



October 28, 2019

Robert Morse
Chief Data Strategist
U.S. News & World Report
1050 Thomas Jefferson St NW, Suite 400
Washington, DC 20007

Dear Mr. Morse:

We write on behalf of the [Society for Empirical Legal Studies](#) (SELS) to express our concern about U.S. News' [plan](#) to create a law school “scholarly impact” ranking based on HeinOnline data. We appreciate your willingness to consider input from the legal academic community, and particularly your May 2, 2019, [statement](#) that “neither the methodology nor the metrics for the proposed new rankings have been finalized.” We were further reassured to read that – contrary to other recent reports – you “do not have any current plans to incorporate scholarly impact rankings . . . in [your] Best Law Schools rankings.” We hope those plans do not change; for the reasons explained below, incorporating the HeinOnline data into *Best Law Schools* would introduce statistical biases that could do serious damage to U.S. legal education.

Although no ranking system is perfect, one strength of the existing ranking approach – as U.S. News officials themselves have argued – is that it provides several accurate metrics for consumers to evaluate for themselves. Unlike other indicators like graduation rate and bar-passage rate, however, HeinOnline’s current citation system does not appear to accurately capture what it represents to. HeinOnline’s metric would [purportedly](#) measure a faculty member’s “scholarly impact.” But the method suffers from a variety of systemic measurement flaws so significant that they undermine its validity as a measure of scholarly impact—and with it, the validity of any metric incorporating it. Making the HeinOnline data part of the *Best Law Schools* ranking would therefore deviate from your longstanding practice of offering readers accurate information.

HeinOnline’s present citation-measurement system has three principal problems: (1) it is biased against interdisciplinary legal scholarship; (2) it omits all book manuscripts and chapters; and (3) it systematically undervalues the academic contributions of junior scholars, which would inhibit law schools from recruiting diverse faculties. We elaborate on each of these problems below and suggest an alternative for measuring scholarly influence.

(1) Bias Against Interdisciplinary Legal Scholarship

First, the HeinOnline citation metrics and scholar rankings significantly misrepresent the true impact of U.S. law faculty scholarship, especially empirical and other interdisciplinary work.

The role of interdisciplinary methods in legal scholarship has grown markedly over the past few decades.¹ Seventeen years ago, Judge Richard Posner wrote in the *Harvard Law Review* that “interdisciplinary



scholarship [already] looms very large, and [(although “saturation” and “diminishing returns” could slow future growth)] if it continues to grow as fast as it has in the last thirty years . . . , it will come eventually to dominate academic law.”ⁱⁱ Today, interdisciplinary approaches form an important component of many law schools’ research programs and student curricula. The trend toward empirical legal research in particular has enriched legal education in the United States, exposing students to a richer, more diverse set of ways to think about the law, and better preparing them for an increasingly data-driven world.ⁱⁱⁱ It is also responsible for a wave of evidence-based legal scholarship, some of which has influenced real policy-making and case outcomes.

These several bodies of research also feature regularly in courts’ decision-making. Federal courts, including the U.S. Supreme Court, now commonly rely on leading journals without “law” or “legal” in the title. Specifically, research addressing legal questions published in leading journals such as the *American Journal of Political Science*,^{iv} *American Sociology Review*,^v *American Political Science Review*,^{vi} *Journal of Financial Economics*,^{vii} and *American Economic Review*,^{viii} among dozens of others, are routinely read by lawyers and judges, and then quoted or cited in their briefs and judicial opinions.

The proposed HeinOnline-based citation-ranking system is a threat to the future of this research. HeinOnline currently omits hundreds of significant venues for interdisciplinary legal scholarship that engage with legal questions, including each of the five leading journals mentioned above. By way of example, a 2008 article by three law professors, “What Matters in Corporate Governance?,” is one of the most influential articles in the history of corporate governance law, having been cited over 3,500 times, including in law reviews and books.^{ix} It is routinely read in U.S. law school courses. But its publication venue, *The Review of Financial Studies*, is missing in the HeinOnline database, thereby stripping its law-faculty authors of professional credit for their substantial impact on legal scholarship.

Beyond this example, we suspect that thousands of other interdisciplinary articles on subjects like financial regulation, law and economics, international law, the psychology of legal decision-making, courts and judging, and legal history feature prominently in law reviews, law school workshops, and law school courses. For methodological reasons, these studies are published less often in student-edited law reviews. But given that law faculties themselves recognize these journals as appropriate and important forums for legal scholarship, they are often given equal weight in law-faculty promotion and tenure evaluations.

Disconcertingly, HeinOnline currently treats all of this important research as non-existent, erasing the contributions of some of the most influential interdisciplinary legal research. Factoring the HeinOnline metric into the *Best Law Schools* scholarly impact rankings would therefore not provide an accurate measure of scholarly impact, which we understand is your goal. Rather, it would punish law schools for hiring and retaining scholars who work in these areas. In essence, incorporating the HeinOnline data would substantially reverse the legal academy’s decades of progress toward interdisciplinary diversity and the resulting benefits for the U.S. legal system.



(2) Omission of Book Manuscripts and Chapters

Relatedly, HeinOnline currently excludes all citations to legal scholars' law-related books and book chapters. No matter how influential their research in reality, the HeinOnline measure therefore gives law scholars who author scholarly legal manuscripts no credit for their contributions.

For instance, one prominent U.S. legal historian has published over half a dozen legal history books and articles that have been collectively cited over 4,500 times by legal historians and others.^x But because these books do not appear (or are not cited) in HeinOnline's selected list of law journals, HeinOnline ignores almost all of that impact, giving that scholar a citation count of under 25. In essence, HeinOnline's limited list of publications treats many of the country's most influential legal scholars as if they had spent their careers idle.

If these metrics were factored into *Best Law Schools*, schools would pay great costs for hiring or retaining legal scholars who publish their legal scholarship largely in books. The result could be long-term damage to venerable legal fields that are book-dominated. HeinOnline's omission of books also threatens the progress that law schools have made (and should continue to make) towards interdisciplinarity, since several areas of the humanities outside law are considered to be "book-based" disciplines, where book-length publications are the *sine qua non* of academic achievement.

(3) Bias Against Junior Scholars and Harm to Diverse Faculties

Finally, HeinOnline considers citations to all past publications, even to publications written several decades ago. Consider two legal scholars: a junior scholar who has been cited highly in the last ten years for a prolific string of recent, innovative work; and a semi-retired professor who has been cited many times mostly for articles written decades ago. Both are undoubtedly a great asset to students, colleagues, and the academic community. Yet the HeinOnline system would likely assign a higher rank to the latter and a lower rank to the former. This is true even if, as has been proposed, less recent citations were de-prioritized or omitted.

Law faculties for many years were mostly closed to women and members of marginalized minority groups. Under a HeinOnline-driven ranking system, law schools would go to great lengths to retain faculty members with long tenures and publication records, even those who have more recently become less productive. This in turn would reduce schools' ability to hire and tenure junior faculty members, who increasingly hail from more diverse demographic backgrounds. Simply put, using HeinOnline is bound to negatively affect these groups and, therefore, to harm faculty diversity nationwide. Furthermore, a large literature suggests that as the demographic diversity of faculties declines, so too does the diversity of law students.

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Skeptics may respond that these three concerns are overblown, and that law schools will not stray far from their own best judgments in making hiring and retention decisions. Recent history suggests otherwise. Soon after the *Best Law Schools* ranking's inception, law schools began to adjust their admissions and personnel



policies with an eye towards their rankings, sometimes to the detriment of legal education.^{xi} For instance, to boost reported first-year LSAT/GPA medians, many schools started admitting fewer J.D. students in order to admit more transfers and non-J.D. students.^{xii} And, among those admitted J.D. students, law schools increasingly prioritized high GPAs, however obtained, thereby de-emphasizing academically rigorous programs and majors where overall grades are lower.

Were HeinOnline's citation metric to become part of *Best Law Schools*, it would likewise shape law schools' faculty hiring and retention decisions. Law schools would increasingly aim to hire or retain scholars based largely on an arbitrary criterion: their HeinOnline citation score. Conversely, schools would feel pressure to devalue those scholars with lower HeinOnline scores, even though it would often mean passing on scholars with greater promise, significant real-world research impact, or special expertise to offer students. This perverse hiring incentive would exist even assuming, as one commentator has [argued](#), the HeinOnline scores generally correlate reasonably well with one other citation measure.

As quantitative social scientists, we are not afraid of being ranked. We understand and appreciate U.S. News' desire to ground its metrics in objective data. But we hope the observations above illustrate why using HeinOnline does not achieve this goal. Existing alternative metrics would serve U.S. News' goal of heightening objectivity and replicability while also addressing most or all of the concerns we've raised above. For instance, Google Scholar's [database](#) of citations includes nearly all academic publications, including books. It can also be tailored in different ways, such as giving more weight to recent publications. While Google Scholar currently contains some attribution errors, so does HeinOnline, and data scientists are already developing ways to clean and harvest more accurate citation data from Google Scholar.

We understand that a primary objective of U.S. News' education rankings enterprise is to serve as the go-to source for information on institutions of higher education (and, of course, to build U.S. News readership). But in order to do that, the underlying information must be valid. In this sense, our two organizations share an important mission: to help prospective students and faculty make informed choices – based on valid, well-constructed data – about their schools and careers.

We would be happy to discuss further how we can work together to accomplish that goal.

Sincerely,

The Society for Empirical Legal Studies Board of Directors



ⁱ See Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 949 (2006) (describing how legal scholarship on evidence has become “decidedly interdisciplinary”); Mathias M. Siems, *The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert*, 7 J. COMMONWEALTH L. & LEGAL EDUC. 5-17 (2009) (observing that while “traditional methods are often regarded as useful but too narrow . . . interdisciplinary research can lead to a more informed and more balanced judgment”).

ⁱⁱ Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1317 (2002).

ⁱⁱⁱ See, e.g., Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1 (2012) (“The new wave of empirical scholarship should lead the way to a better understanding of how, and the conditions under which, international law works, ultimately informing normative projects.”).

^{iv} E.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 464 (2008) (Scalia, J., dissenting) (citing Wendy M. Rahn, *The Role of Partisan Stereotypes in Information Processing About Political Candidates*, 37 AM. J. POL. SCI. 472 (1993), for his conclusion that “all evidence suggests party labels are indeed a central consideration for most voters”); *Shelby Cty., Ala. v. Holder*, 679 F.3d 848, 887 (D.C. Cir. 2012), *rev’d*, 570 U.S. 529 (2013) (Williams, J., dissenting) (citing David Epstein & Sharyn O’Halloran, *Measuring the Electoral and Policy Impact of Majority–Minority Voting Districts*, 43 AM. J. POL. SCI. 367, 390–92 (1999)).

^v E.g., *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 825 (11th Cir. 2004) (crediting Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 166 (2001), for the proposition that “there are no studies of child development based on random, representative samples’ of same-sex households”).

^{vi} E.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (Stevens, J., concurring) (citing Edward R. Tufte, *The Relationship Between Seats and Votes in Two–Party Systems*, 67 AM. POL. SCI. REV. 540, 542–543 (1973); Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 545 (1994); Dennis F. Thompson, *Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States*, 98 AM. POL. SCI. REV. 51, 53 & n. 7 (2004)).

^{vii} E.g., *Fulton Cty. Employees Ret. Sys. v. MGIC Inv. Corp.*, 675 F.3d 1047 (7th Cir. 2012) (Easterbrook, J.) (citing Francis A. Longstaff, *The Subprime Credit Crisis and Contagion in Financial Markets*, 97 J. FIN. ECON. 436 (2010)).

^{viii} E.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (Ginsburg, J., concurring in part) (citing Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 715–16 (2000)); *Bilski v. Kappos*, 561 U.S. 593, 656 (2010) (Stevens, J., concurring) (citing Joseph Farrell & Carl Shapiro, *How Strong Are Weak Patents?* 98 AM. ECON. REV. 1347 (2008)) (“Even if a business method patent is ultimately held invalid, patent holders may be able to use it to threaten litigation and to bully competitors, especially those that cannot bear the costs of a drawn out, fact-intensive patent litigation.”).

^{ix} *What Matters in Corporate Governance?*, Google Scholar (September 1, 2019), https://scholar.google.com/scholar?hl=en&as_sdt=0%2C47&q=What+Matters+in+Corporate+Governance&btnG=.

^x *Samuel Moyn*, Google Scholar (September 1, 2019), <https://scholar.google.com/citations?user=y71CpwYAAAAJ&hl=en&oi=ao>.

^{xi} WENDY NELSON ESPELAND & MICHAEL SAUDER, *ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY* (2016); Donna Young, *How Law School Rankings Change Legal Education*, ACADEME (Am. Ass’n of Univ. Professors), May–June 2017, <https://www.aaup.org/article/how-law-school-rankings-change-legal-education#.XTTVgJNKg6g> (“The [*Engines of Anxiety*] authors found that *U.S. News & World Report* rankings affect marketing strategies, admissions criteria, curriculum, *faculty and staff hiring*, job placement, fundraising, student satisfaction, and alumni giving.” (emphasis added)).

^{xii} ESPELAND & SAUDER, *supra* note xi, at 83–85; see also Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 238 (2006).