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ON THE LEITER SIDE: DEVELOPING A UNIVERSAL ASSESSMENT TOOL FOR MEASURING SCHOLARLY OUTPUT BY LAW PROFESSORS AND RANKING LAW SCHOOLS

*Robert Steinbuch**

With varying results, many scholars and commentators have focused their attention on judging the quality of law professors, as measured by their scholarly output. First, this Article explains the methods respectively developed by Brian Leiter and Roger Williams University School of Law for top-tier and second-tier law schools, and it considers other works of scholarship that measure academic publication. Then, this Article explicates a protocol (the "Protocol") for measuring all of the scholarly output of any law school faculty member. Building on the Leiter and Roger Williams methods, the expanded Protocol accounts for a wider breadth of faculty publications and includes weighting factors based on law-journal rankings. Finally, this Article concludes by applying the Protocol to its Author and his colleagues. In sum, the Protocol that this Article develops and applies will provide a significantly more objective set of data with which to evaluate the scholarly performance of legal academics.

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I. INTRODUCTION

How do we measure the quality of law professors? Institutions, faculties, would-be and actual students, and the public confront this vexing question every day. Most law faculty seem to accept that they should be judged on all three pillars generally posited as the responsibilities of academics: scholarship, teaching, and service. Consensus on how to measure each of these factors, however, is hard to reach. The latest and best law school rankings rely heavily on measurements of scholarly output by faculty members,[1] as does the Order of the Coif in deciding whether even to allow law schools to grant its scholastic honor.[2] In this Article, I significantly expand on the leading, yet nascent, methods for measuring scholarly output.[3] The method developed herein will allow for better evaluation of individual professors. And, perhaps more importantly, this new system will allow us to better rank law schools overall.

I leave for another day, and perhaps another person, the task of developing the measurement tools to evaluate teaching and service. With that said, however, I note at the outset that I reject the claim that scholarship, teaching, and service are mutually exclusive categories. As the website of the highly ranked University of Georgia School of Law aptly states, "While some law schools choose to emphasize either scholarship or teaching, Georgia Law seeks to

1. *See, e.g.*, Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451 (2000); Malcolm Gladwell, *The Order of Things: What College Rankings Really Tell Us*, NEW YORKER, Feb. 14 & 21, 2011, at 68; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, at A1 ("[A] law school's reputation, and the value of its diplomas in the legal market, are almost entirely bound up in the amount and quality of the scholarship it produces. That's been especially so since the late '80s, when U.S. News and World Report started to rank law schools."); Brian Leiter, *Brian Leiter's Top 50 Faculty: Per Capita Productivity of Articles in Top Journals, 2000–02*, BRIAN LEITER'S L. SCH. RANKINGS, http://www.leiterrankings.com/faculty/2000faculty_product_journals.shtml (last visited Sept. 24, 2011) [hereinafter *Brian Leiter's Top 50*]; *Top 40 Law Schools*, ROGER WILLIAMS UNIV. SCH. OF LAW, http://law.rwu.edu/faculty/faculty-productivity (last visited Sept. 4, 2011).

2. *See Order of the Coif Membership Application (Part II)*, ORD. OF THE COIF, http://www.orderofthecoif.org/Part%2520II%2520journals.html (last visited Sept. 22, 2011).

3. *See, e.g.*, Leiter, *supra* note 1, at 455–57 (describing methodology of measuring distinction among law faculties); Gladwell, *supra* note 1, at 68; *Brian Leiter's Top 50*, *supra* note 1; *Top 40 Law Schools*, *supra* note 1.

balance the two, firmly believing that classroom teaching is *enhanced* by scholarly expertise."[4]

Scholarly output—the *quality* and quantity of publications that a professor produces—is not as simple to measure as it might first appear. Do we simply determine how many articles and books an academic publishes, regardless of size and placement? Do we measure the total number of pages that a professor writes, regardless of the form or venue? Do we simply count how many times a professor is published in a top-ten law journal (something most law professors never achieve)? I propose that we take a little from each of those categories and combine them with other factors to delineate a rational and rigorous metric.

In Part I of this Article, I outline the two leading law school ranking systems that directly consider scholarly output: Brian Leiter's ("Leiter") limited classification system that allowed for a new ranking of top-tier law schools and Roger Williams University School of Law's ("Roger Williams") slightly expanded system that resulted in a new ranking of second-tier schools. But Leiter's and Roger Williams's methods, by design, effectively did not allow for further ranking. Thus, after discussing similar literature in Part II, I build directly on Leiter's and Roger Williams's methods to provide a protocol for considering *all* scholarly output by faculty at any law school (the "Protocol") in Part III. As such, the Protocol can (and should) be used as part of an effort to rank *all* law schools.

Unlike Leiter and Roger Williams, the Protocol does not restrict the inclusion of articles to those only appearing in top journals or books printed only by elite publishers. The Protocol accounts for the differing worth of *all* publications based on the quality of their placement through the development of a coding system based on *U.S. News & World Report* and Washington and Lee University ("W&L") rankings, while adopting the Leiter and Roger Williams conventions that apply universally.[5] Finally, in Part IV of the Article, I apply the Protocol to myself as well as to my tenured or tenure-

4. *Faculty & Scholarship*, UNIV. OF GA. SCH. OF LAW, http://www.law.uga.edu/faculty-scholarship/ (last visited Sept. 4, 2011) (emphasis added).

5. This is not to say that had I started with a blank slate, I would necessarily have created the same categories that Leiter and Roger Williams did. But, rather, Leiter, Roger Williams, and I all recognize—indeed, emphasize—that the individual factors in our metrics could easily be adjusted *marginally* in any direction. So, I seek to build on an undoubtedly solid beginning, rather than hoe that land anew.

track colleagues with at least two years of experience, to demonstrate it in use.

II. THE LEITER AND ROGER WILLIAMS STANDARDS

A. Leiter

A decade ago, Professor Brian Leiter developed a metric to measure scholarly output as part of his larger effort of creating a better way to rank law schools.[6] Leiter aptly recognized that scholarly output is, and should be, a key factor in these rankings. Leiter measured faculty productivity of books and articles, factoring in citation rates and subjective reputation among academics, to create a law school ranking for sixty-six top law schools—essentially Leiter's slight expansion of *U.S. News & World Report*'s Tier 1 (top fifty) law schools.[7]

For per capita productivity of articles, Leiter considered only articles published in ten leading law reviews and the leading faculty-edited journals in ten major areas of legal scholarship.[8] Similarly, Leiter considered only books published by the most prestigious—"Tier 1"—publishers.[9] Articles accumulated relative points based on whether they fell into one of four length groupings.[10] Leiter assigned 0 points for articles under 6 pages, 1 point for articles 6 to 20 pages in length, 2 points for articles 21 to 50 pages long, and 3 points for articles over 50 pages.[11]

Additionally, articles that were published in a journal from the professor's school were discounted by half;[12] points awarded for books varied depending on whether the book was, for example, scholarly, a casebook, or an edited compilation;[13] and points were assigned proportionally for coauthored or coedited works.[14]

6. Leiter, *supra* note 1, at 453–57.
7. *Id.* at 457–58.
8. *Id.* at 461.
9. *Id.* at 463.
10. *Id.* at 461.
11. *Id.*
12. *Id.* at 461–62.
13. *Id.* at 463.
14. *Id.* at 462–63.

Leiter aptly proffers that scholarship is the currency in which academic reputations are made.[15] Measuring productivity to ascertain faculty quality, he says, has the benefit of being more current when compared to other measures, such as the inherently time-delayed scholarly impact metric (in which the number of times an author's articles and books are cited by others is counted).[16] Leiter notes additional drawbacks to using citation counts: treatise writers are often cited as a recognized reference point even when they are not regarded as legal scholars;[17] those who write in the latest fad may be overcited,[18] and some work is cited not for its quality but for its lack thereof;[19] also productivity as a measure allows faculty members who work in unpopular and unflashy areas to garner appropriate recognition.[20]

While output is a strong barometer of scholarship, Leiter and I fully recognize that productivity measurements—like all systems to measure scholarship—do not capture all considerations.[21]

B. Roger Williams

The Roger Williams study expanded on Leiter's limited law school ranking system, which only evaluated the top-tier law schools, to calculate the next tier of law schools—the new second tier.[22] To do so, Roger Williams had to expand the number of law journals Leiter counted as scholarly output from 20 to 67 "in light of the reality of where faculty who are not at 'elite' law schools publish their work."[23] Roger Williams "included the general law reviews published by the 54 schools receiving the highest peer assessment scores in the 2008 U.S. NEWS RANKINGS . . . and an additional 13 journals that appeared in the top 50 of the Washington & Lee Law Journal Combined Rankings in June 2007."[24] Thus, Roger Williams

15. *Id.* at 467.
16. *Id.*
17. *Id.* at 469.
18. *Id.*
19. *Id.* at 469–70.
20. *Id.* at 467.
21. *Id.* at 468.
22. *Faculty Productivity Study*, ROGER WILLIAMS UNIV. SCH. OF LAW (Feb. 8, 2011), http://law.rwu.edu/faculty/faculty-productivity/updated.
23. *Id.*
24. *Id.*

reached an expanded list of top law journals that could be used to calculate scholarly productivity—as part of the broader goal of ranking the second tier of law schools.[25]

Roger Williams adopted Leiter's point system: "0 points for articles under 6 pages; 1 point for articles 6–20 pages in length; 2 points for articles 21–50 pages in length; and 3 points for articles exceeding 50 pages."[26] As Leiter had done, for "articles appearing in a journal published by the faculty member's home institution, the points assigned were reduced by one-half."[27] Roger Williams, however, made no mention of, and appears not to have considered, books in its calculation of scholarly output.

III. OTHER LITERATURE

Measuring scholarship is a topic of much interest to academics. Swygert and Gozansky analyzed the output rates of senior law faculty—scholars who had already attained full professor status[28]—and concluded that more than 44 percent had zero publications after tenure.[29] Nearly two-thirds of the population had no more than one publication after tenure.[30] Only 15 percent of the population produced four or more publications after tenure.[31] The "[s]enior faculties that did not do as well as expected were often located in large urban and governmental centers."[32] The most productive 1 percent of the population authored 9 percent of the inventoried publications.[33] The authors concluded that nearly half of senior faculty published minimally or not at all,[34] and this represented an "underutilization of intellectual resources."[35]

25. *Id.*

26. *Id.*

27. *Id.*

28. Michael I. Swygert & Nathaniel E. Gozansky, *Senior Law Faculty Publication Study: Comparisons of Law School Productivity*, 35 J. LEGAL EDUC. 373, 376 (1985).

29. *Id.* at 381.

30. *Id.* at 382.

31. *Id.*

32. *Id.* at 394.

33. *Id.* at 382.

34. *Id.* at 381–82.

35. *Id.* at 393.

Kayes and Ellman questioned Swygert and Gozansky's conclusions.[36] Kayes and Ellman recommended that scholars consider total professional activity rather than number of publications when investigating the effect of tenure on publication rates.[37] They argued that evaluating overall professional activity would appropriately aid in establishing whether the grant of tenure results in "lazy" faculty across the board.[38] Kayes and Ellman talked past Swygert and Gozansky, implying that Swygert and Gozansky suggested prolificness as the only measure to evaluate faculty, yet Swygert and Gozansky, in fact, seem to have used prolificness as a measure of *scholarly* productivity.

Consistent with Kayes and Ellman's effort to expand the definition of scholarship, Colbert focused on "activists and clinicians."[39] Senior faculty and administrators, said Colbert, expect clinicians and activists on the tenure track to produce traditional legal academic works—that is, footnoted law review articles in respectable journals.[40] Colbert argued that clinical and activist scholarly reform activities, however, take several different forms usually referred to as public service; those activities are generally not recognized as scholarship or potential stages leading to traditionally approved scholarship.[41] Colbert argued that this standard disadvantages clinicians and activists.[42] This may explain why, on many faculties, clinicians are not tenure track and, therefore, not expected to produce scholarship like doctrinal faculty are expected to produce.

Kotkin changed the focus to another cohort—women. She claimed that women were underrepresented in law journals.[43] Kotkin admitted that her study did not prove a gender bias in the article-selection process because of a lack of available data on the gender

36. David H. Kayes & Ira Mark Ellman, *The Pitfalls of Empirical Research: Studying Faculty Publication Studies*, 36 J. LEGAL EDUC. 24, 24–25 (1986).

37. *Id.* at 28–29.

38. *Id.* at 28.

39. Douglas L. Colbert, *Broadening Scholarship: Embracing Law Reform and Justice*, 52 J. LEGAL EDUC. 540, 541 (2002).

40. *Id.* at 542.

41. *Id.* at 542–43.

42. *Id.* at 542.

43. Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the "Top Ten" Law Reviews*, 31 WOMEN'S RTS. L. REP. 385, 385 (2010).

breakdown of the author pool.[44] Despite the lack of data, however, Kotkin provided several reasons to examine the existence of gender bias, vel non, in the article-selection process.[45] Kotkin's analysis included a total of 629 works and 1,373 authors, 21.26 percent of whom were women.[46] One or more women authored 25.6 percent of the total number of articles.[47] One or more women and no men authored only 20 percent of the articles.[48] Of the coauthored works, women alone only authored 6.7 percent.[49]

Kotkin presented the possibility that articles authored by women accounted for only 20 percent of submissions to elite law reviews, thereby refuting any gender disparity.[50] Kotkin believed, however, that this possibility was unlikely.[51] By comparing publication data by gender between the top fifteen law reviews and the reviews ranked from sixteen to forty, Kotkin asserted that women were writing in proportion to their representation.[52] Kotkin noted, however, that the gender breakdown for Association of American Law Schools (AALS) member schools was at the time 37 percent female to 63 percent male,[53] with women overrepresented in non-tenure-track writing and clinical positions that often do not carry scholarship components.[54]

Kotkin explored hypotheses explaining gender disparity in publication rates.[55] First, Kotkin presented the critical mass hypothesis, which asserted that article selection was affected by whether there was a critical mass of women on a faculty.[56] Kotkin claimed that her own analysis disproved this hypothesis as the basis for publication disparity.[57]

44. *Id.* at 387.
45. *Id.* at 388.
46. *Id.* at 395.
47. *Id.* at 397.
48. *Id.* at 398.
49. *Id.* at 399.
50. *Id.* at 400.
51. *Id.*
52. *Id.*
53. *Id.* at 412.
54. *Id.* at 413.
55. *Id.* at 419.
56. *Id.* at 420.
57. *Id.*

Kotkin rejected the affirmative action hypothesis, which claims that women are overrepresented on law school faculties due to non-merit-based reasons and, therefore, are less likely to succeed in publishing.[58] She also examined the following hypotheses: the subject matter hypothesis, the slacker hypothesis, the Virginia Valian hypothesis, and the Larry Summers hypothesis.[59]

The subject matter hypothesis states that there are traditionally female subject areas that are less favored by journals.[60] The slacker hypothesis says that women write less because of involvement in institutional matters or family/child commitments.[61] The Virginia Valian hypothesis states that women undervalue their work,[62] but Kotkin instead felt that women failed to pursue publication in the most elite law reviews with the same vigor that males used.[63] Finally, the Larry Summers hypothesis proclaims that women may simply be less adept at critical thinking and legal scholarship.[64] Kotkin questioned the validity of all of these hypotheses, but she presented the need for further empirical analysis as well as internal reflection by the journals themselves.[65]

Gingerich continued Kotkin's focus on the publication rates of female academics, advocating for a blind review policy.[66] According to Gingerich, research suggested that nonblind review posed several problems, including decreasing the ability of publication for women and non-U.S. scholars.[67] Prestige bias, in turn, said Gingerich, negatively impacted young scholars and undermined the perception of fairness and reliability in the review process and the journal itself.[68]

58. *Id.* at 421–24.

59. *Id.* at 425–36.

60. *Id.* at 425.

61. *Id.* at 431.

62. *Id.* at 433.

63. *Id.* at 434.

64. *Id.* at 435.

65. *Id.* at 437.

66. Jonathan Gingerich, *A Call for Blind Review: Student Edited Law Reviews and Bias*, 59 J. LEGAL EDUC. 269, 269 (2009).

67. *Id.* at 270–71.

68. *Id.*

Merritt explored the relationship between research, teaching, and law faculties.[69] To measure scholarship, she measured all published articles in scholarly journals.[70] In addition, she constructed a variable that measured whether a professor published books after joining the tenure track.[71] The presence of articles in top-twenty journals was used as a variable to decipher quality.[72] Variables measuring teaching excellence included teaching awards and instructional credit hours.[73] In addition, Merritt considered: (1) the number of scholarly articles published before appointment to the tenure track;[74] (2) whether any of the pre-hiring articles appeared in any of the top-twenty law journals;[75] (3) whether the professors published any books prior to starting the tenure track;[76] (4) the professors' student-contact hours during the 1996–97 academic year;[77] (5) the number of credit hours professors taught during the summer;[78] (6) the number of student-contact hours that summer;[79] (7) whether the professors had held administrative appointments since joining the tenure track;[80] and (8) several variables reflecting the courses taught by the professors.[81] Control variables included, but were not limited to, a professor's birth year, sex, minority status, law review participation, familial status, and political beliefs.[82]

Merritt found that the number of articles a professor had published prior to his or her hiring correlated with that professor's publishing after hiring.[83] She also found that publishing in a top journal after joining the tenure track correlated with more published

69. Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 766 (1997).

70. *Id.* at 769.

71. *Id.* at 770.

72. *Id.* at 771.

73. *Id.* at 772, 775.

74. *Id.* at 776.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 777.

79. *Id.*

80. *Id.*

81. *Id.* at 778.

82. *Id.* at 778–79.

83. *Id.* at 784.

articles,[84] and consistent histories of article production showed a strong correlation with top journal publication.[85] Indeed, she concluded that "scholarship [does] predict[] more scholarship."[86] Graduating from a prestigious law school, teaching at a prestigious law school, and clerking for the U.S. Supreme Court also showed significant relationships with publishing articles in top journals.[87] Merritt found a possible correlation between the quality of a professor's scholarship and the number of semesters of research leave the professor had.[88] She also found that teaching legal writing or clinical subjects correlated with publishing fewer articles.[89]

Merritt concluded that good teaching and research were not inversely related; rather, outstanding research was compatible with outstanding teaching.[90] However, Scordato disagreed.[91] He proposed a model in which law school faculty may pursue one of three paths: (1) full-time classroom teacher; (2) full-time legal scholar; or (3) the current dualist model of simultaneous classroom teacher and legal scholar.[92]

In another piece, Merritt evaluated "how men and women have fared in the legal academy."[93] She found that men published more articles than women did.[94] Minority men published more than white women did, and white women published more than minority women did.[95] Men, on average, also published more articles in top-twenty law reviews.[96] Additionally, Merritt found that "women [rated] success in research and publications as slightly less important . . . than men [did]."[97] Minority women, white women, and minority men

84. *Id.*

85. *Id.* at 796.

86. *Id.* at 812.

87. *Id.* at 813–14.

88. *Id.* at 817.

89. *Id.*

90. *Id.* at 816.

91. Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 369–70 (1990).

92. *Id.* at 371.

93. Deborah Jones Merritt, *Are Women Stuck on the Academic Ladder? An Empirical Perspective*, 10 UCLA WOMEN'S L.J. 249, 249 (2000).

94. *Id.* at 255.

95. *Id.*

96. *Id.*

97. *Id.*

placed more emphasis on public service than white men did.[98] Some disparities between the sexes disappeared when Merritt controlled for certain factors, including the prestige of the schools at which the professors taught, courses taught, pre-hiring publications, and educational credentials.[99]

While output has been the focus so far, one should not ignore citation counts. Merritt stated elsewhere that citation counts provided some measure of how well white women, minority women, and minority men were establishing themselves in the profession.[100] White men averaged 107.9 citations, white women averaged 78.8, minority women averaged 90.7, and minority men averaged 73.1.[101] Eight members of the study's population, whom Merritt referred to as the "superstars," attracted an exceptional number of cites.[102] The superstars consisted of three minority women, one white woman, and four white men.[103] Merritt believed those numbers showed great scholarly success for white women, minority women, and minority men on law faculties.[104] Although the citation counts of members of those groups slightly lagged behind those of white males, Merritt cited four reasons why people should have been optimistic about that gap.[105] First, the gap was actually smaller than what some scholars believed it was.[106] Second, the gap between citation counts of authors of different sexes and races was quite small when compared to the gap between citation counts based on other variations between authors.[107] Third, for white women and minority women, citation gaps could have resulted from other factors, including socioeconomic background, religion, and school prestige.[108] Finally, the placement of four African American women and one white

98. *Id.* at 256.

99. *Id.*

100. Deborah Jones Merritt, *Scholarly Influence in a Diverse Legal Academy: Race, Sex, and Citation Counts*, 29 J. LEGAL STUD. 345, 346 (2000).

101. *Id.* at 353.

102. *Id.* at 353–54.

103. *Id.* at 354.

104. *Id.* at 363.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

woman among the ten most-cited scholars defeated notions that women or minorities could not exert scholarly influence.[109]

Cunningham analyzed various other measures of scholarly success.[110] He criticized partial productivity studies that considered the length of published articles because article length does *not* necessarily relate to the quality or utility of the article.[111] Moreover, these studies often only counted articles in the most commonly cited journals—ignoring all the others.[112] This tended to overemphasize the right tails of distribution curves.[113]

Similar to Cunningham's criticism of studies that confused article length with article quality, Rhode saw problems with present-day legal scholarship in style and content.[114] She criticized the unnecessary length of scholarly works as well as the emphasis on documentation.[115] Obsessive documentation, she said, "discourages originality without necessarily ensuring factual accuracy."[116]

Eisenberg and Wells discussed the evaluation of scholarship as a means to measure academic reputation.[117] The authors did that through a citation-count study.[118] Eisenberg and Wells recognized that that was only one basis for ranking,[119] and they acknowledged that weak scholarly works may have been heavily cited.[120] But they countered that the articles cited most often were still generally regarded as high quality.[121]

Eisenberg and Wells selected faculty members who had taught for at least two years, and the authors made some adjustments for length of time in teaching.[122] Eisenberg and Wells analyzed all law

109. *Id.* at 365.

110. Lawrence A. Cunningham, *Scholarly Profit Margins: Reflections on the Web*, 81 IND. L.J. 271, 271–75 (2006).

111. *Id.* at 272.

112. *Id.*

113. *Id.* at 275.

114. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1333–34 (2002).

115. *Id.* at 1334.

116. *Id.* at 1335.

117. Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373, 374 (1998).

118. *Id.*

119. *Id.* at 376.

120. *Id.*

121. *Id.* at 377.

122. *Id.* at 379.

schools that *U.S. News & World Report* ranked in 1996 as the top twenty in academic reputation, plus twelve schools selected "eclectically."[123] The authors computed each school's "mean number of documents citing the school's faculty per faculty member and median number of citations for the faculty."[124] The authors asserted that the prominence of constitutional law articles in law reviews suggested that constitutional law scholars should have fared better than their counterparts fared in the study.[125] Indeed, more professors teach constitutional law than they teach any other subject, and constitutional law scholars enjoy higher rates of citation.[126] Only a group teaching feminist courses had higher citation rates than constitutional law scholars had.[127] This may have stemmed from the close connections of feminist writings with constitutional law and jurisprudence.[128] Commercial, comparative, and tax law scholars had lower citation rates.[129]

Shapiro continued the consideration of citation counts.[130] Shapiro admitted that there were some inherent biases in his ranking—the primary one relating to the subject areas scholars wrote about, since some topics had more scholarly literature than others had.[131] For example, Shapiro stated that scholars of business law topics had little chance of making the list.[132] Nevertheless, according to Shapiro, the characteristics of the scholars on his lists should have provided some insight into the characteristics of highly influential legal scholars.[133] His calculations revealed that the most highly cited scholars taught at Yale, Harvard, and the University of Chicago.[134] The result of using a broader collection of highly cited scholars

123. *Id.*
124. *Id.* at 386.
125. *Id.* at 407.
126. *Id.* at 408.
127. *Id.*
128. *Id.*
129. *Id.*
130. Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 411 (2000).
131. *Id.* at 413.
132. *Id.*
133. *Id.* at 419.
134. *Id.* at 420.

showed Harvard ranking first, Yale second, and Chicago third—with Columbia placing fourth.[135]

IV. THE PROTOCOL

Developed herein is a universal system for considering all scholarly output by faculty at any law school—the Protocol. It adopts and builds on the conventions of Leiter and Roger Williams that apply universally. Unlike Leiter and Roger Williams, however, the Protocol does not restrict the inclusion of articles for consideration as "scholarly output" to those appearing only in certain journals or books printed only by certain publishers. Rather, the Protocol considers *all* scholarly publications and values them based on the quality of their placement through weighting factors derived from the *U.S. News & World Report* law school rankings and W&L law journal rankings.

Both Leiter and Roger Williams—unlike Swygert and Gozansky[136]—generally limited their consideration of articles as "scholarly output" to those placed in elite law reviews. Their studies are limited, as noted by Cunningham, in that they overemphasized the right tails of distribution curves.[137] For law professors not employed by the top-echelon schools, such placements are often rare or nonexistent. Further, one should not assume that professors who are well published in lower-ranked law reviews have no scholarly output whatsoever.

Accordingly, the limited approach of Leiter and Roger Williams no longer works if one wants to consider all publications in an evaluation of scholarly output. While Kayes and Ellman evaluated different factors, their broad definition of total professional activity certainly supports the notion of a more inclusive definition of scholarship.[138] However, no one would dispute that a publication in the *Harvard Law Review* carries more weight—as it should—than a publication produced in a lower-ranked law review. In order to consider all articles and books—not just the elite placements—in evaluating scholarly output, one must weigh the placements

135. *Id.*

136. Swygert & Gozansky, *supra* note 28, at 376–78.

137. Cunningham, *supra* note 110, at 275.

138. Kayes & Ellman, *supra* note 36, at 28.

according to their quality. Thus, a more comprehensive approach for judging faculty at schools not in the highest echelon would be to rank publications based on placement (using both the *U.S. News & World Report* law school rankings and W&L law journal rankings—sources employed by both Leiter and Roger Williams, among others).

The Protocol takes on that task. First, it adopts all of the universal scoring methods that Leiter and Roger Williams use. Accordingly, the Protocol excludes all documents less than six pages from consideration. Leiter and Roger Williams's idea is that articles of such length are unlikely to be sufficiently scholarly[139]—although they should count as service.

Next, like Merritt suggests, the Protocol considers articles and books published before a professor's appointment to the tenure track.[140] The Protocol does so for two reasons: not only does the number of publications prior to hiring show a strong positive correlation with the number of articles published after hiring[141] but pre-hiring publication is now typically expected.[142]

Next, the Protocol excludes nonscholarly pieces from the remaining publications. However, the definition of nonscholarly is extremely limited, and, in practice, the pieces excluded for being nonscholarly generally overlap with those excluded by Leiter's six-page minimum. Thus, the Protocol generally considers weblogs and newspaper articles to be nonscholarly, with the caveat that they are examined individually to see whether a legitimate justification for an exception should exist. Similarly, the Protocol considers self-styled, unknown (or not well-known) online journals ad hoc. However,

139. *See* Leiter, *supra* note 1, at 461; *Faculty Productivity Study*, *supra* note 22.

140. Merritt, *supra* note 69, at 776.

141. *Id.* at 784.

142. Brian Leiter, *For a JD/PhD, Does the Caliber of the Law School Matter?*, LEITER REPORTS: PHIL. BLOG (Sept. 28, 2011, 7:16 PM), http://leiterreports.typepad.com/blog/2011/09/for-a-jdphd-does-the-caliber-of-the-law-school-matter.html ("It is true that scholarly writing is now much more important in law school hiring than it was even twenty years ago—hardly anyone gets hired anymore without having at least one publication post- law [sic] school graduation—but before hiring schools even start reading the scholarship, pedigree is used to narrow the pool dramatically. That, I'm afraid, is the reality that anyone thinking about law teaching needs to be aware of."); Rebecca Thomas, *Academia Meets Free Agency*, COLUMBIA LAW SCH., http://www.law.columbia.edu/law_school/communications/reports/winter06/jr_faculty (last visited Sept. 12, 2011) ("'At a school like Columbia, it's impossible to get hired without having published something,' says Prof. Katz. 'The expectation that a candidate has produced a tenure-level article has certainly increased in recent years,' agrees Professor Susan Sturm, who served as co-chair of a past appointments committee.").

well-regarded online journals, such as *The Green Bag*[143] and online companions to established law reviews, are included.

The Protocol assigns point values to articles and book chapters based on the length of the publications. The values reflect the Leiter and Roger Williams methods:[144]

- 3 points: Articles and book chapters exceeding fifty pages.
- 2 points: Articles and book chapters from twenty-one to fifty pages.
- 1 point: Articles and book chapters from six to twenty pages.
- 0 points: Articles and book chapters less than six pages.

Books are also assigned points. Again, the values mirror the Leiter and Roger Williams methods, unless otherwise indicated:

- 9 points: Authored books from an academic press, and treatises or hornbooks from a law publisher.
- 3 points: Casebooks and edited books from an academic press, student aides, and practitioner guides (these last two are my own additions).
- 3 points: New editions of any publication originally valued at nine points.
- 1 point: New editions of any publication originally valued at three points.

Although not a book, book chapter, or article, in any common or proper understanding of these terms, I believe that one should still accord some modest consideration to teacher's manuals because they do have some minor scholarly value. The Protocol assigns them points as follows:

- 1 point: Teacher's manuals.
- .25 points: New editions of a teacher's manual.

143. THE GREEN BAG, http://www.greenbag.org/ (last visited Oct. 25, 2011).

144. Leiter properly capped the maximum credited length at fifty pages, recognizing that for law review articles, the "[m]ost common . . . length limit [is] 35,000 words/70–75 pages, with most preferences ranging from under 25,000 words/50 pages to under 35,000 words/70 pages." *Law Review Submission Resources*, EMORY UNIV. SCH. OF LAW, http://library.law.emory.edu/for-law-faculty/support-for-scholarship/law-review-submission-resources (last visited Aug. 22, 2011). *Harvard Law Review* states that "[t]he *Review* strongly prefers articles under 25,000 words in length—the equivalent of 50 law review pages—including text and footnotes. The *Review* will not publish articles exceeding 30,000 words—the equivalent of 60 law review pages—except in extraordinary circumstances." *Harvard Law Review: Submissions*, HARVARD LAW REVIEW, http://www.harvardlawreview.org/submissions.php (last visited Sept. 12, 2011).

Using these point values, the Protocol applies two different equations to weigh the values of the publications based on the quality of the journal (for articles) or publisher (for books and book chapters). Like Leiter and Roger Williams implicitly do, the first equation uses the most recent *U.S. News & World Report* rankings of law schools as the basis for judging the quality of the publication. However, unlike Leiter and Roger Williams, the Protocol extends the rankings to cover other publications as well:

- 4x: Primary journals at *U.S. News & World Report* Tier 1 schools (top fifty).
- 3x: Primary journals at *U.S. News & World Report* Tier 2 schools (fifty-one to one hundred); secondary journals at *U.S. News & World Report* Tier 1 schools; and well-respected, private, American, peer-reviewed, or refereed law journals.
- 2x: Primary journals at *U.S. News & World Report* Tier 3 schools (101 to 150); secondary journals at *U.S. News & World Report* Tier 2 schools; and foreign academic journals.
- 1x: Primary journals at *U.S. News & World Report* Tier 4 schools (151 to 200); secondary journals at *U.S. News & World Report* Tier 3 schools; foreign, peer-reviewed, or refereed law journals; and non-legal, American, peer-reviewed, or refereed journals.
- .25x: Secondary journals at *U.S. News & World Report* Tier 4 schools; practitioner journals; and national magazines or reporters.

Since the *U.S. News & World Report* rankings are inapposite for books, the Protocol creates a multiplier designed to mimic the aforementioned *U.S. News & World Report* structure by incorporating Leiter's ranking of Tier 1 book publishers as follows:

- 4x: Cambridge, Cornell, Harvard, Oxford, Princeton, California, Chicago, Yale, Aspen, Foundation, and West.[145]
- 3x: All other national presses (e.g., Lexis, Westlaw, Bender, Carolina Press).
- 2x: Local presses (e.g., M&M Press, state bar presses).
- 1x: Self-published works.

145. These are the only presses that Leiter valued. As such, in the Protocol, I converted them to the equivalent of Tier 1.

Following Leiter's lead, the Protocol discounts articles published in a journal at the professor's school by half to account for the home-school advantage. The Protocol applies the same reduction for books published by the professor's home school press. It considers peer-reviewed or refereed journals housed at law schools to be primary journals—not secondary journals. Lastly, it assigns points proportionally for coauthored or coedited works.

The Protocol's use of *U.S. News & World Report* rankings, like Leiter's and Roger Williams's methods, as a basis to construct tiers for publications reflects many academics' behavior and value systems: academics seeking the best placement for their articles often internalize such factors. Many explicitly refer to the *U.S. News & World Report* law school rankings when deciding among competing offers. Another reason for using the *U.S. News & World Report* rankings is that its use produces a nearly perfect normal curve for weighing. An output study that produces a normal curve is more informative than output studies that only consider the right tail of the quality distribution curve (as Cunningham, among others, notes[146]). Moreover, a normally curved quality distribution curve avoids large score movements for small jumps between journals ranked closely numerically.

To calculate the *U.S. News & World Report*–weighed value for each publication, the Protocol multiplies the point value for each publication by the weighing factor and discounts for the home-school advantage and coauthorship, if appropriate. The Protocol then adds the final products for all of a professor's publications to establish that professor's total *U.S. News & World Report*–adjusted score. This score is divided by the years employed in tenure or tenure-track positions to calculate the per annum *U.S. News & World Report*–adjusted score. If the score was not so adjusted, then the measurement would not be productivity *rate*—the critical factor here—but simply total productivity—a far less salient measurement that often merely reflects age. Thus, the formula for the per annum *U.S. News & World Report*–adjusted score (Pa*US*) is as follows:

$$\mathrm{Pa}US = \sum_{i=1}^{n} (\mathrm{P}_i \times \mathrm{M}_{iUS} \times \mathrm{H}_i \times 1/\mathrm{CA}i)/\mathrm{Y}_{\mathrm{t},}$$

146. Cunningham, *supra* note 110, at 271.

where:

- ^{n} = the total number of qualifying publications.
- i = the ordinal numerical identifier assigned to the individual publication.
- P_i = the point value assigned to publication i based on the type of book or length of qualifying article.
- M_{iUS} = the *U.S. News & World Report* multiplier assigned to publication i.
- H_i = .5 if publication i was published by the professor's home school, otherwise 1.
- CA_i = the number of authors for publication i.
- Y_t = the total number of years that the professor has been in either tenure and tenure-track positions.

The second equation the Protocol uses to weigh the value of publications is based on the W&L rankings of law journals.[147] Both Leiter and Roger Williams employed the W&L journal rankings in addition to the *U.S. News & World Report* rankings to make quality assessments of publications. The Protocol does the same—but with greater depth.

W&L provides a score ranging from zero to one hundred for virtually all law journals.[148] The score is a reflection of two variables.[149] The first variable is the number of citations to the journal volumes published in the preceding eight years.[150] W&L found the sources for the citation counts in Westlaw's JLR database (which consists of primarily U.S. articles) and Westlaw's ALLCASES database (which consists of U.S. federal and state cases).[151] Newer journals suffer under this scoring system because they have a shorter period of time to gather points (i.e., cites).[152]

The second variable is impact factor, which shows the average number of annual citations to articles in each journal.[153] Impact-factor

147. *Law Journals: Submissions and Ranking*, WASHINGTON & LEE LAW SCH., http://lawlib.wlu.edu/lj/method.asp (last visited Sept. 13, 2011).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

rankings are biased against journals with a greater number of short articles.[154]

> Nevertheless, if two legal journals have a similar composition of articles, notes, and book reviews, then, from an author's viewpoint it's reasonable to compare the impact-factor of each to see which is a better journal with which to publish. . . . [T]he combined-score ranking (a weighting of both impact-factor and total cites) offers a more balanced view of journal ranking.[155]

As such, the W&L rankings overlap conceptually with citation studies used to value publications. However, rather than relying on the citation counts of professors' own publications, W&L relies on, inter alia, the citation counts of the publishing journal. The benefit of this method is that it is not time lagged like citation counts necessarily are: articles must have sufficient time to garner significant citations in the latter. This means that recently published articles cannot score highly on the citation count metric, regardless of their placement in a high-quality journal.

To scale the one hundred maximum points of the W&L rankings down to the zero-to-four scale of the *U.S. News & World Report* multiplier, the Protocol divided each W&L journal value by 25. For example, the Health Matrix, with a W&L value of 10.8, became .432. The *University of Arkansas at Little Rock Law Review*, with a W&L value of 4.8, became .192. The Protocol attributed the average W&L rating of each faculty member's rated publications to unrated publications for all books and journals not included in the W&L rankings. This approach was adopted from another of Leiter's studies.[156]

However, unlike the *U.S. News & World Report* rankings, the W&L rankings are *highly* right tailed. As such, very few journals score very highly, and the vast majority of them are clumped in a relatively narrow band on the left side of the distribution curve. As a

154. *Id.*

155. *Id.*

156. Brian Leiter, *Top 25 Law Faculties in Scholarly Impact*, BRIAN LEITER'S L. SCH. RANKINGS, http://www.leiterrankings.com/new/2010_scholarlyimpact.shtml (last visited Sept. 13, 2011). In the impact study, Leiter considered, inter alia, the new law faculty—excluding the well-published new dean—at the University of California at Irvine. *Id.* Because U.C. Irvine had only filled about a third of its faculty slots, Leiter adopted the convention of assuming that the next hires will have the same scholarly impact as the third of the faculty already hired. *Id.*

result, the disparity in weighing between those that publish in the apex journals and those that publish in virtually all the rest is dramatic. Equally, the distinction is relatively modest for those that publish in the vast majority of journals other than those at the very top. So, the result of this metric varies. It will show very large differences between those publishing in the highest journals and those publishing in the middle, but it will reveal rather small differences for those publishing in the large middle and the upper bottom.

As with *U.S. News & World Report* rankings, the W&L rankings are inapposite for books. Thus, the Protocol adopts here the same expanded-Leiter-book-publisher-ranking multiplier as it does for the per annum *U.S. News & World Report*–adjusted score (Pa*US*), as follows:

- 4x: Cambridge, Cornell, Harvard, Oxford, Princeton, California, Chicago, Yale, Aspen, Foundation, and West.
- 3x: All other national presses (e.g., Lexis, Westlaw, Bender, Carolina Press).
- 2x: Local presses (e.g., M&M Press, state bar presses).
- 1x: Self-published works.

Thus, to calculate the W&L weighted value for each publication with the foregoing inputs, the Protocol multiplies the point value for each publication by the weighing factor (and discount for the home-school advantage and coauthorship, if appropriate). The final products for all publications are then added to establish each faculty member's total W&L adjusted score. Finally, the Protocol divides this score by the years employed in tenure or tenure-track positions to calculate the per annum W&L adjusted score. Thus, the formula for the per annum W&L adjusted score (PaWL) is as follows:

$$\mathrm{PaWL} = \sum_{i=1}^{n} (P_i \times M_{i\mathrm{WL}} \times H_i \times 1/\mathrm{CA}i)/Y_t$$

where:

- ^{n} = the total number of qualifying publications.
- i = the ordinal numerical identifier assigned to the individual publication.
- P_i = the point value assigned to publication i based on the type of book or length of qualifying article.

- M_{iWL} = the W&L multiplier assigned to publication *i*.
- H_i = .5 if publication *i* was published by the professor's home school, otherwise 1.
- CA_i = the number of authors for publication *i*.
- Y_t = the total number of years that the professor has been in tenure and tenure-track positions.

Thereafter, accepting the competing values of both weighing methods, recognizing that Leiter and Roger Williams used a combination of both *U.S. News & World Report* law school and W&L journal rankings to value publications, and acknowledging the inherent value of considering more nonspurious factors rather than fewer, a third score is calculated by computing the average of each faculty member's per annum *U.S. News & World Report* and per annum W&L scores. The formula for the per annum combined *U.S. News & World Report* and W&L scores (Pa*US*WL) is as follows:

$$\text{Pa}US\text{WL} = (\text{Pa}US + \text{PaWL})/2$$

Finally, the Protocol provides a variant of the Pa*US*WL that employs a decay-value adjusted, per annum combined *U.S. News & World Report* and W&L score in order to discount older publications. Specifically, the Protocol applies a thirty-year stepped decay function to each publication written within the last thirty years. A thirty-year-old publication is discounted by 100 percent to zero—and a one-year-old article is discounted by 1/30. Articles published more than thirty years ago are excluded from consideration. Then, the decay-value adjusted combined *U.S. News & World Report* and W&L weighted score for each publication is aggregated across all publications for each professor and divided by the years in tenure and tenure-track positions. Thus, the formula for the per annum decay-value adjusted, *U.S. News & World Report* and W&L weighted total scholarly output (PaDv) for any professor is as follows:

$$\text{PaDv}=\sum_{i=1}^{n} (((P_i \times H_i \times 1/CA_i) \times (M_{iWL} + M_{iUS}))/2 \times (30 - (Y_c - Y_{ip}))/30)/Y_t$$

where:

- ^{n} = the total number of qualifying publications.

- i = the ordinal numerical identifier assigned to the individual publication.
- P_i = the point value assigned to publication i based on the type of book or length of qualifying article.
- M_{iUS} = the *U.S. News & World Report* multiplier assigned to publication i.
- M_{iWL} = the W&L multiplier assigned to publication i.
- H_i = .5 if publication i was published by the professor's home school, otherwise 1.
- CA_i = the number of authors for publication i.
- Y_t = the total number of years that the professor has been in tenure and tenure-track positions.
- Y_c = current year.
- Y_{ip} = year publication i was published.

This function is designed to reflect the fact that faculty who publish more recently are more likely to publish in the future, and, as such, more recent publications should be counted more in terms of evaluating their scholarly output. The Order of the Coif member school application, for example, reflects this idea when it specifically asks *only* for those publications from the previous five years appearing in the top twenty-five journals (as measured by W&L).[157] Thus, this measure is not only an analysis of historical productivity (a factor that itself predicts future productivity) but also one that captures the "freshness" of that productivity—making the predictive value of future success in publication even more likely. By analogy, this score values an upward trending GPA more highly rather than the opposite—much like admissions committees do for law school applicants. One must understand, however, that this is a separate metric from the per annum combined *U.S. News & World Report* and W&L scores, and it does not supplant it.

Finally, I note that the Protocol developed here does nothing to address the shortcomings of the current system for placement of publications such as those discussed by, inter alia, Kotkin[158] and Gingerich.[159] Nor does the Protocol address whether different cohort

157. *Order of the Coif Membership Application (Part II)*, *supra* note 2.

158. Kotkin, *supra* note 43, at 385.

159. Gingerich, *supra* note 66, at 269.

placement rates reflect external factors or internal preference, as Merritt analyzed.[160] Such considerations are simply beyond the scope of this Article.

V. THE PROTOCOL APPLIED

In this Part, I apply the Protocol to myself and my colleagues. I collected faculty publication data from faculty curriculum vitae postings, University of Arkansas at Little Rock's (UALR) law library catalog, HeinOnline, Westlaw, Lexis, and Google. Where questions remained, I made appropriate educated guesses. I considered data up to the summer of 2010.

In Table A, I present: (1) the raw number of credited publications for each faculty member—with no distinction based on size, type, or placement; (2) the percentage of the professor's publications published in his or her home-school journal (be it at UALR or the journal at the prior school where the faculty member was employed at the time of publication); and (3) the total number of years that the faculty member was employed in tenure and tenure-track positions. Thus, this calculation does not include years in visiting (only non-tenure-track displacing), adjunct, non-tenure-eligible writing, or clinical and instructor positions. This calculation benefits our few faculty members who spent several years in any such position and took advantage of the time and unique academic resources these positions make available to publish, because these individuals improved their productivity without increasing the inherently discounting time factor. For example, at least one member of my faculty shows a significant score gain from having published frequently while in a long-term, non-tenure-track position. While these individuals singularly enjoy this benefit (and it should perhaps deserve discount in the future), overall, I believe that this calculation is nonetheless appropriate because these individuals were not required to write during this time.

In Table B, I present: (1) the per annum *U.S. News & World Report* weighted scholarly output scores; (2) the per annum W&L weighted scholarly output scores; (3) the per annum combined *U.S. News & World Report* and W&L weighted scholarly output scores for each faculty member; and (4) the per annum decay-value adjusted

160. Merritt, *supra* note 93, at 255–56.

combined *U.S. News & World Report* and W&L weighted scholarly output scores. In Table C, I present: (1) the salary; and (2) the named professor status for each faculty member. Finally, in Table D, I present the per-article salary compensation.

TABLE A

Faculty	Number of Qualifying Publications (Unweighted)	Percentage of Publications in Own Journal	Years Employed
Adjoa Aieyatoro	5	0.00%	6
Coleen M. Barger	8	87.50%	10
Theresa M. Beiner	19	15.79%	16
Terrance Cain	0	0.00%	3
Paula J. Casey	5	40.00%	25
John M.A. DiPippa	14	64.29%	26
A. Felicia Epps	3	0.00%	11
Frances Fendler	7	28.57%	24
Michael Flannery	16	0.00%	7
Lynn Foster	20	30.00%	24
Kenneth Gallant	32	6.25%	24
Chuck Goldner	3	33.33%	22
Kenneth Gould	4	100.00%	34
Sarah Howard Hobbs	19	5.26%	18
Phillip D. Oliver	10	20.00%	30
Ranko Oliver	4	25.00%	10
Kelly Olson	5	0.00%	7
Richard J. Peltz	16	18.75%	10
Joshua Silverstein	3	0.00%	6
Robert Steinbuch	14	21.43%	5
June Stewart	1	0.00%	16
J. Thomas Sullivan	36	33.33%	22
Kelly S. Terry	2	0.00%	4

TABLE B

Faculty	U.S. News and World Report Score/Annum	W&L Score/Annum	Combined Score/ Annum	Decay Combined Value Score/Annum
Adjoa Aieyatoro	3.3333	0.5678	1.9506	1.5798
Coleen M. Barger	2.0300	0.2655	1.1478	0.7986
Theresa M. Beiner	8.5313	2.1213	5.3263	4.0431
Terrance Cain	0.0000	0.0000	0.0000	0.0000
Paula J. Casey	0.4664	0.0535	0.2600	0.1244
John M.A. DiPippa	1.5577	0.2188	0.8883	0.4387
A. Felicia Epps	1.2727	0.2596	0.7662	0.6257
Frances Fendler	1.0208	0.1113	0.5661	0.2831
Michael Flannery	12.7286	2.9830	7.8558	5.2801
Lynn Foster	2.3717	0.2196	1.2957	0.7506
Kenneth Gallant	4.6800	0.7265	2.7032	1.6266
Chuck Goldner	0.5000	0.1427	0.3214	0.1272
Kenneth Gould	0.3529	0.0390	0.1960	0.0762
Sarah Howard Hobbs	4.4483	1.0143	2.7313	1.7307
Phillip D. Oliver	1.7667	0.4879	1.1273	0.3850
Ranko Oliver	1.3980	0.2732	0.8356	0.6663
Kelly Olson	2.2857	0.5491	1.4174	1.2149
Richard J. Peltz	6.9970	1.1376	4.0673	3.3858
Joshua Silverstein	3.1667	0.4573	1.8120	1.5606
Robert Steinbuch	13.0000	2.4482	7.7241	7.1976
June Stewart	0.3750	0.0010	0.1880	0.1003
J. Thomas Sullivan	8.0000	1.3880	4.6940	2.5635
Kelly S. Terry	2.5000	0.4900	1.4950	1.4161

A. Productivity Factors

To understand these numbers, recall that an article published in the target range of twenty-one to fifty pages with a very respectable placement in a *U.S. News & World Report* second-tier primary journal, or in a *U.S. News & World Report* first-tier secondary journal, would score six points. One would multiply the two points for an article published in the twenty-one-to-fifty-page range by the three points afforded for placement in a *U.S. News & World Report*

second-tier primary journal or the equivalent. If calculated for every year that a professor is tenure track and tenured, then—given that the column is annualized—that professor would score six points in the above column labeled "*U.S. News & World Report* Score/Annum." A professor with a score of twelve points would have averaged the equivalent of two solid articles per year. And, a professor with a score of three points would have averaged the equivalent of half of a solid article per year (or one solid article every two years).

A similar calculation provides the figure in the column labeled "W&L Score/Annum." As discussed above,[161] the W&L score is highly right-tailed. To calculate the score for this column, one would multiply the same two points for an article published in the range of twenty-one to fifty pages by the adjusted score of the particular journal. For example, the excellent journal publishing this Article (which is also a *U.S. News & World Report* Tier 2 primary journal), the *Loyola of Los Angeles Law Review*, has an adjusted score of .804. Accordingly, if a professor published one article of the same page range in the *Loyola of Los Angeles Law Review* or its equivalent every year, that professor would have a W&L score of 1.6.

The penultimate column, the "Combined Score/Annum," represents the average of the prior two columns. This average shows that a professor annually publishing the equivalent of one twenty-one-to-fifty-page article in a *U.S. News & World Report* second tier primary journal, such as the *Loyola of Los Angeles Law Review*, or its equivalent (a "Very Good Law Review Article"), would have a combined score of 3.8. The last column provides the decayed productivity factors discussed above.

To put the Protocol to use, consider that my school has a post-tenure minimum publication requirement of one article for every two years. To meet this standard, a faculty member roughly needs a combined score of 1.9. Also, if a professor receives summer research funding at my school, the professor must produce one article *every* year. To meet that standard, a faculty member regularly receiving summer research funding needs a combined score of 3.8.

Moreover, while the Protocol scores above are useful for individual comparisons,[162] these scores need to be aggregated for use

161. *See supra* Part III.

162. *See supra* Tables A–B.

in cross-institution law school rankings. UALR's combined *U.S. News & World Report* and W&L score *without* annualizing or calculating the per capita rate is 628.3932. That is the total scholarly output of the school for all currently employed faculty. As discussed above,[163] for individualized comparisons, an annualized rate is a more accurate representation of scholarly performance. That score in its aggregated form for UALR is 49.3693. This number, however, does not account for the size of the faculty. Thus, an equally productive faculty—on an individual basis—that is twice as large as UALR's would have a score twice as large. UALR's combined *U.S. News & World Report* and W&L score *without* annualizing but with calculating the per capita rate is 27.3214. This accounts for the size issue, but leaves open the effects on such calculations of the age of the faculty.[164] And, finally, the per annum and per capita combined *U.S. News & World Report* and W&L score for UALR is 2.1465.

Which calculation to use for such comparisons depends on what one is analyzing. Large schools benefit, based on their size alone, by not making a per capita adjustment. But perhaps not making the per capita adjustment has some legitimacy if one accepts the notion that large schools have more to offer than small schools have to offer due to their larger faculty size.

Schools with older faculty generally (but not always) benefit if the scores are not annualized. Yet perhaps not annualizing the scores has some legitimacy if one accepts the notion that highly seasoned faculty have something unique to present that is absent in schools with more junior faculty. Ultimately, while the per annum factoring is clearly more useful than the per capita is, employing *both* discounting methods for cross-institution comparisons makes the most sense.

Accordingly, as mentioned above,[165] the per annum and per capita combined *U.S. News & World Report* and W&L score for UALR of 2.1465 is the most relevant calculation. With this formula, the Protocol can determine that for UALR overall, each of its faculty members *on average* produces slightly more than the equivalent of one Very Good Law Review Article every two years.

163. *See supra* Part III.

164. *See supra* Part III.

165. *See supra* Part III.

B. Named Professorships

UALR's most recent annual report states that the school "boasts four named professorships *that recognize faculty members for their excellence in scholarship* in addition to their contributions in the classroom. Each appointment is for four years."[166] All but one of the named professors receive an additional $10,000 per year in salary for their positions, and the other receives $7,500 in additional compensation.[167]

While the annual report listed only four named professors as "currently holding named professorships,"[168] this is incorrect. The school, in fact, has a total of seven named professorships.[169] One has stood empty for at least four years. The Dean and one other faculty member fill the remaining two, which have not been subjected to a renewal vote.[170]

166. E-mail from Tonya Oaks Smith, Dir. of Commc'ns, Univ. of Ark. at Little Rock, to Robert Steinbuch, Professor of Law, Univ. of Ark. at Little Rock (Sept. 26, 2011, 01:33 PM CDT) (on file with author) (quoting language from the school's annual report). The school administration's more recent description of the criteria for named professorships has changed, notwithstanding that the official qualifications have not been altered. The criteria are now described to include

> consistent superior classroom teaching that is thoughtful, provocative, and effective; significant scholarly work, measured both by number and quality, as an author and/or panelist; national or international prominence in his or her field, unless the applicant's field is regionally based; and demonstrated commitment to the vision and mission of the law school.

Post Tenure Review Process, UNIV. OF ARK. AT LITTLE ROCK WILLIAM H. BOWEN SCH. OF LAW, http://ualr.edu/law/files/2010/12/posttenure_namedprof.pdf (last visited Sept. 23, 2011).

167. Schedule of Salaries for University of Arkansas at Little Rock, William H. Bowen School of Law (2010–2011) (on file with author) [hereinafter Schedule of Salaries] (detailing salaries for law school professors, deans, and librarians).

168. E-mail from Tonya Oaks Smith, *supra* note 166 (quoting language from the school's annual report).

169. *Ben J. Altheimer*, UNIV. OF ARK. AT LITTLE ROCK, WILLIAM H. BOWEN SCH. OF LAW, LAW REVIEW, http://ualr.edu/lawreview/home/symposium-series/ben-j-altheimer/ (last visited Sept. 29, 2011); *John DiPippa*, UNIV. OF ARK. AT LITTLE ROCK, WILLIAM H. BOWEN SCH. OF LAW, http://ualr.edu/law/faculty/full-time-faculty-a-g/john-dipippa/ (last visited Sept. 29, 2011); *Philip D. Oliver*, UNIV. OF ARK. AT LITTLE ROCK, WILLIAM H. BOWEN SCH. OF LAW, http://ualr.edu/law/faculty/full-time-faculty-h-z/philip-d-oliver/ (last visited Sept. 29, 2011).

170. *John DiPippa*, *supra* note 169; *Philip D. Oliver*, *supra* note 169.

TABLE C[171]

Faculty	Salary (Including Named Professorship Bonus Where Applicable)	Named Professor
Adjoa Aieyatoro	$94,046	No
Coleen M. Barger	$106,817	No
Theresa M. Beiner	$132,272	Yes
Terrance Cain	$83,830	No
Paula J. Casey	$130,414	No
John M.A. DiPippa	$209,350	Yes
A. Felicia Epps	$104,448	No
Frances Fendler	$125,047	No
Michael Flannery	$114,748	Yes
Lynn Foster	$137,512	Yes
Kenneth Gallant	$130,113	No
Chuck Goldner	$139,660	No
Kenneth Gould	$133,523	No
Sarah Howard Hobbs	$137,512	Yes
Phillip D. Oliver	$140,849	Yes
Ranko Oliver	$99,660	No
Kelly Olson	$100,759	No
Richard J. Peltz	$105,708	No
Joshua Silverstein	$90,871	No
Robert Steinbuch	$94,289	No
June Stewart	$107,120	No
J. Thomas Sullivan	$127,262	No
Kelly S. Terry	$89,013	No

The empirical analysis above shows that only two of the six filled named professors have produced a high scholarly output as measured by the Protocol. Thus, scholarly output, as measured by the

171. Schedule of Salaries, *supra* note 167.

Protocol, has not been the major driving force in determining the award of named professorships at UALR law school.[172]

C. Costs of Publication

Hofstra University School of Law professor Richard Neumann recently estimated that the "cost of a law review article written by a tenured professor at a top-flight law school . . . [is] in the neighborhood of $100,000."[173] Neumann based his calculation on the inputs for "a tenured professor at a high-paying school who spends between 30% and 50% of his or her time on scholarship and publishes one article per year."[174]

As discussed above,[175] the assumption of one article per year is not precise. Rather, using the data provided herein allows us to calculate a per-individual productivity value for faculty members at UALR: taking the productivity factor established in the "Combined Score/Annum" column of Table B for each professor, and dividing it by the 3.8 score established as an equivalent of one twenty-one-to-fifty-page article per year in a *U.S. News & World Report* second-tier primary journal, such as the *Loyola of Los Angeles Law Review* or its equivalent, will produce each faculty member's rate of productivity for a Very Good Law Review Article (the "Publication Rate").

In addition, recall that Neumann estimates that faculty members spend between 30 percent and 50 percent of their time on scholarship.[176] If we accept this rough estimate, then by multiplying the average (40 percent) by each UALR faculty member's actual salary and dividing it by his or her actual Publication Rate, as calculated by the Protocol, we will compute how much each faculty

172. I note that the above faculty list includes administrators who maintain faculty status. A colleague suggested that administrators are unable to publish regularly. Whether or not this is true, though, does not alter the scholarly output of these administrators, which is the only metric evaluated here. Indeed, a low output score under the Protocol might support the claim of reduced productivity as a consequence of administrator status, although that data could support the inverse claim as well.

173. Karen Sloan, *Legal Scholarship Carries a High Price Tag*, THE NAT'L LAW JOURNAL (Apr. 20, 2011), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202490888822&slreturn=1&hbxlogin=1.

174. *Id.*; *accord* Segal, *supra* note 1 ("[P]rofessors spend about 40 percent of their time producing scholarship . . . .").

175. *See supra* Tables A–B.

176. Sloan, *supra* note 173.

member is compensated for a Very Good Law Review Article. The following formula represents this equation:

$$\$A = .4(S)/(CSy/3.8)$$

where:

- $\$A$ = salary compensation per Very Good Law Review Article.
- S = annual salary.[177]
- *CS*y = "Combined Score/Annum" column of Table B.

The magnitude of the salary compensation for each Very Good Law Review Article is, as the formula demonstrates, inversely related to the individual's Productivity Rate and directly related to the individual's salary. So, a faculty member who frequently writes Very Good Law Review Articles will have a low per-article compensation. Of course, the less that faculty member makes overall, the lower the per-article compensation—all else being equal.

177. Salaries are current salaries. As such, these calculations will provide the contemporary compensation per article. Previous article compensation would need to be adjusted for varying salaries and the decreasing value of money, but would likely produce roughly comparable numbers when converted to today's dollars. The salary-alone column, by definition, does not consider separate research funding and the costs of research assistants, which Neumann did include. The current funding for summer research assignments is $13,000. Thus, that is the maximum that the per-article compensation could be increased. For those faculty members scoring a 3.8, the maximum adjustment would be appropriate, presuming they received the stipend. Less productive faculty members should receive fewer funded research assignments, which would result in a smaller adjustment. And, since more productive faculty do not receive extra compensation per article, the value of each research assignment would have to be spread out over more than one article—reducing its effect on the compensation figure. In addition, faculty members currently receive access to reimbursement for various academic expenses, including research assistance. This amount is not included in the calculation. If it were, it would modestly increase the per-article cost, but it would *not* increase the per-article compensation.

TABLE D

Faculty	Combined Value Score/Annum	Salary	Salary Compensation/Article
Adjoa Aieyatoro	1.9506	$94,046	$73,760
Coleen M. Barger	1.1478	$106,817	$142,420
Theresa M. Beiner	5.3263	$132,272	$37,791
Terrance Cain	0.0000	$83,830	N/A
Paula J. Casey	0.2600	$130,414	$745,229
John M.A. DiPippa	0.8883	$209,350	$364,086
A. Felicia Epps	0.7662	$104,448	$208,895
Frances Fendler	0.5661	$125,047	$333,453
Michael Flannery	7.8558	$114,748	$22,173
Lynn Foster	1.2957	$137,512	$161,776
Kenneth Gallant	2.7032	$130,113	$73,303
Chuck Goldner	0.3214	$139,660	$698,300
Kenneth Gould	0.1960	$133,523	$1,068,180
Sarah Howard Hobbs	2.7313	$137,512	$76,396
Phillip D. Oliver	1.1273	$140,849	$187,797
Ranko Oliver	0.8356	$99,660	$181,200
Kelly Olson	1.4174	$100,759	$108,930
Richard J. Peltz	4.0673	$105,708	$39,517
Joshua Silverstein	1.8120	$90,871	$75,725
Robert Steinbuch	7.7241	$94,289	$18,579
June Stewart	0.1880	$107,120	$856,960
J. Thomas Sullivan	4.6940	$127,262	$41,052
Kelly S. Terry	1.4950	$89,013	$91,295

Using the aforedescribed formula, Table D shows that the per-article salary compensation at UALR for the equivalent of a Very Good Law Review Article ranges between $18,579 and $1,068,180.[178] Neumann argues that his estimate of $100,000 per article (which also includes funded research assignments and

178. Orin Kerr has suggested in passing that, rather than employing the blanket 40 percent calculation to determine how much of a faculty member's salary is for scholarship, we "compare the salaries of the professors who are active scholars with the salaries of the professors who are inactive scholars" and then calculate the salary for publication. Orin Kerr, *Estimating the Costs of Legal Scholarship*, VOLOKH CONSPIRACY (Nov. 21, 2011, 4:56 PM), http://volokh.com/2011/11/21/estimating-the-costs-of-legal-scholarship/. Tables C and D, and the surrounding text, *supra*, demonstrate the difficulty of this approach for the cohort examined here, as the data suggest that salary in this group is not highly tied to publication rate. Rather, it appears mostly related to length of tenure.

research assistance) constitutes excessive compensation.[179] He suggests that these resources should be redirected to other activities at law schools, such as increased course loads for faculty members.[180] It is unclear, however, whether Neumann merely objects to the level of compensation for scholarship or whether he more broadly opposes the role of scholarship in legal education. If, as he implies, it is the former, then an alternative to simply reducing or eliminating compensation for scholarship in legal academia would be to require increased scholarly productivity. Both options would equally reduce the level of compensation for scholarship, but through opposing means.

VI. CONCLUSION

The development of the Protocol modifies Leiter's and Roger Williams's methods so as to provide a system for considering all scholarly output by faculty at any law school. The most significant benefit of the Protocol is that it does not restrict the inclusion of articles to those only appearing in top journals or books printed by elite publishers. The particular contribution of the Protocol is that it broadens Leiter's and Roger Williams's works by developing focused weighting factors for all publications based on the *U.S. News & World Report* and W&L journal rankings.

The Protocol will benefit individual evaluations of scholarly output for considerations, such as for promotion and tenure, by offering more objective data for consideration by law school faculties, in addition to the understandably subjective evaluations currently employed. More importantly, the Protocol will allow for aggregated comparisons needed for the calculation of the most rigorous law school ranking systems. Leiter and Roger Williams began this process but—by design—established only a limited evaluative tool. With this Article, I hope to have advanced this evaluative effort through the development of the first universal metric—the Protocol. Now, everyone, with some effort, will be able to compute the scholarly output for a school and compare it with that of any other institution. Schools not measuring up will no longer be able to hide behind the vagaries of previous ranking methods.

179. *See* Sloan, *supra* note 173.

180. *See id.*

Schools relying on prestige established generations ago will have to put up or shut up. And schools not given the credit they are due will be able to objectively boast about their own successes. Good luck to all, as it is a brave new world!