

2020

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Recommended Citation

Shontee M. Pant, *Calculating the Gender Gap in Legal Scholarship: An Empirical Study*, 65 St. Louis U. L.J. (2020).

Available at: <https://scholarship.law.slu.edu/lj/vol65/iss1/9>

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CALCULATING THE GENDER GAP IN LEGAL SCHOLARSHIP: AN EMPIRICAL STUDY

ABSTRACT

Women have been attending law school at approximately equal rates as men for decades and began comprising a greater percentage of law school entrants than men in 2016. Yet, men continue to hold a solid majority of leadership positions across the legal field: from seats on judicial benches to podiums in front of law school classrooms. This paper examines one under-evaluated, yet critical gender gap within the legal profession: legal scholarship—specifically legal scholarship published by the flagship law reviews at the top twenty law schools. This article presents original research demonstrating that law reviews might be perpetuating the law professor gender gap because, for the five-year period studied, the law reviews published, on average, twice as many articles with male authors than with female authors.

Based on this evidence, this article highlights points along the article review process that could be subject to implicit biases and suggests ways for those biases to be noticed and minimized. Who gets to speak and whose ideas are heard, matters. Currently men get to speak, and be listened to, more than women in legal scholarship.¹ This article seeks to demonstrate why this should, and how this can, concretely change.

1. Nancy Leong, *Discursive Disparities*, 8 FIU L. REV. 369, 370 (2013) (“Concretely, the [discursive] disparity has negative consequences for women’s lives, careers, and personal well-being. More broadly, the disparity distorts our discourse by conforming that discourse to male perspectives.”).

I. INTRODUCTION

A. *Women in the Law: Rejected to a Majority*

In 1872, the Supreme Court of the United States held in *Bradwell v. Illinois* that it was not a violation of the Fourteenth Amendment to the United States Constitution for a state to deny women law licenses, even if otherwise qualified, thereby precluding them from the practice of law, on the basis of sex.² Undeniably, women have advanced in the legal profession since *Bradwell*.³ Women's progress in the legal field became particularly clear within the last couple years when the law school entering class of 2016 hit a milestone as the first class to have more women than men.⁴ Today, women comprise 51% of the population and 51% of law school students.⁵

Despite the progress women have made in law school attendance rates, law school students today might look at the front of their classrooms and wonder, as undoubtedly decades of law school students before them have wondered:⁶ Where are all the women?⁷ And rightly so.⁸ A 2011 report from the American Bar Association indicates that 74.9% of tenured law school faculty at ABA-

2. *Bradwell v. Illinois*, 83 U.S. 130, 132 (1872).

3. Lauren A. Graber, *Are We There Yet? Progress Toward Gender-Neutral Legal Education*, 33 B.C.J.L. & SOC. JUST. 45, 46 (2013); *Bradwell*, 83 U.S. 130.

4. Elizabeth Olsen, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html> [<https://perma.cc/8BWE-Z8BV>].

5. See Olsen, *supra* note 4; but see Graber, *supra* note 3, at 45 (despite the fact that women attend law school now at slightly higher rates than men, “[j]ustice may be blind, but the nation’s leading law schools have proven to be anything but gender-blind” as women continue to underperform relative to men in law school which can impact their career opportunities).

6. Women and men have been attending law school in nearly identical numbers now for over twenty years. Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 2 (2010).

7. Law students might wonder “where are all the women” in many legal settings, not just in front of the classroom. “[W]omen are grossly underrepresented in leadership roles in the legal profession.” See *id.* at 4.

8. The positive impact of having diverse faculty on diverse student performance has been studied and documented before. Although this specific issue is outside the scope of this paper, having diverse faculty is not just an important concept in the abstract, but has proven to have positive impacts on diverse law school students’ performance. See, e.g., Christopher Birdsall, Seth Gershenson & Raymond Zuniga, *Stereotype Threat, Role Models, and Demographic Mismatch in an Elite Professional School Setting*, IZA-INST. OF LAB. ECON. (Dec. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3210628 (finding the effects of demographic mismatch are particularly impactful for nonwhite female students); see also Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective*, 96 IOWA L. REV. 1549, 1562 (2011) (Dean of U.C. Davis Law School sharing “[d]ifferences of perspective, experience, and knowledge can influence legal scholarship just as they can affect teaching” while advocating for diverse faculty as enhancing the law school education experience).

accredited schools are men and 25.1% are women.⁹ In practical terms, that means a law school student is approximately three times more likely to have a male professor than a female professor.¹⁰

B. Personal Experiences

While serving on the articles team for the *Washington University Law Review* I wondered if, and to what extent, other law reviews considered the many attributes each author they had selected to publish brought to the journal.¹¹ I wanted to know whether there was a gender gap in author publication rates, and if so, given the heavy emphasis on scholarly publications in order to achieve tenure,¹² whether gender gap in publication rates could be playing a role in the gender gap of law school professors I had noticed as a student. These are not simple questions, and I did not anticipate finding singular answers.¹³ For

9. AM. BAR FOUND., AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES (2011); Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 B.Y.U. L. REV. 99, 102 (2009).

10. AM. BAR FOUND., *supra* note 9. The fact that law schools still have tenured faculty positions has undoubtedly slowed the potential turnover in the field of law professors as relatively few tenure-track positions are available each year, particularly in proportion to the pool of qualified applicants.

11. Ann Bartow, *Where Are the Women? Another Post about Gender Disparities at Elite Law Journals*, FEMINIST L. PROFESSORS (April 30, 2009), <http://www.feministlawprofessors.com/2009/04/where-are-the-women-another-post-about-gender-disparities-at-elite-law-journals> [<https://perma.cc/9ANW-BBL9>].

12. See e.g., GEO. WASH. UNIV. LAW SCH., GEORGE WASHINGTON UNIVERSITY LAW SCHOOL FACULTY RULES 6, 17, 25, 31, 33–34 (2018) <https://provost.gwu.edu/sites/g/files/zaxdzs626f/downloads/Bylaws/Law-School-Bylaws.pdf> [<https://perma.cc/Q6NB-Y4EY>] (emphasizing each time the importance of scholarship in hiring and promoting law school faculty to tenure); YALE L. SCH., ENTERING THE LAW TEACHING MARKET (2018–2019), https://law.yale.edu/system/files/area/departments/cdo/document/cdo_law_teaching_public.pdf [<https://perma.cc/FG8P-XDMW>] (emphasizing throughout the need to consider opportunities for scholarship development in evaluating junior faculty and fellowship opportunities).

13. Female professors experience different work demands from students, which result in significantly more work for them and higher expectations than their male counterparts. These increased demands, along with other issues such as gendered student evaluations, can complicate the tenure process for women. Colleen Flaherty, *Dancing Backward in High Heels*, INSIDE HIGHER ED (Jan. 10, 2018), <https://www.insidehighered.com/news/2018/01/10/study-finds-female-professors-experience-more-work-demands-and-special-favor> [<https://perma.cc/NU4Z-E5VH>] (citing Amani El-Alayli, Ashley A. Hansen-Brown & Michelle Ceynar, *Dancing Backwards in High Heels: Female Professors Experience More Work Demands and Special Favor Requests, Particularly from Academically Entitled Students*, 79 SEX ROLES 136–150 (Aug. 2018)); see also KerryAnn O'Meara, Alexandra Kuvaeva, Kudrun Nyunt, Chelsea Waugaman & Rose Jackson, *Asked More Often: Gender Differences in Faculty Workload in Research Universities and the Work Interactions That Shape Them*, 54 AM. ED. RES. J. 1154, 1171 (Dec. 2017). Finally, for a broader discussion from a professor's perspective regarding the challenges of race and gender identity in law school, see Robert S. Change & Adrienne D. Davis, *Making Up Is Hard to Do*:

instance, there are other factors that display both gender-and race-based biases, such as student evaluations, that also play a role in the tenure process.¹⁴ However, given the lack of data regarding gender gaps in legal publication, and the privileged perspective I had into the review process, I was interested in gathering data regarding which authors top law reviews published. I hope that this article will concretely establish what is, likely, commonly known: top law reviews need to make significant progress in order to reach gender equality for the authors they publish.

Race/Gender/Sexual Orientation in the Law School Classroom, 33 HARV. J.L. & GENDER 1, 1 (2010).

14. For authors discussing gender bias in law student evaluations, see Kimberly Jade Norwood, *Gender Bias as the Norm in the Legal Profession: It's Still a [White] Man's Game*, 62 WASH. U. J. L. & POL'Y 25, 29 n.19 (2020) (citing Pamela A. Wilkins, *Law School in A Different Voice: Legal Education As A Work of Mercy*, 63 ST. LOUIS U. L.J. 401, 448–49 (2019) (“[D]espite the strong evidence that standard student evaluations of teaching reflect gender and racial bias, especially in large classes, and despite the weak evidence of any correlation between strong teaching evaluations and student learning, these student evaluations are used in decision making regarding tenure and promotion and in consideration for teaching awards and other awards for faculty excellence. Moreover, they both reflect and shape perceptions of faculty members’ intellectual abilities.”). See also Kathleen Bean, *The Gender Gap in the Law School Classroom—Beyond Survival*, 14 VT. L. REV. 23, 29 (1989); Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 334 (1996); Martha Chamallas, *The Shadow of Professor Kingsfield: Contemporary Dilemmas Facing Women Law Professors*, 11 WM. & MARY J. WOMEN & L. 195, 197 (2005); Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, 31 COLUM. J. GENDER & L. 7, 41 (2015); Joey Sprague & Kelley Massoni, *Student Evaluations and Gendered Expectations: What We Can't Count Can Hurt Us*, 53 SEX ROLES 779, 791 (2005). Student evaluations are not only gender-biased, but also racially biased. For discussions regarding both race and gender biases in student evaluations, see also Therese A. Huston, *Race and Gender Bias in Higher Education: Could Faculty Course Evaluations Impede Further Progress Toward Parity?*, 4 SEATTLE J. FOR SOC. JUSTICE 591, 591–92 (2006); Susan A. Basow & Julie L. Martin, *Bias in Student Evaluations*, in EFFECTIVE EVALUATION OF TEACHING: A GUIDE FOR FACULTY AND ADMINISTRATORS 40, 41 (Mary E. Kite ed., 2012); Landon D. Reid, *The Role of Perceived Race and Gender in the Evaluation of College Teaching on RateMyProfessors.com*, 3 J. DIVERSITY HIGHER EDUC. 137, 138 (2010). For a view questioning the usefulness of student evaluations altogether, compare Richard L. Abel, *Evaluating Evaluations: How Should Law Schools Judge Teaching?*, 40 J. LEGAL EDUC. 407, 422 n.54 and accompanying text. Women of color stand at the intersection of these gender and racial biases. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243 (1993); see also Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371–72 (1991).

C. Timeliness

1. Publication Requirements for Tenureship at Tier I Law Schools Have Increased

The tenure process is notoriously opaque, undoubtedly varies by law school, and is oftentimes unfair.¹⁵ That said, recent shifts in publication norms for tenure make the question of whether there is a gender gap in publication rates particularly timely.¹⁶ Specifically, there has been a shift in the publications requirements for tenureship at Tier I law schools, from two articles to three.¹⁷ If, for instance, there is a publication gap for women, Black people and people of color, or other groups underrepresented in legal academia and in the legal field more generally, then the increased pressure to publish three articles at very good law reviews in order to achieve tenure at a Tier I school might have disparate impacts on groups not being published, and thus any gender gaps in scholarship publication rates are increasingly consequential. Moreover, given that Tier I law schools are increasing publication norms for tenure,¹⁸ it is reasonable to expect that this publication norm will spread to lower-ranked schools, thereby further impacting faculty representativeness throughout all law schools. Other scholars, such as Paula A. Monopoli, have support for the position that the heavy focus on scholarship has hindered women's progress in the legal academy.¹⁹ As this article will demonstrate, because the top twenty law reviews are not publishing men and women at equal rates, so long as scholarship, specifically scholarship published in elite law reviews, is required for tenureship, it is very likely that women will continue to be underrepresented as law professors relative to their representation as law school students.²⁰ Thus, these increases in scholarship

15. Katherine Barnes & Elizabeth Mertz, *Is It Fair? Law Professors' Perceptions of Tenure*, 61 JOURNAL OF LEGAL EDUCATION, 511, 511 (2012), www.jstor.org/stable/42894249.

16. Loftus C. Carson, II, *Employment Opportunities and Conditions for the African-American Legal Professoriate: Perspectives from the Inside*, 19 TEX. J. C.L. & C.R. 1, 18 (2013) (noting the recent shift from two to three articles to be published requirements to become a professor at a Tier I law school).

17. *Id.*

18. *Id.*

19. Paula A. Monopoli, *Gender and the Crisis in Legal Education: Remaking the Academy in Our Image*, 2012 MICH. ST. L. REV. 1745, 1747 (2012) (“incentivizing of scholarship at the expense of pedagogy and the slow progress of women to tenured, full professorships—are linked”); see also McGinley, *supra* note 9, at 142–43 (for a discussion regarding “careerism,” “a practice enacted by men whose masculine identities depend on their breadwinner status and upward mobility. It includes working long hours, placing their work ahead of other considerations, and working on tight deadlines. Men who practice careerism often rely on women’s support in order to be free to work the schedules they work.” Increased institutional scholarship expectations negatively impact women, partially because of the gendered ideas behind “careerism.”).

20. See Monopoli, *supra* note 19 and accompanying text; Olsen, *supra* note 4.

expectations for tenure will very likely hinder the progress of underrepresented minorities onto law school faculties.²¹

2. Recent Litigation Challenging Law Reviews' Articles Selection Processes

Recent litigation regarding law reviews' articles selection processes also makes this study particularly timely. In October 2018, Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) filed a pair of joint lawsuits against Harvard Law Review and New York University (NYU) Law Review.²² The lawsuits challenge Harvard and NYU law reviews' methods of considering diversity statements for a very small number of seats as part of the admittance processes for students onto their respective law reviews, as well as the law reviews' practices of asking authors for their demographic information when the authors submit articles for review for potential publication. FASORP alleges white male authors have been denied opportunities to publish as a result of these law reviews considering race, gender, and other diversifying factors.²³ Counsel for FASORP vowed to file suit against other law reviews as well, citing the clarity of Harvard and NYU Law Reviews' policies as the reason why FASORP sued those two journals first.²⁴

The United States District Court for the Southern District of New York and the United States District Court for the District of Massachusetts recently dismissed FASORP's actions against both NYU Law Review and Harvard Law Review, respectively.²⁵ As of late spring 2020, FASORP filed a notice of appeal for its claim against NYU Law Review,²⁶ and, based on the docket, the case appears to be ongoing.

The law has not directly addressed whether law reviews can consider the demographics of underrepresented groups when admitting students onto the

21. See Carson, *supra* note 16 and accompanying text.

22. Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) v. Harvard Law Review, et. al. No. 1:18-cv-12105 (D. Mass. filed Oct. 6, 2018); Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) v. New York University Law Review, No. 1:18-cv-9184 (S.D.N.Y. filed Oct. 7, 2018).

23. *Id.*

24. Lee Harris, *UChicago Law Grad Represents Suits Against Harvard, NYU Law Reviews Alleging Bias Against White Men*, CHICAGO MAROON (Jan. 14, 2019), <https://www.chicagomaroon.com/article/2019/1/15/uchicago-law-grad-sues-harvard-nyu-law-reviews-all/> [https://perma.cc/DG4G-C4VA].

25. Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) v. New York University Law Review, No. 18 Civ. 9184-ER, slip op. at 8–15 (S.D.N.Y. Mar. 31, 2020); Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) v. Harvard Law Review, No. 18-12105-LTS, slip op. at 20 (D. Mass. Aug. 8, 2019).

26. Notice of Civil Appeal, *Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) v. New York University Law Review, et. al.* (2020) (No. 20–01508).

journal or when selecting scholarship for publication.²⁷ Moreover, neither lawsuit against NYU or Harvard provides insight into this particular issue because, at the current stages in the litigation, the district courts dismissed both cases on standing grounds or because of failures to state claims.²⁸ In *Grutter v. Bollinger*, the Supreme Court of the United States upheld affirmative action policies at the University of Michigan Law School,²⁹ emphasizing that a racially diverse student body positively contributes to the education of all students in law school.³⁰ The logic of *Grutter*³¹ can likely be extended to the law review membership and review processes.³² Having a diverse law review that is able to adeptly select more diverse, more nuanced scholarship, will further enhance the education of students on the journal. Although the future of *Grutter* remains uncertain,³³ the diversity practices at Harvard, NYU, and other law reviews with similar policies are defensibly within the *Grutter* holding.³⁴

3. *U.S. News & World Report* Proposed Scholarly Impact Rankings Increase the Importance of Legal Scholarship

Finally, potential updates in law review scholarship rankings make an empirical study of the gender gap in legal scholarship imminently important. In

27. Law schools at every level need to do more to support students of color. See Erin Thompson, *Law Schools Are Failing Students of Color*, THE NATION (June 5, 2018), <https://www.thenation.com/article/law-schools-failing-students-color/> [<https://perma.cc/W4NT-KDJ4>]. Changing the law review admission process to enable more students of color to be on the journal would be one step that would enable law schools to better serve these students.

28. *Harvard Law Review*, No. 18-12105-LTS, slip op. at 20; *New York University Law Review*, No. 18-civ-9184-ER, slip op. at 8–15.

29. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

30. Johnson, *supra* note 8, at 1556.

31. *Grutter*, 539 U.S. at 345.

32. Aidan F. Ryan, *Texas Group Sues Harvard Law Review for Using ‘Race and Sex’ to Select Members*, CRIMSON (Oct. 9, 2018), <https://www.thecrimson.com/article/2018/10/9/law-review-FASORP-lawsuit/> [<https://perma.cc/U6VX-D2PZ>] (A former NYU Law Review member spoke regarding the affirmative action policies on the NYU Law Review: “‘We were looking for diversity— race, gender, other background experiences all played into that—but it was done perfectly consistent with the Grutter plan,’ Harpalani said. ‘So that’s how NYU Law Review worked.’”).

33. The future of *Grutter* has been a topic of active discussion within scholarly publications. See Johnson, *supra* note 8, at n.26 (citing Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201 (2006); Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577 (2009). Some have sharply criticized the *Grutter* decision. See, e.g., Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705 (2008); see also Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633 (2005)). This uncertainty is, no doubt, due in part to Chief Justice John Roberts’s seeming opposition to affirmative action, including his often-discussed quote: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

34. *Grutter*, 539 U.S. at 345.

February 2019, *U.S. News & World Report* announced that the publication is considering ranking law schools by scholarly impact.³⁵ Although this scholarship ranking would be separate from the oft-cited law school rankings,³⁶ ranking law schools by scholarly impact could impact which articles law schools decide to publish, with potentially significant negative consequences. In particular, this proposed scholarly impact ranking could exacerbate “home journal” biases.³⁷ Because there are already significant opportunities for bias present within the review process,³⁸ it is important that law reviews critically evaluate and address potential points of implicit bias in the article review process as they currently stand, before any of the new rankings are released and potentially further exacerbate pre-existing biases.

II. RESEARCH QUESTIONS PRESENTED

(1) Are law reviews publishing male and female authors at equal rates? (2) If no, why not?³⁹ (3) Within the framework of the articles review process, are there points in the articles selection process that could be subject to implicit bias? (4) Finally, if there are points in the articles selection process that could be subject to implicit bias, what changes can be made to reduce the potential impacts of any biases in the review process?

35. Robert Morse, *U.S. News Considers Evaluating Law School Scholarly Impact*, U.S. NEWS (Apr. 19, 2019, 11:36 AM), <https://www.usnews.com/education/blogs/college-rankings-blog/articles/2019-02-13/us-news-considers-evaluating-law-school-scholarly-impact>. Judging by the tone of this published letter from U.S. News, law school deans and professors expressed significant concerns regarding this proposal. Robert Morse, *U.S. News Responds to the Law School Community*, U.S. NEWS (June 22, 2020, 9:36 AM), <https://www.usnews.com/education/blogs/college-rankings-blog/articles/2019-05-02/us-news-responds-to-the-law-school-community>. See also Karen Sloan, *Changes to US News Law School Rankings Met with Skepticism*, LAW.COM (June 22, 2020, 9:40 AM), <https://www.law.com/2020/01/08/changes-to-u-s-news-law-school-rankings-met-with-skepticism/>.

36. Staci Zaretsky, *The 2019 U.S. News Law School Rankings Leak: The Top 100*, ABOVE THE LAW (Mar 13, 2018, 9:05 PM), <https://abovethelaw.com/2018/03/the-2019-u-s-news-law-school-rankings-leak-the-top-100/>.

37. 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, 404 (2010) (discussing home school privilege).

38. See *infra* Section V.

39. It would be particularly helpful to have author demographic data for all manuscripts submitted to law reviews and expanded demographic data for authors of articles published. Unfortunately, that data is particularly difficult to acquire for all journals. This Article suggests that journals track that data in order to see which authors are being represented at each stage of the review process. See discussion *infra* Section VI proposing ways to address implicit biases throughout the law review articles selection process.

III. METHODOLOGY

A. *Sample Size*⁴⁰

The dataset presented is comprised of law review volumes from the 2013–14, 2014–15, 2015–16, 2016–17, and 2017–18 journal cycles for each of the flagship law reviews for the top twenty schools.⁴¹ I reviewed over one hundred law review volumes, including the 2,074 authors published within those volumes in total.

B. *Articles & Rankings*

In order to address whether male and female authors are being published at equal rates, I coded the gender of each author who published a piece within as an “Article” in the flagship law reviews of the top twenty law schools within the five-year period studied.⁴² If an article had more than one author, I coded the gender of each author individually because the alternative would create a system in which articles had a certain percentage authorship by gender, e.g. 66% female and 33% male in an article co-authored by one man and two women. Such a system would be both confusing and unduly complicated for no analytically beneficial reason. Additionally, each author of an article, whether as a sole author or as a co-author, can list the article on their resume and thereby benefit professionally from the publication. The professional impacts from publication tie into the potential impacts of publication rates on tenure opportunities by gender—the question of ultimate concern. I used the flagship law reviews of the top twenty law schools instead of the other most likely contender,⁴³ the top twenty law reviews as ranked by the Washington & Lee rankings,⁴⁴ because professors surveyed find the law school rankings to be a better indicator of journal quality than the Washington & Lee rankings system.⁴⁵

40. Complete datasets are available upon request.

41. Zaretsky, *supra* note 36.

42. *Id.* In order to determine which articles were published, I examined PDFs of each issue of each volume of the law reviews considered either as listed on each respective law review’s publication site or, if the site was not easily laid out, then I would search and find the full volume on HeinOnline, <https://home.heinonline.org/> [<https://perma.cc/73J9-W728>]. Only “Articles” were reviewed as opposed to Commentaries, Book Reviews, or other pieces because Articles are frequently considered to be the most prestigious type of publication within a law review, and thereby the most beneficial, professionally, for authors.

43. *Id.*

44. *W&L Journal Rankings*, WASHINGTON & LEE SCHOOL OF LAW (2019), <https://managementtools4.wlu.edu/LawJournals/Default.aspx> [<https://perma.cc/EVG6-VVJW>].

45. Michael D. Cicchini, *Law Review Publishing: Thoughts on Mass Submissions, Expedited Review, and Potential Reform*, 16 U. N.H. L. REV. 147, 151 (2017) (indicating the majority view of law professors is to preference using the *U.S. News & World Report* rankings to determine their preference of which journals to publish with as opposed to relying on the Washington & Lee rankings system). As an example, for those unfamiliar with law review rankings, University of

2019 USNWR Ranking ⁴⁶	2019 W&L Ranking ⁴⁷	School
1	1	Yale University
2	3	Stanford University
3	2	Harvard University
4	10	University of Chicago
5	4	Columbia University
6	11	New York University (NYU)
7	5	University of Pennsylvania
8	16	University of Michigan – Ann Arbor
9	7	University of California – Berkeley
9	17	University of Virginia
11	25	Northwestern University
11	18	Duke University
13	24	Cornell University
14	6	Georgetown University
15	15	University of Texas – Austin
16	13	University of California – Los Angeles
17	20	Vanderbilt University
18	27	Washington University in St. Louis
19	28	University of Southern California (Gould)
20	14	University of Minnesota

Southern California is ranked eighteenth by U.S. News & World Report but ranked forty-first on the Washington & Lee journal rankings system. Under this presumption, authors who are most concerned with publishing with the highest ranked law review would prefer to publish with Washington University than, for example, Boston College, which is ranked twenty-seventh by U.S. News & World Report but has the twenty-fourth highest ranked journal according to Washington & Lee.

46. Evan Jones, *New 2019 USNews Law School Rankings*, LAWSCHOOLI (Mar. 26, 2018), <https://lawschooli.com/2019-law-school-rankings/> [https://perma.cc/T9BF-Y7CM]; Mike Spivey, *2019 USNWR Rankings (2018 Release) Are Here! (Now updated #1-#144)*, Spivey Consulting (Mar. 18, 2018), <https://blog.spiveyconsulting.com/2019-usnwr-rankings/> [https://perma.cc/NVZ2-UFQY].

47. There are some schools “missing” from the W&L rankings that are present in the USNWR Rankings. This is because the USNWR rankings and the W&L rankings do not correlate perfectly; not every school ranked in the top twenty by USNWR has its respective flagship law review ranked in the top twenty by W&L. *W&L Journal Rankings*, *supra* note 44.

C. Masthead Collection Process

In order to determine who was on the articles team and who was the Editor-in-Chief or President of the law review, I examined the mastheads available at the beginning of each law review journal volume.

D. Determining Gender

In order to determine the gender of the authors and editors, I searched for each author and editor on Google. I focused on finding professional biographies for all individuals through their respective employers' websites, which were almost always law schools or law firms. Then, I would code the individual as female if feminine pronouns (she/her) were used to describe the individual within their professional institutional biography, or male if masculine pronouns were used (he/him). For the individuals for whom I was unable to locate a professional institutional biography, I would search for media coverage of the individual that used feminine or masculine pronouns as part of the article. Finally, if the first two attempts failed, I would locate the individual's LinkedIn profile by searching their name in combination with their law school alma mater and would determine their gender based on their LinkedIn photo. All authors and editors coded for gender for purposes of this study were found online through one of the above three methods.

E. Methodology Limitations

Because the journals do not independently track and publish the gender of either authors or editors,⁴⁸ in order to proceed with the study I needed to assume that the institutions or media organizations writing regarding the individual's gender identity were correct.⁴⁹

48. To my knowledge, journals neither independently track nor publish any demographic information about their membership members and very few track any demographic information for authors. I argue that journals should track both and other scholars have taken similar positions. See *infra* notes 122–123 and accompanying text.

49. I sincerely hope that I represented author and editor gender identity correctly for reasons beyond data accuracy. I assumed the editor names on the masthead and the author names next to their scholarship were the individuals' preferred names. As there have been at least one transgender and/or gender nonconforming student at Yale in each year for the past couple years, it is possible I misidentified at least one student if that student was a law review editor. In order to proceed with the study, I made the assumption that students identified as the gender most readily identifiable to a stranger if they were identified by their LinkedIn profile, as opposed to an institutional biography. Although Yale is only one school of the twenty listed here, it is possible that other students at other schools identify as a gender that is not the gender most readily apparent to a stranger or that a student or author identifies as a nonbinary gender. *Trans at YLS: A Guide for Trans Students & Allies*, YALE L. SCH. (2015), https://law.yale.edu/sites/default/files/area/department/studentaffairs/document/trans_at_yls-2015.pdf [<https://perma.cc/H46V-K8JA>].

IV. ARE THE TOP TWENTY LAW SCHOOLS' LAW REVIEWS PUBLISHING MALE AND FEMALE AUTHORS AT EQUAL RATES?

A. *Prior Literature*

Although some of the particular challenges of becoming a professor as a woman,⁵⁰ as a person of color,⁵¹ or both,⁵² have been discussed in the literature, there is limited empirical data on the gender disparity of legal scholarship published by top law reviews.⁵³ The last empirical study conducted on gender disparity in elite law reviews was in 2010, by Minna J. Kotkin.⁵⁴ Kotkin's study of gender disparity and privilege in the top ten law reviews found that "there is a significant gender disparity in publication at all of these journals, with some variation as to degree."⁵⁵ The findings presented in Kotkin's study also indicate that a "significant gender disparity" remains in all of these journals.⁵⁶ However, there is room for optimism. Kotkin reports that female authors constituted an average of 20.4%⁵⁷ of authors published by top law reviews from 2006–08,⁵⁸ but the findings presented in this paper indicate that in the five journal cycles studied, from 2013–18, the average percentage of female authors published was 31.56%, over a 50% increase from Kotkin's 2010 findings and just over a 10% increase on a 100-point scale.⁵⁹

Scholars have previously examined disparities of publication rates of underrepresented minorities within the legal field, including gender disparities

50. Bean, *supra* note 14, at 32; Chamallas, *supra* note 14, at 199, 205–06; Farley, *supra* note 14, at 333–34, 339.

51. Carson, *supra* note 16, at 12–13.

52. Meera E. Deo, JD, PhD, *Trajectory of A Law Professor*, 20 MICH. J. RACE & L. 441, 441 (2014) (providing "evidence to support the thesis that ongoing changes in legal education will likely continue to create barriers both to entry and advancement for women of color law faculty members and those who aspire to join legal academia"); *see also* Meera E. Deo, JD, PhD, *Intersectional Barriers to Tenure*, 51 U.C. DAVIS L. REV. 997, 1024 (2018) (discussing specific limitations women of color face to publishing scholarship because "the type of scholarship that many women of color law faculty produce is sometimes undervalued at their institution and by their colleagues, creating additional complications in the tenure and promotion processes").

53. Kotkin, *supra* note 37, at 404.

54. *Id.*

55. *Id.* at 386.

56. *Id.*

57. *Id.* at 387.

58. Important distinguishing factors between the study conducted here and Kotkin's study are that Kotkin counted all work published by authors which were non-symposium pieces (including pieces such as essays and book reviews) and Kotkin's study was over a three-year period for the top-ten law reviews. In contrast, this study only evaluated articles authors' and surveyed the top twenty law schools' flagship journals, for reasons discussed more fully in the methodology portion of this paper. *See supra* Section III for expanded discussion of methodology used and reasoning behind the methodology.

59. *See discussion infra* Section IV.b.

for authors of student notes,⁶⁰ and gender disparities in author citation rates.⁶¹ Although there is limited empirical work specifically studying the gender gap in law review publications, scholars have previously discussed the gender gap in scholarly publications in other fields. For instance, the gender disparity within scholarship in political science,⁶² social work,⁶³ science,⁶⁴ psychology,⁶⁵ and other academic fields has been studied.⁶⁶ One broader issue of this scholarly gap across academic fields is that men are able to write about, and consequently impact, what is discussed in scholarly fields more than women because their scholarship is getting more attention on the whole by being published more.⁶⁷

B. Findings: Top Law Reviews Publish, On Average, Nearly Twice as Many Men as Women

Flagship law reviews for the top twenty schools did not publish men and women at equal rates during the 2013–14, 2014–15, 2015–16, 2016–17, and 2017–18 journal cycle years.⁶⁸ The journals published 2,074 articles authors in total and of those, 1,414 (68.17%) were men and 660 (31.82%) were women. Thus, over the five-year period, it was over twice as likely that the journal would publish a male author as opposed to a female author.

60. Jennifer C. Mullins & Nancy Leong, *The Persistent Gender Disparity in Student Note Publication*, 23 YALE J.L. & FEMINISM 385, 385 (2011).

61. Christopher A. Cotropia & Lee Petherbridge, *Gender Disparity in Law Review Citation Rates*, 59 WM. & MARY L. REV. 771, 771 (2018).

62. Heather K. Evans & Erik P. Bucy, *The Representation of Women in Publication: An Analysis of Political Communication and the International Journal of Press/Politics*, 42 PS: POL. SCI. & POL. 295, 295 (2010).

63. Allen Rubin and David M. Powell, *Gender and Publication Rates: A Reassessment with Population Data*, 32 J. NAT'L ASS'N SOC. WORKERS 317, 317 (1987).

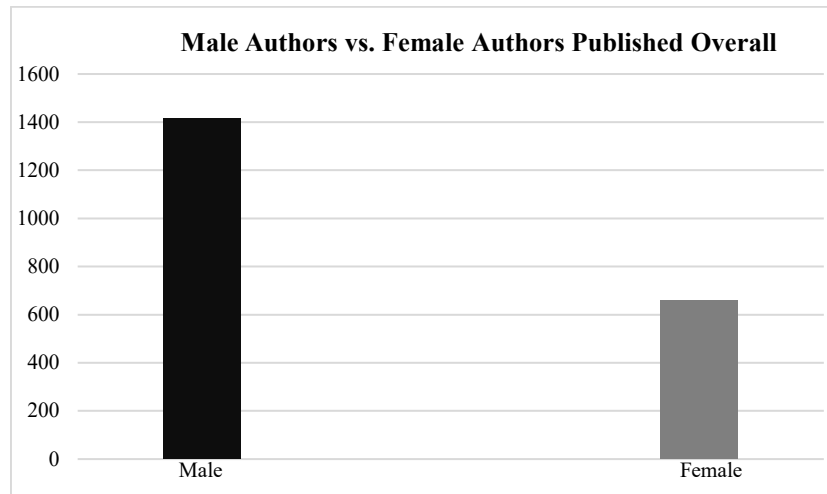
64. Gerhard Sonnert & Gerald Holton, *Career Patterns of Women and Men in the Sciences*, 84 AM. SCIENTIST 63, 63 (1996).

65. L.S. Fidell, *Empirical Verification of Sex Discrimination in Hiring Practices in Psychology*, 25 AM. PSYCHOL. 1094, 1094 (1970).

66. Although not all studies are able to point to definitive data, the importance of interpreting “null” findings has also been discussed within the literature. Sven Kepes, George C. Banks & In-Sue Oh, *Avoiding Bias in Publication Bias Research: The Value of “Null” Findings*, 29 J. BUS. & PSYCHOL. 183, 183 (2014).

67. Leong, *supra* note 1, at 370.

68. See table titled “Male Authors vs. Female Authors Published Overall” *infra* Section IV.b.



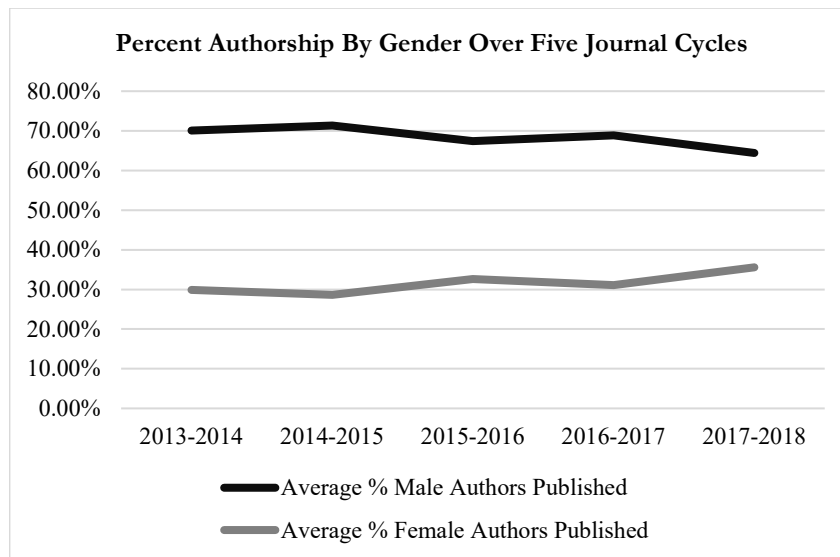
Top law reviews have significant potential to impact academic careers. Simply put, if top law reviews do not publish women at equal rates to men, they also certainly preclude women from achieving tenure at equal rates to men.⁶⁹ This conclusion can reasonably be extended across groups of underrepresented minorities in the legal community.⁷⁰

However, law reviews did make progress within the data period studied in terms of the percentage of female authors published. From the 2013–14 journal publication cycle to the 2017–18 publication cycle, law reviews published approximately 5% more female authors, from below an average of 30% in the 2013–14 journal cycles to an average of 35.58% published in the 2017–18 journal cycle.⁷¹

69. See *supra* notes 11, 12, 16 and accompanying text.

70. *Id.*

71. See table titled “Percent Authorship by Gender Over Five Journal Cycles” *infra* Section IV.b.



V. WHY IS THERE A PUBLICATION GENDER GAP? EXPOSING POTENTIAL POINTS OF IMPLICIT BIAS THROUGHOUT THE ARTICLES SELECTION PROCESS ⁷²

A. *Law Reviews' Submission Preferences Are Implicitly Biased Towards Men*

All law reviews included in the sample studied express distinct submission preferences for judges, professors, judicial clerks, or practicing attorneys,⁷³ and top law reviews almost never publish student work as an article if a student is the sole author.⁷⁴ Expressing an outright preference for, and simultaneously excluding, those who are not judges, professors, or practitioners, inherently expresses a preference for men because each of these groups includes more men than women.⁷⁵ Women comprise only 33% of federal judges,⁷⁶ 30% of state

72. The term “implicit” here is used to describe attitudes, memories, and stereotypes that are outside of “conscious, intentional control.” See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006); see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497–1539 (2005).

73. See, e.g., *Articles & Essays*, VA. L. REV. (Aug. 28, 2019, 7:33 PM), <http://www.virginia-lawreview.org/submissions/articles-essays> [<https://perma.cc/6K49-JU9V>] (“We welcome Article submissions from judges, professors, practitioners, and law clerks.”).

74. “Notes” are often student work but typically only come from students at the home institution of the journal.

75. See *infra* notes 77–80.

76. “Women make up one-third of the courts’ full-time, active Article III judges.” UNITED STATES COURTS, *40 Years Later, Pioneering Women Judges Savor Place in History* (Aug. 14, 2019), <https://www.uscourts.gov/news/2019/08/14/40-years-later-pioneering-women-judges-savor-place-history> [<https://perma.cc/9CHH-J4C6>].

judges,⁷⁷ 25% of professors,⁷⁸ and 38% of practicing attorneys.⁷⁹ Although the preferences that law reviews express for authors is logical given the need for expertise on legal topics, these preferences likely impact the pool of authors who submit articles for review in the first place.

Not only is the pool of judges, professors, or practicing attorneys heavily skewed towards men,⁸⁰ but also law students are implicitly gender-biased towards associating leadership roles in the legal profession with men.⁸¹ Justin D. Levinson and Danielle Young studied the implicit gender biases that law students have towards certain legal jobs by creating a new Implicit Association Test (IAT), a “Judge/Gender IAT,” designed to test whether people associate judges with men or women.⁸² Despite the fact that men and women now enter law school at equal rates,⁸³ Levinson and Young found that a diverse group of male and female students associate judges with men, not women.⁸⁴ Given that men comprise nearly 70% of the judicial bench, this it is not surprising.⁸⁵ However, the fact that law reviews express preferences for individuals in specific jobs overwhelmingly filled by men,⁸⁶ and students on law reviews impliedly associate these same jobs with men,⁸⁷ makes it less likely that law review editors would consider women to be the expert authorities they would want to publish on a topic.

B. Curriculum Vitae Requirements Favor Elite Schools and Prior Publication Experience, Thereby Reinforcing and Perpetuating Selection of Male Authors

The curriculum vitae (CV) requirement is also a problematic component of the inherently expressed preferences for judges, professors, judicial clerks, or practicing attorneys.⁸⁸ Nearly all law reviews for the top-twenty ranked schools

77. *The Gavel Gap*, THE AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, <https://gavelgap.org/pdf/gavel-gap-report.pdf> [<https://perma.cc/XC5E-KKMV>] (last visited Sep. 30, 2020).

78. AM. BAR FOUND., *supra* note 9; McGinley, *supra* note 9.

79. Jennifer Cheeseman Day, *Number of Women Lawyers At Record High But Men Still Highest Earners*, U.S. CENSUS BUREAU (May 8, 2018), <https://www.census.gov/library/stories/2018/05/women-lawyers.html> [<https://perma.cc/WF43-HUY4>].

80. *See supra* notes 76–78.

81. Levinson & Young, *supra* note 6, at 3.

82. *Id.*

83. Olsen, *supra* note 4.

84. Levinson & Young, *supra* note 6, at 3.

85. *The Gavel Gap*, *supra* note 77.

86. VA. L. REV., *supra* note 73.

87. Levinson & Young, *supra* note 6, at 3.

88. VA. L. REV., *supra* note 73 (“We welcome Article submissions from judges, professors, practitioners, and law clerks.”).

require authors to submit CVs along with the article.⁸⁹ This requirement persists widely despite numerous prior studies demonstrating that the use of CVs in evaluating candidates can be highly flawed and subject to implicit biases.⁹⁰ For instance, prior scholarship demonstrates that law review editors consider the pedigree of the school the author is from as a proxy for article quality, sometimes referred to as “letterhead bias.”⁹¹ Although letterhead bias has not been studied extensively within the legal-scholarship context, the studies conducted thus far indicate that the institution the author is writing from can significantly impact what publication offers the article receives.⁹² Separate studies also demonstrate that the institution where articles are published is often perceived as an indicator of article quality, with the average article published at a journal of a higher-ranked institution being cited more often than the average article published by a journal of a lower-ranked institution.⁹³ Thus, institutional bias contributes to a never-ending cycle of elitism in the article review selection, publication, and citation process.

C. Articles Team Composition

Articles teams need to be diverse in order to be able to effectively select scholarship.⁹⁴ Yet, how diverse the articles team can be is necessarily limited by

89. See, e.g., YALE L. SCH., *supra* note 12, at Ch. 1(C)(4).

90. Levinson & Young, *supra* note 6, at n.68 (2010) (citing Rhea E. Steinpreis et al., *The Impact of Gender on the Review of the Curricula Vitae of Applicants and Tenure Candidates: A National Empirical Study*, 41 SEX ROLES 509, 520–22 (1999); David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1416–17 (2008) (discussing several resume studies that have found gender bias in hiring); Heather K. Davison & Michael J. Burke, *Sex Discrimination in Simulated Employment Contexts: A Meta-Analytic Investigation*, 56 J. VOCATIONAL BEHAV. 225, 232–34 (2000); Alice H. Eagly et al., *Gender and The Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOL. BULL. 3, 7–9 (1992); Judy D. Olian et al., *The Impact of Applicant Gender Compared to Qualifications on Hiring Recommendations: A Meta-Analysis of Experimental Studies*, 41 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 180, 180–195 (1988); Janet Swim et al., *Joan McKay Versus John McKay: Do Gender Stereotypes Bias Evaluations?*, 105 PSYCHOL. BULL. 409, 414–19 (1989); Henry L. Tosi & Steven W. Einbender, *The Effects of the Type and Amount of Information in Sex Discrimination Research: A Meta-Analysis*, 28 ACAD. MGMT. J. 712, 713–19 (1985)).

91. Michael J. Higdon, *Beyond the Metatheoretical: Implicit Bias in Law Review Article Selection*, 51 WAKE FOREST L. REV. 339, 344–45 (2016). Anecdotally, after making an offer to an author from a Tier IV school, I was thanked for having our articles team look beyond the letterhead into the merits of the article. The experience indicated to me that letterhead bias is prevalent.

92. Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those with all the Power—Student Editors*, 59 S.C. L. REV. 175, 188 (2007) (finding that most students surveyed considered the institution of the author, though to varying degrees).

93. Alfred L. Brophy, *The Signaling Value of Law Reviews: An Exploration of Citations and Prestige*, 36 FLA. ST. U. L. REV. 229, 229 (2009).

94. THE GEORGETOWN LAW JOURNAL (@GEORGETOWNLJ), *Janae Stacier, GLJ Senior Articles Editor and @GeorgetownBLSA President, speaks on the importance of having a diverse*

how diverse the law review editorial staff is as a whole.⁹⁵ Lynne Kolodinsky's 2014 empirical study regarding the gender divide of student editors at the top twenty law reviews provides support for the proposition that women are underrepresented on top law reviews when compared to female representation in law school classes.⁹⁶ Recent news reports have also noted the significant underrepresentation of racial and ethnic minorities on top law reviews.⁹⁷ The bottom line is that the lack of diversity on top law reviews necessarily inhibits articles teams from being diverse with negative consequences for selected scholarship.⁹⁸

There is a slight but statistically significant relationship between the percentage of male articles editors and the percentage of female authors published. As the percentage of male articles editors increased, the percentage of female authors published decreased slightly, seen depicted in the graph below.

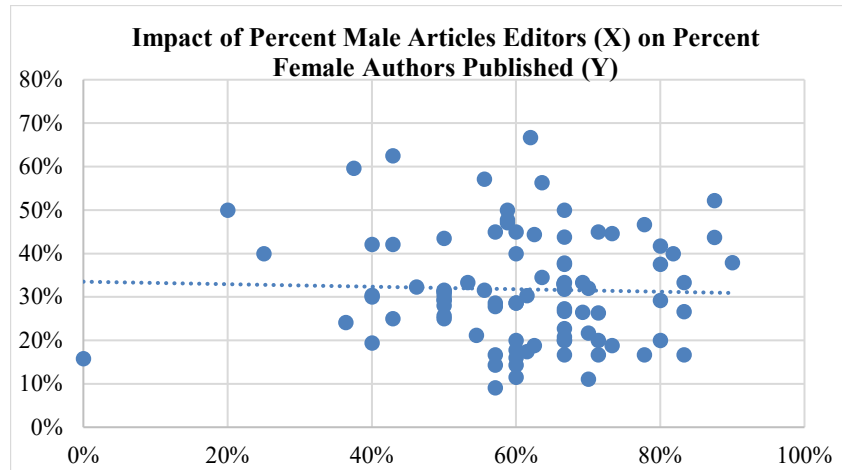
Articles Committee to select rigorous and important content for publication, TWITTER (Aug. 28, 2020, 5:13 PM), <https://twitter.com/GeorgetownLJ/status/1113934371298381827> (discussing the importance of having diverse articles teams in order to have a rigorous discussion for critically selecting scholarship); Mark A. Godsey, *Educational Inequalities, the Myth of Meritocracy, and the Silencing of Minority Voices: The Need for Diversity on America's Law Reviews*, 12 HARV. BLACKLETTER L.J. 59, 71 (1995) ("Minority voices are indirectly muted when all of the incoming articles are screened by all-white committees and then edited in six or seven stages by the same homogeneous group of people."). Law reviews are one of the last forums to discuss the need for leadership diversity. The importance of diverse leadership has been discussed extensively in the corporate setting, see, e.g., James A. Fanto, Lawrence M. Solan, & John M. Darley, *Justifying Board Diversity*, 89 N.C. L. REV. 901, 901 (2011).

95. See *infra* note 102 and accompanying text.

96. Lynne N. Kolodinsky, *The Law Review Divide: A Study of Gender Diversity on the Top Twenty Law Reviews* (May 2014) (unpublished student note, Cornell University) (on file with Cornell Law Library).

97. David Lat, *Minorities and Women and Law Reviews, Oh My!*, ABOVE THE LAW BLOG (Aug. 17, 2010, 1:53 PM), <http://abovethelaw.com/2010/08/minorities-and-women-and-law-reviews-oh-my/> (observing the severe lack of diversity at top law reviews, with most top law reviews having fewer than ten members identifying as racial minorities out of over 150 members total and with women also being significantly underrepresented, despite equal or nearly equal representation in the incoming class).

98. Stacier, *supra* note 94.



D. Law Review Leadership's Personal Biases

Articles are often selected by the articles team with minimal external inputs. Therefore, within law reviews, the individuals whose personal biases have the greatest possibility of influencing the selection process are likely the individuals with the most power in the review process the Chief Articles Editor⁹⁹ and the Editor-in-Chief. Knowing this led to separate but related questions regarding how personal biases of journal leadership influenced the percentage of female authors published.¹⁰⁰

For the data periods studied, volumes led by a female Chief Articles Editor published an average of 30.98% female authors, while volumes led by a male Chief Articles Editor published an average of 31.98% female authors. For the data periods studied, volumes led by a female Editor-in-Chief published, overall, an average of 31.79% female authors, while volumes led by a male Editor-in-Chief published an average of 31.72% female authors. These findings indicate that the gender gap in legal scholarship persists despite the gender of law review

99. Sometimes referred to as the Senior Articles Editor or an equivalent title.

100. The lack of diversity in law review leadership makes the potential personal biases of those in leadership potentially harder to address. Ms. JD has studied the representation of women in law school and on law reviews in an effort to improve the success of women in law school and the legal profession. Ms. JD has found that women are disproportionately underrepresented in leadership positions on the top 50 law reviews and the New York Law School Law Review expanded on Ms. JD's work in a project published in 2011. See Dana Brodsky et al., *2010–2011 Law Review Diversity Report*, NEW YORK LAW SCHOOL LAW REVIEW (October 2011), <http://www.nylslawreview.com/wp-content/uploads/sites/16/2011/10/2010-2011-Law-Review-Diversity-Report.pdf>; Stephanie Chichetti, Emily Freeborn & Lilia Volynkova, *2011–2012 Law Review Diversity Report*, NEW YORK LAW SCHOOL LAW REVIEW (October 2012), <http://www.nylslawreview.com/wp-content/uploads/sites/16/2012/10/2011-2012-NYLS-Law-Review-Diversity-Report.pdf>.

leadership. Therefore, the solution to addressing law reviews' gender biases, reflected in the gender of the authors published, is not as easy as simply having, for example, a female Editor-in-Chief. However, these findings are not surprising given the gendered implicit biases that both male and female law students display towards leadership roles in the legal profession and the existing disparities in the pool of preferred authors (judges, practicing lawyers, and law professors).¹⁰¹ Hopefully, future studies will expand the findings presented in this paper to address the relationship between racial and ethnic minority leadership on law reviews and racial and ethnic minorities published.¹⁰²

E. Rankings Systems: U.S. News & World Report Law School Rankings, Washington & Lee Journal Rankings

Another element that could bias articles selections is the rankings systems that both law schools and journals use. Higher-ranked journals might feel less pressure to attempt to "game" the rankings system compared with lower-ranked journals, which might feel pressure to move up in journal rankings. However, even that is not certain because undoubtedly higher-ranked journals feel pressure to maintain their respective rankings.

The top twenty journals are ranked below with number one being the journal in the top twenty that published the highest percentage of female authors and with number twenty being the journal in the top twenty that published the lowest percentage of female authors, for the period studied.¹⁰³

101. See Levinson & Young, *supra* note 6, at 3.

102. The severe underrepresentation of racial and ethnic minorities on law reviews makes studying publication rates of minority authors particularly important, but difficult to study. Godsey, *supra* note 94, at 61 (highlighting the extreme lack of diversity on law reviews, including 76% of law reviews with no black or African American members, 69% with no Hispanic members, and 85% with no Asian members). Minorities, particularly minority women, remain severely underrepresented in law review leadership positions. Adriane Kayoko Peralta, *The Underrepresentation of Women of Color in Law Review Leadership Positions*, 25 BERKELEY LA RAZA L.J. 69 (2015).

103. See table below.

Highest To Lowest Avg. % Female Authors Published	2019 USNWR Ranking ¹⁰⁴	2019 W&L Ranking ¹⁰⁵	School	% Female Authors Published
1	6	11	New York University (NYU)	46.72
2	9	7	University of California – Berkeley	42.2
3	16	13	University of California – Los Angeles	42
4	1	1	Yale University	38.23
5	2	3	Stanford University	36.68
6	17	20	Vanderbilt University	35.7
7	15	15	University of Texas – Austin	35.2
8	9	17	University of Virginia	32.46
9	18	27	Washington University in St. Louis	32
10	19	28	University of Southern California (Gould)	30
11	3	2	Harvard University	29.26
12	20	14	University of Minnesota	28.86
13	13	24	Cornell University	28.34
14	14	6	Georgetown University	27.96
15	7	5	University of Pennsylvania	26.42
16	8	16	University of Michigan – Ann Arbor	24.48
17	5	4	Columbia University	24.24
18	11	25	Northwestern University	24.12
19	11	18	Duke University	24
20	4	10	University of Chicago	22.32

The data indicates no clear relationship between either the U.S. News & World Report Ranking¹⁰⁶ or the Washington & Lee Journal Ranking¹⁰⁷ and the percentage of female authors published. Notably, two of the top three law schools, Yale and Stanford, are in the top five law reviews that published the highest percentage of women.¹⁰⁸ However, Harvard, which is ranked third by

104. Evan Jones, *New 2019 USNews Law School Rankings*, LAWSCHOOLI (March 26, 2018), <https://lawschooli.com/2019-law-school-rankings/> [<https://perma.cc/EM6P-G7UG>]; Mike Spivey, *2019 USNWR Rankings (2018 Release) Are Here! (Now updated #1-#144)*, Spivey Consulting (Mar. 18, 2018), <https://blog.spiveyconsulting.com/2019-usnwr-rankings/> [<https://perma.cc/34Q6-YX3L>].

105. *W&L Journal Rankings*, *supra* note 44.

106. Zaretsky, *supra* note 36.

107. *W&L Journal Rankings*, *supra* note 44.

108. Zaretsky, *supra* note 36.

U.S. News & World Report,¹⁰⁹ ranks eleventh of the top twenty, based on percentage of female authors published.

VI. PROPOSED CHANGES TO THE ARTICLES SELECTION PROCESS TO REDUCE POTENTIAL IMPACTS OF IMPLICIT BIASES

The research presented in this paper indicates there is a gender gap in legal scholarship published as “Articles” by the top twenty law schools’ flagship law reviews.¹¹⁰ As law review publications can impact professors’ tenure prospects, law reviews must take steps, including recognizing their own power and role in the tenure process, in order for gender equality to improve among tenured law school professors.¹¹¹

At the very least, it is necessary for law reviews and articles selection committees to recognize that, by expressing a preference for judges, professors, or practicing attorneys,¹¹² they are inherently narrowing the pool of “approved” authors to include substantially more men than women. One could argue that law reviews are, in fact, publishing what is a reflective portion of men to women in their journals as compared with the proportion of men to women in the “approved” jobs. However, it is unpersuasive to argue that maintaining a gender gap is permissible simply because it reflects what is already a significantly gender-imbalanced profession. Law reviews should and must recognize the impact they could have both on those whose voices are amplified through publications and professors whose careers may be impacted. Having more diverse law professors would substantially positively impact the legal field as a whole.¹¹³

There are two distinct options for solving the gender disparity in law reviews: knowing nothing or knowing and considering everything. Concrete suggestions for each approach are proposed in turn below.

109. *Id.*

110. *See supra* Section IV.b.

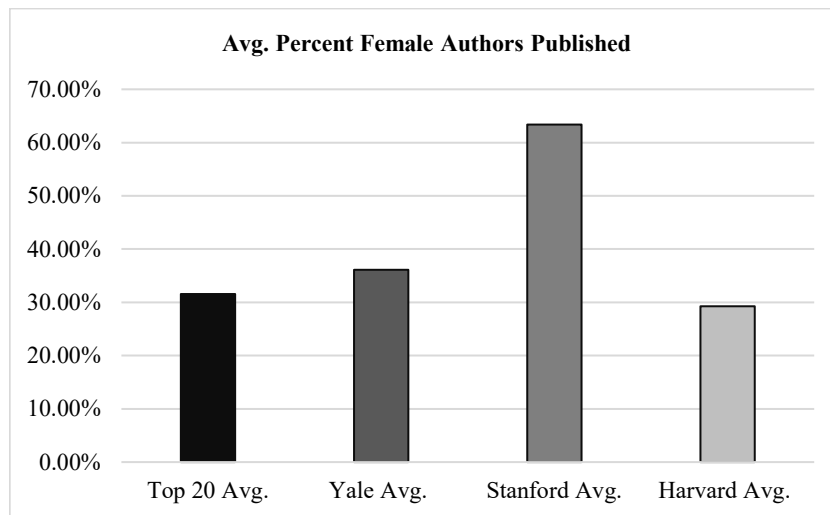
111. Some corporations have realized the importance of taking the bias out of the hiring process, instead of on the people doing the hiring. For that reason, the solutions proposed here focus on taking the bias out of different steps in the articles review process, as opposed to trying to “debias” each articles editor. In the law review context, it is particularly important to focus on debiasing the process, as opposed to debiasing the editors, because articles editors change each year and thus changes to the process would likely lead to longer-lasting progress relative to focusing on removing bias from the individual editors. Jay J. Van Bavel and Tessa V. West, *Seven Steps to Reduce Bias in Hiring*, WALL ST. J. (Feb. 20, 2017), <https://www.wsj.com/articles/seven-steps-to-reduce-bias-in-hiring-1487646840> [<https://perma.cc/GH2R-LSXR>].

112. *See supra* note 88 and accompanying text.

113. Godsey, *supra* note 94, at 67–70 (discussing the responsibility of law reviews to “Provide a Forum of Debate Equally Accessible to All Voices.”).

A. *Knowing Nothing*

Within the top twenty flagship law reviews, there are three journals that use blind review processes, to greater or lesser degrees: Yale, Harvard, and Stanford.¹¹⁴ The caveat to all of the types of blind review practiced by these three journals is that at least one person on the team, typically the lead or most senior articles editor, knows who the author is. This is typically needed for practical purposes, primarily so the teams can communicate with the authors.



The results indicate two of the three law reviews that practice some form of blind review published, on average, a higher percentage of women than the average of the top twenty law reviews. Thus, the data suggests that even a degree of blind review has a positive relationship with the percentage of women published. Other scholars have also called for law reviews to implement blind review processes.¹¹⁵ Hopefully the research presented in this paper will bolster and provide support for prior calls for blind review.¹¹⁶

True double-blind review, distinguished from the current “blind” review processes which are not 100% blind, would require some form of a wall or screen between the author and the articles team.¹¹⁷ This wall could be formed

114. *Submissions*, YALE L. J. (Apr. 20, 2019, 11:41 AM), <https://www.yalelawjournal.org/submissions> [<https://perma.cc/AV7P-7V3V>]; *Submissions*, HARV. L. REV. (Apr. 20, 2019, 11:42 AM), <https://harvardlawreview.org/submissions/> [<https://perma.cc/4VZE-8MM2>]; *Article Submissions*, STAN. L. REV. (Apr. 20, 2019, 11:43 AM), <https://www.stanfordlawreview.org/submissions/article-submissions/> [<https://perma.cc/F9UE-VCUQ>].

115. Jonathan Gingerich, *A Call for Blind Review: Student Edited Law Reviews and Bias*, 59 J. LEGAL EDUC. 269 (2009); see also Jessica Lynn Wherry, *Dear Student Editors, We Need Your Help*, 24 AM. U. J. GENDER SOC. POL’Y & L. 433, 436 (2016).

116. *Id.*

117. *Id.*

physically or digitally. If either a student or an administrative staff member on each law review were responsible for holding the identity of the author secret from the articles team and functioning as the messenger between the articles team and the author, then law reviews could effectively implement a physical wall. This would undoubtedly be more complicated than current systems where the articles teams correspond with the authors directly and might minimize the capacity of law reviews to build personal relationships with each author, which could theoretically hurt lower-ranked journals. However, the potential benefit of diversifying the legal profession and legal scholarship would be worth the extra hassle involved.

If law reviews or authors think a physical wall would be too complicated, a digital wall could also be implemented. Most law reviews use submissions platforms such as Scholastica to facilitate law review submissions.¹¹⁸ These platforms already support levels of anonymity in author submissions and could anonymize the submissions further, for instance by assigning each submission and its respective author a number, which would be all that the articles teams would know or see regarding the author. Given that the submissions platforms are already in place, it would be possible for changes to be made on the already-existing platforms without the burden of having to build new platforms from scratch that would support this level of anonymity.

If law reviews are unwilling to implement true double-blind review processes, a modest and easily implementable step is a policy that all editors involved in the articles review process review the author's CV and any identifying information last. As all authors are relatively easy to find online and most authors include a good deal of biographical information in the first footnote, it is imperative that the "review the CV last" policy be interpreted broadly to include avoiding all identifying information.¹¹⁹ Implementing this type of policy would afford authors greater opportunities for their work to be reviewed on the merits as opposed to primarily on their CV.

B. Knowing Everything: Lessons from Corporations Working to Reduce Biases in Hiring

The law review articles selection process is remarkably similar to any competitive hiring process: large pools of talented people compete for very limited slots with the pool of candidates narrowing at each step. Because of the similarity between the law review articles selection process and a competitive

118. SCHOLASTICA, <https://scholasticahq.com/> [<https://perma.cc/MZ5B-CNQU>] (last visited Sep. 30, 2020).

119. *See, e.g.* note 1. From this footnote, you can know both where I went to law school and where I went to college. You also know some of the people worked or otherwise helped me with this article. This is precisely the type of information that could bias a person reviewing this article.

hiring process, law reviews have a lot to learn from companies who have committed to reducing bias in their hiring practices.¹²⁰

Scholars and companies alike have studied and documented the need to diversify the pools of applicants at each stage of the hiring process in order to ultimately hire diverse employees.¹²¹ It is reasonable to believe that, similar to how having more female applicants and more females in the initial resume review round leads to a greater chance of hiring a woman, having more female authors submit manuscripts and more female authors in the initial article review stages would lead to more publication offers to female authors. Thus, in order to ultimately publish diverse authors, it is necessary to include the work of diverse authors at each stage of the review process.

Yet, law reviews will not know if they have authors who are underrepresented minorities throughout the review process if they do not collect and track authors' demographic information. Therefore, collecting and tracking authors' demographic information at each stage of the process is imperative.¹²² There are commonly four key phases to the review process and tracking which authors clear each review stage and which are rejected would provide important data for editors, ultimately allowing editors to assess their own biases with the critical assistance of objective data.¹²³ These four stages are: the submission stage, the individual editor review stage, the articles team review stage, and the publication offer stage.

Once data has been collected for each review stage, the review process can be continually improved year after year, volume after volume. Ultimately, it should be a priority for each journal to be attentive to and work towards minimizing points of bias present throughout the articles selection process. Ultimately, if these biases are reduced, likely more diverse authors will be published and ultimately more diverse junior faculty will be hired.

120. *Women in the Workplace 2018*, MCKINSEY & CO. <https://womenintheworkplace.com/> [<https://perma.cc/LCX6-ZMXZ>] (last visited Oct. 1, 2020).

121. Rebecca Knight, *7 Practical Ways to Reduce Bias in Your Hiring Process*, HARV. BUS. REV. (June 17, 2017), <https://hbr.org/2017/06/7-practical-ways-to-reduce-bias-in-your-hiring-process> [<https://perma.cc/CFP6-LPJQ>]; Stephanie K. Johnson, David R. Hekman, and Elsa T. Chan, *If There's Only One Woman in Your Candidate Pool, There's Statistically No Chance She'll be Hired*, HARV. BUS. REV. (Apr. 26, 2016), <https://hbr.org/2016/04/if-theres-only-one-woman-in-your-candidate-pool-theres-statistically-no-chance-shell-be-hired> [<https://perma.cc/9P85-ASSW>]; Samantha McLaren, *3 Ways Companies Are Fighting Bias in the Workplace and Hiring Process*, LINKEDIN TALENT BLOG (July 23, 2018), <https://business.linkedin.com/talent-solutions/blog/diversity/2018/companies-fighting-bias> [<https://perma.cc/PH32-YEGL>].

122. Wherry, *supra* note 115, at 439 (supporting the idea of tracking data of authors at various stages throughout the articles review process).

123. *Id.*

VII. ADDITIONAL CAUSE FOR CONCERN: THE NEGATIVE EFFECTS OF THE CORONAVIRUS PANDEMIC ON FEMALE ACADEMICS PUBLISHING

Hindsight is twenty-twenty and of course history will be able to better ascertain the effects of the Coronavirus (COVID-19) pandemic on the world, including on the publication rates of women versus men. Despite early suggestions that pandemics have historically led to moments of brilliance, and perhaps such brilliance would emerge again during this pandemic experience, it is noteworthy that neither William Shakespeare nor Isaac Newton had childcare responsibilities when they were each stuck self-isolating, writing *King Lear* or developing early theories of gravity, respectively.¹²⁴ Initial reporting suggests that the pandemic has lowered women's article submission rates across academic fields.¹²⁵ It appears, at least so far, that COVID-19 restrictions have exacerbated gender inequalities, leading women forced into more traditional gender roles to not have the time and space necessary for research.¹²⁶ This appears to be because in a male-female household partnership, if men do not step up to tend to group and family cohesion, then women 'step in' and legal scholarship is taking the hit.¹²⁷

VIII. LIMITATIONS & FUTURE RESEARCH

In order to properly assess the data presented, it is important to acknowledge potential limitations of this data. First, as addressed before, the basis of assessing gender is not perfect. As a result, the data may incorrectly reflect authors' and editors' gender identities. Given the careful review process for gender identity,¹²⁸ this is unlikely, although not impossible.

Another factor limiting the types of conclusions that can be made is that there is not necessarily a direct correlation between where an author publishes and their tenure options. The data presented clearly identifies a gender gap of authors published by top law reviews, but the link between the gender gap of authors published and the gender gap of tenured professors cannot be made directly. There are many factors involved in the tenure process.¹²⁹ However,

124. Helen Lewis, *The Coronavirus is a Disaster for Feminism*, THE ATLANTIC (June 23, 2020, 5:33 PM), <https://www.theatlantic.com/international/archive/2020/03/feminism-womens-rights-coronavirus-covid19/608302/> [<https://perma.cc/J8A2-S5E8>].

125. Colleen Flaherty, *No Room of One's Own*, INSIDE HIGHER ED (June 23, 2020, 5:22 PM), <https://www.insidehighered.com/news/2020/04/21/early-journal-submission-data-suggest-covid-19-tanking-womens-research-productivity> [<https://perma.cc/JF57-3BC9>].

126. *Id.*

127. See Guarino, C.M., Borden, V.M.H. *Faculty Service Loads and Gender: Are Women Taking Care of the Academic Family?* 58 RES. HIGH. EDUC., 672–694 (2017). <https://doi.org/10.1007/s11162-017-9454-2> [<https://perma.cc/2W2Y-QM4D>].

128. See *supra* Section III for more information regarding the methodology used.

129. Scholarship requirements are not the only factor at issue, although it is an important one, as other university expectations of faculty disproportionately have a negative impact on women.

scholarship is a known and heavily emphasized requirement, and therefore it is reasonable to suggest that a gap in scholarship opportunities for women leads to a gap in tenure opportunities.¹³⁰

Finally, this study focused primarily on the gender gap in law review articles publications. However, the gender disparity is almost certainly not the only disparity in legal scholarship. I strongly encourage interested scholars to expand this study to determine the rate at which the flagship law reviews of the top twenty schools are publishing authors of color.¹³¹

IX. CONCLUSION

The research presented in this paper empirically demonstrates that a substantial gender gap exists¹³² for articles authors published by the flagship law reviews at the top twenty law schools.¹³³ This legal scholarship gender gap parallels the significant gender gap for women in legal leadership positions, including as particularly relevant here, law professors.¹³⁴ Because law review publications can impact tenure possibilities for authors,¹³⁵ law reviews must be

Monopoli, *supra* note 19, at 1773 (“Facially neutral university norms about the unified model of teaching and scholarship have a disparate impact [on women].”).

130. *See supra* notes 13, 14, 17–18, and accompanying text.

131. As Professor Kimberly Norwood has noted, both gender bias and racially gendered bias in the legal profession are “very real and pervasive.” Norwood, *Gender Bias as the Norm in the Legal Profession: It’s Still a [White] Man’s Game*, 62 WASH. U. J. L. & POL’Y 27 (2020). An ABA report released in June 2020 highlighted the particular challenges that women of color face in the legal profession. Seventy percent of female minority lawyers had left the field of law or were considering leaving the legal profession because of challenges that they faced. When one considers that only, for instance, 2% of equity partners at large firms are women of color, and that this statistic has remained static for twenty years, this underscores that the legal profession should stop the back-patting. Debra Cassens Weiss, *Majority of minority female lawyers consider leaving law; ABA study explains why*, ABA JOURNAL (June 22, 2020, 4:19 PM), <https://www.abajournal.com/news/article/most-minority-female-lawyers-consider-leaving-law-aba-study-explains-why> [https://perma.cc/5SR8-34MM]. The full study discussed can be found here: Destiny Perry, Paulette Brown, and Eileen Letts, *Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color*, AMERICAN BAR ASSOCIATION: COMMISSION ON WOMEN IN THE PROFESSION (July 3, 2020, 12:03 PM), <https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf> [https://perma.cc/X8TF-A95T].

132. *See supra* Section IV.

133. Hopefully the data presented here will shed greater light on another facet of equality women face in the legal profession with the ultimate goal of remedying this inequality. Levinson & Young, *supra* note 6, at 41 (noting that one of the best ways to remedy inequality, specifically including the continued subordination of women in the legal profession, is to understand the inequality as fully as possible).

134. *See supra* notes 11–12, and accompanying text.

135. *See supra* notes 13, 14, 17–18 and accompanying text.

aware of points of implicit bias present throughout the articles review process and actively work to reduce these points of bias.¹³⁶

Law reviews are uniquely positioned to effect change. Although almost all statutes are created retrospectively, law reviews have the capacity to advance legal change prospectively. Yet, if the ideas advanced prospectively continue to systematically deprioritize voices that the letter of the law itself already deprioritizes, then law reviews will continue to perpetuate a system of law that is retrospective and underinclusive.

Although the legal scholarship gender gap presented here may not be surprising, it is my hope that the empirical evidence of this gap will spur law review editorial teams to thoughtful discussions and provoke them to take concrete actions to reduce points of bias throughout their articles review process because who gets to speak, and who is listened to, matters.¹³⁷

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136. Godsey, *supra* note 94, at 67–70 (discussing the responsibility of law reviews to “Provide a Forum of Debate Equally Accessible to All Voices”); Jason Hawkins, *Roundtable on Increasing Author Diversity in Legal Scholarship: Program and Bibliography*, UNIV. OF MD. (Apr. 10, 2015), http://digitalcommons.law.umaryland.edu/wle_2015a/1 [<https://perma.cc/Q97Y-EPDP>] (discussing ways to improve author diversity in legal scholarship).

137. Leong, *supra* note 1, at 370.

* J.D. Washington University in St. Louis School of Law; B.A. Principia College. Thank you to the editors at the Saint Louis University Law Journal, particularly Chioma Chukwu and Louise Taylor, for their patient and thoughtful edits. Thank you to my mother, Christina Pant, for reading and providing input on prior drafts. And a heartfelt thank you to Professor Kimberly Jade Norwood at Washington University in St. Louis School of Law, for teaching the “Implicit Bias in the Law” seminar that inspired this article. And then for rejecting the first handful of paper ideas I proposed. I would not have written this article if you had not believed that I could do better. As will shortly become relevant, I served as the Chief Articles Editor for the *Washington University Law Review* for Volume 97. Views reflected in this paper are solely my own.