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Paul Horwitz

University of Alabama - School of Law, phorwitz@law.ua.edu

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Essay

“Evaluate Me!”: Conflicted Thoughts on Gatekeeping in Legal Scholarship’s New Age

PAUL HORWITZ*

“Look at me! Grade me! Evaluate and rank me! I’m good, good,
good and oh so smart!”

– Lisa Simpson¹

As another entrant into the fast-growing ranks of online law review supplements, the *Connecticut Law Review* has chosen to begin by contemplating—or is that “CONNtemplating?”—an ambiguous phrase: “Law Reviews Matter: Legal Scholarship, Law Reviews, and the Online Age.” We might read that open-ended phrase in several ways. Perhaps most interestingly, it might be read as inviting us to think about the “matter”—the pronouncements, extrusions, eruptions, and, alas, ephemera—contained within the law review format, and its increasing emigration to an infinite online space, on SSRN, Bepress, blogs, and elsewhere. We might also read it as a positive pronouncement: no matter how battered by their many critics or by competition from online sources, law reviews *do* matter, damn it. But the very act of making that

* Visiting Associate Professor, Notre Dame Law School; Associate Professor, University of Alabama School of Law (fall 2007). Co-blogger on *Prawfsblawg*, <http://prawfsblawg.blogs.com>. Thanks to Matt Bodie, Peg Brinig, Al Brophy, Rick Garnett, Ethan Leib, Michael Olivas, and especially Kelly Horwitz for comments on a draft of this paper.

¹ *The Simpsons: The PTA Disbands!* (Fox television broadcast April 16, 1995); see Wikiquote, The Simpsons, http://en.wikiquote.org/wiki/The_Simpsons (follow “6.20 The PTA Disbands” hyperlink) (last visited Apr. 24, 2007).

pronouncement, the very need to make the assertion, cannot help but lead readers to supply the question mark the editors have seen fit to omit. In an "online age" in which "legal scholarship," in its many forms, can be propagated with ease and without the assistance of the law review and its editors, *do* "Law Reviews Matter?"

In this contribution, I want to offer some decidedly personal thoughts on the implied question of whether law reviews continue to matter in the online age, as well as the implied assertion that they do. To make a long story short, I think they still do matter, with or without online supplements—and that the existence of online supplements, while surely a positive development, won't much affect the reasons why they matter. But, for the most part, that is not the game I will be hunting here.

This question has been the subject of much recent discussion in a variety of similar online and print publications.² If I have anything to contribute to what has already been said, it is a note or two of a kind that is often obscured by the professional and professorial voice that still generally characterizes legal scholarship: some candor, some tentativeness—and more than a dash of complicity. Michael Olivas recently observed that although law professors, like most academics, are deeply fascinated with the "tribal rituals" involved in "who gets what and how they go about getting it," these issues are still "a little embarrassing and uncomfortable to mention in public."³ What I have to offer here are some embarrassing and uncomfortable thoughts on who gets what and how they go about getting it in the online age.

A useful place to start, I think, is to situate this commentary within and between a set of antinomies posed by other scholars, both of which serve as the leitmotifs of this short contribution. The first is a paired opposition presented by Julius Getman, in his deeply personal and valuable critique of the present state of the American university, and especially the law school, *In the Company of Scholars*.⁴ Getman writes of his discovery over time that "the surface calm of academic life obscure[s] a continual struggle between the elitist and egalitarian aspects of higher education."⁵ As Peter Alces summarizes the theme, "the members of the academy are preoccupied both with their prestigious titles and trappings and, at the same

² See, e.g., Symposium, *Open Access Publishing and the Future of Legal Scholarship*, 10 LEWIS & CLARK L. REV. 733 (2006); Editorial, *The Future of Legal Scholarship*, 116 YALE L.J. POCKET PART 1 (2006), <http://yalelawjournal.org/editorial/the-future-of-legal-scholarship.html>; Symposium, *Bloggership: How Blogs Are Transforming Legal Scholarship*, Berkman Center for Internet & Society, Harvard Law School, <http://cyber.law.harvard.edu/home/bloggership> (last visited Apr.28, 2007).

³ Michael A. Olivas, *Reflections on Academic Merit Badges and Becoming an Eagle Scout*, 43 HOUS. L. REV. 81, 82, 85 (2006); see also David P. Bryden, *Scholarship About Scholarship*, 63 U. COLO. L. REV. 641, 642 (1992) ("Our reticence on the subject of professorial selfishness reflects, I suppose, a taboo against cynicism within the family.").

⁴ JULIUS GETMAN, *IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION* (1992).

⁵ *Id.* at 2.

time, with disseminating their message and its benefits to all in earshot, literally or figuratively.”⁶ Those words were published in 1994, but could not be more applicable to the online age.

Getman does not attempt to resolve the tension, although the book is surely a cry to other academics to recognize and ameliorate it where they can. Indeed, although he spiritedly defends egalitarianism in the academy, he also notes that he came to be “more tolerant of academic elitism and less comfortable with its populist critics.”⁷ Nevertheless, his conclusion is that the tension between elitism and egalitarianism in the academy is ubiquitous and endless, a product of the conflicting desires and the “widespread insecurity” of the scholar and teacher.⁸

Getman’s depiction of the eternal conflict between elitist and egalitarian values in the academy helps frame our understanding of changes in the legal academy that have been occurring since long before the online age, let alone the rise of blogs and online law review supplements, but which surely have been reinforced by those developments. A fairly standard account might run something like this: In the old days, elites ruled. A relatively small number of professors at a relatively small number of highly prestigious law schools stood at the top of a fairly well defined hierarchy—and belonged there (or believed they did). Their status in the hierarchy was confirmed through the recognition of their scholarship in a small and select number of prestigious venues: law reviews at highly ranked schools, university presses, and the like. Publication in a particularly prestigious journal, as Larry Solum notes, performed a “certification” function: “if it’s in the Yale Law Journal, it must be good.”⁹ In some cases, certification of a scholar by one of these intermediaries secured his position as a member of the elite;¹⁰ he “wrote up.” In other cases, a professor’s membership in an elite school, by dint of other hard-won credentials, increased the likelihood that he would be published in an elite law review, which in turn was taken to confirm his membership in the elite, in an endless circular motion.

⁶ Peter A. Alces, *Toil of the Firestarters*, 92 MICH. L. REV. 1707, 1709–10 (1994) (reviewing GETMAN, *supra* note 4).

⁷ GETMAN, *supra* note 4, at x.

⁸ *Id.* A recent book review seems to have come up with *le mot juste* here, albeit in a very different context. See Lee Siegel, *The Niceness Racket*, NEW REPUBLIC, April 23, 2007, at 49, 50, available at LEXIS, News Library, NEWRPB File (reviewing DAVE EGGERS, WHAT IS THE WHAT: THE AUTOBIOGRAPHY OF VALENTINO ACHEK DENG (2006), and referring to “the exclusive egalitarian club” of the *McSweeney’s* publishing enterprise).

⁹ Lawrence B. Solum, *Download It While It’s Hot: Open Access and Legal Scholarship*, 10 LEWIS & CLARK L. REV. 841, 861 (2006).

¹⁰ Cf. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1328 (2002) (judgments about legal scholarship “determine who is appointed, promoted, published, and featured in important academic events”).

None of this worked perfectly well, and few would have supposed otherwise.¹¹ Still, on the whole, the distinction between a few great schools (and their professors, and their students) and the remaining schools was clear, and things sorted themselves out more or less as they should. And this sense of hierarchy was evident throughout the legal profession as a whole: those students certified as members of the elite through admission to a prestigious law school, and who in turn spent their time as law review editors certifying the prestige of their professors, would occupy the empyrean heights of the great law firms in New York, Boston, or a few other cities, which would set the standard of greatness for the profession. Of course there were other options: other schools, other firms, other places. But those alternatives could, for a long time, be treated as falling beneath the notice of those who occupied the elite institutions.

The online age, in the conventional account, takes a sledgehammer to the old days.¹² As Solum says, "[t]he new world of legal scholarship is about disintermediation"¹³—the elimination of all the old barriers and intermediaries that kept the elites in their place and everyone else in theirs. Jack Balkin makes a similar point in somewhat different terms, arguing that the Internet provides a way of "rout[ing] around the traditional gatekeepers of legal scholarship."¹⁴

The list of online vehicles for routing around the traditional gatekeepers is pretty well recognized by now. Legal blogs, of course, are one way to get noticed through non-traditional channels. Similarly, the Internet greatly facilitates access to legal scholarship by a wide variety of readers, and offers legal scholars a means of distributing and publicizing their work, without the significant mediation supposedly performed by the law journals.¹⁵ Online supplements to mainstream law reviews, like this

¹¹ Among other things, as I make clear below with reference to the legal profession as a whole, some or many of those who sat atop the law school hierarchy did so in part because they managed to fend off potential competition from women and members of racial and ethnic minorities, who either were not given a chance to develop the relevant credentials for law teaching or were not given full consideration as candidates even if they had those credentials. See, e.g., Michael A. Olivas, *The Education of Latino Lawyers: An Essay On Crop Cultivation*, 14 CHICANO-LATINO L. REV. 117, 133–34 (1994).

¹² In fact, of course, in many respects things had changed in the legal academy, and the legal profession as a whole, long before the Internet was even a gleam in Al Gore's eye. But the online age certainly has contributed to these changes, and added some new wrinkles of its own.

¹³ Solum, *supra* note 9, at 857.

¹⁴ Jack M. Balkin, *Online Legal Scholarship: The Medium and the Message*, 116 YALE L.J. POCKET PART 23, 25 (2006), <http://thepocketpart.org/2006/09/06/balkin.html>. Balkin is referring specifically here to only one gatekeeper—the traditional law review. I think his point can be generalized, however. Online speech is, in fact, a way of routing around *all* the traditional elite gatekeepers: not just the law reviews, and specifically the elite law reviews, but also the elite law schools that house them, and the elite law professors who train the editors of the top journals and enjoy pride of place in their pages.

¹⁵ See, e.g., Solum, *supra* note 9, at 858. One of the primary vehicles for disseminating legal scholarship on the Internet is, of course, the Social Science Research Network, or "SSRN," <http://www.ssrn.com/>.

one, occupy a middle ground. By selecting pieces from contributors, they provide a mediating function. But they also provide an additional means of calling attention to a scholar and his or her work, and may even prove more willing to publish the work of young and unproved scholars than are their hard-copy parents.¹⁶ The true innovation of the law review supplements is their form,¹⁷ but they thus also serve a routing-around function. Finally, although they have been around so long that they may seem unremarkable or dated, Westlaw and Lexis/Nexis themselves also route around traditional gatekeepers, since they provide a means for *any* legal scholarship that is collected by those databases to turn up in the same search that also turns up articles from the *Harvard Law Review* and other elite journals.

In short, as Dan Hunter has observed, the Internet has drastically “reshap[ed] the way that users can access content,”¹⁸ in a way that weakens the old gatekeepers’ hold on power. Beyond that, the Internet has also provided a variety of new formats in which legal scholars can present and publicize their ideas. What this means, in effect, is that the old gatekeepers can no longer keep the hordes from the gate. A vulgar arriviste who is willing to use these new media can receive attention, readers, and even respect without being certified in the traditional way by the traditional sources.¹⁹ That, at least, is the fairly conventional account offered by the champions of the online age.²⁰ This account is surely overstated, in part for reasons I will suggest below. But it is certainly the chorus in the triumphalist song sung by a number of law bloggers in recent years.²¹ In Getman’s terms, it is the triumph of egalitarianism over elitism.

¹⁶ See, e.g., Editorial, *supra* note 2, at 2.

¹⁷ See Solum, *supra* note 9, at 854–56 (listing other examples of ways in which online speech may encourage changes in the format of legal scholarship).

¹⁸ Dan Hunter, *Open Access to Infinite Content (Or “In Praise of Law Reviews”)*, 10 LEWIS & CLARK L. REV. 761, 768 (2006).

¹⁹ Some of those online media may perform a light certification function, as Peg Brinig has pointed out to me. For example, SSRN technically “peer reviews” papers that one uploads to the service. Moreover, one must be selected for inclusion in the various subject-matter series of papers posted on SSRN, and selection involves choices made by the editors of these series, who are themselves usually respected figures in the field. But the threshold for inclusion in both cases is low. See, e.g., Solum, *supra* note 9, at 858 (“[T]here is no pretence of selecting only the ‘best’ pieces [on SSRN]. Everything written by serious academics will be abstracted in the appropriate journal”). Although he is too modest to mention it, Larry Solum also performs a certification function when he selects papers to publicize on his *Legal Theory Blog*.

²⁰ See, e.g., Franklin G. Snyder, *Late Night Thoughts on Blogging While Reading Duncan Kennedy’s Legal Education and the Reproduction of Hierarchy in an Arkansas Motel Room*, 11 NEXUS 111, 121 (2006) (arguing that “[t]he ability of the institutions, particularly the elite ones, to control the dialogue of legal education has decreased dramatically” as a result of blogs, SSRN, and other online resources).

²¹ See Brian Leiter, *Why Blogs Are Bad for Legal Scholarship*, 116 YALE L.J. POCKET PART 53, 57 (2006), <http://www.thepocketpart.org/2006/09/20/leiter.html> (noting the note of “self-congratulation” struck by many “like-minded academic bloggers,” and their resistance “to the suggestion that blogs are not as important as their proprietors think they are”).

These developments have triggered an ongoing debate about the meaning and value of the changes in the environment of legal scholarship caused by the online age. What does the online age add to the existing order of legal scholarship? Does it take away from the existing order—and are those changes good or bad? How do we address concerns about quality in legal scholarship and/or blogging by legal scholars in the online age? Are there reasons to be concerned about these developments as well as welcoming them? And how should we measure the impact of these developments on legal scholarship? A variety of increasingly familiar arguments have been staked out on these positions. Underneath them all, though, we can sense the recurring theme that is at least old as Getman's book, and really far older: the contest between egalitarianism and elitism.

A nice example of this can be found in the second set of opposing views on which I want to focus: a pair of observations by Larry Solum and Brian Leiter, both of whom are renowned as legal scholars *and* as legal bloggers. Solum argues that the Internet has disrupted the rule of the traditional intermediaries in legal scholarship, and that this is, by and large, a good thing, given the contributions that might be made to legal scholarship by a wide range of individuals outside the gates of the traditional elite law schools and law reviews:

I have been astonished by the thoughtful and genuinely informative comments and blog posts that have come from nonacademic sources. I'm proud to be an academic and I believe in the value of academic institutions. But I think it is both wrong and silly to think that credentials matter more than content.²²

Elsewhere, Solum has similarly argued that the online age has "opened new doors for the intelligent and ambitious," and that "there is extraordinary talent located outside the elite legal academy The smart and motivated are everywhere."²³

By contrast, Leiter has written to suggest that the online age eliminates the "mediating boundaries" of "experience, education, and intelligence," and that this "poses problems for serious scholarship."²⁴ Responding to the passage by Solum quoted above, Leiter acknowledges that there are "many non-academic experts," and says, "one must, of course, agree that 'content' matters more than 'credentials.'"²⁵ But he worries that the reduced role of elite intermediaries and the immediacy of the Internet will "conspire to

²² Blogging, Legal Scholarship, and Academic Careers, Legal Theory Blog, http://lsolum.blogspot.com/archives/2006_01_01_lsolum_archive.html#113683990156732487 (Jan. 9, 2006, 17:35 EST).

²³ Solum, *supra* note 9, at 865.

²⁴ Leiter, *supra* note 21, at 53.

²⁵ *Id.* at 56.

create availability cascades that result in inferior work getting the most scholarly attention and, in the process, lowering the general quality of scholarly discourse.”²⁶ Blogs are “hostage to the ignorance and irrationality of their most visible proprietors,” and on the whole “have been bad for legal scholarship, leading to increased visibility for mediocre scholars and half-baked ideas and to a dumbing down of standards of judgments.”²⁷

What is this dialogue, if not Getman’s eternal conflict rewritten for a new age? Solum strikes a distinctly egalitarian note, praising the online age both for its ability to open up access to legal writing for a wide audience beyond the conventional elite circles of legal scholarship and for its ability to allow anyone and everyone to “contribute significant new ideas to scholarly debates.”²⁸ Leiter, in turn, strikes a note of elitism, with his concern that the elimination of intermediaries will open the floodgates to “mediocre scholars” and their “half-baked ideas.”²⁹ His solution, too, strikes a note of elitism: he suggests that the online age might be counteracted by the increasing presence of “first-rate scholars” in the blogosphere, and a “shift to peer-refereed publications in the legal academy.”³⁰ In other words, restore the gatekeepers.

Now, as I will suggest below, there is something to both positions. Despite the usual tendency to freight these words with moral judgment, and the easy appeal of standing with the masses and against the old guard, egalitarianism is not always good, and elitism is not always bad—at least, it is not necessarily bad if the selection of those elites is based on something more than crude credentialism. But if I had to choose which position to favor—or, more precisely, which mood to adopt, for both Solum and Leiter evoke, in broad strokes, a general mood of optimism and pessimism, respectively, about the online age—I would adopt Solum’s optimistic and egalitarian view.

In important respects, my vote for this position is influenced by my take on changes in the larger legal profession, of which the advent of the online age is, in some ways, an echo. Consider the entry of Jews into the legal profession in the “old days” I discussed earlier. Not so long ago—and, not coincidentally, at the height of “the American legal profession’s cartel” status³¹—Jews were still unwelcome at many of the law firms that sat perched at the top of the gatekeeping elite of the legal profession.³²

²⁶ *Id.*

²⁷ *Id.*

²⁸ Solum, *supra* note 9, at 865.

²⁹ Leiter, *supra* note 21, at 57.

³⁰ *Id.*

³¹ RICHARD A. POSNER, *OVERCOMING LAW* 60 (1995).

³² As Posner notes, the sentiment was an old one, and tended to express itself in elitist, credentialist terms at one abstract remove from any actual mention of ethnicity. Thus, without attributing any anti-Semitism to him, he quotes Professor Wigmore recommending early in the last

But, in concert with and as a part of a broader suite of changes in the legal profession that rendered it more competitive and less guild-like, Jews, and members of other ethnic minorities, nevertheless stormed the gates of the profession, and altered it forever. In Balkin's terms, they routed around the old gatekeepers, transforming the profession in the process in ways that the gatekeepers at the elite firms—many of which are now long gone—could neither prevent nor fully foresee.

It is easy enough to "pine for the days of the professional guild and professional mystique," before the vulgarization of the profession became "an offense to the fastidious."³³ Not a few lawyers have expressed nostalgia for the old days, at least as they choose to remember them. But there can be little doubt that opening the legal profession to genuine competition was a good thing. It made the profession far more egalitarian, and the very success of the new and "vulgar" entrants to the profession laid bare the extent to which the old gatekeepers were elite by status, not merit, and the degree to which the profession was and always had been a business—albeit a cartel rather than a genuinely competitive one.³⁴

One could make many of the same observations about the online age of legal scholarship and its effects on the academic side of the legal profession.³⁵ As Solum observes, there is a significant crop of extraordinarily talented legal scholars out there, and by no means are all of them to be found in the mythical "top 15" law schools, or the top 50. His own blog documents each year the increasingly impressive backgrounds of entering professors at all strata of legal education. And yet, no matter how accomplished or promising they are, they know that some set of gatekeepers will judge them on little more than the school displayed on their nametag at the next AALS convention.³⁶ The online age offers these "smart and motivated"³⁷ scholars a variety of methods for routing around

century that law students be required to have completed two years of college as "a beneficent measure for reducing hereafter the spawning mass of promiscuous semi-intelligence which now enters the bar." *Id.* at 61 n.38 (quoting John H. Wigmore, *Should the Standard of Admission to the Bar Be Based on Two Years or More of College-Grade Education? It Should*, 4 AM. L. SCH. REV. 30, 31 (1915)).

³³ RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 194, 196 (1999). For examples of such laments, see, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

³⁴ See POSNER, *supra* note 33, at 196–97.

³⁵ To be clear, I am not suggesting that any of the scholars who inhabit the "elitism" side of the elitism-egalitarianism divide I am describing in legal scholarship harbor any improper or exclusionary motives. I am only suggesting that certain aspects of the recurring conflict between elitism and egalitarianism are evident in both the decartelization of the legal profession and the current discussion of the online age of legal scholarship.

³⁶ Everyone in legal education is familiar with this phenomenon, in which, on meeting someone at the AALS convention, one watches his or her eyes slide toward the school name on one's nametag—and, as often as not, to some entirely different part of the room immediately thereafter. We are all aware of it because, often enough, our own eyes are completing a similar circuit. See generally Eric L. Muller, *What's in a Name(Tag)?*, 52 J. LEGAL EDUC. 314 (2002).

³⁷ Solum, *supra* note 9, at 865.

the more status-obsessed members of the palace guard: distributing their work on SSRN, hawking their ideas on blogs, taking advantage of online law review supplements to enjoy at least a residue of the prestige associated with their parent reviews (“My last piece was published in the *Harvard Law Review . . . Forum*”), and so on. Many of the charges that were leveled against the new entrants to the legal profession in 1960 could be raised against them today. They want to be heard, they want their ideas to circulate, and they do not pretend otherwise. They cannot affect a studied indifference to such matters as self-promotion, as could a junior faculty member at an elite school, who knows that his or her institutional affiliations alone will guarantee an audience and ample writing and speaking invitations. Their model may seem to be Sammy Glick as much as Erwin Griswold.³⁸

These up-and-comers of the online age *are* more vulgar than the more elite members of the legal academy, by many measures—although the elites are certainly just as ambitious. But *if* their work is good, and if they succeed in finding an audience for it, I cannot help but think that is a good thing. If their manner of doing so seems vulgar to some, then I cast my vote with the vulgarians. If they are an “offense to the fastidious,” then so much the worse for the fastidious.

Now, some caveats must be added to this conclusion. First, as I’ve said, egalitarianism is not always a good thing, and elitism is not always a bad thing. Were it otherwise, Getman’s work would not be nearly so compelling, for he recognizes that both elitism and egalitarianism are important motivating factors in the academy, that both have their role to play, and that it is the good scholar’s lot to remain suspended between them, pulled in both directions. One may properly criticize the elite gatekeepers when their position is founded on little more than status and their role consists of little more than evaluating credentials and guarding against challenges to that status. But that is not the same thing as denying that there are authorities who have *earned* their authority, that there is and can be such a thing as standards (hopefully, but not always, performance-based ones), or that there is such a thing as good and bad scholarship. To the extent that some gatekeepers—professors who are expert in a field, refereed journals, or (even) law review editors—*accurately* certify some work as more trustworthy and meritorious than other work, or negatively stamp a particular work as poor, that function can be a valuable one, helping to economize our limited time and attention by steering us toward the best work and away from the worst.

Thus, I think there is something to be said for the “elitist” views expressed by Professor Leiter. And Leiter is clear that “‘content’ matters

³⁸ See BUDD SCHULBERG, WHAT MAKES SAMMY RUN? (1941).

more than 'credentials,'"³⁹ although I am not sure whether he uses quotes here because he is adopting Solum's terms, or because he wants to cast doubt on them. And yet, I am troubled by his pessimistic view of the online age, and of the value of blogs and bloggers in particular.

I do not mean to unduly extol bloggers. Nor do I mean to unearth a subtext to Leiter's words if there is none there. But I find it hard to read his comments without sensing a subterranean mood of credentialism. It emerges, for instance, from the elision between drawing a distinction between good and bad *scholarship* (or, as he puts it, "half-baked tripe"),⁴⁰ and his repeated focus on, and faith in, undefined "leading scholars,"⁴¹ or "first-rate scholars" with "pre-Internet *gravitas*,"⁴² as opposed to the ranks of "second-rate scholar[s]."⁴³ I do not mean to deny that there is a difference. But it is all too easy to move from a qualitative assumption about the work of various scholars, which is difficult and time-consuming, to a convenient but simplistic scrutiny of the names and places on their resumes.

My sense that a crude, rather than sensitive and qualitative, elitism might linger somewhere beneath the surface is reinforced by my doubts about the primary concern Leiter raises—that blogging is especially subject to "availability cascades,"⁴⁴ in which Internet buzz about scholarship will elevate mediocre work over better and more careful work. My sense is that this concern, although not unfounded, is overstated.

In thinking about this concern, we must consider the relevant audiences for legal scholarship, whether traditional scholarship or its Internet-driven variants. One audience is that of journalists, non-academic lawyers, laypeople, and so on. I doubt their interest will affect legal *scholarship* one way or the other; and while it may well be true that their attention will focus at times on second-rate scholarship that makes its way online, it will also sometimes fasten on first-rate ideas. In any event, how are we better off if these individuals are simply deprived of access to information altogether? Are their only options either to voice prejudices uninformed by *any* information, of greater or lesser quality, or to wait patiently for the elites to inform them what to think? A second audience consists of second-rate scholars; but I should think that Leiter is not interested in what they think in any event.

The third audience consists of "leading" or "first-rate" scholars. All the online age has done is give them increasing access to scholarship from a variety of sources and individuals. If they are capable of sorting between

³⁹ Leiter, *supra* note 21, at 56.

⁴⁰ See *id.* at 55.

⁴¹ *Id.*

⁴² *Id.* at 57.

⁴³ *Id.* at 53.

⁴⁴ *Id.* at 54.

good and bad scholarship, then so much the better—they will have more access to both, easier access to first-rate scholarship from unknown scholars and schools, and a cheaper and louder megaphone with which to call attention to the good work. If they are not capable of distinguishing between the two, then we ought to be suspicious of their own elite status. So, in the end, while I think he does offer a useful reminder of the values of elitism, I am not certain that Leiter’s pessimism is strongly warranted. I think Leiter raises some valid concerns, but worry that they may slide easily into a simple concern with maintaining the status of what Solum calls the “right people.”⁴⁵

I am thus left with the view that routing around the gatekeepers, a phenomenon that is greatly facilitated by the online age, is on balance more likely to be a good thing than a bad one. If it appears to be a more vulgar pursuit than we are used to, that perception merely reflects the extent to which the existing gatekeepers, like the white-shoe law firms of old, have managed to launder or conceal the same ambitions and impulses while maintaining guild-like privileges against those outside the gates.

But things are more complicated than that. For, as Balkin observes, routing around is not the only observable phenomenon of the online age. It also commonly features “glomming on”—the tendency of online media to “depend on [traditional gatekeepers] rather than displace them. The old gatekeepers don’t go away entirely, and new ones arise that partially supplement and partially compete with them.”⁴⁶ Thus, the online age is likely both to reproduce old methods of signaling quality—one will care more about the online presence of the *Harvard Law Review* than the online *Podunk Law Review*—and to come up with new ones, such as ranking by SSRN downloads (which will, in turn, generally favor papers uploaded by scholars who have already been certified by the old gatekeepers).

Similarly, the old gatekeepers will find ways of glomming onto and co-opting the new media. The *Harvard Law Review* will bring its status-reinforcing type font to the online *Harvard Law Review Forum*, and Harvard Law professors will upload their papers to SSRN, and take their high download rates as further evidence that the elite certification process is working as it should – or take their low downloads as evidence that the new system is arbitrary and bankrupt. So the new methods of evaluating one’s work and one’s influence in the online age will “gradually be layered on top of existing methods of assessing quality and generating scholarly reputations; and they will, over time, merge with and influence them.”⁴⁷ Thus, the online age will disturb and in some cases alter the *ancien regime*, but as with most revolutions, a certain quality of “meet the new boss” will

⁴⁵ Solum, *supra* note 9, at 865.

⁴⁶ Balkin, *supra* note 14, at 28.

⁴⁷ *Id.* at 29.

sneak in.⁴⁸ Certainly things will change in terms of the format of legal scholarship⁴⁹ and its availability,⁵⁰ and some new scholars may succeed in routing around the old gatekeepers, thus achieving something like Getman's dream of egalitarianism. But we will continue to have gatekeepers in one form or another, certainly including the old gatekeepers; after all, whatever their flaws, they do serve at their best to separate the wheat from the chaff, as Leiter observes. So there will be room for elitism in the online age too. The tension continues, as it must, in this age as any other.

And this is where a measure of candor is called for. Like many young scholars who have established a presence on the Internet, I am a champion of the new regime. I welcome the egalitarian impulse of the online age, I use it to advance my own ideas and seek new and wider platforms for my work, and I cheer on those who route around the staid old traditional elites. But I am also eager to receive status in the old regime. And I'm not only talking about myself. Many legal bloggers, while stressing the contributions that the online age makes to the egalitarian side of the eternal scholarly divide, have also used it to "trade up"—to seek the approbation and certification of elite law schools and elite law reviews. Perhaps we deserve that approbation, and maybe we would have gotten it even if we had stayed offline. But it is clear that we are self-consciously working the new system to gain the prerogatives of the old. We are proving that nametags don't matter, or shouldn't—while working the online age for the chance at a better nametag.

There is a link here, I think, although perhaps not an entirely evident one, to a phenomenon that I believe is related to the rise of the ostensibly egalitarian online age: a dramatic increase in the interest we pay to rankings in the legal academy.⁵¹ Our rankings fixation takes the form of critiques of *U.S. News*, defenses of *U.S. News*, alternatives to it, citation studies, law review rankings and critiques of those rankings, SSRN rankings and critiques of those rankings, and so on.

I do not mean to demean these studies.⁵² Given the last paragraph, I could hardly get away with doing so if I wanted to. Leaving aside the

⁴⁸ THE WHO, *Won't Get Fooled Again*, on WHO'S NEXT (Polydor 1971).

⁴⁹ See generally Solum, *supra* note 9.

⁵⁰ See generally Hunter, *supra* note 18.

⁵¹ For a superb example, see Symposium, *Dead Poets and Academic Progenitors: The Next Generation of Law School Rankings*, 81 IND. L.J. 1 (2006). In a recent paper, Pierre Schlag refers to law schools' "obsessive fixation on rankings—rankings of law schools, rankings of law reviews, rankings of legal scholars, rankings of citation and impact, and soon to come, by way of the web and pomo, rankings of rankings." Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)* 32 (Univ. of Colo. Law Sch. Legal Studies Research Paper Series, Paper No. 07-11, Apr. 4, 2007), available at <http://ssrn.com/abstract=976078>.

⁵² Indeed, this very collection of papers contains some valuable thoughts on the subject of law reviews and law school rankings from one of my esteemed colleagues. See Alfred L. Brophy, *Mrs.*

question of whether and why we would want to reform the rankings, thinking about impact, citations, and so on is a perfectly valid and important aspect of our study, not so much of law, but of the legal academy as an institution. But it is worth asking *why* we are currently so intent on the study of rankings, at the very moment at which the online age, by providing an infinite content universe⁵³ and multiple opportunities for routing around, has weakened the hold of the old gatekeepers: why, in Pierre Schlag's formulation, we are suffering from such "rank anxiety."⁵⁴

Surely the reason has something to do with the fundamental insecurity of the legal academy.⁵⁵ Certainly Brian Leiter is right to say that the legal academy "often lacks expert mediators,"⁵⁶ and we all know it. Such insecurity is entirely natural in a field of scholarship that is so parasitic on insights from other disciplines in which most law professors are not thoroughly grounded, whose own internal methods often reduce to little more than "case-law journalism,"⁵⁷ and that either does not contain a canonical body of literature,⁵⁸ or in any event certainly does not require its resident scholars to master it through a doctoral process or any other mechanism.⁵⁹ It is even more natural if, as Schlag argues, it is safer to worry more about "how well or how badly we are doing [legal scholarship] relative to everybody else" than about whether the entire enterprise of legal scholarship is itself problematic.⁶⁰

Finally, this fixation with rankings is still more natural if, as we might frankly acknowledge, the legal academy tends to be populated by individuals who are skilled, first and foremost, at jumping through hoops. As Charles Lawrence wrote some time ago, "[l]aw school faculties recruit and hire those candidates who have followed their own footsteps on a prescribed path of high LSAT scores, superior grades at prestigious law schools, editorships on prestigious law reviews, and prestigious judicial

Lincoln's Lawyer's Cat: The Future of Legal Scholarship, 39 CONN. L. REV. CONNTEMPLATIONS 11 (2007), <http://conntemplations.org/comments.php?y=07&m=05&entry=entry070505-120000>.

⁵³ See Hunter, *supra* note 18.

⁵⁴ Schlag, *supra* note 51.

⁵⁵ See generally *id.*

⁵⁶ Leiter, *supra* note 21, at 54. I am not sure I agree with the somewhat narrow reasons why he suggests this is so. In effect, Leiter blames this on law students and the media. They are excellent targets, but I tend to assume that the fault lies in ourselves.

⁵⁷ Schlag again. See Schlag, *supra* note 51, at 27.

⁵⁸ Although efforts have been made to arrive at one, as well as to study canonicity in American legal scholarship more generally. See LEGAL CANONS (Jack Balkin & Sanford Levinson eds., 2000); THE CANON OF AMERICAN LEGAL THOUGHT (David Kennedy & William W. Fisher eds., 2006).

⁵⁹ David Lodge's academic comedy CHANGING PLACES contains a parlor game played by English professors, called "Humiliation," in which the object of the game is to name a literary classic that one has not read, with the winner being the person who displays the most embarrassing ignorance. One academic wins the game, and loses his chances at professional advancement, when he admits he has not read *Hamlet*. See DAVID LODGE, CHANGING PLACES: A TALE OF TWO CAMPUSES 135-36 (1975). This is a game that law professors would be well advised not to play.

⁶⁰ Schlag, *supra* note 51, at 34.

clerkships.”⁶¹ We are used to being evaluated and praised, and we have never lost the taste for it. Hence the epigraph to this paper. The legal academy is, truly, a collection of JD-carrying Lisa Simpsons. We are never happier than when a gold star is being put on our papers: by our local colleagues, by professors at elite institutions, and even (or especially) by student law review editors at the “right” journals.⁶² It is natural, then, that we should turn our attention to building newer and more elaborate evaluation systems for ourselves—especially in an online age that, as I have suggested, disrupts the old evaluation systems.

Another useful way of thinking about both the online age and our present rank anxiety—two highly related phenomena, as I hope I have shown—comes from the notion of the “economy of prestige,” which has been used by James English to describe the culture of prize-giving.⁶³ English argues, in short, that the very act of criticizing prizes—for the biases implicit in selecting them and for the very absurdity of awarding them—“is itself a fundamental and even in many circumstances an obligatory part of the game, a recognizable mode of complicitous participation” in the cultural function of creating prestige as a form of cultural capital.⁶⁴

We might profitably view the struggle between the old and new gatekeepers of the legal academy, and the endless concern with rankings, in this light. By routing around the old gatekeepers, we are in effect signaling our continued fascination with the status they can confer. By glomming onto the online media and the egalitarianism they represent, the old gatekeepers—perhaps including this law review—both co-opt the new media and attempt to retain their traditional gatekeeping status. By critiquing existing forms of ranking (and proposing new ones), we similarly are validating ranking as an activity just as much as we are attempting to undermine the existing forms of ranking. We might thus develop on Balkin by saying that “routing around” and “glomming on” are not two *separate* characteristics: they are, in fact, intimately related aspects of the system of legal scholarship as a form of cultural capital. My embarrassing revelation about my own relationship to the online age, and

⁶¹ Charles R. Lawrence, “Justice” or “Just Us”: Racism and the Role of Ideology, 35 STAN. L. REV. 831, 855 n.88 (1983).

⁶² In fairness, this concern with the markers of status is hardly limited to the legal academy, although, for the reasons I have offered, it might be especially acute in that field. For a discussion of the “widespread concern with status and the measurement of status in our society” and an attempt to relate it to the legal academy’s rankings fixation, see Michael E. Solimine, *Status Seeking and the Allure and Limits of Law School Rankings*, 81 IND. L.J. 299, 306–08 (2006).

⁶³ See generally JAMES F. ENGLISH, *THE ECONOMY OF PRESTIGE: PRIZES, AWARDS, AND THE CIRCULATION OF CULTURAL VALUE* (2005). Michael Madison has already argued for the relevance of English’s work to the world of law reviews, and the newer world of online legal scholarship. See Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige, and Open Access*, 10 LEWIS & CLARK L. REV. 901, 905–07 (2006).

⁶⁴ ENGLISH, *supra* note 63, at 189.

that of many of my online colleagues—that we are both critics of existing forms of prestige and eager supplicants for them—is thus perhaps not as embarrassing as I had feared. The online and offline players are each engaged in the same cultural capital game, and it is the only game in town.

Given this fix, I end with very little by way of prescription.⁶⁵ I remain an optimist about the contribution that the online age of legal scholarship can make to legal scholarship as a whole, and equally optimistic about the value of the online age in breaking down old hierarchies and offering young scholars new means of circulating their ideas outside the usual restrictive fora. But I also must acknowledge that the online age is not so separate from the old gatekeepers as it may want to seem, and that this will be increasingly true as the old gatekeepers find new ways of participating in the online age, or turn SSRN and other creatures of the online age into new means of “processing professional prestige.”⁶⁶ Whether online or off, the legal academy is too insecure, and too concerned with the making and trading of prestige as a cultural good, to stop just because it has found new and better means of distributing the underlying work itself. Prizes there must be. The online age may substantially democratize the process, although even that is uncertain, but it certainly will not eliminate it. To the contrary, it is an increasingly important part of the game. One might hope that we could simply stop playing the game altogether; that we could care only about the underlying work, not where it appears or who has certified it as great, and that we might devote somewhat less time to measuring each other, or to measuring those measures. I might also hope to be the world’s first 200-year-old man. But I am betting neither will happen.

Still, there may be some light at the end of the tunnel.⁶⁷ In his study of the culture of prestige, English writes that the nature and volume of public criticism of prizes has reached such a point that we may finally witness “the weakening of the collective magic by which aesthetics has for so long been levitated, the gradual revelation of a hidden support system extending upward from the ground of social practice to the higher level of art.”⁶⁸ To quote Louis Menand, this “willingness to speak without embarrassment about the significance of prizes and awards, and about the whole economy of cultural production and consumption, may, paradoxically, signal the demise of the prize system.”⁶⁹ Perhaps a similar fate awaits the legal academy. Maybe if we can “speak without embarrassment” about the role of both the old gatekeepers and the new online age in the production of

⁶⁵ Cf. Schlag, *supra* note 51, at 29 (“[W]hen was the last time you saw a law review article end on the note, ‘Oh, my god, we are all so totally fucked’?!”).

⁶⁶ Madison, *supra* note 63, at 913.

⁶⁷ Thus proving Schlag’s point yet again. See *supra* note 65.

⁶⁸ ENGLISH, *supra* note 63, at 245.

⁶⁹ Louis Menand, *All That Glitters: Literature’s Global Economy*, NEW YORKER, Dec. 26, 2005, at 136, available at LEXIS, News Library, NEWYRK File.

prestige, and acknowledge the role of rankings—“good” ones and “bad” ones—in generating the same cultural capital, the whole game will lose some of its luster. Until then, as Getman observed, we will remain caught exquisitely between egalitarianism and elitism, openly championing one and privately craving the other.