.”\textsuperscript{13}\textit{U.S. News} is also the only major law ranker; “no other ranking comes close in popularity or influence.”\textsuperscript{14} Law professors admitted to considering ranking when making employment choices over other factors like urban versus rural dwelling.\textsuperscript{15} Currently, the\textit{U.S. News} Best of Law School ranking is so ingrained in the legal academy that how it measures schools are the metrics many administrators say they must focus on, with little room to consider other initiatives.\textsuperscript{16}

¶8 Because rankings use data and measurement, they may seem to be objective studies. Michael Sauder and Wendy Nelson Espeland looked critically at the Best Law School ranking, including interviewing law school deans and law students. Their work clarifies the conflict at hand. A dean they interviewed said, “[It is] the reification of this stuff to the decimal point that makes it look like a science and is what makes [the Best Law School ranking] so destructive.”\textsuperscript{17} The intended audience of the ranking, students looking to make consumer choices about attending a law school, admits they assume \textit{U.S. News’s} ranking is sound. As explained by a student in another interview, “I wasn’t concerned with methods. I just figured they knew what they were talking about….”\textsuperscript{18} Compare this to another interview with a law school dean: “I think the biggest danger [is] people thinking that the rankings are anything more than one set of opinions.”\textsuperscript{19} For the Best Law School ranking, \textit{U.S. News} compiles data from a number of sources, but the primary source is data gathered from the schools themselves.\textsuperscript{20}

\begin{thebibliography}{99}
\item[13.] Sauder & Espeland, supra note 12, at 205–06.
\item[14.] Id. at 207.
\item[15.] Espeland & Sauder, supra note 3, at 116.
\item[16.] Id. at 124–25.
\item[17.] Sauder & Espeland, supra note 12, at 217.
\item[18.] Id. at 216.
\item[19.] Id. at 217.
\end{thebibliography}
Another analysis that interests legal scholars is the ranking of scholarly influence. In 1998, Professors Theodore Eisenberg and Martin Wells studied scholarly impact, seeking to quantify the “quantity and quality of publications” using Westlaw’s texts and periodicals database for tenured and tenure-track professors at 32 law schools. Professors Brian Leiter and later Gregory Sisk again used Westlaw to measure, but only within the law review and journal portion of the secondary sources database and with a carefully chosen roster of professors aimed at including anyone with a significant scholarship obligation. Professors Paul Heald and Ted Sichelman studied using Hein citation counts, but also used paper download counts from the Social Science Research Network (SSRN) to measure what they called “traditional” tenured and tenure-track faculty.

Though the studies listed above were successful, issues could arise if scholars without core competency in quantitative social science research methods engage in these types of projects. For analytics to be meaningful, the data collected and the analysis of that data must be sound. Similarly, scholars must be immersed in the field they seek to measure. These previous scholarly impact rankings gathered their data by accessing existing sources of legal scholarship. These sources were created to aid legal research, not as data repositories for quantitative study. Without an understanding of the field, they may be misused.

Quantitative Measurement

There are multiple ways to examine the quality of data collection and measurement, and although in law librarianship we often strive for perfection, a certain amount of error is expected in data collection. The paramount concern is not that there be no error but that the data and the resulting metrics are effective in doing what they intend to do, here measure “faculty productivity and impact.” There are four questions to ask about the quality of data: is it accurate, is it reliable, is it valid, and is it credible?

Although errors are not the defining element of a sound metric, they do matter in defining accuracy. Accuracy is “the difference between a measured value and the true value.” The underlying question is, how well do your data get to the actual measure of the thing under investigation? For example, a marathon, by definition, is 26.2 miles long.

26. Id.
There are very precise ways to measure those miles that account for topography, but most consumer GPS trackers will not measure in the same ways, resulting in runners not seeing 26.2 on their personal devices. When there are errors, obviously accuracy is impacted. For the data gathered from law scholarship sources, citations missed or wrongly attributed would lessen the accuracy of the scholarly impact metric. Complicating the question, the data may not be accurate but still appear reliable. To have a quality dataset, there should be reasonable accuracy.

¶13 When looking at the reliability, the question is, will using the measure multiple times produce the same results? Reliability requires consistency of results over time. A missing citation would not make the metric unreliable as long as it was consistently missing. To expand our marathon example, using the exact route and GPS device, you would expect to see the same measurement each run. Sometimes a measure might be formed in part to make sure it will perform with relative accuracy and reliability, for example, choosing a specific marathon race and GPS device. However, making an operational definition too narrow may cause issues for validity and credibility. By limiting an operational definition of marathon to a specific race route, this operationalization of marathon would miss many types and locations of marathons. Reliability is important, but it does not make data valid. In other words, reliability is a necessary but not a sufficient condition to create validity. Reliability is necessary to a quality dataset.

¶14 Validity asks whether a metric measures what it purports to measure. There are multiple types of and approaches to examining validity, but perhaps most at issue for scholarly impact ranking is content validity—does it cover the range of meanings, or the dimensions, of the concept of scholarly impact? Imagine if our example marathon study data were being used not to note the difference between GPS devices with and without topographical information but as evidence of the actual distance of the original marathon. GPS data are certainly data in the same realm, but they cannot actually reverse-engineer Pheidippides's fateful path in Greece. If data are not used in the ways they were designed to be used, pressure is naturally created on the validity of the results. Much like the other questions, even with validity, a metric still might not have credibility. For a quality metric, there needs to be validity.

¶15 Credibility is about the reader believing that research represents their reality. Professors Korstjens and Moser define credibility as “the confidence that can be placed in the truth of the research findings.” Multiple factors impact credibility, but key are the use of sound, transparent methods obtaining feedback and adjusting methods and interpretations based on that feedback; and the level of trust between researchers and participants. Imagine the people conducting our marathon study were shoe designers

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29. Id. at 599–600.
instead of scientists immersed in GPS measurement. Although interested in the data, and likely profiting from it, shoe designers are not experts in the field. Also at issue is the question of whether the data and the possible analysis of the data present a credible source of research. More simply put, for the metric to be credible the reader must be able to trust that the researcher, data, and analysis can be successful.

¶16 No study is perfect; there will always be limitations. However, a study should try to be as accurate, reliable, valid, and credible as possible, and should plainly state its limitations. To achieve a quality data collection and measure, the study should carefully consider all of these factors. It is also helpful to confer with others immersed in the field to ensure the study has potential to be valid and credible.

Unintended Datasets

¶17 Often a study begins with carefully gathering data intended for use in the measure. The data will be carefully curated, with the designers considering the accuracy, reliability, validity, and credibility of the data they are attempting to gather. Sometimes, however, data that has been gathered for some other purpose is used in a study. Using data in this way does not fatally flaw a study. However, the same levels of thoughtfulness must occur about the accuracy, reliability, validity, and credibility as happen when the data is gathered intentionally. These unintended datasets must still be able to create quality studies.

¶18 Several existing unintended databases have been used to measure scholarly impact. In addition to those already used, other comparable datasets exist. These databases are unintended because none of them were created primarily to be used as data in a study. Westlaw is a large, commercial database of law materials including scholarly publications aimed at performing complex legal research tasks. It has been used to measure scholarly impact more than once. Data sources similar to Westlaw include LexisNexis (Lexis) and Bloomberg Law (Bloomberg), which have different but comparable databases of materials and very similar aims. Westlaw, Lexis, and Bloomberg hold many different types of publications, including books. These sources gather their resources by publication and offer many ways to search by publication, publication type, and subject.

¶19 There are also some data sources that focus on law articles. The first is HeinOnline. In addition to other holdings (like large databases of legislative sources), Hein holds a very large collection of law journal articles; the holdings are aimed at aiding legal research. The articles are gathered by publication. There are also article-only databases gathered by author instead of publication. Although there are many small collections of this type (most popular is the individual law school repository), there are two large collections: SSRN and BePress Digital Law Commons (Digital Commons). Both SSRN and Digital Commons are concerned primarily with preservation and dissemination of legal

scholarship. SSRN is an Elsevier product that allows scholars to make their prepublication work publicly available (although works generally remain available after publication as well). Digital Commons is a platform where many schools house their individual school repositories, so the articles can be accessed at the school level but also as part of the larger Digital Commons community.

¶20 Much like individual law school repositories, there are also individual law school journal websites. All of these collections allow web access to the public to at least some of their articles. Google Scholar is a data source that seeks to collect any scholarly paper available on the internet and make it searchable and available for research. Although Google Scholar is specifically for articles, Google has a similar product for books, aptly named Google Books. Both Google products are aimed at collecting and making available large amounts of information.

¶21 An interesting but different source to consider is the Current Index to Legal Periodicals (CILP). CILP does not hold materials itself but does index and add subject headings to law journals, making it a unique but potentially important part of law scholarship analysis moving forward.

¶22 The first quality to consider is if the data sources have the materials necessary to measure the question asked by the study. The breadth and depth of the available publications is important for analysis to properly reflect the rich and varied publications produced by the legal scholarship community. Keep in mind credibility asks that the study reflect the reality of the field. Effectively, a dataset must allow measurement of what those immersed in the field consider should be measured. For law scholarship, this typically includes law journal articles, books, and book chapters. There are certainly other things to consider, but these are the core publications. Westlaw and Lexis both report having over 4,000 secondary sources each, including about 2,500 books and 1,000 journals. The actual publication holdings do differ between Westlaw and Lexis, though, of course, there is some overlap. Although both hold books and book chapters, they do not generally hold monographs. Monographs are nonserial books written on a specific (often timely) topic and are a frequent publication by law scholars. Bloomberg’s holdings are more difficult to quantify as they do not disclose how many secondary sources they hold. They hold all BNA (Bureau of National Affairs), ALM (American Law Media), and PLI (Practising Law Institute) materials (books and articles), as well as their own proprietary publications, but do not engage in collecting as many scholarly press materials as Westlaw and Lexis.

¶23 Google Scholar's number of holdings is unknown (it is actually, like much of Google’s information, secret), but studies show its scholarly holdings of articles in all disciplines in the 300 million range. Because Google Scholar indexes articles and not

34. Id.
35. See, e.g., Rosa Freedman, Failing to Protect: The UN and the Politicisation of Human Rights (2014).
37. Michael Gusenbauer, Google Scholar to Overshadow Them All? Comparing the Sizes of 12 Academic
journals, it is important to rescale when comparing its holdings to databases like Westlaw counted by journal. Depending on how long a journal has been in production, one could represent thousands of articles. A search in Google Scholar for the words “law” or “legal” returned about 1.9 million articles. In a similar search at the article level, Hein produced slightly more articles than Google Scholar. Both Westlaw and Lexis limit their searches to 10,000 results, but when ordered by date both searches indicate the results would be far less than Hein or Google Scholar without the self-imposed limit. SSRN holds around 300,000 papers in its Legal Scholarship Network compared to Digital Commons and its 500,000 law papers.

These collections hold vastly different amounts of legal scholarship and, to some extent, varied fields of scholarship. The larger, more inclusive collections have potential to be better sources, but they still lack important resources, perhaps most importantly significant monograph holdings. Further complicating this issue is some of the sources (Westlaw, Lexis, Bloomberg) feature their own (as well as their subsidiary) publications over others. Without an intended dataset created to allow good measurement of legal scholarship, studies that allow use of data from various systems would be preferable.

The next important factor to consider is if the data is organized in a way to allow quality study. Currently legal scholarship does not have a system of unique, persistent identification. This means publications and authors are very easy to confuse, and those seeking to count them will face challenges. At this time, neither Westlaw, Lexis, nor Bloomberg has consistent author identification. Further, authors not directly listed in the citation (for instance, in an et al. citation) may not be connected to the publication at all. The publications themselves are also not uniquely identified across services, so measurement across multiple services would be difficult. SSRN and Digital Commons do perform better in identifying authors because they are submitted by authors. However, they also do not uniquely identify publications across services. Google Scholar does not uniquely identify authors or publications. CILP is edited to carefully index each publication but not each author. HeinOnline does not have consistent author identification.

Because these data sources were not intended to be used as datasets for quantitative measure, they may lack features that make study possible or, alternatively, simple to perform. Existing sources of legal scholarship have different holdings that cannot be persistently or uniquely identified across them. Though any of these sources might be used successfully to produce a limited study, attempting to use them does require special attention both to the data collection and the proposed measure.

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Examination of UH Law Data in HeinOnline

¶27 U.S. News announced a potential ranking, and the legal community’s reaction was spirited. There were several categories of exceptions taken to the ranking. After explaining the intentions of the proposed ranking and the reactions to it, this article uses UH Law’s scholarly data in HeinOnline to understand what the fatal issues with the proposed ranking might have been. Finally, the criticisms of the ranking and the lessons learned are discussed.

In Like a Lion, Out Like a Lamb

¶28 Over a three-year period culminating in 2021, a potential scholarly ranking was announced by U.S. News, vigorously discussed, and quietly shelved. In early 2019, U.S. News announced it would undertake data collection to potentially create a new scholarly impact report aimed at ranking the influence of law professors’ scholarship. Multiple facets of the ranking were criticized, including what would be counted, how it would be counted, and the ranking’s potential impact. Law libraries participated in projects to disambiguate authors and ensure their institution’s work was properly gathered. Such a project happened at the University of Houston Law Center (Houston Law), where a data study took place over two years; the results of that data are presented in this article. Then, even as more responses were posted as forthcoming articles, the movement toward a potential ranking suddenly stopped in 2021 without a single public word from U.S. News. Although the full reasons for U.S. News’s decision to halt its work are unknown, the studies, including the one at Houston Law, revealed problems with the potential ranking.

¶29 U.S. News published a blog post on February 13, 2019, declaring intent to gather data and potentially create a scholarly impact ranking.40 The subtitle of the post read, “U.S. News may publish a new ranking, separate from the overall Best Law Schools, that measures faculty, productivity, and impact.”41 In under 250 words, the blog detailed the project focus would be data collection aimed at a new scholarly impact ranking; this new ranking would measure productivity using “citations, publications, and other bibliometric measures.” It went on to announce a collaboration with legal periodical giant William S. Hein & Co. (publisher of HeinOnline). Law schools would be asked to provide lists of their own full-time tenured and tenure-track faculty names, and U.S. News would link those names to data within Hein to create a ranking. Finally, it noted the ranking would not be integrated into the Best Law School ranking in 2019, but instead would be a separate ranking in 2019.42

¶30 This announcement from an entity as powerful as U.S. News gained immediate attention in the legal academy. After all, U.S. News reports a monthly readership of its

41. Id.
42. Id.
various publications of more than 40 million people. Among those publications is the Best Law School ranking, the only widely circulated law school ranking of its kind. This ranking has shaped perceptions of legal education for over thirty years. The Best Law School ranking seeks to measure five general categories including school reputation (surveyed from peer institutions, lawyers, and judges). The announcement of the new proposed ranking meant *U.S. News* was extending its work in measurement of law schools into a new field, scholarly publication metrics.

¶31 The voice behind the blog announcing the new ranking and the Best Law School ranking was *U.S. News*’s chief data strategist, Robert Morse. Morse leads the team that designs the surveys and methodologies for the Best Law School rankings, as well as other projects like Best Colleges and Best Graduate Schools. He also monitors the data collection for the rankings.

¶32 Another major actor in this story, *U.S. News*’s source of data for the new scholarly impact report, is HeinOnline. Hein, as a provider principally of law review reproductions, has long been lauded by law librarians for its reliable scans and careful optical character recognition techniques. Hein has won multiple American Association of Law Libraries (AALL) product awards. The primary value of HeinOnline is in the sheer amount and variety of its holdings, the law reviews themselves.

¶33 Prior to the announcement detailed above, no formal relationship between *U.S. News* and Hein existed. Further, *U.S. News* had never before publicly commented on the scholarly production of law professors (though measuring law professors’ scholarly impact was certainly not a new topic in legal academia). Prior to the announcement, Hein had done some work in scholarly impact, namely on its digital HeinOnline platform through its ScholarCheck and related ScholarRank features. ScholarCheck uses data internal to HeinOnline to rank authors. The data used include the number of articles and cases that cite the article in question within the Hein holdings, the number of times the article has been accessed on HeinOnline in the last year, and the number

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44. Sauder & Espeland, supra note 12, at 206.
45. Morse, supra note 20.
46. Morse, supra note 40.
48. Id.
50. HeinOnline Databases, HeinOnline, https://home.heinonline.org/content/ [https://perma.cc/P9RW-QAA3].
52. Leiter, supra note 22; Sisk, supra note 22.
of articles the author has been cited in across all their work available in the Hein holdings. Together these data points create the ScholarRank on Hein. Though Hein held (and continues to hold) great value in its careful curation of law journal holdings, its scholarly impact projects prior to the U.S. News announcement were never the subject of major focus in the legal academy.

¶ 34 On February 25, 2019, almost two weeks after U.S. News’s announcement, Hein took to its blog to confirm its involvement in the potential ranking. The blog post is brief: like U.S. News’s announcement, it is only about 250 words. The title is “U.S. News Considers Using Hein’s ScholarCheck to Evaluate Law School Scholarly Impact.” After lauding U.S. News as “the global authority in education rankings,” the blog goes on to summarize U.S. News’s blog entry from February 13th. It also includes two links explaining Hein’s ScholarCheck features. The mention of the existing ScholarCheck tool in the title of the blog and the links to information about ScholarCheck are significant. Morse’s early blog post does not mention ScholarCheck, just that the citations and publications available in HeinOnline would be utilized. Hein placing focus on ScholarCheck within its announcement blog post muddled Hein’s role because it implied Hein would be more involved in the potential ranking beyond just providing raw data or access to its collection.

¶ 35 The ranking announcements were brief, but the reactions to them were not. Reactions happened at many public levels, from Twitter pages and blog posts to full academic articles and conference presentations. U.S. News and Hein responded to many of these reactions. The discussions had several main points of contention: which scholars would be included in the ranking, which data would be used, the source of those data, what methodology would be used (specifically if it could overcome issues like self-citation as well as more onerous issues like subject prestige, and gender and racial inequities), if it would be part of the Best Law School ranking, and what impact it might have on the academy. Overarchingly the reactions asked if scholarship should even be studied, and, if so, if quantifying it was the right plan.

¶ 36 The first concern was who the ranking would include. The announcement indicated the ranking would be limited to “full-time tenured and tenure-track faculty.”

54. Id.
55. Id.
57. Id.
58. Id.
59. Id.
60. Id.
63. Morse, supra note 40.
Faculty like clinicians, librarians, or other non-tenure track professors are not always required to produce scholarship, although some non-tenure track professors, such as research professors, are required to produce scholarship more than other requirements like teaching. Professor Gregory Sisk, who regularly publishes law scholarly metrics, notes excluding faculty like clinicians is fair because it creates a more level comparison between professors engaging in the same activities. He goes further to say pre-tenure faculty could be excluded because they have not yet produced much scholarship, so they potentially could not be compared effectively, indicating that a line between non-tenure and tenure is not definitive in these types of studies.

¶ It resonates that certain types of scholars might be affected by inclusion because their jobs do not support publishing, but there were also vocal critics of their exclusion. For instance, an open letter was written to express outrage at the exclusion of “full-time, non-tenure track professors” from U.S. News’s data. The letter noted that clinicians and writing professors were vital parts of faculties and made important advancements in scholarship. This is certainly true, but it is also true that different categories of professorship are created to fairly define job duties. Even if limited to all tenured and tenure-track faculty with no provisos, the comparison could never be truly even because other exceptions to scholarship requirements exist (such as administrative duties for deans). The underlying issue is not that different jobs or situations have different duties, but that using scholarship as a proxy for overall faculty value is problematic when not all faculty are required to produce scholarship equally. This question would spark controversy no matter how it was answered because it attempts to define who produces scholarship in a field where there is no consensus on the subject. Choosing this subset of work inherently promotes the value of those making scholarly contributions over other types of contributions vital to law school success.

¶ Another round of reactions was related to the announcement that U.S. News would be working with HeinOnline to produce the new ranking. There were primarily two areas of concern about the data itself. First, the choice of using HeinOnline as the data source, and second, the related choice to limit the citations to law reviews. The first criticism noted HeinOnline had not been helpful in the past in analyzing scholarship metrics because it did not tie works to individual scholar profiles; in other words, the authors had not been indexed within the system to disambiguate and ensure they could

65. Id. at 29–30.
67. Id.
69. Id.
70. See, e.g., Bylaws, supra note 64.
be correctly gathered as a data point.71 Other studies had relied on Westlaw, which does attempt to use an author index to tie individual scholar profiles to their creators.72 At least one professor defended the use of Hein, saying that it has more holdings than Westlaw and notes all authors instead of just the first author like Westlaw.73 Others questioned why Google Scholar was not used, though Morse said it produces too many false results to be used effectively (implying, correctly, that Google Scholar, like Hein, does not have a reliable system of linking authors to their publications).74 Certainly, choices must be made about which data to use in any quantitative analysis, but these choices should be made not based on convenience of previously collected materials but, rather, because they represent the field as fairly as possible.

¶39 Without doubt, Hein holds an enormous amount of law scholarship.75 Unfortunately, its holdings suffer author ambiguity. A successful dataset with authors as a data point demands authors be uniquely and persistently identified and then gathered into a data point (index). Otherwise, there is author ambiguity, which results in both over-counting and undercounting in the dataset. Specifically, the dataset must separate scholars with the same or substantially similar names and link works by a single scholar who changes their name or writes it in different ways (“Jane Scholar” versus “Jane A. Scholar”). In law, no significant emphasis is placed on using the exact same name throughout scholarship, so this is a frequent problem. Also, having professors with the same or very similar names at multiple institutions is not avoidable. A successful dataset of law scholarship including author as a data point requires a careful evaluation of individual authors and the replacement of individual names with unique identifiers, even if the identifier is not publicly revealed. Hein has not done this work to ensure author disambiguation, so it will be difficult for them to participate in a reliable study of law scholarship with author as a data point.

¶40 Further responses to the choice of Hein were not about the number of holdings or the potential for false results but that the scope of Hein’s holdings is limited to mostly law reviews. There were two problematic factors: using Hein would exclude books and book chapters, and this choice would exclude many multidisciplinary articles, thus undercounting scholars who publish outside law journals. Among these critics were the Law & Society Association and the Society for Empirical Legal Studies, which cited concern for their own members who published books as well as those who publish in journals outside law.76 Even the scholar who defended Hein, considering the alternatives,
noted that the choice to use Hein presented “substantial limitations” because it could not count books, chapters, or other non-law review materials.\textsuperscript{77} If \textit{U.S. News} included citations to books and chapters within the law reviews on Hein, that could produce a reasonable evaluation. A conversation with \textit{U.S. News}’s Morse confirmed it would not attempt to count citations to books or chapters at this time, and further revealed it would limit to counting citations only of the articles also found in HeinOnline.\textsuperscript{78} He went on to say that he did not think these non-law review citations unimportant, and if there were a way to count the other citations, he would.\textsuperscript{79} The choice to count only certain law review citations excludes important work and, when used as a proxy for overall quality of scholarship, creates an artificial distinction and a perceived valuing of one type of publication over another. The choices to exclude books and book chapters, and journals outside law, signaled potential problems with the ranking.

\textsuperscript{¶}41 The next issue to consider is that many thought there was no way the methodology could correct the flaws of the data. At the time of the announcement \textit{U.S. News} had not determined the specific methodology but stated it would use “citations, publications, and other bibliometric measures.”\textsuperscript{80} Because so few details of the method were given at the time of the announcement, there was speculation about how the ranking would work and if it would be able to correct some areas of concern. One issue that caused discussion was subject matter prestige, or the concept that certain types of subjects are written about more and, in turn, are cited more.\textsuperscript{81} For instance, the Law & Society Association raised concerns about certain types of scholars (specifically mentioned were non-doctrinal and data-driven) and their scholarship did not create as many citations as other types (mentioned were constitutional or “purely doctrinal”).\textsuperscript{82} The Public Citizen Litigation Group had similar concerns about consumer law scholars.\textsuperscript{83} Tax scholars’ underrepresentation in the literature was noted as another potential concern.\textsuperscript{84}

\textsuperscript{¶}42 Another issue related to counting citations is that junior scholars might be penalized simply because they had not had as much time to produce articles.\textsuperscript{85} “[R]ankings...
that rely on the median or mean of cumulative lifetime citations will predictably quite heavily regard schools with older faculties. Early scholars were not the only audience identified that might have a non-subject-based issue. Gender and race were also identified as potential issues.

¶43 The overarching response was that the method had potential to be problematic, but that would have to wait to be determined, although some were doubtful the method could overcome these issues. For example, Professor Leiter said it is “unclear... whether they plan to combine productivity with impact measures....I fear that’s what they may do.”

¶44 Multiple people and organizations expressed concern that the scholarly impact ranking would become part of the Best Law School ranking. “I bet money they will incorporate it going forward,” said Professor Leiter. Some also thought this would be a positive development, perhaps decreasing the impact of the reputation survey. Multiple times Bob Morse of U.S. News stated the ranking was not currently planned as part of the existing Best Law School ranking. Incorporating the potential ranking into the Best Law School ranking would certainly raise the scholarship metric’s influence by a great margin because the Best Law School ranking is already seen as so important. For example, Stanford Law Dean Larry Kramer said law schools “distort...policies to preserve your ranking, that’s the problem.” Morse’s inclusion of the word “currently” certainly signaled the data could become part of the Best Law School ranking in the future.

¶45 Finally, a related area of concern was the impact the new ranking would have on the legal academy. The words used were not subtle. For example, the Society for Empirical Legal Studies warned the ranking “could do serious damage to U.S. legal education.” Another sweeping statement was made by the Law & Society Association:

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86. Chilton & Masur, supra note 84, at 64.
87. Id. at 63.
89. Leiter, supra note 88; Sloan, supra note 66.
90. Leiter, supra note 88.
92. Leiter, supra note 88.
93. Wallace & Lutkenhaus, supra note 12, at 12.
96. Paul Caron, Society for Empirical Legal Studies Urges U.S. News to Use Google Scholar Rather Than
“[I]f law schools attempted to game the system to improve their rankings, as has happened with other U.S. News metrics, the intellectual, interdisciplinary, and racial diversity of law school faculties and the range of topics they choose to write on might have been negatively affected.”97 Others joined with similar concerns.98

¶46 Not all of the discussions thought ill of the ranking. A few notable defenders also came forward. One was Ted Sichelman, a University of San Diego law professor.99 He called the criticism of the ranking “an echo chamber of misinformation.”100 It is not clear why he felt this way, though likely he thought the responses speculative. Later, with his coauthor Paul Heald, he went on to support not only the use of Hein as the data source but also the idea of ranking scholarship with empirical data and its usefulness to the legal academy.101

¶47 U.S. News and Hein responded to the reactions in writing and at several conference panels. U.S. News produced a second blog post on May 2, 2019, three months after the initial announcement, which is, to date, the last public communication about the scholarly impact ranking. This blog post reproduced a letter U.S. News sent to law school deans.102 The blog post explains a letter was written to address feedback from the law school community, specifically questions about the methodology and how the ranking would fit into the Best Law School ranking.103 The letter stated that U.S. News found the planned rank “reliable,” noting it would “continually improve and expand.” It noted resources beyond law reviews and journals would not be the current focus, though U.S. News understood law reviews and journals were not the only impactful scholarship, and case law would be incorporated in the future as well as other sources if they became available. It clarified rankings would be done at the law school level, not individual faculty members, to allow for “more even comparison.” It also reiterated the method had not been developed yet and the ranking would not currently become part of the Best Law School ranking. In addition to these statements, it explained it would

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97. Caron, supra note 76.
100. Id.
103. Id.
continue to work with the Hein database and then thanked those who had given input (though it also commented it did not agree with all the input). 104

¶48 *U.S. News* also developed a frequently asked questions document. 105 Included was information about the role of law schools, namely that schools would be asked to provide full-time tenured and tenure-track faculty names (in an effort to aid author ambiguity). It went on to say that Hein would then link citation information to those names “published in the previous five years and which are available in HeinOnline.” 106 It reiterated that in 2019 it would not be part of the Best Law School rankings. 107 It confirmed a detailed methodology would be published when the ranking was published. 108 Finally, it reiterated some information about Hein such as its law review holdings. 109 Hein also created a document in its Knowledge Base to answer questions about the data. 110 The document explains how to help Hein disambiguate authors and properly affiliate them with their institutions. 111 It is clear from both of these documents that the work to disambiguate authors fell on the institutions themselves, most often on law libraries. It is important to note that schools were not given the option to opt out of this unpaid work, so if they could not disambiguate, they risked harming their institutions’ rank.

¶49 Multiple conferences also featured appearances by *U.S. News’s* Morse as well as Hein representatives. 112 In July 2019, at the AALL Annual Meeting, a panel included two executives from Hein, President Shane Marmion and Executive Vice President Shannon Hein, as well as *U.S. News’s* Morse. 113 Marmion began by talking about author profiles and citation tracking. 114 He went on to say that Hein was “approached last summer [2018] by a group of law professors and deans and asked, because of the [HeinOnline] Law Journal Library and its depth of content, if [Hein] would talk to *U.S. News* and approach them about considering doing a scholarly impact factor.” This is the first time we hear officially that the impetus for the ranking was from the law community, though the identities of these “law professors and deans” remains unclear. He also noted that

104. *Id.*
106. *Id.* Five years was potentially chosen because of the timing of the last Sisk ranking.
107. *Id.*
108. *Id.* Although what *U.S. News* considers “detailed” is a matter of debate as its currently published methodology for the Best Law Schools ranking is not very detailed.
109. *Id.*
111. *Id.*
113. *Hot Topic, supra note 51. Law librarians Lisa Davis and Bonnie Shucha also appeared on the panel.*
114. *Id.* All text discussing the 2019 AALL Annual Meeting cites to this source.
Hein was not being compensated, and that, on the contrary, “this is exhausting a lot of resources.” After discussing the depth of Hein’s journal holdings, he went on to say that it would not be involved with the methodology and that in fact neither Hein’s ScholarRank (based on the calculation of five ScholarCheck metrics) nor any Hein citation metrics would be used. Marmion went into detail about the holdings and the citation analysis at Hein. Citation analysis started with the Bluebook, he reported, but has “expanded.” He admitted that Hein was aware its citation pattern analysis was not comprehensive, that there were errors in its system, and that its biggest challenge at the time was name disambiguation.

¶50 Morse spoke next at the 2019 AALL Annual Meeting. He explained part of his planned methodology: “[W]e’re going to be summing up the data, so it’ll be like the average citations per faculty member. The analysis we’re going to be producing is the average citations and not the average citations of that human being. It’s the average citations. If there’s fifty law school faculty members, it’s the average citations of those fifty people or their median citations.” Morse explained he expected the methodology to change over time. He defended the use of Hein over Google Scholar because it “ha[s] issues too” and is not curated. After more discussion and some question and answer, he apologized for not understanding the impact working with U.S. News would have on the law library community. He added that he hoped it would be worth it. Finally, he noted that while nothing is secretive, it had taken many individual meetings and phone calls and needed to be more transparent in the future in communications.

¶51 At the 2020 AALS Annual Meeting, there were multiple panels related to the U.S. News scholarly impact ranking. The morning of January 3rd, a panel met called “Ranking Legal Scholarship.” Morse, as well as other professors, Morse began his portion of the talk by saying that the reason U.S. News was creating the ranking was to “provide valuable…information for prospective students…consumer information.” He acknowledged that the audience for scholarly law rankings had previously been academia but that U.S. News thought providing information like this would help prospective law students measure “good faculty.” He claimed the ranking would be a “valid indicator” and was “very important” to “many prospective students.” The evidence he provided for these statements was the competition between students to be placed on law reviews.

¶52 He then spoke about the amount of discussion that had taken place about the rankings within the legal community and mentioned the open letter U.S. News wrote in response. He stated that he believed U.S. News’s plan to start with the data from Hein

115. AALS Hot Topic Program, supra note 74.
116. Id. The full panel also included moderator Aaron Taylor from AccessLex, Sarah Dunaway from Vanderbilt, Rachel Moran from UCLA, Christopher Ryan from Roger Williams, and Michael Vandenbergh from Vanderbilt.
117. Id.
118. Id.
119. Id.
120. Id.
121. Id.
and evolve over time was “credible” and would “create a foundation to expand over
time.”122

¶53 The next day another panel met called “Measuring Scholarly Impact, Are Citation Metrics the Right Fit for Law Schools?”123 Hein and Marmion from Hein appeared on the panel.124 Marmion explained how Hein author profiles worked, including “all of the works published inside the HeinOnline index from that author.”125 He mentioned Hein does calculate self-citation and H-index scores.126 He went on to say while their citation counts are imperfect, they are working to find better ways to count citations but are “sticking with what we have right now.”127

¶54 These public statements are not the only communications from U.S. News, just those that are publicly available. Multiple communications were sent to law school deans and law library personnel and posted in the law school dean listserv regarding the ranking, though these communications generally related to the mechanics of data collection, including confirming lists of current faculty and providing any alternate names a faculty member may have used in publications.128

**UH Law Data Evaluation of U.S. News Data**

¶55 In May 2019 and September 2020, the HeinOnline database was searched to verify the records of all publications by faculty employed by Houston Law during the time of this study. All HeinOnline author profiles for all faculty members were reproduced in lists. Then the faculty was narrowed to tenured and tenure-track faculty as the potential ranking noted it would include only those faculty classifications. The faculty list included anyone with appropriate rank employed at Houston Law between 2019 and 2020. If rank changed during the study, the more junior rank was used for the study. The study was undertaken after the U.S. News announcement of the potential scholarly impact ranking to ensure the Houston Law faculty were counted as accurately as possible. This study identified many expected and unexpected errors.

**Method**

**Examined Faculty Publications**

¶56 This study examined all publications by the 45 Houston Law tenured and tenure-track faculty held in HeinOnline relative to their actual scholarly record. At the time, the Houston Law faculty was composed of assistant professors (6.7%, 3), associate

122. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* An h-index is a quantitative metric that uses publication data to estimate broader contributions for analysis. J.E. Hirsh, *An Index to Quantify an Individual’s Research Output*, 102 PROCEEDINGS NAT’L ACADEMY SCI. U.S.A. 16569 (2005).
128. For example, *U.S. News* sent an email to law schools that it would be publishing the ranking in 2021 and wanted to verify the full-time tenured and tenure-track faculty. Email from Robert Morse, Chief Data Strategist, U.S. News, Preparing for U.S. News Law School Scholarly Impact Ranking (Nov. 6, 2020).
professors (17.8%, 8), and full professors (75.6%, 34). The majority of the faculty were male (71.1%, 32; 28.8%, 13, female) and did not identify as ethnic or racial minorities (77.8%, 35; 22.2%, 10, ethnic or racial minorities). The assistant dean for faculty development, who chairs the Houston Law Faculty Scholarship and Advancement Committee, classified all faculty members as interdisciplinary scholars or not for the purposes of this study. Only 13.3 percent (6) of the faculty were classified as interdisciplinary scholars, and 86.7 percent (39) were non-interdisciplinary.

To identify the universe of faculty publications as of the time of the study, publication lists were created for each faculty member based on pre-existing library scholarship lists and the curriculum vitae published on the Houston Law faculty webpage. These lists of publications were then distributed to each faculty member to be confirmed or revised as needed. Houston Law reference librarians then examined the final lists, created a list of all publications, and classified each publication as a book, chapter, article, or “other.” Given that the potential U.S. News ranking intended to focus only on articles, this study focused on examination of the accuracy of the list of article citations.

**Study Procedures**

After the creation of the list of faculty article publications, the next phase of the study analyzed and compared each faculty member’s HeinOnline Author Profile Page to the list. First, in May 2019, a Houston Law reference librarian visited each faculty’s HeinOnline Author Profile Page and compared the list to Hein, noting any differences in the two. Any index-only articles were also noted. Any articles that appeared in Hein but were not part of the list were added to the list of publications. It was then confirmed with the Houston Law faculty member that they did not author the additional publication found in Hein. The data were checked for any errors, and articles were carefully de-duplicated to produce the true list. Articles from the true list not included on the Author Profile Page were then searched by title. If the article was found via a title search, the reason the article was not included in the HeinOnline Author Profile Page was discovered and recorded. In September 2020, the same steps were taken for any articles published from May through December 2019.

This process of locating and analyzing the HeinOnline holdings for Houston Law faculty was replicated exactly in June and July 2021. Following this initial review of the profile pages relative to the scholarship lists, a six-category coding system to classify the identified inaccuracies emerged. Table 1 identifies each of the categories and their definitions that were then applied to the errors identified by comparing the HeinOnline citations to the true list of publications. This coding system was then applied to each citation on the HeinOnline Author Profile Page and articles found via the title search to determine whether four high-level issues were or were not present. Errors that were included in the fourth category were further coded into three subcategories. All discrepancies

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129. Administration, Univ. of Hous. L. Ctr., https://law.uh.edu/about/administration/ (last visited Nov. 21, 2022).
between the two coders were discussed and resolved, allowing for the achievement of 100 percent intercoder reliability. The inaccuracies identified within the HeinOnline database via this coding system naturally clustered to illuminate two underlying issues within the dataset—issues with article availability and issues with article attribution.

**TABLE 1**
Categories and Definitions for Coding Article Inaccuracies

<table>
<thead>
<tr>
<th>Category</th>
<th>Category Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Issues with Article Availability</strong></td>
<td></td>
</tr>
<tr>
<td>1. Missing</td>
<td>Article on the true list of faculty article publications was not located in HeinOnline.</td>
</tr>
<tr>
<td>2. Index only</td>
<td>Data about an article written by Houston Law faculty member (e.g., title, author, citation) is included on Hein, but the article text is not available.</td>
</tr>
<tr>
<td><strong>Issues with Article Attribution</strong></td>
<td></td>
</tr>
<tr>
<td>3. Incorrect attribution</td>
<td>Article is credited to a Houston Law faculty member, but the credited faculty member did not write the article.</td>
</tr>
<tr>
<td>4. Attribution error</td>
<td>Article written by Houston Law faculty member existed in Hein but was not properly connected to their Author Profile page due to one of three errors.</td>
</tr>
<tr>
<td>4a. Name error</td>
<td>The Houston Law faculty member was not identified as an author (e.g., an author of a multipart article where only the first author was identified as the author).</td>
</tr>
<tr>
<td>4b. Name variation error</td>
<td>An article was not properly attributed because a variation of the Houston Law faculty member’s name was used (e.g., Jane Scholar, Jane A. Scholar, Jane Ann Scholar).</td>
</tr>
<tr>
<td>4c. Spelling error</td>
<td>The Houston Law faculty member’s name was misspelled.</td>
</tr>
</tbody>
</table>

The coders also captured the number of times Hein recorded the article was cited by another article. Using searches on name and citation, the citation numbers were compared, any inconsistencies were included in the dataset, and the publication in question was coded as having a citation error. These citation errors naturally clustered into four emergent categories (see table 2), and all identified errors were coded in one of these categories. The citation coding step was taken only for articles written by Houston Law faculty, not articles wrongly attributed to the faculty. Again, all coding discrepancies between the two coders were discussed and resolved, allowing for the achievement of 100 percent intercoder reliability.

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130. Hein calculates the number of articles that contain cites to the publication in question, not the total number of citations.
TABLE 2
Categories and Definitions for Coding Citation Inaccuracies

<table>
<thead>
<tr>
<th>Category</th>
<th>Category Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issues with Citations</td>
<td></td>
</tr>
<tr>
<td>1. Citation error</td>
<td>An error was found in the citation (e.g., a journal title was incorrectly abbreviated).</td>
</tr>
<tr>
<td>2. Forthcoming</td>
<td>The cited article had not yet been published. Therefore, the citation did not include some journal title, volume, or issue information, and instead noted the article as forthcoming.</td>
</tr>
<tr>
<td>3. Search string error</td>
<td>An error was found in the search syntax created by Hein (e.g., one letter was incorrectly entered into the search information).</td>
</tr>
<tr>
<td>4. Unknown error</td>
<td>Errors without an identifiable source.</td>
</tr>
</tbody>
</table>

Final Dataset

¶61 This procedure allowed for the careful creation and examination of a comprehensive dataset of Houston Law faculty’s article publications as well as those Hein wrongly attributed to them. The true list of faculty publications reviewed and confirmed by Houston Law faculty consisted of 1,338 articles. In contrast, the initial search of HeinOnline Author Profile Pages for Houston Law faculty identified 1,094 articles. However, Hein wrongly attributed 54 of these articles to Houston Law faculty. Title searches for articles on the true list that were not included in Author Profile Pages located 59 articles. A total of 239 articles written by Houston Law faculty (17.9%) were never located in Hein.

¶62 In total, this study examines 1,392 articles (1,338 written by Houston Law faculty, 54 wrongly attributed to Houston Law faculty) published between 1948 and 2019. The majority (51%) were published after 2008. Unsurprisingly, the faculty had varying levels of experience ranging from 1 to 47 years (M=21.9, sd=13.3). Similarly, individual author counts ranged from 1 to 90 law review articles (M=29.7, sd=20.3). The overwhelming majority of these faculty members (93.3%, 42, N=45) had at least one error in their publication lists. All attribution and citation errors found during the coding process were sent to HeinOnline for correction.

Findings

¶63 This systematic examination of citations within the HeinOnline holdings relative to the true list of articles published by Houston Law faculty over the course of their careers illuminated three key underlying issues that need to be examined and addressed before relying on HeinOnline, or any other similar product, to create a scholarly impact metric. The first underlying issue focuses on the availability of articles in HeinOnline’s holdings. The second issue centers on the accuracy of an article’s attribution to its author(s). The third issue focuses on the accuracy of Hein’s number of article citations.
Availability

§64 HeinOnline currently holds more than 2,500 full-text journal titles, most dating back to each journal’s first issue, which brings its journal volume count to well over 60,000 volumes.131 Despite this impressive number of holdings, HeinOnline does not hold every volume of every law journal. When the Houston Law faculty publication lists were compared to HeinOnline’s holdings, many articles could not be found simply because the publication was not held by HeinOnline. Missing articles constituted 17.8 percent (239, n=1,338) of the true list of faculty publications. Missing articles impacted 80.0 percent of faculty (36, N=45), many of whom had multiple items missing (88.9%, 32, n=36). The number of missing articles ranged between zero and 29 articles per faculty member (M=5.3, sd=6.6), representing between 4.3 percent and 57.1 percent of these faculty members’ article publications (M=15.1%, sd=14.9).

§65 To examine if the missing articles varied systematically with different aspects of a faculty member’s career, research interests, or characteristics, a series of statistical tests was conducted. While the number of articles missing from Hein as a percent of total articles a faculty member had published is practically significant for individual faculty members, no statistical relationship was found with a faculty member’s rank within the law school.

**TABLE 3**

<table>
<thead>
<tr>
<th>Rank</th>
<th>Number of Articles Missing from Hein</th>
<th>Percent of Articles Missing from Hein</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean</td>
<td>Standard Deviation</td>
</tr>
<tr>
<td>Assistant Professors</td>
<td>1.3</td>
<td>2.3</td>
</tr>
<tr>
<td>Associate Professors</td>
<td>1.4</td>
<td>2.8</td>
</tr>
<tr>
<td>Full Professors</td>
<td>6.6</td>
<td>7.1</td>
</tr>
</tbody>
</table>

§66 In contrast, striking differences were found in the number and proportion of missing articles between interdisciplinary scholars and non-interdisciplinary scholars. As shown in Table 4, interdisciplinary scholars were statistically more likely to have their articles missing from HeinOnline’s holdings, both in discrete numbers and proportionally to all of their article publications. In fact, for three interdisciplinary authors approximately half or more of their article publications were missing (range 48.0% to 57.1%).

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132. Number of Missing Articles F=2.72, df=2/42, p=.08; Percent of Published Articles Missing F=0.91, df=2/42, p=.41.
There were, however, no striking differences in article availability by gender or race that disadvantaged females or racial or ethnic minorities. This study is limited as the Houston Law faculty is predominately male and not identified as racial or ethnic minorities. Further study is needed of other, more diverse faculty compositions. While, on average, Houston Law male authors had more missing articles than females and authors who did not identify as racial or ethnic minorities had more missing articles than those who did identify as racial or ethnic minorities, these were not statistically significant differences.

### TABLE 5
No Relationship Between Gender and Missing Articles\(^{134}\)

<table>
<thead>
<tr>
<th>Identity</th>
<th>Number of Articles Missing from Hein</th>
<th>Percent of Articles Missing from Hein</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>Mean 6.1, Standard Deviation 6.9</td>
<td>Mean 16.7%, Standard Deviation 15.6%</td>
</tr>
<tr>
<td>Female</td>
<td>Mean 3.5, Standard Deviation 5.7</td>
<td>Mean 11.3%, Standard Deviation 12.5%</td>
</tr>
</tbody>
</table>

### TABLE 6
No Relationship Between Racial/Ethnic Minority Status and Missing Articles\(^{135}\)

<table>
<thead>
<tr>
<th>Identity</th>
<th>Number of Articles Missing from Hein</th>
<th>Percent of Articles Missing from Hein</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Minority</td>
<td>Mean 5.0, Standard Deviation 5.4</td>
<td>Mean 16.1%, Standard Deviation 15.8%</td>
</tr>
<tr>
<td>Minority</td>
<td>Mean 6.3, Standard Deviation 10.3</td>
<td>Mean 11.9%, Standard Deviation 10.8%</td>
</tr>
</tbody>
</table>

\(^{67}\) Journals not held by HeinOnline are an important part of the issue of article availability, but there is another category of publications shaping this issue. Some journals are not reproduced in full text on HeinOnline but are only indexed with basic...

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133. Number of Missing Articles \(t(43)=-2.06, p<.05\); Percent of Published Articles Missing \(t(43)=-4.66, p<.001\).
134. Number of Missing Articles \(t(43)=12, p=0.24\); Percent of Published Articles Missing \(t(43)=1.12, p=0.27\).
135. Number of Missing Articles \(t(43)=-0.53, p=0.60\); Percent of Published Articles Missing \(t(43)=0.79, p=0.44\).
metadata. The indexed information includes title, author, basic citation, and topics. Articles are listed in HeinOnline as index-only not because of a lack of importance or other indicator relating to scholarship quality but because HeinOnline and the journal in question did not reach a contractual agreement to completely hold the title. Though indexing the article does create a more accurate picture of an author’s total publications, in our study it appeared to prevent accurate citation counts. HeinOnline notes that index-only articles are fully searchable and that both citations to and within index-only articles are counted. However, multiple searches for Houston Law articles cited within index-only articles failed. In other tests, citations to articles inside index-only articles identified by HeinOnline were successful. Although not the subject of this study, it is possible that the Houston Law failed searches are not related to the articles being index-only; however, due to the nature of index-only articles it was not possible to determine.

¶ These index-only journals generally have agreements that require an embargo on publication of varying lengths of time. Practically, this means HeinOnline has historical content for these journals but recent issues are not available. For instance, at the time of the study, the *Yale Law Journal* had a one-year embargo, which means only articles older than one year appear on HeinOnline in full text. At the time of the study, in HeinOnline’s Law Journal Library database, 3,788 titles had an embargo of some length of time ranging from three months to over five years.

¶ At the Houston Law Center, 1.4 percent (20, N=1,338) of the true list of faculty publications were index-only. Compared to articles not found in HeinOnline, this may seem like a relatively low number; however, considering the index-only law reviews are not used to measure citation counts, merely having index-only articles is only a small part of the issue. Index-only articles impacted nearly a quarter of the Houston Law faculty (24.4%, 11, N=45), several of whom had multiple index-only articles (27.2%, 3, n=11). Among faculty with index-only articles, the number of index-only articles ranged between zero and six per faculty member (M=0.4, sd=1.1), representing between 2.9 percent and 100 percent of these faculty members’ article publications (M=3.3%, sd=14.9).

137. Email on file with the author.
TABLE 7
No Relationship Between Rank and Number of Index-Only Articles Found but Relationship Between Rank and Percent of Index-Only Articles Found\textsuperscript{138}

<table>
<thead>
<tr>
<th>Rank</th>
<th>Number of Index-Only Articles in Hein</th>
<th>Percent of Index-Only Articles in Hein</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean</td>
<td>Standard Deviation</td>
</tr>
<tr>
<td>Assistant Professors</td>
<td>0.3</td>
<td>0.6</td>
</tr>
<tr>
<td>Associate Professors</td>
<td>0.3</td>
<td>0.5</td>
</tr>
<tr>
<td>Full Professors</td>
<td>0.5</td>
<td>1.2</td>
</tr>
</tbody>
</table>

TABLE 8
No Relationship Between Interdisciplinary Scholarship and Index-Only Articles\textsuperscript{139}

<table>
<thead>
<tr>
<th>Type of Scholarship</th>
<th>Number of Index-Only Articles in Hein</th>
<th>Percent of Index-Only Articles in Hein</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean</td>
<td>Standard Deviation</td>
</tr>
<tr>
<td>Interdisciplinary</td>
<td>0.3</td>
<td>0.5</td>
</tr>
<tr>
<td>Non-Interdisciplinary</td>
<td>0.4</td>
<td>1.1</td>
</tr>
</tbody>
</table>

TABLE 9
No Relationship Between Gender and Index-Only Articles\textsuperscript{140}

<table>
<thead>
<tr>
<th>Identity</th>
<th>Number of Index-Only Articles in Hein</th>
<th>Percent of Index-Only Articles in Hein</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean</td>
<td>Standard Deviation</td>
</tr>
<tr>
<td>Male</td>
<td>0.3</td>
<td>1.1</td>
</tr>
<tr>
<td>Female</td>
<td>0.7</td>
<td>0.9</td>
</tr>
</tbody>
</table>

TABLE 10
No Relationship Between Racial/Ethnic Minority Status and Index-Only Articles\textsuperscript{141}

<table>
<thead>
<tr>
<th>Identity</th>
<th>Number of Index-Only Articles in Hein</th>
<th>Percent of Index-Only Articles in Hein</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean</td>
<td>Standard Deviation</td>
</tr>
<tr>
<td>Non-minority</td>
<td>0.3</td>
<td>0.7</td>
</tr>
<tr>
<td>Minority</td>
<td>0.7</td>
<td>1.9</td>
</tr>
</tbody>
</table>

\textsuperscript{138} Number of Index-Only Articles $F=0.18$, $df=2/42$, $p=.83$; Percent of Published Articles Index-Only $F=8.77$, $df=2/42$, $p<0.01$.

\textsuperscript{139} Number of Index-Only Articles $t(43)=0.22$, $p=.83$; Percent of Index-Only Articles $t(43)=0.29$, $p=0.77$.

\textsuperscript{140} Number of Index-Only Articles $t(43)=-1.01$, $p=.28$; Percent of Index-Only Articles $t(43)=-1.90$, $p=0.06$.

\textsuperscript{141} Number of Index-Only Articles $t(43)=-0.94$, $p=.35$; Percent of Index-Only Articles $t(43)=0.48$, $p=0.64$. 
**Attribution**

¶71 The second issue illuminated by this analysis was the accuracy of the attributions by HeinOnline to specific authors. The first type of attribution error identified in this study were full-text articles in HeinOnline that were not attributed to our authors. The percentage of articles not attributed was 5.6 percent (62, n=1,099), impacting 40 percent (18, N=45) of Houston Law faculty. Over half of these errors (61.3%, 38, n=62) were based on name variations. One faculty member’s variation included Last Name, First Name, Middle Initial, while another was Last Name, First Name Middle Initial. This example demonstrates that both predictable and reported variations are an issue, like the absence of a middle initial. However, so are unusual variations that are harder to predict like this addition of a comma between first name and middle initial.

¶72 Other errors (37.1%, 23, n=62) reflected more complex problems with the dataset that resulted in authors not being attached to their work in Hein. The most noted errors were articles where only the first author was indexed and other authors were not attributed. This is separate from one article with multiple coauthors that did not cause errors in attribution. For example, in one prominent review, an issue took on a legal topic in six parts, authored by six different scholars. A Houston Law faculty member authored one part of the article, but the individual part in question was not attributed to any author. After request, the author was listed, but at the time of this article's publication, of the six parts, only the introduction (the first listed author) and the professor in question (after request) were attributed, leaving four scholars unattributed.

¶73 Data entry errors were the final issue. One article (1.6%, n=62) analyzed in this study was not attached to its author because the author’s last name was slightly misspelled when entered in HeinOnline. The actual scan of the journal page shows the correct spelling, but the name was not spelled correctly when it was entered into HeinOnline, preventing proper attribution.

¶74 It follows that if articles are not properly attributed to authors, they are also sometimes attributed to the wrong author. Of all the articles available and attributed to Houston Law authors in Hein, 4.7 percent of those articles (54, n=1,153) were not actually authored by Houston Law faculty members. Articles were incorrectly attributed to 11.1 percent (5, N=45) of Houston Law faculty members. In these instances, names of the article author and the wrongly attributed author are identical, but they are different people. For instance, a former professor at another university shares the name of a Houston Law professor. Multiple articles, many from the other university’s flagship law review, were wrongly attributed to the Houston Law professor.

**Citation Counts**

¶75 The final underlying issue shaping the accuracy of a scholarly impact metric centered on Hein’s counts of the number of times an article is cited in other articles. HeinOnline lists how many articles cite an article, not how many total citations exist to an article. HeinOnline listed 12,963 citations of Houston Law authors. Almost 1 percent of the articles contained a citation error at the article level (0.9%, 121, N=12,963). Like attribution errors, the errors in citation counts were sometimes added incorrectly
(falsely increasing citation count), and sometimes citations were not added when they should have been (falsely decreasing citation count). Some articles that cited Houston Law faculty were not counted. Some articles that did not cite Houston Law faculty were included in Houston Law citation counts. After accounting for both types of count errors, the total citation count by Hein was 99 articles short.

¶76 Closer examination of the nature of these citation errors revealed four permutations. The majority of citation errors, 69.4 percent (84, n=121), had to do with the form of the citation used in the searches generated by Hein. The problems included publications making journal title or abbreviation errors, such as excluding citing articles that spelled the journal name out instead of abbreviating it. Another example was an erroneous space between the abbreviation for Law Journal (L. J. instead of L.J.). These types of errors are likely correctable. Instead of only searching for the correctly abbreviated version of the citation, Hein should program its citation search system to search the full citation, and multiple obvious variations of regular citation errors could be entered into the Hein citation finding system. Citation form errors in this category also resulted from issue and page numbers. To correct this problem in part, HeinOnline’s page number searches should search for the entire range of pages of an article, not just the first page. These errors also originate from journal issue structure. Journals with structures involving seasons instead of numbers sometimes pulled the wrong issue. One citation search pulled from the fall issue instead of the spring issue, so any citations to articles in the fall issue were not counted. Although perhaps more of a challenge, these issues should still be solvable by careful indexing.

¶77 Another permutation of citation errors were citations to articles listed as “forthcoming” (4.1%, 5, n=121) at the time of the article’s initial publication. Because the citations are not listed fully, HeinOnline’s search did not find them. The third permutation of citation errors were found when errors in the search string were corrected (3.3%, 4, n=121) such as data entry of one wrong letter. A reasonable amount of error is expected in any system, and these two permutations of errors accounted for less than 10 percent of citation errors.

¶78 The final permutation of citation error is more troubling. Nearly a quarter of citation errors (23.1%, 28, n=121) were citation errors with no obvious, identifiable source. The citation and search string were verified as correct, but Hein did not count the articles in the author’s citation count. More investigation into this type of error is necessary to determine whether it could be corrected.

Other Evidence

¶79 One of the major areas of concern about the potential U.S. News ranking was that certain types of scholarship, like books, chapters, and non-law reviews, would be excluded because they are not available on Hein. In this study, considering just two academic years of data (2019–2020 and 2020–2021), 43.7 percent (74, n=169) of all Houston Law faculty scholarship were books and book chapters. Ten of the authors who did not publish any articles during this time frame would not be represented in U.S.
News’s potential measure despite their 40 books and two chapter publications during this time.

¶80 Another area of concern was the exclusion of publications by non-tenure-track (NTT) faculty. Before the Houston Law faculty list was narrowed to tenured and tenure-track faculty, HeinOnline’s author pages were recorded for other NTT faculty including clinicians and legal writing professors. Houston Law employed 21 NTT faculty at the time, nearly half of whom (47.6%, 10) had at least one publication in HeinOnline. These NTT faculty published 72 articles (M=5, sd=5.6) that, according to Hein, were cited 243 times (M=20.5, sd=67.6).

¶81 A systematic examination of the data in HeinOnline reveals many of the criticisms of the proposed ranking metric have merit. Multiple problems were found including limitations of the holdings of Hein, errors with attributing authorship, and problems counting citations to and within articles. It is also clear that excluding citations to books and book chapters severely limits the metric. Finally, there is evidence that some NTT faculty are cited at the same levels as some tenured and tenure-track faculty.

Criticisms and Lessons Learned

¶82 Fewer than 500 words announced the potential U.S. News scholarly impact ranking. Then thousands of words were written and spoken critiquing or encouraging the would-be ranking. The reactions and responses revolved around issues of what would be counted, how it would be counted, and what impact the ranking could have on the legal academy. Multiple studies sought information about the accuracy of the ranking, including one at Houston Law. Then, without even one official word, the potential ranking was abandoned. In early August 2021, a confidential email was allegedly sent to the American Bar Association Law Dean’s Listserv\textsuperscript{142} with an announcement passed from U.S. News that the proposed ranking would not move forward because certain metrics were not easily available. The announcement specifically called out interdisciplinary scholars as a disproportionately adversely impacted group. Bloomberg Law confirmed receipt of an email with a similar message from U.S. News.\textsuperscript{143} Bloomberg’s communication mentions the ranking was only ever proposed and that U.S. News decided “not to pursue” the new ranking.\textsuperscript{144} HeinOnline also updated its posting about author disambiguation, noting that the ranking was not moving forward.\textsuperscript{145}

\textsuperscript{142}. The message is private, and though the contents are an open secret, its existence is officially only alleged as the American Bar Association Dean’s Listserv has strict rules about membership and privacy of posts. Listserv Protocols: Dean’s List Protocols, Reminders, Information, Am. Bar Ass’n, https://www.americanbar.org/groups/legal_education/resources/legal_education_listservs/listservprotocols/ [https://perma.cc/C4HW-L45S].


\textsuperscript{144}. Id.

\textsuperscript{145}. Preparing for U.S. News Scholarly Ranking, supra note 110.
¶83 There were earlier signs that the ranking was not going as planned. First, the amount of controversy around the ranking surprised U.S. News.\textsuperscript{146} Much more damning, the timing of the release of the survey was pushed back on multiple occasions. At the time of the announcement, the FAQs gave the 2019 calendar year.\textsuperscript{147} At a conference at Texas A&M, U.S. News’s Morse said it would be pushed to 2020.\textsuperscript{148} Then spring 2021 came and ended, and finally the unofficial word came that the ranking would not happen.\textsuperscript{149} Although now it is clear the scholarly ranking will not be produced by U.S. News at this time, many questions remain. Chief among them is why U.S. News chose to stop pursuit of the ranking and to what degree those reasons were related to the concerns voiced about the potential ranking, including the data source, Hein. Whether or not U.S. News reenters the field, there is much to be learned from the failed ranking as the scholarly community moves forward.

¶84 The reported email sent to law school deans mentioned issues with interdisciplinary scholarship.\textsuperscript{150} This concern is certainly legitimate, as borne out by the Houston Law analyses. There are also many other issues with the Hein data and available analyses that seem difficult to overcome. Returning to the list of issues enumerated by the potential rankings, it becomes obvious how legitimate these concerns were.

¶85 First, the concern of who the survey included. The potential ranking planned only to use tenured or tenure-track faculty. Critics warned against excluding NTT faculty. The reasons explained for excluding them were that their jobs did not consistently require or support writing scholarship. The analysis of all Houston Law faculty shows it would likely be a more credible measure to allow schools to choose which faculty would be included based not on status but instead on whether their scholarship contributes to the law school’s scholarship record. Since schools were asked to identify their tenured and tenure-track faculty, it would not be a significant difference to ask which scholars to include (perhaps ask for only five or 10) and allow schools to inclusively identify their scholars who publish.

¶86 Next, the concern of the choice of Hein as a dataset. U.S. News claimed it sought to measure “faculty productivity and impact.” It claimed using journal articles only was reasonable because students compete to be on law reviews during law school. However, students’ reasons for being on editorial boards have little to do with law journals being superior publications. Instead, they compete for these appointments to aid them in getting jobs. Excluding books and book chapters diminishes the dimensions and nuances of scholarly impact. Further, in this perspective, the dimensions of the concept of scholarly impact are diminished to mere citation counts. The question of why a digitally

\textsuperscript{146} AALS Hot Topic Program, supra note 74; Measuring Scholarly Impact, supra note 112.
\textsuperscript{147} U.S. News, supra note 105.
\textsuperscript{148} Caron, supra note 94.
\textsuperscript{150} Id.
available article is or is not cited or where it is cited is eliminated in favor of a simple measure.

¶87 The arbitrary nature of what is not counted because it is not held in Hein or is held in index-only form makes this especially troubling. While an author can control, to some extent, where they place their work, they cannot control who is citing them or where those citations are published. In this system where every journal with a citation matters, this inconsistency is highly problematic. There is no reasonable argument that the articles cited in last year’s issues of the Yale Law Journal are not worthy of being counted, yet they were excluded when counting who they cite because of the Hein embargo. At least those index-only titles are included in citation searches by Hein. Articles not included on an author’s profile are not included in any way, even if they are frequently cited in the articles held on Hein.

¶88 U.S. News’s response to criticism about including only journal articles was that a dataset to measure books and chapters was not available. That response is not sufficient to exclude books and chapters. If anything, it supports not measuring something that cannot be properly measured. Admittedly, it would be difficult to collect such a dataset. Others found alternatives. Leiter and Sisk include citations to books.151 After Fred Shapiro ranked articles in a study, he was criticized for not including citations to books.152 He agreed in a later work and said, “The research challenge of amassing the data for authors and books was formidable—indeed, well-nigh impossible.”153 For a legitimate measure to move forward, the difficult work of collecting these materials needs to be done or the measure needs to be more honestly described. Many felt the exclusion of these materials meant the ranking would not realistically measure scholarly impact.

¶89 Employing the Hein dataset had a significant, fundamental flaw. The dataset was not designed to support this type of measure because it does not have an author index. Hein created HeinOnline to hold and distribute a large set of law review articles. It has certainly succeeded. However, this ranking sought instead to count citations by author, so it needs the articles to be gathered by that information point. Unfortunately, the author information point has not been meticulously standardized in Hein because it was not designed for this use. Instead, various versions of names exist in articles as authors change their last names with major life events or even just add or remove a hyphen or a middle initial. Along with these more intentional types of name variations, journals sometimes make errors that are brought into the dataset, and human error occurs during data entry by Hein. Similarly, some citations can be found by searching the articles, but others do not meet the requirements of the search, like forthcoming citations, and are not found. The careful disambiguation of journal names and created systems that cross-reference former journal titles was not done for author names or

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151. See Leiter, supra note 22, at 455–57; Sisk, supra note 22, at 44–45.
citations within the articles. Author name and citation count are what *U.S. News* sought to measure.

¶90 The potential methodology of the ranking was also criticized. Specifically, critics wondered how *U.S. News* could right problems with institution and subject prestige, gender, and race in a citation study.\(^{154}\) The decision to measure impact by citation also implies that citations are created because the cited work made a positive impact on the article in question. That is not necessarily true, as citations are created for various reasons including comparing alternative viewpoints and critiquing other work.\(^{155}\) All citations, even those that contradict the argument, methods, or interpretation of the cited article, are treated the same in Hein. Some citations are certainly used to refer to work that had a positive impact on the work at hand. Law review acknowledgments, placed in the star footnote, could potentially tell us valuable information about the scholars who directly impacted an article, but are not cited with a particular work so would not be counted.\(^{156}\) Taking this idea another step, many times in legal publications scholars who would be included as coauthors in other disciplines are acknowledged in the star footnote instead. This eccentricity in how we acknowledge each other in law further works against using citation to measure impact.\(^{157}\) Even though the measure sought to compare authors, what it is truly measuring are articles. The citation of an article, not a citation to an author, is what is being counted.

¶91 On its face, this definition of scholarly impact does not make sense, a reaction many other experts, particularly law librarians, had indicating this metric’s inadequacy. Other attempts to measure legal scholarship were judged by their own creators as merely one concept to consider. For instance, Shapiro said his own work to quantify successful papers “falls somewhere between historiography and parlor game.”\(^{158}\) Without supplemental information that could be gathered from surveys, interviews, and other indicators of influence such as panel appearances, speaking engagements, awards, and appointments to institutions like the American Law Institute (ALI), this metric is not likely to truly measure scholarly impact but only one subset of a specific specialty.

¶92 Another criticism was the possibility of inclusion in the Best Law School ranking. Although the announcement stated the ranking was to be a separate ranking, many felt it would eventually become part of the larger Best Law School ranking. If the measure is expanded as a proxy for law school quality, even more problems are created for whether the measure can do what it intends to do. In other words, can citations within a very specific dataset of one type of publication tell us if one law school is better than another?

\(^{154}\) See, e.g., Eisenberg & Wells, *supra* note 21, at 375–76.

\(^{155}\) Shapiro excluded negative citations in his work. Shapiro, *supra* note 153, at 1600.


Also at play when discussing the Best Law School ranking is its questionable reputation as evidenced by the consistent criticism of that ranking. In 2021, the 2022 Best Law School ranking was changed three times before publication, drawing ire from law deans. This was not the first time the ranking has faced criticism. In 1997, 150 law deans signed a joint letter condemning the ranking’s methodology. Issues have also been identified with the data used to develop the Best Law School ranking. In its own editorial guidelines, U.S. News states: “For any content that uses data, whether based on data collected via U.S. News statistical surveys or from external reports, the Education team fact-checks numbers to ensure accuracy.” Nevertheless, obvious data errors appeared in the published 2022 survey results. For example, one small state law school reported 15 million more library titles than Yale or Harvard.

This leads to the final criticism, the impact of the potential ranking on the academy. It appears that U.S. News lacks the deep knowledge that would come from time in the field studying scholarly impact. To properly create datasets and new measures, the people involved have to truly understand the field and how its multiple facets interplay. The designers should be immersed in the field. U.S. News was not. Alternatively, it has enormous power in the field of the legal academy, creating an expansive imbalance. Whatever U.S. News published would without doubt be noted and discussed by every law school. At the same moment, U.S. News would have inherent difficulty understanding the importance of small differences within the field. Its own chosen data and measure would instantly create a definition of what scholarly impact was, and that definition would not properly respect experts in the field. Discussing the ranking, Espeland and Sauder explain that “[b]y magnifying the importance of trivial differences, rankings change the phenomena they purport only to measure.” Morse stated he was surprised at the amount of criticism the potential ranking received. Even this surprise is evidence that U.S. News lacked understanding of the scholarly impact community when it waded into potentially creating a powerful, widely viewed ranking of legal scholarship.

Though the U.S. News scholarly impact ranking never materialized, and the criticisms leveled at it likely had merit as detailed above, it did serve as an impetus for meaningful conversation. First, it showed that undoubtedly the law scholarly community is keenly interested in the topics of measurement and ranking. Second, it brought

161. Id. at 495–96.
163. This was the first year U.S. News collected titles from main library collections, and though instructions were provided, there was criticism of how quickly this metric was forced on schools. The intent of mentioning this error is not to draw attention to the school in question but to show that the data is not being thoroughly checked for error.
164. Sauder & Espeland, supra note 12, at 213.
into focus the issue of how *U.S. News* currently measures law school quality, specifically its reliance on survey instruments. Finally, it questioned whether scholarly impact could or should serve as a proxy for law school quality.

¶96 When the *U.S. News* potential ranking was announced, the responses were numerous. For example, Dean Paul Caron’s popular *TaxProf Blog* published over 20 entries on the report.¹⁶⁵ Though the topics within the responses varied, one thing was made quite clear: the scholarly community cared deeply about how it might be measured. This concern resulted in many meaningful conversations about data measurement. With data analytics on the rise, it was an important conversation to have, and the scholarly community now has an opportunity to capitalize on the lessons we can learn from the failed ranking. Without the pressure of the *U.S. News* report, it is hard to imagine so much focus would have taken place on the subject in the same relatively short time frame.

¶97 One worthwhile point of these discussions was the measure for quality within the *U.S. News* Best Law School ranking. Currently, *U.S. News* uses survey instruments to quantify perceptions of law school quality.¹⁶⁶ One survey is sent to other law schools, and they are asked to rank schools on a scale.¹⁶⁷ Multiple criticisms exist about the survey, including the ability to game the results and the persistent echo chamber created over time as schools recall previous *U.S. News* rankings when assigning value in the current survey.¹⁶⁸ Another criticism is that the survey does not meaningfully attempt to measure things that are important to potential law students, most importantly for our discussion, the quality of law professors.¹⁶⁹ Some scholars thought the addition of a scholarly impact ranking to *U.S. News* meant the survey might eventually weigh less than it had in the past, and this was seen as a good thing. Quality of scholarship is traditionally one measure in law faculty hiring and promotion processes. This measure is usually a more individualized process of reading and seeking reviews from relevant scholars, which is not feasible on a large public scale. Scholarly impact rankings outside *U.S. News*’s attempt to show that individualized processes are not the only avenue for measurement, and indeed quantitative rankings of this type can be credible and reliable.¹⁷⁰

¶98 Scholarly impact alone cannot cure the quality measurement problem of the *U.S. News* Best Law School ranking. Other factors should be considered as well. There

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¹⁶⁵. See, e.g., Caron, *supra* notes 61, 76, 94, 96 & 159.


¹⁶⁷. *Id.*


are studies that show positive correlation between faculty with good course evaluations and being highly cited.\textsuperscript{171} Other studies show no correlation as well.\textsuperscript{172} If the existing \textit{U.S. News} survey is not to be used because it is at best a poor proxy for faculty quality and, at worst, does not even attempt such a measure, it should not be replaced with another attempt to proxy one set of data as a total indicator for faculty quality. Student evaluations of faculty teaching can be studied and included. These datasets and measures are as potentially difficult and problematic as those already mentioned, but that does not make them any less worthwhile of an information point.\textsuperscript{173} Teaching awards are another potential source of data.

\textsuperscript{¶}99 The second conversation point to continue is why and to what depth law schools invest in scholarship.\textsuperscript{174} The Best Law School ranking has been accused of “homogenizing” legal education by forcing all law schools to care about the same set of factors.\textsuperscript{175} Surely this could happen in scholarly impact as well, as scholars are forced to consider whether a journal is in HeinOnline, if their subject will stir up a good number of footnotes, and even perhaps if they want to infer impact on someone they are thinking of including in a footnote of their own.\textsuperscript{176} Perhaps scholars think themselves impervious to these types of external factors, but administrators certainly have historically cared about what the rankings measure and might, if presented with a \textit{U.S. News} scholarly impact ranking, find themselves discouraging retirement of a productive faculty member or considering the potential impact of a lateral hire’s scholarship over factors like teaching reviews or curricular fit.\textsuperscript{177} In truth, the Best Law School ranking already devalues teaching quality, and a scholarly impact ranking with similar influence could contribute to that treatment.\textsuperscript{178}

\textsuperscript{¶}100 \textit{U.S. News’s} announcement created a flash of focus on scholarly impact rankings resulting in meaningful conversation about how faculty quality is measured and why law schools value scholarship. Scholarship is valued and should be included in any meaningful discussion of faculty quality. However, scholarly impact should not be the sole indicator of faculty or law school quality, and further efforts to measure faculty quality should recognize the differences in missions and scholarly aims of different law schools.

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\textsuperscript{173} Barton, \textit{supra} note 171, at 625.

\textsuperscript{174} Jaschik, \textit{supra} note 98.


\textsuperscript{176} \textit{Id}.

\textsuperscript{177} Chilton & Masur, \textit{supra} note 84, at 65; Iacono, \textit{supra} note 168, at 222.

\textsuperscript{178} Iacono, \textit{supra} note 168, at 225.
The Path Forward

¶101 Looking at the data of one institution reveals evidence that the *U.S. News* proposed ranking could not measure its intended goal because the data could not represent the rich and varied publications it sought to measure. The exclusion of books and chapters, and decision to include only a subset of articles, severely limited its credibility. Further, Hein’s data was not created to measure citation, and the flaws found in the data negatively impacted the evaluation. There is evidence that almost all scholars would be undercounted, even after excluding books and chapters. Further, there is evidence that interdisciplinary scholars would be specifically undercounted. We know from other studies, like Sisk and Leiter, that measuring scholarship meaningfully is possible. Other sources of data exist, but more importantly other ways to count citations exist.

¶102 To move scholarly impact measures forward, several things must happen. First, both authors and their publications must be systematically uniquely and persistently identified. Then current studies must honestly and responsibly share their limitations; they must not present themselves as more than they are. Finally, more small studies need to take place in the field to provide varying, quality examinations of the field.

Identifying Scholars and Publications

¶103 For data to tell us something meaningful, the dataset has to be capable of producing accurate, reliable measures.179 Every school needs to take on the burden of collecting and auditing its own scholarship.180 Throughout the three years of the impending *U.S. News* ranking, schools tried to exercise influence over the dataset and method. One factor schools can control is the data itself. One of the most difficult parts of measuring impact is author disambiguation. Another, perhaps more difficult though less discussed problem, is creation of true and complete scholarship lists. Often studies attempting to measure the credibility of HeinOnline’s holdings compare it to other lists that are also incomplete.181 No organizations are in a better position to properly disambiguate authors and publications than law schools themselves. Every year all law schools (likely through their law libraries) should work to produce a complete list of faculty scholarship for the year. While they could also identify and correct any public lists (like HeinOnline’s author pages), that should not be the aim of their work. Performing unpaid work for for-profit companies is not a practice that should continue in law librarianship. Instead, law libraries should partner with their schools to support the scholarly agenda of the institution.

¶104 But these collections must be able to be benchmarked against one another to study one school or scholar next to another. Without a more systematic way to identify authors and publications, no amount of thoughtful collection at the individual school

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179. Uwe Flick, *An Introduction to Qualitative Research* 258 (4th ed. 2009).
level can solve any of the problems of quantifying scholarship. The two-step combination to move forward is for each author to have a unique, persistent identifier and each publication to have a unique, persistent identifier. Then those two identifiers can combine to let data be collected across systems to properly reflect the rich, varied field of legal scholarship.

¶105 Luckily the tools to move forward already exist and are used by fields outside law. ORCID (Open Researcher and Contributor ID) allows author identifiers, and Digital Object Identifiers (DOIs) allow publication identifiers for all kinds of works. ORCID is a nonprofit that seeks to connect researchers to their contributions using unique, persistent identifiers.¹⁸² Scholars can visit ORCID’s website to create a free ORCID iD. Although ORCID iDs can be assigned by institution, a large fee is required to do so. The more thoughtful approach is for institutions to ask each author to create their own iD, then appoint an appropriate person (likely someone in the library) as a designated user of their account moving forward. Then the profile can be populated with all publications by the author or their designee. This approach is scalable and should be a priority at any institution that values scholarly work.

¶106 The necessary companion to author identification is publication identification. DOI is an identification syntax.¹⁸³ Much like ORCID iD, a DOI provides a unique, persistent identifier for a publication of any kind (DOIs are not limited to scholarship and have many uses, including movies and audio recordings).¹⁸⁴ A DOI must be registered through a participating organization. For scholarly works, Crossref is the leading registrar.¹⁸⁵ Crossref requires both an annual membership fee based on volume of publication revenue (or publication operations expenses if no revenue is generated) and a fee per item registered.¹⁸⁶ For a law journal, this cost would be $275 a year plus $1 per article for current registration.¹⁸⁷ Prior works can be registered for $0.15 an article.

¶107 However, most academic libraries already pay membership fees to Crossref, and Crossref allows any entity (here a law school) to use its institutional membership without any additional fees (Crossref will give law schools their own prefix to simplify billing of individual publication fees). This allows academic law libraries to take the role of Sponsor for all the law journals and publications at their institution and work toward having all publications registered with a DOI. The journal, or when appropriate the library, can properly maintain the metadata and reference linking for the publications.¹⁸⁸ This means the only direct financial cost involved would be the per

¹⁸⁵. Id.
¹⁸⁷. Id. This assumes publication revenue or expenses of under $1 million.
publication registration cost. Even at a school with many journals, this is not a large expense.

¶108 A third prong is necessary to examine citation, not just production: having the standard guide for legal citation, The Bluebook: A Uniform System of Citation, require DOI in citation.189 Currently other citation formats include DOI in their citation requirements.190 For instance, the APA Publication Manual asks that a DOI be included for any work that has one whether or not the work was used in its online format.191 MLA prefers a DOI for online works when available.192 The current edition of the Bluebook is silent about DOI, which is perfectly logical as very few legal publications currently have DOIs. However, Bluebook’s requiring DOI to be included when available in the same manner as APA would encourage legal publishers to register DOIs. More importantly, when a publication is registered, finding citations to it can be accurately performed because the unique, persistent nature of the DOI allows indexing without the problems of title and author disambiguation. With these changes, authors submitted by a participating law school (like they were required to do for the proposed U.S. News ranking) could be submitted by ORCID iD. Then all of their publications could be collected using the DOIs in their ORCID profiles. Finally, chosen collections could be searched by DOI to find citations. Because the publications searched would also have DOI, it would be simple to de-duplicate and allow searches across multiple databases. Using the full publication lists on ORCID would properly reflect the varied nature of law publications.

Honesty and Responsibility

¶109 Public communications about legal scholarship studies must be honest and responsibly present their results. Data cannot truthfully communicate hard things in easy ways.193 Any ranking or report of data must be very intentional and precise in naming what it claims to do.194 Then the ranking or report should be frank about the limitations of a dataset and the measures used. This frankness means it will have more credibility. After all, any study will have limitations, and clearly reported limitations to a study’s validity are more likely to be accepted because the study is not presenting itself as anything other than what it is. If a study is only of citations to articles, it should just name and report itself as such. It should not report itself as a measure of faculty quality or even scholarship quality. Clearly a limited study of citations to a subset of articles should not present itself as a measure of professor quality.

189. See generally The Bluebook: A Uniform System of Citation (21st ed. 2020).
193. Sauder & Espeland, supra note 12, at 225.
194. Mandel, supra note 98, at 70.
¶110 In addition to who creates the report, how it is presented should also be considered. Instead of reporting every school, no matter what their mission, it would be useful to publish measurement of those schools aimed at producing scholarship. There are many types of law schools with different missions, and rankings should help consumers find the type of law school they are seeking instead of attempting to homogenize law schools into one list. The best kind of report would recognize the mission of a law school and help the consumer evaluate how good the school is at reaching that mission. The report would show who is successful at what the consumer seeks instead of showing who is failing in a field (they may have never intended to enter).

¶111 If a larger group of schools were ranked, it would be best to group them into similar groups by mission, size, institutional control, and so on. Group ranking allows like schools to be more meaningfully compared because small disruptions like one retirement or lateral move would not cause major movement in the ranking. For meaningful comparison, the impact of the disruption should be about the same as the change in the ranking. We also know aspects of identity such as gender and race as well as concepts like subject and institutional prestige may influence citation. Intentional grouping of scholarly impact reports could work to control, though they likely could not eliminate, these issues. For instance, if only private institutions with large budgets are compared to one another, the fear of institutional prestige is reduced.

¶112 Even with a relevant question presented to an interested audience as well as a valid and credible measure, the report must be presented responsibly. Measures must be honest in describing themselves and not serve as a proxy for a question they cannot fully answer. Finally, the report should group data and eliminate misleading results. Meaningful data is most useful when it is presented well. If data misleads or presents itself as more than it is, it could damage the subject as well as the reputation of quantitative study more generally.

Extend Efforts to Measure in the Field

¶113 The sheer influence of *U.S. News* means any project it undertakes has serious impact. An entity with so much power should report a measure only when it is sure it can produce quality results. There are inherent difficulties in measuring scholarly impact in law. Because of these known limitations, it is particularly important that the influence of the measure match the credibility of the measure. One powerful measure sitting as a single arbiter creates outsized influence. Instead, multiple thoughtful measures created by different entities would be preferable. Each of these measures

196. Stake, *supra* note 175, at 230.
197. Eisenberg & Wells, *supra* note 21, at 375.
198. *Id.*
should study whatever is truly understood by the creator. Law professors should study scholarly influence because no one can better understand what influence means in a community than those engaged in the process.

¶ 114 Rather than an omnibus ranking, multiple reports of subsets of data could create an understanding of the scholarly community. It is easy to imagine how weighing various factors like bestselling books, books owned by many libraries, articles that have been cited multiple times, and publication awards would together create a more vivid understanding of scholarship impact instead of any one of those measures acting as a proxy for overall quality.

¶ 115 Similarly, reports by different scholars or appropriate entities allow interested parties to compare and contrast different information and discover meaningful data. Tax scholars should be involved in producing lists of important tax scholarship, the same way female-identifying scholars should aid in production of lists of their scholarship. This type of engagement in the field disallows outside entities narrative control of the merit of our work for their profit. Each field understands best its own peculiarities in publication, so it is best situated to report to others how its publications influence the field. There does not need to be wholesale agreement on how these reports are formed; in fact, disagreements indicate multiple reports would likely be more informative than one compromised report.

Conclusion

¶ 116 Legal scholarly impact cannot be quantified by any single measure. The choices made by U.S. News for its potential scholarly impact ranking exposed problems on multiple fronts of quality quantitative assessment. Accuracy, validity, and credibility all had pressure created by the dataset chosen by U.S. News, as well as the choices of what to include and exclude in that dataset, and even by U.S. News’s choice to enter into the field of scholarly impact.

¶ 117 Even as the now defunct U.S. News scholarly impact ranking is dissected and discussed, data analytics will certainly continue in law and in the legal academy. We have not heard the last of major scholarly impact rankings. U.S. News may attempt a process again in the future. Whether or not that happens, there is a path forward for accurate, valid, reliable, and credible measures to happen in scholarly impact.

¶ 118 Hard questions cannot be answered easily by quantitative measure. That does not mean quantitative measure should not be valued. Instead, it must be approached thoughtfully and responsibly. No single data source currently exists that can easily represent the varied and rich publications in law. However, there are clear ways to progress. Those who would engage in study should understand both the field they want to engage and how to properly conduct a study. U.S. News’s decision to not move forward with its ranking gives law scholars an opportunity to seize the momentum U.S. News created and exercise control over our own future measurements. The law community can continue to be reactive to flaws, as we were with U.S. News, or we can be proactive in creating solutions.
¶119 In an effort to produce meaningful measures, law schools, and specifically academic law libraries, should take (and in many instances continue) leadership roles in curating and recording legal scholarship for their institutions. If the combination of ORCID and DOI is used in true scholarship lists produced by institutions, the work of meaningful measure across data sources can begin. While that work is progressing, measures must carefully and honestly plan and report themselves. Finally, many measures by different, interested scholars should occur to allow comparison of multiple reports. Though these steps are challenging, they have the potential to reflect the true nature of scholarly impact.
Keeping Up with New Legal Titles*

Compiled by Susan Azyndar** and Susan David deMaine***

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* The works reviewed in this issue were published in 2021 and 2022. If you would like to write a review for “Keeping Up with New Legal Titles,” please send an email to the new book review editors, Chava Spivak-Birndorf (cys28@drexel.edu) and Matt Timko (mtimko@niu.edu).

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Reviewed by Tammy Pettinato Oltz*

1 The proper interpretation of the Fourteenth Amendment has been controversial since its ratification in 1868. The recent decision in *Dobbs v. Jackson Women’s Health Organization* to eliminate a constitutional right to abortion—and the potential fallout it portends for other rights rooted in the Fourteenth Amendment—has again cast a spotlight on one of the most revolutionary amendments ever adopted.

2 Just in time for this new examination comes *The Original Meaning of the Fourteenth Amendment: Its Spirit and Letter* by Randy E. Barnett and Evan D. Bernick. Impressive in size and scope, the book aims to do no less than convince “the justices of the United States Supreme Court to change the way they interpret the Constitution” (p.ix). The book explains the original meaning of the two most important and litigated sections of the amendment: section 1, which includes the Privileges and Immunities,
Due Process, and Equal Protection Clauses; and section 5, which gives Congress enforcement powers.

¶3 As the book's title indicates, Barnett and Bernick start from the premise that originalism, and in particular what has been deemed public meaning originalism, is the appropriate interpretive lens to use in understanding the meaning of complex constitutional provisions. While originalism itself has a controversial history, there can be little doubt that a majority of the current Supreme Court has now accepted it as a critical interpretive tool. Thus, its importance to constitutional interpretation has now been solidified at the highest levels.

¶4 Still, originalists continue to debate among themselves about the best methods and sources for interpreting the Constitution. Joining this debate, Barnett and Bernick make a significant contribution to both Fourteenth Amendment scholarship and originalism scholarship. In adopting original public meaning originalism, they reject the notion that the most important historical sources are those that elucidate the intent of the amendment's framers. Instead, they argue that the original meaning of the Fourteenth Amendment lies in what a well-informed public would have thought it meant at the time of its passage. More novel, they also argue that the public meaning in 1868 must be understood through the lens of the antislavery arguments that grew and strengthened in the decades leading up to the passage of the Fourteenth Amendment. In other words, the meaning in 1868 must be contextualized not just by events in the immediate aftermath of the Civil War but also by the long abolitionist push that preceded it and ultimately inspired the Fourteenth Amendment.

¶5 The authors ultimately conclude that the Fourteenth Amendment should be interpreted much more expansively than the Court, with a few notable exceptions, has allowed. Contrary to the current prevailing interpretive trend, which seeks to contract what some view as interpretative excesses of past Courts, the authors argue that the Fourteenth Amendment was always meant to create "a floor but not a ceiling for the privileges and immunities to which we are entitled" (p.x). This conclusion is one, of course, that many others have also reached. The unique contribution of the authors here is a convincing case for this traditionally liberal interpretation using the traditionally conservative methodology of originalism.

¶6 The main flaw of the book is the same one that afflicts virtually all originalist scholarship: the historical sources cited, though wide ranging, underrepresent historically marginalized groups, particularly Black people and women of all colors, who made up a significant percentage of the population both at the nation's founding and at the passage of the Fourteenth Amendment. Until originalism can account for how "public" meaning can be determined when vast swaths of the population were prohibited from participating in public life, it will always exist under a shadow of illegitimacy. This shadow will persist even when, as here, the conclusion is one arguably favorable toward marginalized people. A theory that depends on the benevolence of propertied White men, whether those of the past or those in the present, is not likely to ever gain widespread acceptance among the many who do not fit into that group.
Despite this flaw, this book represents a necessary, new interpretation of the Fourteenth Amendment and given the prominence of its authors, one likely to gain a rapid foothold in constitutional scholarship. It is a must-have for any academic law library and a should-have for any university or college library with a history and/or political science collection. It is not likely to be useful in most nonacademic law libraries except those firm or court libraries serving institutions where federal constitutional law cases arise with some frequency.


Reviewed by Firiel Hubbell*

In *The Hollow Core of Constitutional Theory: Why We Need the Framers*, Donald Drakeman discusses how the actual intent of “the Framers ha[s] been missing from much of constitutional theory’s mainstream for decades” (p.11), with interpretative theories emphasizing either detaching from the past in favor of a modern understanding or, more recently, the original public meaning of words instead. According to Drakeman, the argument between these two approaches to interpreting the U.S. Constitution misses the mark. A centuries-long tradition of considering lawmaker intent when interpreting the law preceded the drafting of the Constitution and was well known to the Framers. We, he argues, should therefore “return[] constitutional theory to a core focus on the will of the lawmaker” (p.4).

The Constitution is a formal document built from the Framers’ intentions as well as their understanding of the meaning of both legal tradition and the words they chose. Delegates to the Constitutional Convention deliberated how to govern: that is, to secure the common good and protect citizens. Drakeman claims that interpretive theory has shifted away from the more appropriate approach of considering, as Blackstone put it, “the old law, the mischief, and the remedy …. [I]t is the business of the judges so to construe the act as to suppress the mischief and advance the remedy” (p.51, quoting Blackstone’s *Commentaries*). To uphold the Framers’ will, modern lawmakers must seek to understand the “mischiefs” that concerned the Framers and the remedies they intended.

In developing “an interpretive method that will enable [judges] to apply unchanging texts to changing circumstances” (p.22), Drakeman reviews archaic and modern theories of interpretation. He hearkens back to Roman law and traces to the present day the use of the lawmakers’ intent as an interpretative mechanism. From a librarian’s perspective, Drakeman’s account of the resources consulted by the Constitution’s drafters is particularly interesting because he is quite thorough in analyzing the impact of historical texts. Sixty percent of Constitutional Congress delegates were trained lawyers who studied the most robust treatises of the era. Drawing on letters and memoirs, Drakeman is able to portray, for example, just how Sir William Blackstone’s *Commentaries on the Laws*

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of England and Edward Coke’s *Institutes of the Lawes of England* influenced the Framers. He notes that Blackstone stressed the need for jurists to consult several resources when interpreting the law and considering lawmakers’ intent. From Coke’s *Institutes*, the Framers knew that the law should be interpreted within an updated context as circumstances unimaginable to the lawmakers arise.

¶11 As a history buff, I was especially interested in the Constitution’s roots in Roman law. Emperor Justinian had legal curators compile digests of Roman jurists’ opinions into a statutory schema that became a “First Restatement of Everything” (p.59), so to speak, and could be interpreted only by imperial authority. The Framers used what they learned from Justinian’s laws in forming the civil processes and system of jurisprudence for the United States.

¶12 After investigating the conundrums posed by trying to determine the intent of a group of lawmakers, particularly one from the past, Drakeman goes on to explore the problem of determining the meaning of a word when the word has more than one—the “semantic summing problem” (p.97). Drakeman considers the Tax and Establishment Clauses as examples of how multiple meanings create ambiguity and how early Supreme Court decisions resolved such questions. For instance, during the founding era, “excise taxes” were defined differently in different states. By dictionary definitions at the time, “excise” was limited to a tax on manufactured goods, and in the northern states it was used to mean a tax on any property. This latter definition was not well received in the South because it could lead to excise taxes based on ownership of enslaved people.

¶13 One possible solution to this semantic summing problem is the Corpus of Founding-Era American English (COFEA) database. The database was designed to help deepen our understanding of the meaning of the Constitution. It houses 126,393 texts with more than 135 million words from written material dating from 1760 to 1799. COFEA is still in beta stage, and applying corpus linguistics to the Constitution, or “using targeted digital searches to discover the meaning of constitutional terms” (p.115), is still quite new. Researchers are still determining which methodologies to use to compile datasets that avoid confirmation bias, over- or under-exclusion, and elitism of extant written texts.

¶14 Continuing with the Tax and Establishment Clauses, Drakeman also analyzes the more traditional use of historical documents to determine the Framers’ intent. As evidenced by the historical record, there are several instances where the Framers used flexible language deliberately, intending a law to be interpreted liberally as necessitated by the circumstances. Drakeman asserts the Framers did not always want the law to be rigid; rather, they wished to leave room for expounding.

¶15 Drakeman concludes with the idea of sociological legitimacy, or legitimacy derived from what people think. The Supreme Court depends on public support and the support of the other branches of government. People must believe the Court is interpreting the Constitution correctly. Instead of masking attempts to steer public policy with layers of “language about original or aspirational readings of the Constitution” (p.195), a return to a more traditional investigation into the Framers’ intent offers a more honest and legitimate approach to interpretation.
Drakeman provides extensive citations, and a good index makes topics relatively easy to find. Despite the complexity of the topic and his historical explorations, Drakeman keeps his writing appropriate to most readers, especially those with some legal training. It is far more readable than many similar works. I recommend this book for all academic law libraries.


 Reviewed by Christina Lowry*

16 In *Juris Zoology: A Dissection of Animals as Legal Objects*, Geordie Duckler combines biology, legal analysis, and poetry to take the reader on a thought-provoking journey through the relations between humans and animals. Duckler approaches the discussion of animal legal rights from both a scientific and a legal perspective to demonstrate where the two fields overlap and how they differ as to the concept of nonhuman animals. Duckler explores the interactions between humans and animals throughout history, showing how our social and legal structures have evolved through interacting with animals.

17 Duckler states that scientists, poets, and lawyers all “observe and perceive relationships, and all manipulate aspects of their study-object by using tools to pry apart layers” (p.xii). Using the tools of biology and the law, Duckler dissects the idea of granting animals the same rights as humans. Duckler explains the scientific theory, how it is used, and how it parallels techniques used in day-to-day legal practice. A few examples Duckler uses include the similarity between a pleading or motion and a scientific hypothesis, as well as the similarity between the arrangement of rules of evidence or civil procedure and the structure of scientific principles. After comparing the legal and scientific fields, the author briefly discusses how legal procedure and precedent do not adhere to the scientific method by highlighting how subjectivity is lauded and acceptable in the law. A common phrase Duckler uses throughout the book is lawyer-scientist. A lawyer-scientist has the task of rigorously and carefully observing and objectively analyzing aspects of life, death, utility, and value in the natural world. Duckler emphasizes that when practicing animal law, a more scientific approach, not a lawyerly approach, is needed to advocate in an animal rights case.

18 Duckler thoroughly explains how science categorizes animals, which is helpful for people with an interest in animal law but little to no scientific background. Even though science has an exact and systematic way of categorizing all forms of life, Duckler shows how the scientific classification conflicts with social and legal definitions of animals. The legal separations of domestic animals from animals classified as livestock, animals classified as wildlife, and animals classified as pests and their roles in society have an economic effect that lawyers must keep in mind when approaching the debate around animal rights. One fascinating example of problems created by legal definitions

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is a tax incentive program initiated after World War II. This program classified dogs raised on farms as an “alternative crop” (p.15) that might diversify income streams for struggling farms. Although the tax incentive has since expired, puppy mills and the concept of dogs as marketable goods continue.

¶20 Duckler highlights tensions between the scientific and legal definitions of animals. Using numerous examples throughout the book, Duckler offers many considerations to bear in mind when discussing whether animals should be granted the same rights as humans. If animals are persons or given the same rights as humans, can they be charged and convicted of crimes? Can animals commit crimes? How do you punish the animals for committing the crimes? If animals can be sentenced, what defenses would be available? Duckler approaches these questions using the tools of law and biology.

¶21 After taking the reader through the evolution of human interactions with animals and how law has responded, Duckler explains why animals should not be granted the same rights as humans, exploring issues such as the difficulty of interpreting animal communications, the vast array of species in countless environments, and implications for animal owners (drawing a parallel to termination of parental rights proceedings). Duckler makes the point that our legal system can be tweaked to create a more enlightened scheme for the treatment of animals. He also demonstrates why animal rights lawsuits are problematic by discussing various cases throughout the book. The breakdown of the issues that arise in animal rights cases will interest anyone involved in this area of law.

¶22 Juris Zoology can be read in its entirety or as individual chapters that pertain to specific arguments. Although I believe that some nonhuman animals should be afforded personhood under the law, I found Duckler’s arguments compelling, and he has me reconsidering my opinion. I highly recommend this book for anyone interested in the debate over granting animals personhood status, all academic law libraries, and libraries in firms that deal with animal law cases.


Reviewed by Elizabeth Hilkin*

¶23 Linda Greenhouse served as Supreme Court correspondent for the New York Times for 30 years. During that time, she won the Pulitzer Prize for Beat Reporting for her coverage of the Court. After retiring in 2008, she continued to write biweekly op-eds about the Court for many years. Regular readers of her work recognize Greenhouse’s astute observations about the Court and her ability to explain cases in a straightforward manner. Justice on the Brink provides the same high-caliber insight into Justice Barrett’s ascendancy and the cases heard by the Court in the aftermath of Justice Ginsburg’s death.

¶24 Greenhouse contextualizes the recent history of the Court with a discussion of Chief Justice Roberts and his voting record, detailing the decisions in which he took a

* © Elizabeth Hilkin, 2022. Assistant Director for Public Services, Legal Information Center, University of Florida Levin College of Law, Gainesville, Florida.
middle ground as a way to preserve the neutrality of the Court. However, Greenhouse also recognizes that with Donald Trump’s appointments of Justices Gorsuch, Kavanaugh, and Barrett, Roberts is no longer needed for a conservative majority.

¶ 25 Each chapter covers a single month, creating a snapshot of the Supreme Court over the course of the year beginning July 2020. Greenhouse’s approach of examining each month under a magnifying glass means that each chapter is an illuminating look at the work of the Court at a certain point in time. As Greenhouse mentions in her acknowledgments, she refrained from going back and editing these chapters as decisions were released. What she creates is a work that depicts, moment by moment, the changes to the Supreme Court throughout the relevant year.

¶ 26 Although COVID-19 played a significant role in the decisions of the October 2020 term, many of the Court’s cases carried political charge. Among the cases the Court decided in the October 2020 term were cases focused on voting rights (Brnovich v. Democratic National Committee2), the Affordable Care Act (California v. Texas3), and religion (Fulton v. Philadelphia4). Per curiam decisions addressed limitations on restrictions at religious services in New York set by executive order during COVID-19 (Roman Catholic Diocese of Brooklyn v. Cuomo5), and questions on the 2020 census excluding undocumented immigrants (Trump v. New York6).

¶ 27 Greenhouse spends significant time discussing the Court’s “shadow docket,” the cases the Court decides without formally accepting them for argument. Among the shadow docket cases in the October 2020 term were Dunn v. Smith7, in which the Court refused to vacate the finding by the Eleventh Circuit Court of Appeals that Alabama’s denial of a spiritual advisor at an execution violated the free exercise of religion, and Food & Drug Administration v. American College of Obstetricians & Gynecologists8, reinstating a prohibition on mail delivery of the abortion drug mifepristone when in-person requirements were lifted for many medications during the pandemic. Cases that have been accepted for full briefing with issued opinions provide the position of all the Justices, but as Greenhouse points out, the position of some Justices is left out of the shadow docket cases. For example, in Dunn v. Smith, Justices Breyer, Sotomayor, and Barrett joined Justice Kagan, while Justices Thomas, Kavanaugh, and Chief Justice Roberts dissented. The positions of Justices Gorsuch and Alito are unknown, except to the extent that, had both Justices dissented, Alabama would have prevailed.

¶ 28 With the Court’s decision in Dobbs v. Jackson Women’s Health9 in June 2022, as well as Justice Breyer’s retirement and the appointment of Justice Ketanji Brown Jackson, some of the questions Greenhouse could only speculate about in Justice on the

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2. 141 S. Ct. 2321 (2020).
4. 141 S. Ct. 1868 (2020).
5. 141 S. Ct. 63 (2020).
7. 141 S. Ct. 725 (2020).
Brink have since been answered. Luckily, Greenhouse has discussed these historic moments at length in recent New York Times columns. Regardless of the trajectory of the Court in the upcoming years, Greenhouse has created a comprehensive account of the tumultuous October 2020 term. Recommended for all libraries.


Reviewed by Jill A. Sturgeon*

¶29 *The Chevron Doctrine* is a narrative that winds through the decisions leading to and following the Supreme Court's decision in *Chevron, U.S.A., Inc. v. NRDC, Inc.* In the process, it tells the history of administrative law in the United States, emphasizing the Court's role in that development. Author Thomas Merrill points out flaws in the doctrine's deference standard, as well as the judicial branch's inconsistent application of that standard, after placing the decision in the context of the traditional canons of statutory interpretation.

¶30 While the book goes beyond being entirely informational (the author is making an argument, after all), it does contain a considerable amount of detail. An in-depth description of the *Chevron* case explains that the long opinion written by Justice Stevens was never intended to be a landmark decision altering the way courts approached agency interpretations. It was simply an answer to the EPA's "bubble" controversy, which allowed air pollution increases at one stationary source if there were offsetting reductions at another stationary source. Merrill then posits that the reason *Chevron*'s two-step analysis became the primary test for reviewing agency interpretations was that lower courts preferred the simplicity of applying Justice Stevens's two relatively straightforward steps over the complexity of applying the matrix of factors set forth in earlier cases.

¶31 At the outset, Merrill asserts that there are four values that should be kept in mind while evaluating the process of judicial review of agency interpretations. Basically, does the analysis of agency interpretations: (1) allow people to have consistent expectations about the rules they must follow? (2) reinforce constitutional rights? (3) require policy decisions be made by elected (and thus more accountable) branches of government? (4) encourage agencies to make sound interpretations? If you agree that these are the correct criteria for judicial review of agency interpretation, then the argument that follows regarding the *Chevron* doctrine's flaws is compelling.

¶32 Merrill also presents an interesting juxtaposition of the *Chevron* doctrine's rise in popularity and the argument between textualism and intent. The D.C. Circuit in particular actively applied the *Chevron* doctrine in the wake of the *Chevron* decision, and Justice Scalia became its champion on the Supreme Court. Scalia's passing, Merrill suggests, is one of many factors in *Chevron*'s fall from popularity. *United States v. Mead*

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Corp.\textsuperscript{11} introduced a step zero to the two-step review process, effectively dispensing with the straightforward benefits of the \textit{Chevron} doctrine and limiting its application.

¶33 After pointing out the cases that further crumbled \textit{Chevron}'s two-step approach into a multilayered morass, Merrill turns to the task of proposing solutions to the tangled process. Any solution would need to address evaluating the authority of agencies and courts in the realm of statutory interpretation and constitutional questions, including preemption. It would also need to achieve the four values outlined at the outset, and it would need to be straightforward if it was going to enjoy \textit{Chevron}'s popularity.

¶34 A reformed doctrine might have three steps, the first ensuring that the agency had not exceeded the boundaries of its authority. The second would look for any deviation from statutory requirements, and the third would review the agency’s own rule-making process, ensuring that the agency had complied with the notice-and-comment requirement. In the process of adopting this reform, the Court could both reaffirm \textit{Chevron} and rediscover the Administrative Procedures Act.

¶35 Reading this book around the same time as I was preparing a proposal for an administrative law research course was especially useful for me. The book provides a good review of important cases in agency interpretation and is easy to read. The \textit{Chevron} story is told with case summaries to demonstrate the evolution of the \textit{Chevron} doctrine, and each chapter ends with a summary that encapsulates and emphasizes the chapter’s main point. Overall, the book is a worthwhile addition to academic law libraries’ monograph collections.


\textit{Reviewed by Mary L. Shelly and Steven A. Nelson*}

¶36 In \textit{Torn Apart}, Dorothy Roberts analyzes the negative effects of the child welfare system in the United States, which are felt most acutely by Black families, and she advocates for abolition of the current system. Roberts is the George A. Weiss University Professor of Law and Sociology and the Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights at the University of Pennsylvania. She is also the founding director of the Penn Program on Race, Science, and Society in the Center for Africana Studies. \textit{Torn Apart} arises from and continues her previous published work in \textit{Killing the Black Body: Race, Reproduction, and the Meaning of Liberty} (Pantheon, 1997) and \textit{Shattered Bonds: The Color of Child Welfare} (Basic Books, 2002), in addition to numerous related articles.

¶37 Roberts’s analysis of race and the child welfare system is a much-needed update to an understudied aspect of the institution. As noted in the prologue, no book has been written analyzing race and the child welfare system since 1972. But since that time, the

\textsuperscript{11} 533 U.S. 218 (2001).

child welfare system has undergone drastic change. Roberts begins by questioning a fundamental, but largely unchallenged, premise: that the child welfare system exists for the welfare of the nation's children. Roberts's conclusion, based on decades of work and research in this area of the law, is that the child welfare system does not in fact primarily function to protect children but rather serves primarily as a family policing system. Because of the significant harm caused by this state-sanctioned family policing, and in line with advocates for prison and police abolition, she concludes that the system must be abolished rather than reformed.

§38 In *Torn Apart*, Roberts demonstrates how the current child welfare system harms both children and families, why its structure ensures this outcome, and how this harm permeates the continuum of the system's processes. Roberts weaves narratives—stories of families who found themselves caught up in the web of this family policing system—with national data to illustrate the scope of the system's effects on individual families and to communicate the widespread scale of the system's negative effects. These processes harm not only the children directly swept into the system but also their parents, siblings, and the broader community. For those unaware of how the current child welfare system operates, the book explains and offers several eye-opening examples of how small mistakes can trigger the system's gears and potentially lead to “the death penalty of the family policing system”—the termination of parental rights (p.23). The discretion involved in these cases often leads to inconsistent results: a mistake that serves as a humorous anecdote in one family may trigger the demise of another. Roberts deftly demonstrates the minimal bar to entry into the system, the onerous burdens to exit it with a family intact, the ways children are worse off while in the system and continue to be worse off after exiting it (whether with their own parents or not), and the woefully inadequate checks against mistreatment. Throughout their time caught up in the system, children are subjected to many dangers and negative consequences that often greatly exceed the original risk that triggered the state's interference with their care.

§39 We highly recommend that law libraries purchase this book. Roberts's writing style is accessible to a wide audience of readers, and her examination has wide applicability for researchers interested in law, sociology, and family policy. This book is likely to be of particular interest to those who study or whose practice involves issues related to any of the following: gender, race, and intersectional discrimination; reproductive justice; civil rights; antidiscrimination; family law; poverty law; and criminal law. It would also be a good addition to collections that serve students and faculty working in clinics that address discrimination, race, and/or the legal needs of women, children, and families.

§40 At a time when the Supreme Court is making fundamental changes to legal doctrines governing the rights of individuals to control their bodies and their rights to raise children in the way they choose, *Torn Apart* could not be timelier. It calls into question the goals and aims of systems in the United States nominally meant to support children, women, and families in a manner necessary to consider. This book will help
scholars and practitioners address these issues as the legal field responds and adapts to such changes.


Reviewed by Gerard Fowke*

¶41 How do we reckon with the law’s complicity in evil? How should we think about judicial decisions we find immoral? The essays in *Law’s Infamy: Understanding the Canon of Bad Law* offer six wildly different answers to these questions. Still, the Supreme Court’s recent *Dobbs*¹² decision has all but assured this book’s ability to capture the zeitgeist.

¶42 If “law’s infamy” has the unidiomatic gait of a freshly minted phrase, it’s because the term originates with the editors, who acknowledge that it is “by no means a familiar locution” (p.1). They position infamy as a “distinctive kind of injustice” (p.1) that becomes the subject of moral condemnation, placing it beyond the pale of reform. As an organizing concept, infamy is thought-provoking but proves too nebulous to hold this collection together. Indeed, many of the contributors give infamy short shrift, instead treating it as an opportunity to explore the related idea of the anticanon. Unlike infamy, the anticanon is couched in empiricism, defined as the set of cases universally cited as exemplars of “wrongness.” The anticanon also plays an important socializing role in the law, defining the legal community in opposition to decisions emblematic of institutionalized evils like slavery and segregation. Thus, in his influential article on the topic, Jamal Greene defines the anticanon to include cases that “all legitimate constitutional decisions must be prepared to refute.”¹³

¶43 Of course, if the criterion for inclusion is near-universal repudiation, our polarized politics ensure that this anticanon is vanishingly small. This lacuna of repudiation can readily be theorized as an indicator of the law’s pervasive biases, creating an affinity between topic and method that makes Sherrally Munshi’s essay entitled “‘The Courts of the Conqueror’: Colonialism, the Constitution, and the Time of Redemption” stand out in this collection. The essay critiques “the privileged, if increasingly uncomfortable” (p.54) canonical placement of *Johnson v. M’Intosh*, Chief Justice Marshall’s decision granting the federal government an unreviewable right to “appropriate the lands occupied by the Indians.”¹⁴ Munshi unsparingly describes how Marshall turned a manufactured title dispute into a vehicle for lending legitimacy to the “colonial violence that enabled the founding of the nation” (p.62). In her eyes, the fact that such an infamous decision is excluded from the anticanon—instead, it is the first case many 1Ls encounter in Property class—reflects the conspicuous absence of Indigenous and noncitizen rights from narratives of constitutional redemption.

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14. 21 U.S. 543, 584 (1823).
¶44 Two other essays take a more abstract approach, trying to map the conceptual landscape of infamy. In the collection’s closing chapter, Paul Horwitz explains the relative paucity of anticanonical cases by pointing to the shattering of the postwar liberal consensus that had once permitted the “confident invocation” (p.233) of antiprecedents as symbols of judicial wrongness. Infamy plays an ancillary role in this account; for Horwitz, the subordination of the word’s original connotation of public dishonor to its contemporary evocations of simple notoriety is yoked to the same broader loss of social stability and cultural persistence that curtails the development of canon. Although this thesis is hardly groundbreaking, the attempt to define terms is notable within the context of an impressionistic collection.

¶45 The other conceptually oriented contribution, Robert L. Tsai’s “Supreme Court Precedent and the Politics of Repudiation,” takes the opposite tack. Tsai detaches infamy from moral failure. Instead, he defines an “infamous case” pragmatically, as one that has become “irrelevant to decision-making and vulnerable to repudiation” (p.101). What makes this values-free framework intriguing is the way it antagonizes the broader themes of Law’s Infamy by collapsing distinctions between the infamous, the anticanonical, and the merely wrongly decided. The succinct neutrality of Tsai’s definition sets the tone for an essay that calls on the examples of Roe v. Wade and Dred Scott in equal measure in what amounts to a step-by-step guide to the realpolitik of repudiation. Instead of getting swept up in opprobrium, Tsai matter-of-factly depicts the interplay of different actors—elites, politicians, activists—as they worked to render disfavored decisions infamous before leading the charge toward their repudiation.

¶46 The sheer variety on display in these essays demonstrates how malleable the vocabulary of infamy can be. This plasticity makes for a powerful, if cliché, rhetorical trope, but it also thwarts meaningful analysis. When the Dobbs Court conjures a comparison to the “infamous decision of Plessy v. Ferguson,” it consigns Roe to the ranks of anticanon while eliding any legal arguments that might justify that move. Dobbs directs this rhetoric at a supportive interpretive community in the conservative legal movement, giving its vacuousness a feature-not-a-bug quality that contributes to the opinion’s trollish tone. However, in a scholarly context, the analytical challenges of infamy are more difficult to dodge. Without a common sense of exactly what infamy entails, these chapters cannot build on one another. The end result is a provocative assemblage of arguments that often appear to be talking past one another.

¶47 Despite these flaws, the post-Dobbs era promises a bright future for the scholarship of infamy, and this title is an important and curious work. While I wouldn’t place Law’s Infamy in the emerging canon of the anticanonical, it will nonetheless elicit interest due to the liminal space it occupies within that corpus, an odd space where the infamous is endlessly foreshadowed, yet never quite decided. Recommended for academic law libraries.

16. 60 U.S. 393 (1857).
17. 142 S. Ct. at 2237.

Reviewed by Daniel G. Donahue*

¶ 48 *The Proof: Uses of Evidence in Law, Politics, and Everything Else* approaches a single question from several directions, using basic principles from three scholarly disciplines to discuss and propose an explanation for why people believe what they do about controversial topics. In this book, Frederick Schauer simplifies and blends the legal profession’s perspective on the use of evidence, psychology’s observations on how the human mind evaluates information, and just a little bit of philosophy’s treatment of investigations into the nature of truth. The resulting work is likely to be educational for both legal professionals and members of the general public, if for different reasons, while remaining entertaining for both audiences.

¶ 49 *The Proof* begins, appropriately enough, with a discussion of what conclusions the book’s arguments can and cannot support. The author bases his discussion here, and in subsequent chapters, on examples of factual disputes from both modern and not-so-modern history. Overall, a substantial number of the examples are drawn from news coverage of various statements made by public figures in the United States within the last few years. To the author’s credit, the examples are treated objectively and clinically, even when the author’s own conclusions are obvious regarding the accuracy of a given claim.

¶ 50 The first few chapters lay the groundwork for a discussion of what makes a statement factually accurate. These chapters start by summarizing the philosophical distinctions between observed fact and inference as well as between objective fact and value judgment. The book builds on this summary by introducing the reasoning behind the Federal Rules of Evidence and their common law counterpart, specifically the rules relating to the burden of proof, materiality, and admissibility. This progression also introduces a general reader to the reasoning behind the rules of evidence, and the many entertaining or timely examples keep a legal reader from becoming bored when covering such familiar ground.

¶ 51 From there, Schauer begins to lean on modern psychology to expand the book’s previous arguments, examining how information is filtered and changed by the person providing that information. Moreover, Schauer explains, psychological concepts reveal the many factors that produce faulty information. Bad memory, poor perception, bias, improper context, logical fallacies, and dishonesty on the part of the presenter are all introduced from the psychologist’s perspective and then immediately applied to explain the legal rules of evidence. While still aimed at and accessible to a general audience, the legal discussion here is likely to be informative to any legal professional short of trial attorneys with substantial experience either preparing witnesses to speak to a jury or cross-examining the same.

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The next few chapters of *The Proof* return to a focus on legal concepts, with a discussion of expertise and how experts can both explain and confuse factual interpretation. Schauer also calls on previously discussed themes of philosophy to examine how logical examinations of relevance, relation, and authority (again, in the sense of expertise) can demonstrate the use and misuse of testimony.

In the final chapters, Schauer returns to psychology. These chapters complete the examination of evidence by considering how the recipient of evidence can transform that evidence into something unintended by its provider. Schauer concludes with a review of how the law accommodates and compensates for personal biases of jurors and other consumers of evidence. Schauer’s decision to circle back to the nature of conveying information and to remind the reader of why and how information is conveyed makes for a satisfying conclusion to the book.

Overall, *The Proof* is a book suitable for a variety of readers. While the primary intended audience of this book seems to be members of the general public confronted by conflicting claims covered by popular news media (making this book extremely timely), legal professionals dealing with evidence can benefit from it as well. *The Proof* provides endnotes a fifth of the size of the main text for professional audiences to refer to for citations and suggestions for further reading. Readers interested in intellectual entertainment might enjoy the book’s contrast of different scholarly disciplines; the book’s juxtaposition of how philosophers identify evidence, how psychologists explain it, and how legal and government professionals manipulate it (ethically or otherwise) is both informative and entertaining. And, given the book’s substantial focus on evaluating statements made by public figures, any reader interested in refining their ability to annoy politically argumentative relatives at a holiday dinner should find exactly what they need in *The Proof*. Recommended for public, college/university, and law libraries.


Reviewed by Shaun Esposito*

This book provides a brief look at the issues of textualism and originalism as practiced by three Supreme Court Justices. In particular, the author, Dana Ulloth, looks at the decisions and writings of Justices Hugo Black, Antonin Scalia, and Clarence Thomas. In examining their writings, Ulloth delineates what he identifies as the three eras of originalism. Along the way, he notes the views of additional Justices on the use of originalism, but not with the great depth he uses to examine Justices Black, Scalia, and Thomas. Before discussing the specifics of these three Justices, Ulloth provides historical background about the views of the nation’s Founders who drafted the Constitution along with his own take on shortcomings of the originalist viewpoint. He also provides detailed biographical information about Justices Black, Scalia, and Thomas and examines specific
decisions to show how their views differ from each other and, sometimes, from their own previous decisions.

¶56 Ulloth identifies Justice Black as the first defender and proponent of originalism, using Black’s decisions on the First Amendment’s Free Speech and Establishment Clauses to demonstrate his approach. Justice Scalia represents the second era of originalism. In the author’s view, Scalia combined textualism with originalism in his decisions and writings, and he particularly notes Scalia’s view that abortion should be left to the states as an illustration of this combination. Ulloth reviews Justice Scalia’s Establishment Clause decisions and compares them to Justice Black’s use of originalism in such cases. In addition, the author examines Scalia’s decisions on the Second Amendment and gay marriage, using this last issue to highlight Justice Thomas’s differing application of the originalist doctrine to this issue. He then investigates Justice Thomas’s writings and decisions to set out the third era of originalism and compares Thomas’s view of originalism to those of Scalia and Black. Ulloth closes with a critique of the originalist doctrine, calling into doubt the claim that it provides an objective method for interpreting the Constitution. He provides a final critique of the doctrine by noting that it has been applied inconsistently, noting how the three Justices featured in the book often came to conflicting results on similar issues. If it were truly an objective method of interpretation, the results should be similar.

¶57 It is worth noting that Ulloth is not a law professor or lawyer but a communications professor with a Ph.D. in radio, film, and television studies from the University of Missouri–Columbia. The author’s qualifications distinguish the book from the many others written by law professors and jurists on the topic. Rather than an in-depth legal analysis of the doctrine and its application, Ulloth provides a general overview of the development of the doctrine, its application, and its criticism. In addition to including cases and articles written by the three Justices, he also provides extensive citations to works by legal scholars on the subject. The book will not have much appeal for firm and county or state law libraries. It will mainly interest academic law libraries and other academic libraries. It is particularly appropriate for undergraduate libraries, especially those with extensive undergraduate law and political science programs. Academic law libraries might supplement their collections on this topic by legal scholars and judges with this book, but it is not a substitute for such items.

¶58 One final note concerns a “Publisher’s Notice” appearing just before the title page. In bold type it provides, “This book is sold on the condition that it not be photocopied or electronically reproduced in whole or in part” (n.p.). Following some language that it is “illegal to allow the text of this book to be reproduced,” the note states, “We consult worldcat to identify buyers who allow the illegal reproduction of our books and also libraries that possess illegal copies” (n.p., bold in original). It is not clear whether the publisher attempts with this language to exclude the work from protection of the fair use provisions of the Copyright Act, but it left a bad taste in my mouth.

Reviewed by Robin Linkowski*

¶59 Catherine Young and Wendy Packman are both clinical psychologists who also have law degrees. They started this collaborative book over a shared desire to destigmatize mental health issues in the legal community. In *The Wounded Attorney: How Psychological Disorders Impact Attorneys*, Young and Packman discuss the stress the legal profession can cause, especially to those already predisposed to mental health issues. This stress is exacerbated further by the competitive nature of the legal field, where workaholism is praised and admitting to mental or emotional struggles can carry a stigma of weakness. They also posit that legal culture can discourage empathy toward struggling colleagues and subordinates as it runs contrary to the ideal of “thinking like a lawyer.”

¶60 The book focuses on the disorders of anxiety, depression, bipolar disorder, PTSD, addiction, and the possible comorbidity of these issues. Within the subject of addiction, it breaks down differences in types of addictions such as alcohol, opioids, and stimulant use. The authors then discuss each affliction and how it negatively influences the work product of affected attorneys by causing, for example, missed deadlines, client overbilling, or simply failure to do the work.

¶61 A large portion of the book presents examples of attorney discipline cases in which the defending attorney was suffering from some form of mental illness. The authors used Lexis and public state bar records to search for disciplinary cases between 2010 and 2020, and then narrowed the search results by using keywords such as “PTSD,” “bipolar,” and “cocaine.” They then combed through thousands of results to present the cases that best reflected each of these mental health issues.

¶62 Each case example starts by describing the misconduct that brought the attorney to the disciplinary board and how the attorney’s mental health influenced that misconduct. The authors then describe how each attorney defended themselves to the disciplinary board and what steps each took to prevent any type of malpractice from happening again. Last, they discuss the board’s ruling in each case and examine the board’s reception of the attorney’s affliction as a reason for the misconduct. At the end of the section, they summarize the techniques that have been the most successful in garnering mitigation, giving readers who find themselves in a disciplinary situation guidance in how to best approach the disciplinary board.

¶63 In the final chapters, the authors move the conversation to a more practical note by giving suggestions on when and how to seek help for mental illness. They recommend organizations and resources to help those who are struggling, including some specific to attorneys such as lawyer assistance programs and targeted support groups. They also give specific examples of how to create a better foundation for empathy and mental health awareness in law schools and state bar associations.

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¶64 This comprehensive and well-researched book is written in an engaging, conversational style. The authors’ use of bullet points and tables makes the information easy to digest, and the footnotes and references provide a wealth of additional information and resources helpful for future reference requests.

¶65 Arguably, mental health is an issue that affects everyone in the legal and affiliated professions in some way. Even if not dealing personally with mental health challenges, an attorney is likely to witness colleagues or subordinates struggling. As a result, I would recommend this book to a wide audience including law students, professors, firm hiring managers and HR personnel, attorneys at all levels, and those who serve on attorney disciplinary boards. Most important, this book is a valuable read for anyone in the legal field who is or knows somebody struggling with mental health. This book starts a much-needed conversation and is appropriate for all law libraries.
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