

Essay

Killing the Motivation of the Minority Law Professor

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INTRODUCTION: RESPONDING TO CRISES

I am still struggling with an existential career tension: should I be writing about things that I'm passionate about, or should I restrain those impulses to focus on what plays well in the legal academy and what will build me a reputation¹ that procures me tenure? I thought I had been cured of this waffling disease in my first year in the academy when I shared the idea for my first project with two of my mentors. To my surprise, they saw right through me: “[W]e can tell you have no interest in this. If you want to write about things you do not care about you should go out and make seven figures. This job is not worth it.” Tough, but fair with zero lies told. My mentors had honed in on something about intrinsic and extrinsic motivation that I had not yet figured out, and that would continually haunt me for years to come. Fortunately, this was very early in the development of that first project, so it was easy enough for me to change course and commit myself to a mission: I would only write about things I absolutely cared about.

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1. Which I could then leverage to write said things I am passionate about.

Little did I realize that the conversation with my mentors was just the preface to what has become a recurring and sometimes paralyzing internal conversation/debate about the purpose of my writing and how true it is to my normative commitments and quest for justice.² Passion versus what sells is not an either-or proposition. Rather, there was push-pull nature to the set of never-ending compromises and accommodations to external pressures and legal scholarship norms that I made in my first eight years as a legal scholar. I went on to write my first paper about wealth inequality instead of tax procedure, but I made nods to practitioners, deleted the racial focus, and crafted a perfectly palatable, clever by half, but unlikely-to-ever-be-enacted policy proposal.³ It took a long time for the paper to take shape, and I did not finish several other articles I wanted to publish, but that first article won an award. It also helped me achieve my goal of being hired as a tenure-track professor. Ultimately, the extrinsic reward and financial reality of needing a job took precedence.

The persistent and toxic inequality that the last few years has highlighted forced me to confront again the relationship between my scholarship and the so-called outside world. I can imagine lots of scholars are asking questions about the importance or significance of their work during a time of crisis. The call for papers that sparked the impulse to write this Essay underscored that there has been a perfect storm wherein the traditional division of domestic responsibilities has failed women, and the already weakened social support structures have broken down, disproportionately hurting those at the bottom of society. The psychological and emotional effects of police violence and inequality have exhausted Black Americans and other people of color.⁴ These can lead one toward helplessness, but they can also spur one to act. Many minority scholars have been asking themselves throughout the pandemic, how can I best use my voice to

2. These commitments are common for minority law professors. *See, e.g.*, Andrew Wm. Haines, *Reflections on Minority Law Professors Balancing Their Duties and Their Personal Commitments to Community Service and Academic Duties*, 10 ST. LOUIS U. PUB. L. REV. 305, 310–11 (1991).

3. *See* Goldburn P. Maynard Jr., *Addressing Wealth Disparities: Reimagining Wealth Taxation as a Tool for Building Wealth*, 92 DENV. U. L. REV. 145 (2014).

4. Christina Pazzanese, *How Unjust Police Killings Damage the Mental Health of Black Americans*, HARV. GAZETTE (May 13, 2021), <https://news.harvard.edu/gazette/story/2021/05/how-unjust-police-killings-damage-the-mental-health-of-black-americans> [<https://perma.cc/M6KU-X3DR>].

promote broad and lasting social change?⁵ Theoretically, this should not have been difficult for me, because I long ago made the commitment to write about things I cared about. But the crises on the ground showed just how far multiple small compromises had taken me away from the promotion of lasting social change. I did not need all my scholarship to be radical or non-traditional, but I was deeply concerned that very little of it was.

Scholarship that is relevant to the unprecedented times that we live in often overlaps with a deep interest in eradicating injustice that was sparked early in the life of many minority scholars. This deep interest is central to why these scholars became lawyers and later law professors.⁶ But such scholarship also goes against the grain, is less likely to be accepted (especially in fields that are “about the market,” but also public legal fields⁷), can marginalize a scholar’s future work, and can make tenure a more difficult proposition. This Essay hypothesizes that a significant number of minority scholars with radical ideas forego those projects or mute them to fit their work within the dominant paradigm of legal scholarship.⁸ For the purposes of this Essay, I assume that radical and non-normative scholars disproportionately come from disadvantaged groups.⁹ Those minority scholars who move forward and publish their radical or non-normative papers spend significant time attempting to overcome internal and external resistance, negotiating with mentors, and finding ways to make the radical seem palatable. This harms the produc-

5. Note that while I center minorities throughout the paper, many non-minority individuals have asked the same questions and experienced similar despair.

6. See discussion *supra* note 2 and accompanying text.

7. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784, 1790 (2020) (listing contracts, property, antitrust, intellectual property, and corporate law as market-focused but also analyzing how inequality is narrowly defined in public law).

8. See *id.* (exploring how the “Twentieth-Century Synthesis,” a pervasive view of the law that relies on neoliberal premises like market efficiency, neutrality, and formal equality, muted problems of distribution and power throughout public and private law).

9. I use this term broadly. For example, it includes Black, Latino, Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

tivity of the radical and non-normative minority junior scholars¹⁰ not only through inefficiency, but also through the long-term destruction of intrinsic motivation that is vital and overlaps with successful, fulfilling, and productive careers.¹¹

The very idea of productivity should be viewed critically, as it hides the homogeneity of the scholars who tend to rise to the top of productivity charts.¹² It does not question where the time comes from and who undertakes that work that the scholarship-oriented scholar excuses himself from. On these, I will defer to other scholars.¹³ This Essay takes a different course by accepting productivity as a useful metric and considering a correlate that just about all highly productive scholars share: strong intrinsic motivations for pursuing research.¹⁴ These scholars care about research for reasons other than tenure requirements, prestige, or financial rewards.¹⁵ Such scholars pick a topic they are really interested in and dig in—they follow their bliss. There has been extensive research into what makes these scholars tick.¹⁶ Em-

10. For the purposes of this paper, I will oversimplify things by referring to radical scholars. The reality is a lot more complicated since one scholar may publish a paper with a range of ideas from the mainstream to the radical. Some individuals also move back and forth depending on the publication. The concept of radicalism itself is highly contested and its definitions and contours are discussed in more detail in Part II.

11. See, e.g., Ioana Alexandra Horodnic & Adriana Zait, *Motivation and Research Productivity in a University System Undergoing Transition*, 24 RSCH. EVALUATION 282, 290 (2015) (finding that intrinsic motivation was positively correlated with research productivity while extrinsic motivation was negatively correlated among Romanian academics).

12. See Marek Kwiek, *The European Research Elite: A Cross-National Study of Highly Productive Academics in 11 Countries*, 71 HIGHER EDUC. 379, 395 (2016) (finding high homogeneity).

13. See, e.g., MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019) (recounting interviews with ninety-seven minority law professors who shared their professional challenges).

14. See, e.g., Rebecca S. Martínez, Randy G. Floyd & Luke W. Erichsen, *Strategies and Attributes of Highly Productive Scholars and Contributors to the School Psychology Literature: Recommendations for Increasing Scholarly Productivity*, 49 J. SCH. PSYCH. 691, 714 (2011) (“[I]ntrinsic motivations for pursuing research may be more reinforcing than doing so simply for tenure requirements or to gain extrinsic . . .”).

15. *Id.*

16. See, e.g., Rebecca A. Krukowski, Reshma Jagsi & Michelle I. Cardel, *Academic Productivity Differences by Gender and Child Age in Science, Technology, Engineering, Mathematics, and Medicine Faculty During the COVID-19 Pandemic*, 30 J. WOMEN’S HEALTH 341, 342–43 (2021) (introducing a study to

pirical studies suggest that individual characteristics like intrinsic motivation, hard work, and persistence outpace institutional factors like availability of research funds and research being considered in promotion decisions.¹⁷ The intrinsic desire to produce scholarship one loves appears to be a wellspring from which highly successful scholars can draw throughout their careers. It overlaps with the fact that the most accomplished and creative people tend to love what they do and feel it has some impact on the world.¹⁸ It stands to reason that universities should be promoting fertile environments for this kind of desire or motivation. The legal academy actually does this in several ways. More than other fields, legal scholarship is unmoored to any particular

assess the relationships between gender and child age on self-reported academic productivity); Fernanda Staniscuaski, Livia Kmetzsch, Rossana C. Soletti, Fernanda Reichert, Eugenia Zandonà, Zelia Ludwig, Eliade F. Lima, Adriana Neumann, Ida V. D. Schwartz, Pamela B. Mello-Carpes, Alessandra S. K. Tamajusuku, Fernanda P. Werneck, Felipe K. Ricachenevsky, Camila Infanger, Adriana Seixas, Charley C. Staats & Leticia de Oliveira, *Gender, Race and Parenthood Impact Academic Productivity During the COVID-19 Pandemic: From Survey to Action*, 12 FRONTIERS PSYCH. 1640 (2021) (reporting the influence of gender, parenthood and race on academic productivity during the pandemic period); Philip G. Altbach, *What Counts for Academic Productivity in Research Universities?*, 79 INT'L HIGHER EDUC. 6, 6–7 (2015) (explaining how different factors affect academic productivity); Christopher R. Carpenter, David C. Cone & Cathy C. Sarli, *Using Publication Metrics to Highlight Academic Productivity and Research Impact*, 21 ACAD. EMERGENCY MED. 1160 (2014) (providing a broad overview of measures of academic productivity and impact using publication data); Susan Washburn Taylor, Blakely Fox Fender & Kimberly Gladden Burke, *Unraveling the Academic Productivity of Economists: The Opportunity Costs of Teaching and Service*, 72 S. ECON. J. 846 (2006) (investigating the relationships among research productivity, teaching, and service); Lorenzo Ductor, *Does Co-Authorship Lead to Higher Academic Productivity?*, 77 OXFORD BULL. ECON. & STAT. 385 (2015) (examining the relationship between co-authorship and academic productivity); Cathy C. Sarli & Christopher R. Carpenter, *Measuring Academic Productivity and Changing Definitions of Scientific Impact*, 111 MO. MED. 399 (2014) (providing an overview of the history and present-day practices of how productivity affects scientific research impact outcomes).

17. See, e.g., Kwiek, *supra* note 12; Daniel Teodorescu, *Correlates of Faculty Publication Productivity: A Cross-National Analysis*, 39 HIGHER EDUC. 201, 204 (2000).

18. See, e.g., E. PAUL TORRANCE, *THE MANIFESTO: A GUIDE TO DEVELOPING A CREATIVE CAREER* 13 (2002) (presenting findings of a research study into creativity and success which followed participants over the course of four decades).

methodology, and the multitude of directions it takes is quite liberating, even if it remains a sore spot for much critique and alarmist sentiment.¹⁹

Yet not all scholarship is given its fair shake, and we can do better. I argue that the legal academy disproportionately dampens the productivity of junior scholars with radical ideas or non-normative jeremiads by forcing them to moderate their arguments or forego truly radical ideas until after tenure or forever. This disproportionately harms minority scholars for whom these ideas form a vital nucleus of their intrinsic motivation. While there have been other essays that have considered the place and value of legal scholarship²⁰ and debated the merits of critical scholarship,²¹ this Essay adds to the literature by elaborating on the impact of motivation on scholarship across academia.²² This leads to less myopic law-centered recommendations and pragmatic ideas that could be put into place at law schools tomorrow. To this end, this Essay proceeds as follows: Part I briefly details some of the challenges to producing scholarship. Not only is writing difficult, but the tenure-track faculty member must confront a number of anxieties and systemic limitations. Producing legal scholarship has unique challenges because of its lack of unifying methodology and outside influence of other social sciences, particularly economics. This Part then proceeds to analyze some of the literature on high research productivity. Here I underscore the importance of freedom and bliss, partly because research finds that these result in more high-quality scholarship.

Part II highlights some of the ways radical and non-normative junior scholars are stripped of their love of scholarship during their pre-tenure years. This leaves the radical or non-normative junior scholar in a difficult position because scholarship moderation can lead to a sense of guilt and selling out. Yet, the publication of ideas that depart too far from the norm can result in marginalization. This is partly because, by definition, radical

19. See, e.g., Danielle K. Citron & Robin West, *On Legal Scholarship*, CURRENT ISSUES LEGAL EDUC. 1, 1–2 (2014), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1074&context=shorter_works [https://perma.cc/RVW2-RVG8] (assessing the value of legal scholarship and analyzing critiques against it).

20. See discussion *infra* Part I.B.

21. See discussion *infra* Part II.C.2.

22. Shari Motro, *Scholarship Against Desire*, 27 YALE J.L. & HUMAN. 115, 120 (2015) (arguing that some scholars feel pressured to produce scholarship that goes against their “sense of purpose”).

ideas work against the dominant paradigm, but also because by departing from certain norms such scholarship lays bare decades-old legal academy insecurities about the legitimacy of legal scholarship.

Finally, Part III concludes with three suggestions on how universities and the legal academy can improve their flexibility and foster more productive environments for radical scholars: (1) explicitly promoting a follow your bliss attitude; (2) supporting research collaboration; and (3) rewarding systemic lines of research.

I. CHALLENGES TO THE PRODUCTION OF SCHOLARSHIP AND THE IMPORTANCE OF FOLLOWING YOUR BLISS

This Part of the Essay briefly details some of the challenges scholars encounter in producing scholarship generally and, more specifically, legal scholarship. I describe some of the insecurities and influences that help determine what kinds of scholarship the legal academy values. This Part then proceeds to analyze some of the literature on high research productivity. Here I underscore the importance of freedom and bliss, partly because research finds that it results in more high-quality scholarship.

A. WRITING IS DIFFICULT, AND WRITING SCHOLARSHIP IS HARDER

The challenges of producing valuable scholarship should not be underestimated. When considering legal scholarship, it is helpful to get a broader view of trends and issues in academia more generally to prevent short-sightedness. Scholarship is difficult to produce across the academy, and academics across universities find themselves squeezed by structural factors like lack of government support or funding which favors certain kinds of research.²³ The challenges of writing itself should also not be underestimated. Unlike a research paper for a class, academic writing requires the writer to settle into a daily life of writing that offers little of the feedback and engagement that a course does.²⁴

23. See, e.g., SHEILA SLAUGHTER & LARRY L. LESLIE, *ACADEMIC CAPITALISM: POLITICS, POLICIES AND THE ENTREPRENEURIAL UNIVERSITY* 11 (1997) (introducing the “market behaviors” pressures on the part of institutions to conduct more for-profit activities, such as patenting and subsequent royalty, etc.).

24. See, e.g., ERIC HAYOT, *THE ELEMENTS OF ACADEMIC STYLE* 9–10 (2014) (discussing the differences between writing a seminar paper and publishable work).

Committee assignments, speaking engagements, and community service can quickly overwhelm one's writing schedule.²⁵ Writing and synthesizing complex information also requires high-level brain functioning²⁶ and lots of time²⁷—a commodity that can be scarce with teaching, service, and personal responsibilities vying for it. A pre-tenure academic like myself is told to write as much as possible, but we come in the door with at best limited teaching experience. Thus, despite hearing a lot of advice to the contrary, I spent countless hours trying to prepare for and improve my teaching.

At the risk of oversimplifying, good writing is hard. Jane Trombley has provided a short and simple list of factors to illustrate this: (1) writing requires focus; (2) writing requires practice; (3) writing requires diligence; (4) writing requires courage; and (5) writing requires humility.²⁸ Her unscientific and yet accurate assessment: "Writing is damn hard."²⁹ Similarly, Erin Sturm lists three factors, two of which are linked to psychology: (1) crippling perfectionism; (2) inconsistent writing schedules and being out of practice; and (3) lack of confidence and fear of failure.³⁰ The lack of confidence and crippling perfectionism³¹ hit very close to home, as they have haunted me throughout every

25. See, e.g., Taylor, Fender & Burke, *supra* note 16, at 856–57 (finding that teaching and service commitments have a significantly negative impact on the research productivity of academic economists).

26. See, e.g., Nancy E. Millar, *The Science of Successful Teaching: Incorporating Mind, Brain, and Education Research into the Legal Writing Course*, 63 ST. LOUIS U. L.J. 373, 394 (2019) (discussing the complexity of synthesizing information and the variety of neural pathways that need to work correctly in order to write).

27. See, e.g., C. Michael Levy & Sarah Ransdell, *Is Writing as Difficult as It Seems?*, 23 MEMORY & COGNITION 767, 777 (1995) (finding that the quality of writing could be differentiated based on the amount of time writers devoted to revising).

28. Jane Trombley, *5 Simple Reasons Why Writing Is Hard, Really Hard*, THE WRITING COOP. (Jan. 30, 2018), <https://writingcooperative.com/5-simple-reasons-why-writing-is-hard-really-hard-1cfee9ced1f5> [<https://perma.cc/GBC6-BNFD>].

29. *Id.*

30. Erin Sturm, *Why Is Writing So Difficult? Here Are 3 Reasons Why*, THE WRITE LIFE (Nov. 8, 2018), <https://thewritelife.com/why-is-writing-so-difficult> [<https://perma.cc/AB7F-RB85>].

31. See, e.g., Kerry Ann Rockquemore, *Breaking the Cycle*, INSIDE HIGHER EDUC. (Nov. 14, 2012), <https://www.insidehighered.com/advice/2012/11/14/essay-breaking-cycle-academic-perfectionism> [<https://perma.cc/7BY4-S4ZY>] (discussing that perfectionism is a pervasive problem for academic writers).

year of my career. For minorities, there is also a healthy dose of impostor syndrome and paralyzing fear of failure.³² This is not a novel insight: being among the first of a group to enter into a profession is difficult. Despite knowing that one belongs, the minority professor is often faced with the daily reality that many individuals do not look like them. We worry that we will be letting down our minority group or that our work will be exposed as fraudulent. These are by no means feelings that only minorities experience, but minorities are likely to experience them more often.

It's not only the very act of writing that makes the production of scholarship difficult. Academics are trying to push knowledge to places it has not been before.³³ That in itself can be overwhelming for any human being. There is no one to hold your hand, and there is often a feeling of "what have you done for us lately." Scholarship has to be novel and exciting.³⁴ Academic writing is also not something one is taught per se. In his book *The Elements of Academic Style*, professor of comparative literature Eric Hayot explains how, in college and graduate school, future scholars tend to write papers over the course of three to four weeks.³⁵ As professors, they must write a piece over a substantially longer period with considerable periods of research and revision.³⁶ By focusing on short-term writing projects, graduate school fails to prepare the academic for writing as a lifelong practice.³⁷ Hayot agrees with Trombley and many writers that writing is hard, and adds that this is a systemic problem.³⁸ Those

32. See, e.g., Ed Yong, *Psychologists Find New Ways to Steel Minority Students Against Fear of Failure*, SCI. AM. (June 2013), <https://www.scientificamerican.com/article/psychologists-steel-minority-students-against-fear-failure> [<https://perma.cc/S4GN-NKDS>] (discussing stereotype threat and the fear of failures undermine minority students' performance in school, sports, and the workplace).

33. Jessica Stewart, *Clever 12 Step Infographic Explains the Path of a Ph.D.*, MY MODERN MET (June 22, 2017), <https://mymodernmet.com/phd-infographic-matt-might> [<https://perma.cc/952E-C2EB>] (describing an infographic by computer science professor Matt Might that illustrates why it is difficult to get a PhD).

34. Exciting is relative in this context of course.

35. HAYOT, *supra* note 24, at 8–9.

36. *Id.* at 9–13.

37. *Id.* at 10.

38. *Id.* at 16.

who tend to succeed are not individuals like myself, but rather those who come from families who have been in academia.³⁹

Since there is no writing instruction, academic writing can be a sink-or-swim proposition with a steep learning curve. This, in turn, harms those from minority and other disadvantaged groups, which will be a recurring theme throughout this Essay. It favors academics who have parents or individuals close to them who were previously a part of the academy. These individuals come in knowing what a writing career looks like on the microlevel. Accordingly, Hayot argues that this further cements an unfair system based on luck and class privilege.⁴⁰ Academic writing also produces its own anxieties. Hayot put it starkly when he wrote, “in general all academic writers suffer from some kind of writing fear.”⁴¹ He calls this fear inevitable.⁴² A specific form of this fear is what he calls “not knowing when it’s ok to not be writing.”⁴³ Academic writing calls for structure but for those who have no idea how to impose this on a long-term project, it only increases their anxiety. Basically, the minority scholar is faced with producing novel content in a form that they have not been trained to produce with little support or guardrails.

Another important factor to highlight is that academics are not full-time writer-researchers. This can result in inconsistent writing schedules, which, as Sturm notes, can make writing that much more difficult.⁴⁴ A key to writing is for it to become a practice. The tendency is for tenure-track academics to have flexibility, but usually not at consistent times throughout the week. Usually, empty calendar slots are filled with meetings and appointments, and it can be difficult to be the lone holdout for hard-to-come-by committee meeting times because you must write at the same exact time each day. That feels like a luxury most academics cannot afford. Junior scholars naturally feel pressure to be more flexible than senior faculty, thus foregoing consistent daily writing in favor of spurts and binges on our free days.

39. See, e.g., Cathleen O’Grady, *Academia Is Often a Family Business. That’s a Barrier for Increasing Diversity*, SCI. (Apr. 1, 2021), <https://www.science.org/content/article/academia-often-family-business-s-barrier-increasing-diversity> [<https://perma.cc/DY73-W2ZL>].

40. HAYOT, *supra* note 24, at 16.

41. *Id.* at 18.

42. *Id.* at 30.

43. *Id.* at 22.

44. Sturm, *supra* note 30.

Writing time competes with service and teaching commitments, which makes the psychological gymnastics involved that much more complicated. The tenure-track professor can always put off writing by spending time prepping for class. Hayot calls this “the most common form of virtuous procrastination for well-meaning academics.”⁴⁵ Note how the minority scholar may feel a particular pull in this direction, both because they are often called upon to embrace more service and because they may feel a particular responsibility to students from disadvantaged backgrounds.⁴⁶

There is also a particularly harsh reality that minority professors tend to get worse student evaluations,⁴⁷ so they will often have to invest more time trying to please students and to overhaul their approaches to teaching.⁴⁸ Even writing and research time need to be apportioned effectively, leading one into the potential trap of another form of virtuous procrastination: doing more research instead of moving forward with actual writing.⁴⁹

Funding pressures, including lower contributions from state governments, have only added to competitive pressures and norms to produce even more scholarship. There are concerns that this is leading some to cut corners and focus on ways they can please funders.⁵⁰ Publishing quantity can become the singular focus of some faculty members under pressure.⁵¹ It can also lead to a dampening of work one loves in favor of work that sells well: “Those who are continually successful at writing successful funding proposals may have mastered the art, and their success

45. HAYOT, *supra* note 24, at 22.

46. *See, e.g.*, Haines, *supra* note 2, at 305.

47. *See, e.g.*, Sylvia R. Lazos, *Are Student Teaching Evaluations Holding Back Women and Minorities?*, in *PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA* 164 (Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González & Angela P. Harris eds., 2012) (exposing the challenges of working in academia, including student evaluations).

48. *Id.* at 175–76 (discussing the additional burdens placed on minority instructors).

49. HAYOT, *supra* note 24, at 34–35.

50. *See, e.g.*, Cris Shore, *Beyond the Multiversity: Neoliberalism and the Rise of the Schizophrenic University*, 18 *SOC. ANTHROPOLOGY* 15, 22 (2010) (analyzing reform in New Zealand universities partly due to funding pressures).

51. Lydia Carson, Christoph Bartneck & Kevin Voges, *Over-Competitiveness in Academia: A Literature Review*, 1 *DISRUPTIVE SCI. & TECH.* 183, 186 (2013).

is more related to ‘slick grantsmanship’ than their proposed research addressing the questions that matter most to society.”⁵² Instead of aligning their interests with a thirst for knowledge or benefiting society, such scholars focus on what gets them ahead. No one can blame them for keeping their eyes on the kind of research that is prized.⁵³

Importantly, while these unforgiving production standards are often initiated by top schools and departments, they eventually make their way down the ranks. The elite schools disproportionately train the majority of academics, so their values are continually disseminated with each graduating class.⁵⁴ Additionally, scholars at lower-ranked programs often want to move to more elite programs, and thus they will tend to produce scholarship that impresses said schools.⁵⁵

If we combine all these factors, we can understand that while there is no organized conspiracy against minority scholars, the expectations and underlying structures work against their success as new entrants to the academy. As the next section shows, some of these pressures are exacerbated by the relationship between law schools and universities.

B. THE LEGAL ACADEMY IS INSECURE ABOUT ITS PLACE IN THE UNIVERSITY

The production of legal scholarship has its own challenges, in addition to the ones previously discussed for scholars across the university. The legal academy finds itself in a world of academic capitalism and stiff competition for resources, which in turn incentivizes the production of certain kinds of scholarship.⁵⁶

52. *Id.* at 185 (quoting D.H. Osmond, *Malice’s Wonderland: Research Funding and Peer Review*, 14 J. NEUROBIOLOGY 95, 98 (1983)).

53. Peter Roberts, *Neoliberalism, Performativity and Research*, 53 INT’L REV. EDUC. 349, 359–62 (2007) (analyzing the emphasis on extrinsic rewards over intrinsic motivations for research).

54. Joel Warner & Aaron Clauset, *The Academy’s Dirty Secret*, SLATE (Feb. 23, 2015), <https://slate.com/human-interest/2015/02/university-hiring-if-you-didn-t-get-your-ph-d-at-an-elite-university-good-luck-finding-an-academic-job.html> [<https://perma.cc/RT9F-WBK5>].

55. *Id.* (“One explanation for this skewed hiring system is that lower-prestige institutions are trying to emulate their high-prestige brethren.”).

56. See, e.g., Clare O’Hagan, Pat O’Connor, Eva Sophia Myers, Liv Baisner, Georgi Apostolov, Irina Topuzova, Gulsun Saglamer, Mine G. Tan & Hülya Çağlayan, *Perpetuating Academic Capitalism and Maintaining Gender Orders Through Career Practices in STEM in Universities*, 60 CRITICAL STUD. EDUC.

As will be discussed below, there are also anxieties about methodology within law. There is no one accepted framework or method that legal scholars can lay claim to. Rather, legal academics tend to be jacks-of-all-trades, borrowing from the social sciences and humanities quite freely.

This insecurity about law's place is important to understand, not because it is a new insight but because it helps explain why legal academics have sounded so gloomy about the state of the profession throughout the decades. Rather than an anomaly, it is the norm for legal academics to worry about the rigor and worth of legal scholarship. This leaves legal academia vulnerable to influence because it searches for validation and a sense of belonging in the academic hierarchy. This was somewhat held at bay during the boom years when law schools were profit centers of universities but has come back to the fore in the last decade as the fortunes of law schools have cooled.⁵⁷

Legal scholars love to think about the state of legal scholarship. Several scholars have analyzed legal scholarship from different perspectives in individual papers and as part of symposia.⁵⁸ What often emerges is a pessimistic view of legal

205 (2019) (discussing the career practices perpetuated and reinforced by academic capitalism).

57. Karen Sloan, *Law School Rush May Be Over, with Applications down 10%*, REUTERS (Mar. 3, 2022, 3:34 PM), <https://www.reuters.com/legal/legalindustry/law-school-stampede-may-be-over-with-applications-down-10-2022-03-03> [<https://perma.cc/43UJ-RYJL>] (suggesting that the law school applications have declined steadily over the past years).

58. *Symposium: Law, Knowledge, and the Academy*, 115 HARV. L. REV. 1278 (2002); Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327 (2002) (arguing that the current diversity of approaches to legal scholarship is a healthy development; that recent theoretical, interdisciplinary, and "outsider" perspectives enrich the study of legal issues; and that these perspectives are no more ideologically driven than their predecessors); Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981) [hereinafter Posner, *Present Situation*] (arguing that doctrinal analysis should remain the core of legal scholarship and that it is endangered at leading law schools); Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314 (2002) [hereinafter Posner, *Legal Scholarship Today*] (arguing that the future of interdisciplinary scholarship is threatened by problems of quality arising from the peculiar and inadequate institutional structure of interdisciplinary legal scholarship, and that it depends on the ability of the practitioners of this scholarship to influence practice); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988) [hereinafter Rubin, *Practice and Discourse*] (offering a critique based on the internally defined purposes of legal scholarship, concluding that this scholarship is often ineffective on its own terms); Alan D. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229 (1981)

scholarship, with a measure of policing of boundaries and several suggestions of what could be done to improve things. Compare the following four passages, decrying the state of legal scholarship. The first is from Mark Tushnet in 1981:

I sense that the community of legal scholars is afflicted with a vague malaise, sometimes girded about by a pretentious complacency. Perhaps more important, that community has been operating for some years outside the main currents of significant intellectual activity. I cannot imagine, for example, an intellectual history of contemporary America in which legal thought would play an important part. There may of course be an erroneous premise implicit in the view that legal scholarship should be a central element of the serious intellectual discourse in this country. After all, law, like engineering, is an applied rather than pure endeavor, and no one expects engineers to participate in the intellectual life of the community.⁵⁹

The second passage is from Edward Rubin in 1988:

These are not cheerful times for standard legal scholarship. In fact, the field is widely perceived as being in a state of disarray. It seems to lack a unified purpose, a coherent methodology, a sense of forward motion, and a secure link to its past traditions. It is bedeviled by a gnawing sense that it should adopt the methods of other disciplines but it is uncertain how the process is to be accomplished. The field even lacks a conceptual framework within which to criticize itself.⁶⁰

(defending “trashing” as a valuable form of legal scholarship which more truly exposes reality); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CALIF. L. REV. 889 (1992) (recommending that scholarship be judged using the criteria of clarity, persuasiveness, significance, and applicability); Pierre Schlag, *Pre-Figuration and Evaluation*, 80 CALIF. L. REV. 965 (1992) (responding to Professor Rubin by arguing that the evaluation question arises from the unraveling of the dominant paradigm of legal thought); Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1980) (contending that legal scholarship lies at the edges of serious intellectual activity because it does not confront the relationship between objectivity and subjectivity); David Feldman, *The Nature of Legal Scholarship*, 52 MOD. L. REV. 498 (1989) (arguing that legal scholarship cannot be measured by reference to scientific techniques, and placing a high value on academic freedom); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002) (arguing that all empirical and causal assertions in all legal scholarship should follow a unitary approach to inference that is grounded in the logic of statistics); Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153 (2002) (rejecting much of Epstein and King’s indictment of legal scholarship and arguing that scholarship must necessarily proceed on the basis of unproven empirical assumptions if it is to proceed at all); Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517 (2000) (analyzing legal scholarship over a period of time and finding little or no decline in doctrinal analysis, a modest rise in law and economics, and a boom and subsequent bust in Critical Legal Studies).

59. Tushnet, *supra* note 58, at 1205.

60. Rubin, *Practice and Discourse*, *supra* note 58, at 1835.

The third passage is from Robert Gordon in 1993:

The legal-academic machine is undoubtedly cranking out a good deal of useless blather: articles that seem to have hardly anything to do with addressing or understanding any legal problem, articles clotted with hermetic jargon or puffed up with self-indulgent posturing, articles clumsily practicing intellectual modes that people in other fields execute with much more grace and precision, articles borrowing intellectual fashions that would be better off never having been invented.⁶¹

The fourth passage is from Deborah Rhode in 2002:

The legal profession has no shared vision of what kinds of scholarship are most valuable or even most valued by the academy. Leading scholars in virtually every field believe that their own type of research is insufficiently appreciated. Theorists perceive a 'revolt from theory.' Doctrinal scholars feel dismissed and denigrated as 'mundane,' 'arid,' or 'passé.' Empiricists and legal historians see their work marginalized as 'merely descriptive.' There is also no agreement about whether legal scholars are producing too much theory, too little theory, or the wrong kind of theory.⁶²

There is apparent insecurity at play here. From the passages, we can glean that despite the fact that legal scholars are better paid than many of their university colleagues,⁶³ there is a sense of impostor syndrome running through the ranks of legal academia. As a result, there is a common lack of cheer and some despair about the fact that there is no shared vision or method. Robin West and Danielle Citron succinctly summarized the complaints against legal scholarship thus:

It is too professional or too normative to be true 'scholarship' for some critics and too academic for others. It is too disorganized, undisciplined, or disperse: no one can articulate widely shared standards of quality, or even a widely shared method that defines the discipline. No one can state its point. And, to add insult to injury, it costs too much.⁶⁴

These complaints and insecurities lead us back to the university as a whole. Academics are as status-obsessed as anyone else, and there is an unwritten pecking order in the sciences and across the academy. Economist Richard Freeman illustrated this when he used his discipline as a baseline in a 1999 essay.⁶⁵ Free-

61. Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2076–77 (1993).

62. Rhode, *supra* note 58, at 1328.

63. See, e.g., Arthur Austin, *Law Professor Salaries*, 2 GREEN BAG 243, 243 (1999) ("Law professors are paid more than their colleagues in the arts and humanities.").

64. Citron & West, *supra* note 19, at 2.

65. Richard B. Freeman, *It's Better Being an Economist (But Don't Tell Anyone)*, 13 J. ECON. PERSPS. 139, 141 (1999).

man argues that hard scientists like physicists and mathematicians are unnerved by the superior labor prospects that economists enjoy, despite what they see as inferior, less scientific work.⁶⁶ He imagines that economists would be similarly unnerved if sociologists and political scientists fared better than economists on the job market because they consider those social sciences less scientific, with less powerful analytic tools.⁶⁷

Freeman calls mathematics “the queen of the sciences” and physics “the ideal natural science.”⁶⁸ Given this exalted status, he tries to understand why economics enjoys its perch in the labor market.⁶⁹ Somewhat perversely, according to Freeman, economics is helped by the fact that the best and brightest dream of being natural scientists.⁷⁰ It means that economics has a much more elastic supply curve than the natural sciences, with economists more willing to move around to other fields should the market collapse.⁷¹ On the demand side, it actually helps that economists have solved fewer problems than those in the natural sciences have, because it leaves a lot more opportunities for discovery.⁷² Thus, economics is able to remain at the top of the labor market by walking a careful line between being the worst of the hard sciences and the best of the social sciences.⁷³

If economics is the best of the social sciences, law is an unholy mishmash. Law is clearly important in the world at large.⁷⁴ But in academia, there has always been an uneasy relationship given its trade school beginnings.⁷⁵ Besides moving apprenticeships into the halls of academia, law does not have a comfortable

66. *Id.* at 140.

67. *Id.* at 141.

68. *Id.* at 141–42.

69. *Id.*

70. *Id.* at 142.

71. *Id.* at 143–44.

72. *Id.* at 144.

73. See, e.g., Marion Fourcade, Etienne Ollion & Yann Algan, *The Superiority of Economists*, 29 J. ECON. PERSPS. 89, 91 (2015) (“Economics occupies a unique position among academic disciplines. It is characterized by far-reaching scientific claims linked to the use of formal methods; the tight management of the discipline from the top down; high market demand for services, particularly from powerful and wealthy parties; and high compensation.”).

74. See, e.g., John Griffiths, *Is Law Important?*, 54 N.Y.U. L. REV. 339, 344 (1979) (exploring the relationship between legal rules and social phenomena).

75. See, e.g., Rubin, *Practice and Discourse*, *supra* note 58 (offering a critique based on the internally defined purposes of legal scholarship, concluding that this scholarship is often ineffective on its own terms).

fit.⁷⁶ Is it a social science? Does it belong with the humanities? In some sense it is like engineering, which is not really a science, but rather an applied endeavor that utilizes scientific principles. On the other hand, law is a professional subject that utilizes social science methods. This leaves it in an insecure place in academia. In the status competition of the academy, legal scholars want to show their work is legit.⁷⁷ This often leads them to critique—much more harshly—work that is not seen as rigorous enough.⁷⁸ Part of the idea here is to police boundaries and weed out or at least isolate the work deemed unscientific or unworthy.

This is the world the minority junior scholar focused on eradicating injustice enters. Work that is deemed more scientific and rigorous is viewed as more valuable. When I started law school in 2002, I learned there were critical race theory scholars, and I was inspired by them. But I also knew that they had been deemed troublemakers and that professors at my own law school had questioned the value of their work.⁷⁹ Yes, these individuals were successful, but their work had also been marginalized within legal academia as less-than-rigorous.⁸⁰

This boundary-policing also leaves legal scholarship that much more open to being influenced by, and to seeking approval and legitimacy from other departments in the university. Lee Epstein and Gary King struck at the center of this insecurity in 2002, when they published an article claiming that much empirical legal work did not follow many of the rules of inference and labeling many of its conclusions overconfident.⁸¹ At worst, this had to sting; and at best, it laid down a challenge to the legal academy. The *University of Chicago Law Review* even devoted an exchange to the article, with six scholars weighing in.⁸² The

76. *See id.*

77. *See, e.g.,* Gordon, *supra* note 61 (discussing the value of different types of legal scholarship).

78. Rhode, *supra* note 58, at 1328 (“[O]ur often unexamined preferences guide not only the content, methodologies, and focus of our own work, but also our individual and institutional judgments about the work of others.”).

79. *See* Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or “A Foot in the Closing Door,”* 49 *UCLA L. REV.* 1343, 1344–54 (2002) (describing the struggles and successes of critical race theory professors in the wake of Professor Derrick Bell’s departure from Harvard Law School, prompted by the School’s reluctance to hire Black faculty).

80. *See id.* at 1365–69 (listing critiques of critical race scholarship).

81. Epstein & King, *supra* note 58, at 6–7.

82. Frank Cross, Michael Heise & Gregory C. Sisk, *Above the Rules: A Response to Epstein and King*, 69 *U. CHI. L. REV.* 135 (2002) (disagreeing with the

Epstein and King article attracted much criticism and numerous comments from significant legal scholars in major law reviews.⁸³

One positive response came from then-Northwestern Law Dean David Van Zandt.⁸⁴ Van Zandt viewed the Epstein and King article as a great service and noted that their views largely resonated with his.⁸⁵ For Van Zandt, the lack of methodological and theoretical training and lack of strong norms of peer review meant that “the work of many law school faculty falls short of the standards that prevail in other disciplines.”⁸⁶ Where Van Zandt differed is that he actually found Epstein and King’s solutions too timid.⁸⁷ He had a better solution: hiring candidates with JD-PhDs.⁸⁸ There was nothing special about law’s methodology as “[l]aw and legal institutions are merely a subset of social and political phenomena that are studied every day in economics, political science, and other departments.”⁸⁹ Given this lack of method, it was reasonable for law schools to welcome those who were better trained. According to Van Zandt, the best reason that law school is so special is that it serves as a gathering place for those tackling similar problems.⁹⁰ Crucially, Van Zandt’s discipline-based law school project is partly about adding

majority of Epstein and King’s points on the state of empirical legal research methodology); Goldsmith & Vermeule, *supra* note 58 (rejecting much of Epstein and King’s indictment of legal scholarship and arguing that scholarship must necessarily proceed on the basis of unproven empirical assumptions if it is to proceed at all); Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169 (2002) (responding to Epstein and King by providing a defense of empirical legal scholarship).

83. See, e.g., Larry Catá Backer, *Defining, Measuring, and Judging Scholarly Productivity: Working Toward a Rigorous and Flexible Approach*, 52 J. LEGAL EDUC. 317, 331–32 (2002); Nancy Staudt, *Introduction*, 13 WASH. U. J.L. & POL’Y 1, 5 (2003); Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 336–38 (2005).

84. David E. Van Zandt, *Discipline-Based Faculty*, 53 J. LEGAL EDUC. 332 (2003) (arguing that law schools should be composed largely of academics with disciplinary training in one of the social sciences).

85. *Id.*

86. *Id.*

87. *Id.* at 335.

88. *Id.* at 337.

89. *Id.* at 334.

90. *Id.* (“The best reason for the existence of law schools as separate entities . . . is not that there is some special ‘legal methodology,’ but rather that it makes great sense for people interested in a common set of problems and institutions to work in a common environment in order to share knowledge of what is a complex set of social institutions.”).

“professional legitimacy” to law schools and “open[ing] . . . doors” for research.⁹¹ PhDs from other departments make a law school more legitimate. Van Zandt himself started Northwestern down this path, with the majority of hires during Van Zandt’s administration being JD-PhDs.⁹²

The quest for legitimacy resulted in a race amongst the top schools to hire professors with JD-PhDs.⁹³ The PhD gives the legal academy prestige, credibility, and the methodological and theoretical training in research methods it craves.⁹⁴ But, repeating an earlier theme, it disadvantages those who come from lower-income backgrounds and makes the barriers to entry that much higher.⁹⁵ It also dampens the prospects of those who want to depart from more traditional methodologies because that kind of work is seen as lowering the prestige and undermining the place of law schools at universities.

The pressures of this search for legitimacy and policing of methodology have effects across the legal academy, regardless of school rank. What’s most alarming is that these unwritten standards and norms must be quickly absorbed if one wants to move forward in academia. Shari Motro, like many other scholars in tax and related areas, found that she would be taken more seriously if she “talked law-and-economics rather than law-and-literature,” asked questions that could be solved “rather than ones that merely invited a conversation,” and wrote, “about tax law rather than feminist theory.”⁹⁶ These external pressures did not decrease after tenure, and Motro knew that if she wanted to stay in the game, she needed to stay within the mold.⁹⁷

For the minority junior scholar the message is clear: venture outside of the norm at your own risk. As discussed above, because the legal academy is insecure about its place in academia it has leaned toward the methodology of other social sciences. To the extent one is not able to produce such work and one wants to

91. *Id.* at 335.

92. *Id.*

93. Lynn M. LoPucki, *Dawn of the Discipline-Based Law Faculty*, 65 J. LEGAL EDUC. 506, 516 (2016) (analyzing the increase in JD-PhD hiring among law schools).

94. See Van Zandt, *supra* note 84 (arguing that law schools should be composed largely of academics with disciplinary training in one of the social sciences).

95. LoPucki *supra* note 93, at 541–42.

96. Motro, *supra* note 22, at 116.

97. *Id.* at 117.

take on the mantle of a radical scholar, her work might be marginalized and opportunities for advancement might dry up. The pressure is not only to produce, but to produce work within the class deemed scientific or rigorous.

C. FREEDOM AND AUTONOMY TO PRODUCE SCHOLARSHIP

Scholars, both in the legal academy and outside of it—minority or majority—are of course able to overcome these challenges to have successful and fulfilling careers. One of the best ways to consider how this is done is to review research on the most productive scholars. They tend to represent a small percentage of scholars, and they also tend to share characteristics.⁹⁸ Productivity as quantity is by no means an uncontroversial concept.⁹⁹ Here I just accept that being productive, as in producing scholarship (regardless of kind or publication outlet), is desirable.

Several factors come into play when analyzing productivity, but some general trends converge across studies. Structural factors (such as how academic departments are managed and led) interact with personal variables (such as intrinsic interest in the subject matter of one's discipline) to determine levels of productivity.¹⁰⁰ "By far the best structural predictor of individual output is the academic's membership of a highly active research department. He or she is, statistically speaking, four times more productive than his or her colleagues in one of the less vigorous units."¹⁰¹ Membership of an academic unit that is cooperatively managed, together with a sense of satisfaction rather than alienation from the work environment, is likely to result in a higher level of individual research activity and a correspondingly high level of individual productivity.¹⁰²

98. See, e.g., Paul Ramsden, *Describing and Explaining Research Productivity*, 28 HIGHER EDUC. 207, 216–19 (1994) (analyzing academic productivity and finding common factors and variables linked to productivity).

99. See, e.g., Backer, *supra* note 83, at 318 ("This change reflects my sense that our focus ought to be on the faculty member, as a self-conscious contributor to learning, rather than on the production of a narrowly and rigidly defined object.").

100. Ramsden, *supra* note 98, at 211–12.

101. *Id.* at 219.

102. *Id.* at 224.

Individual factors were even more influential in determining productivity. The most productive scholars consistently valued their freedom and autonomy.¹⁰³ The norms developed by sociologist Robert Merton are often used as a frame of reference for what constitutes the traditional ideals to which academics adhere in producing and diffusing their knowledge.¹⁰⁴ Two such values are universalism and disinterestedness.¹⁰⁵ That is, the best scholars remain open to a range of ideas and are free from outside influence.¹⁰⁶ Other researchers support this idea that scholars value their freedom.¹⁰⁷ For example, John Ziman has argued that the scientific norm of originality requires freedom to undertake research of one's choosing.¹⁰⁸

This freedom is only relevant if it is meaningful. Predictably those with the most privilege are also the most able to defend this freedom and autonomy, while those from disadvantaged backgrounds find academic freedom to be a pipe dream. A 2010 study suggests that academics with strong reputations and extensive resources can more easily maintain their professional autonomy and academic freedom.¹⁰⁹ Similar findings have been offered in studies that show that hierarchical positioning within the academic field (i.e., senior faculty at prestigious universities) influences the strategies that faculty use to maintain their autonomy.¹¹⁰

All of these factors and a history of discrimination leave us with a group of highly successful and productive scholars that is

103. *Id.* at 210.

104. ROBERT K. MERTON, *THE SOCIOLOGY OF SCIENCE: THEORETICAL AND EMPIRICAL INVESTIGATIONS* 267–78 (1973) (introducing and illustrating a system of values including “universalism,” “communism,” and “disinterestedness”).

105. *Id.* at 270–77.

106. See Liudvika Leisyte & Jay R. Dee, *Understanding Academic Work in a Changing Institutional Environment*, in 27 *HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH* 123, 155 (J. C. Smart & M. B. Paulsen eds., 2012).

107. See generally JOHN ZIMAN, *REAL SCIENCE: WHAT IT IS, AND WHAT IT MEANS* 75–76 (2000).

108. *Id.* at 170.

109. Liudvika Leišytė, Jürgen Enders & Harry De Boer, *Mediating Problem Choice: Academic Researchers' Responses to Changes in Their Institutional Environment*, in *RECONFIGURING KNOWLEDGE PRODUCTION: CHANGING AUTHORITY RELATIONSHIPS IN THE SCIENCES AND THEIR CONSEQUENCES FOR INTELLECTUAL INNOVATION* 266 (Richard Whitley, Jochen Gläser & Lars Engwall eds., 2010).

110. See, e.g., MICHAEL MULKAY, *SCIENCE AND THE SOCIOLOGY OF KNOWLEDGE* 25 (1979); Neil W. Hamilton, *Faculty Autonomy and Obligation*, 93 *ACADEME* 36, 41 (2007).

highly homogenous. For example, “the upper echelons of highly productive academics” in Europe, meaning the top ten percent of academics, ranked in terms of publishing performance in eleven European countries, “provide, on average, almost half of all academic knowledge production.”¹¹¹ Perhaps unsurprisingly, most of these top publishers carry the privilege of being male:

From a gender perspective, the proportion of male academics among research top performers is higher (three out of four) than that of female academics but “productivity concentration indexes” . . . show that the role of highly productive female academics is much higher than traditionally assumed in the literature on social stratification in science.¹¹²

As previously mentioned, academic and intellectual freedom have long been at the center of the academy.¹¹³ Norms of originality require “freedom to undertake research of one’s own choosing.”¹¹⁴ But funding conditions have begun to threaten the professional autonomy of academics. Faculty have long been engaging in strategies to protect their freedom, including packaging their scholarship in ways that appeal to funding audiences.¹¹⁵ Two examples are instructive. A study of research groups of life scientists and medieval history departments in the United Kingdom and the Netherlands has shown that strategies may range from passive compliance to active manipulation,¹¹⁶ and that dependence on external governmental research funding and contract research may influence the selection of research topics.¹¹⁷ Research has also indicated that scientists in Germany and Australia adapt to funding conditions that threaten their professional autonomy.¹¹⁸ The researchers found that applied physicists used strategies such as diversifying research topics, selecting externally predetermined topics, avoiding risky research, and avoiding controversial topics.¹¹⁹

111. Marek Kwiek, *Inequality in Academic Knowledge Production: The Role of Research Top Performers Across Europe*, in *THE TRANSFORMATION OF UNIVERSITY INSTITUTIONAL AND ORGANIZATIONAL BOUNDARIES* 203 (Emanuela Reale & Emilia Primeri eds., 2015).

112. *Id.*

113. Leisyte & Dee, *supra* note 106, at 154.

114. *Id.* at 155.

115. *Id.* at 156.

116. Leišytė, Enders & De Boer, *supra* note 109, at 286.

117. *Id.* at 287.

118. Grit Laudel, *The Art of Getting Funded: How Scientists Adapt to Their Funding Conditions*, 33 *SCI. & PUB. POL’Y* 489, 489 (2006).

119. *Id.* at 497.

To put it simply, freedom and autonomy generally results in more high-quality scholarship, but the structural pressures on the university are pushing in the direction against such freedom. This leaves us with a homogenous group of highly productive scholars. Those least likely to have this freedom are minority scholars. This march toward more publishing output from university leadership because of funding pressures also works against minorities, who have the most demands on their time, and have the least inside knowledge coming into the profession.¹²⁰ Thus, the current system will only further exacerbate disparities.

D. DESIRE AND THE LOVE OF SCHOLARSHIP

Related to the freedom and autonomy to create publishable work is the desire to do so. As previously discussed, there's a lot of effort, resources, and mental gymnastics required to produce scholarship. Writing what one cares about keeps the scholar going. Importantly, law's much-maligned lack of mooring to any particular method actually turns into a strength when viewed from the standpoint of success and productivity. Desire matters when it comes to producing scholarship,¹²¹ and at least theoretically, legal scholarship offers the scholar many options to follow their bliss.

"[T]he strongest personal (i.e., individual) correlates" to productivity "are early interest in research, involvement in research activity, and seniority of academic rank."¹²² Intrinsically motivated academics tend to agree with the following statements: (1) "I genuinely enjoy writing for publication;" (2) "I invariably enjoy doing research;" (3) "I find most new topics in my subject area interesting and often spend extra time trying to obtain more information about them;" (4) "I become increasingly absorbed in my academic work the more I do;" and (5) "While I realize the truth is forever changing as knowledge is increasing,

120. See *supra* note 46 and accompanying text.

121. See, e.g., PAULA E. STEPHAN & SHARON G. LEVIN, *STRIKING THE MOTHER LODE IN SCIENCE: THE IMPORTANCE OF AGE, PLACE, AND TIME* 17–22 (1992); Ramsden, *supra* note 98, at 223; Daniel Teodorescu, *Correlates of Faculty Publication Productivity: A Cross-National Analysis*, 39 *HIGHER EDUC.* 201, 207 (2000); Marek Kwiek, *The Internationalization of Research in Europe: A Quantitative Study of 11 National Systems from a Micro-Level Perspective*, 19 *J. STUD. INT'L EDUC.* 341, 351 (2015) [hereinafter Kwiek, *The Internationalization of Research in Europe*]; Marek Kwiek, *supra* note 111, at 203.

122. Ramsden, *supra* note 98, at 218.

I feel compelled to discover what appears to me to be the truth at this time.”¹²³ At a very basic level, they love their research and have an endless curiosity to continue pursuing it.

The results of this research are supported by social science findings about extrinsic and intrinsic motivation. For example, a central tenet of economics is that individuals respond to incentives or extrinsic motivators.¹²⁴ After all, human beings tend to respond to rewards. In contrast, for psychologists and sociologists, rewards and punishments are often counterproductive because they undermine intrinsic motivation.¹²⁵ While valuable in some contexts, a 2003 study showed how performance incentives offered by an informed principal (manager, teacher, parent) can adversely impact an agent’s (worker, child) perception of the task, or of his own abilities.¹²⁶ Incentives are then only weak reinforcers in the short run and negative reinforcers in the long run.¹²⁷

Contrary to the pressure-packed, results-based work environments favored by some, and increasingly seen at universities, “[r]esearch suggests that individuals are motivated to perform well when the work is meaningful and they have responsibility for the outcomes of their assigned tasks.”¹²⁸ Since the direction of research is often highly personalized, it makes sense that comparatively the best research would be on topics the scholar found interesting and/or meaningful. This is also supported by research into how motivation impacts faculty members:

Motivational factors indicate the need for an environment which increases intrinsic motivation while supplying extrinsic motivators as informational tools only. Increasing amounts of administrative control and increased concern about promotion and tenure are both seen as counter-productive in the long run. Extrinsic rewards appear to rein-

123. *Id.* at 215.

124. See, e.g., Edward P. Lazear, *Performance Pay and Productivity*, 90 AM. ECON. REV. 1346, 1346 (2000) (finding that monetary incentives increase worker output).

125. See, e.g., Edward L. Deci, Richard Koestner & Richard M. Ryan, *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125 PSYCH. BULL. 627, 628 (1999).

126. Roland Bénabou & Jean Tirole, *Intrinsic and Extrinsic Motivation*, 70 REV. ECON. STUD. 489, 492 (2003).

127. *Id.*

128. S. K. Srivastava & Kailash Chandra Barmola, *Role of Motivation in Higher Productivity*, 5 GLOB. J. BUS. MGMT. 105, 105 (2011).

force intrinsic motivation only when they are given in a positive, informational sense.¹²⁹

Instead, the motivation has to come from within and from working on things one cares about, making changes crucial to humanity's existence, and solving problems one is curious to tackle. This has been analyzed from the lens of gender differences, but could also perfectly describe multiple minorities and disadvantaged groups:

[W]omen publish less in part because they are less driven by a desire to produce numerous publications and receive professional accolades. Rather, as revealed by further investigation into this data set, women are more likely than men to view an academic career as an "opportunity to influence social change." It is quite possible that for many women, time not spent publishing is spent instead on projects or other activities perceived as having more direct societal impact.¹³⁰

The same could be said about other disadvantaged groups of radical scholars. If the goal is societal change, scholarship can sometimes fall short or feel incredibly futile. To the extent that its production feels like a rote exercise for quantity's sake or it has to be moderated to stay in the academy, it can be especially daunting and can force such a scholar to work against their desire. This is dangerous and counterproductive for the long-term motivation of radical and non-normative scholars who disproportionately come from underrepresented groups.

By analyzing scholarship and the academy, this Section showed that while good scholarship is difficult to produce, we do have an idea of *how* good scholarship is produced. While trends and pressures on universities are pushing in the direction of less autonomy and more extrinsic rewards, the research reveals that more freedom and support for work that is meaningful would be more successful. Unfortunately, a group that is disproportionately made up of minority scholars is asked by the legal academy to moderate their work and to recast their projects in ways that make them unmeaningful.

II. THE DAMPENING OF RADICAL SCHOLAR PRODUCTIVITY

This Part of the Essay builds on the previous discussion to show the ways in which the legal academy dulls the intrinsic

129. E. Dendy Sloan, *Extrinsic Versus Intrinsic Motivation in Faculty Development*, 23 CHEM. ENG'G EDUC. 134, 137 (1989).

130. Linda J. Sax, Linda Serra Hagedorn, Marisol Arredondo & Frank A. DiCrisi, *Faculty Research Productivity: Exploring the Role of Gender and Family-Related Factors*, 43 RSCH. HIGHER EDUC. 423, 436 (2002).

motivation of radical and other non-normative scholars. It begins by defining what I mean by radical scholarship. This incorporates some parts of the definition provided by Cornel West in an essay on the topic, but also integrates other scholars who do not hew to all of the commitments West outlines.¹³¹ Next, by using the examples of the Hebrew prophet Jeremiah and the legal scholar Derrick Bell,¹³² it underscores that a part of radical scholarship is accepting some despair and futility. Yet, this despair is enhanced by having to work against a dominant economics-based paradigm and a focus on scholarship that shows its worth in the short term. Finally, I tie all of this together by showing that these factors cumulatively tend to sap the intrinsic motivation of the radical or non-normative scholar and lead to lessened productivity and career satisfaction.

A. DEFINING RADICAL SCHOLARSHIP

Because the word “radical” has several meanings, which can sometimes incorporate any work that is generally on the left, it is important to dial down what I mean by radical or non-normative scholarship. This section attempts to do so by borrowing from the work of Cornel West,¹³³ and an essay by Danielle Citron and Robin West defending legal scholarship.¹³⁴

I am using the word “radical” quite broadly for this Essay, hence why I use it and “non-normative” interchangeably. In this sense, radical is “[v]ery different from the usual or traditional; favoring extreme changes in existing views, habits, conditions, or institutions.”¹³⁵ This is also related to the political definition: “Advocating extreme measures to retain or restore a political state of affairs; associated with political views, practices, and policies of extreme change.”¹³⁶ This does not mean that the scholarship is necessarily of the left, but for the purposes of this Essay, I will be solely discussing such scholarship.

131. See generally Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797 (1990).

132. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (Basic Books ed., 1992); Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelations or Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571 (1993).

133. See West, *supra* note 131.

134. See Citron & West, *supra* note 19.

135. *Radical*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

136. *Id.*

Despite these simplistic definitions, I think it is important to further describe what makes scholarship radical, because it reveals some of the difficulties in producing this kind of scholarship. In a 1990 essay, Cornel West considered the role of law in progressive politics.¹³⁷ Importantly, West tries to carve out a space between an overly optimistic liberalism and downbeat leftism that makes exorbitant claims about the law.¹³⁸ West distinguishes between American radicalism (the left), liberalism (the center), and conservatism (the right).¹³⁹ According to West, while liberalism is preferable to conservatism, it is not transformative because liberalism is essentially tied to capitalism, economic growth, and corporate priorities: it bakes inequality into its framework.¹⁴⁰ Conservatism is dangerous in its openly brutal repression, but liberalism is also treacherous because it diffuses radicals' claims for change and makes the status quo comfortable.¹⁴¹ Liberalism is also able to co-opt some radical claims, thus making it hard to ascertain whether some legal radicalism is just an extension of liberalism.¹⁴²

West accepts that law is not sufficient to transform the misery and suffering of capitalism and undo the social inequality in America.¹⁴³ But rather than just relegate the law to a legitimizing place in society, West sees important work it can accomplish.¹⁴⁴ According to West, legal work that challenges cultural conservatism on race, class, and sexual equality is able to attenuate some of its most overt expressions, but still leaves us with many subtle ones.¹⁴⁵ Law may not be able to transform, but it performs important defensive work against cultural conservatism that would interpret law in more racist, sexist, or homophobic ways.¹⁴⁶ This work is liberal in that it proceeds from within the existing legal order, but radical in intent in that it preserves former radical victories from the conservative offensive.¹⁴⁷

137. See West, *supra* note 131.

138. *Id.* at 1797.

139. *Id.* at 1798–800.

140. *Id.* at 1797.

141. *Id.* at 1798.

142. *Id.*

143. *Id.* at 1798–99.

144. *Id.* at 1799–800.

145. *Id.* at 1799.

146. *Id.*

147. *Id.*

West takes a view of American history wherein lengthy cold periods of conservatism are then followed by brief progressive moments/victories garnered through social movements.¹⁴⁸ As such, progressive legal work serves to defend the progressive victories until the next moment of radical upheaval.¹⁴⁹ West criticizes Critical Legal Studies (CLS), which preceded the more rights-positive Critical Race Theory (CRT),¹⁵⁰ for not understanding this important role often served by civil rights lawyers.¹⁵¹ He questions the pessimism and myopia of critiquing one of the only feasible ways to stem relentless conservative attacks.¹⁵² Ultimately, West concludes that there can be no substantive progressive politics beyond extensions of liberalism without social movements.¹⁵³ Without such movements, most legal progressive efforts remain primarily defensive.¹⁵⁴

Here West deepens the role he imagines for the lawyer as society's memory:

The role of progressive lawyers not only is to engage in crucial defensive practices—a liberal practice within the court system—but also to preserve, recast, and build on the traces and residues of past conflicts. This latter activity is guided by a deep historical sensibility. . . . Progressive lawyers can seize this opportunity to highlight the legal system's internal contradictions and blatant hypocrisy, using the very ideals—fairness, protection, formal equality—it heralds. This kind of progressive legal practice, narrative in character and radical in content, can give visibility and legitimacy to issues neglected by and embarrassing to conservative administrations and can educate citizens on the operations of economic and political powers in the courts.¹⁵⁵

Under this conception, law uses its prestige and authority in American society to raise historical consciousness and create channels for resistance.¹⁵⁶ Here, West rehabilitates CLS for exposing the human costs of liberal law under the guise of formal equality.¹⁵⁷ But he critiques its distance from social movements,

148. *Id.* at 1799–800.

149. *Id.* at 1800.

150. CRT explicitly accepted the central place of rights. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 8–11 (3d ed. 2017).

151. West, *supra* note 137, at 1800.

152. *Id.*

153. *Id.* at 1801.

154. *Id.*

155. *Id.* at 1802.

156. *Id.*

157. *Id.* at 1803.

which limits its potential.¹⁵⁸ Ultimately, West is looking to more transformative change, but this only happens during a short-lived period when American radicalism provides serious and concrete threats to corporate power by calling for substantial redistribution of wealth and resources.¹⁵⁹ Thus, progressive lawyers keep alive past victories, try to encourage social movements, and when radical victories are achieved, they defend them until the next transformative movement.¹⁶⁰ West calls for a two-pronged strategy by progressive lawyers whereby they unrelentingly defend substantive democracy and an all-inclusive liberty.¹⁶¹

For the purposes of this Essay, I want to expand the focus beyond the radical scholarship discussed by Cornel West to include other kinds of non-normative legal scholarship. In their case for the value of legal scholarship, Danielle Citron and Robin West defend the normative nature of legal scholarship and analyze its value.¹⁶² They place doctrinal and reformist scholarship at the center of the legal mainstream.¹⁶³ According to their description, doctrinal scholarship seeks a clear interpretation of the law and strives to make it the best it can be.¹⁶⁴ Reformist scholarship aims to render the law more just by arguing for legal reforms.¹⁶⁵ These forms of scholarship are widely accepted within law. Upon digging deeper, Citron and West found that most of the critiques against legal scholarship are not against these normative kinds of scholarship in their traditional form.¹⁶⁶

Rather, the problems are with what Citron and West term non-normative scholarship, in which they include critical, theoretical, and inter-disciplinary scholarship.¹⁶⁷ The purpose of these is “either to criticize law, though not toward reformist ends, or to seek a better understanding of it, either by engaging its more theoretical foundations or by examining it through the lens of other disciplines, drawn, loosely, from the social sciences or the humanities.”¹⁶⁸ Of the three of these, critical scholarship

158. *Id.*

159. *Id.* at 1804.

160. *Id.*

161. *Id.* at 1805.

162. Citron & West, *supra* note 19, at 2–3.

163. *Id.*

164. *Id.* at 3.

165. *Id.* at 4.

166. *Id.* at 7, 10.

167. *Id.* at 7.

168. *Id.*

is most likely to be consistently radical, as both theoretical and inter-disciplinary studies invite a wider range of mainstream perspectives. This critical scholarship often seeks to deconstruct traditional structures and often elicits bewildered responses, if not outright rejection in legal academia.¹⁶⁹

Thus, the remainder of the Essay will focus on radical scholarship in the sense that such work rejects that injustice and suffering can be resolved through the existing capitalist system. Such work might also be radical in criticizing law, not toward reformist ends and often not offering proposals or solutions.

B. THE DESPAIR OF THE RADICAL SCHOLAR

Producing radical scholarship can be difficult and lonely because one is working against the grain. Most human beings do not enjoy perpetual conflict, which is what the radical or non-normative scholar often signs up for. Questioning the status quo reveals truths that make some uncomfortable. Radical scholars often have to peer beneath contradictions and veneers to see hypocrisy and speak truth to power. This can be a heavy responsibility that one retreats from:

By discarding the presuppositions of linear progression and those of either present or future sharedness, one confronts a world of legal ideology characterized by struggle, or conflict, between competing worldviews. This world recognizes the possibility of permanent defeat. Because it accepts contradiction, and accepts the fundamental irreconcilability between the concrete expectations of losers and the myths that perpetuate the winners, it seems much closer to an accurate picture, free from distorting or dissonant presuppositions. The process of delegitimizing scholarship eventually reveals a world that is characterized more by conflict than by harmony, and by patterns of illegitimate hierarchy.¹⁷⁰

One of the issues for the radical scholar is that they may not know their place in legal academia. Among a dizzying set of compromises that one must make to survive, it is not immediately clear which ones are proper. Perhaps one should compromise early and build a power base to make more lasting change, but that also sounds overly strategic and disingenuous. Given that scholarship builds over time, the radical minority scholar might want to hold back, lest they go too far out on a limb and suffer reputational consequences. There is a sense in which radical and non-normative scholars feel like unwilling messengers. They tend to tire of being the ones who always have to bring up these

169. See discussion *infra* Part II.C.2.

170. Freeman, *supra* note 58, at 1235–36.

issues, and nevertheless feel a responsibility to do so lest the vulnerable be overlooked. This aspect of radicalism is linked to the biblical tradition, which in turn inspired some of the work of radical legal scholar Derrick Bell.¹⁷¹

Though not supported by historical scholars, one ancient tradition ascribes the authorship of the biblical books of Jeremiah and Lamentations to the prophet Jeremiah.¹⁷² Lamentations consists of five poetic laments for the 586 BCE destruction of Jerusalem.¹⁷³ The tone of the book is appropriately bleak as the poet laments the desertion of the city by God, along with the subsequent suffering by its inhabitants and its ultimate destruction. This ascribed authorship led to Jeremiah being known as the “weeping prophet.”¹⁷⁴ His name further inspired the French noun *jérémiade*,¹⁷⁵ and subsequently the English *jeremiad*, meaning “[a] prolonged lamentation or complaint; a cautionary or angry harangue.”¹⁷⁶

In the Bible, Jeremiah often seems lonely and unhappy. He was born in a small town, miles away from the capital of Jerusalem, into a priestly line, but one that did not have high standing with the Jerusalem priests because its line of ancestry was not as prominent.¹⁷⁷ Jeremiah was called to prophesy in his early twenties by God to proclaim Jerusalem’s coming destruction by invaders from the north.¹⁷⁸ He was basically dragged kicking and screaming into being the bearer of horrible news with the hope that the nation would change its ways.¹⁷⁹ Jeremiah attempted to escape his fate by emphasizing his youth and inexperience with little success.¹⁸⁰

171. See discussion *supra* note 132 and accompanying text.

172. BRUCE M. METZGER & MICHAEL D. COOGAN, *THE OXFORD COMPANION TO THE BIBLE* 419 (1993).

173. *Id.*

174. *Id.*

175. *Jeremiad*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

176. *Id.*

177. *Jeremiah & Lamentations and Work*, THEOLOGY OF WORK PROJECT, <https://www.theologyofwork.org/old-testament/jeremiah-lamentations> [<https://perma.cc/4DK5-F5UQ>].

178. *Id.*; *Jeremiah* 1:14–16, 4.

179. Compare *Jeremiah* 4:19 (“My anguish, my anguish! I writhe in pain!”), with *Isaiah* 6:8 (“Whom shall I send, and who will go for us?” Isaiah replied, “Here am I; send me!”).

180. *Jeremiah* 1:6–7, 11–16.

Only radical change would save Judah. The nation had deviated so far from God's laws that they had broken the covenant, causing God to withdraw his blessings.¹⁸¹ Judah's sin was not only the worship of idols, but also societal injustice and greed.¹⁸² God guided Jeremiah to proclaim that the nation of Judah would suffer famine, foreign conquest, plunder, and captivity in a land of strangers.¹⁸³

Jeremiah "was the pessimist, who was in reality the realist."¹⁸⁴ He was dismissed and ridiculed by false prophets who prophesized lasting peace and stability, arguing that God would never let the city of Jerusalem fall to an invader.¹⁸⁵ But no one wants to welcome a Debbie Downer, regardless of the truth of their message. Perhaps expectedly, Jeremiah was often treated horribly, and his prophecies led to vicious plots against him.¹⁸⁶ His priestly kin and the men of his hometown conspired to kill him.¹⁸⁷ Yes, God protected him, but when Jeremiah complained about his persecution, God responded by telling him it would worsen.¹⁸⁸ Jeremiah did not hold in just how disappointed he was by his fate.¹⁸⁹ To the contrary, he openly lamented the suffering and mockery that being a prophet had caused him.¹⁹⁰ But, he had little choice in the matter.¹⁹¹ He had to continue his work.¹⁹²

One senses a similar sense of despair, but with a more optimistic twist, in the work of radical legal scholar Derrick Bell. One of Derrick Bell's most controversial arguments was the "racism is permanent" thesis from *Faces at the Bottom of the Well*.¹⁹³ According to Bell, racism is a stabilizing force that unites whites

181. *Jeremiah* 2–3.

182. *Jeremiah* 7: 8–9, 5:27–28.

183. *Jeremiah* 10–11.

184. *Jeremiah & Lamentations and Work*, *supra* note 177.

185. *Jeremiah* 6:13–15, 14:14–16, 23:9–40, 27:1–28:17.

186. *Jeremiah* 11:21, 18:18, 20:1–2, 26:8.

187. *Jeremiah* 11:18–23.

188. *Jeremiah* 4.

189. *Id.*

190. *Id.*

191. *Jeremiah* 1:14–16.

192. *Id.*

193. BELL, *supra* note 132, at 12–13, 92, 108, 198.

across the socioeconomic spectrum.¹⁹⁴ It is “an integral, permanent, and indestructible component of this society.”¹⁹⁵ Even the big victories are temporary “peaks of progress” that become irrelevant as the white supremacist system adapts.¹⁹⁶ There has been a difference in uptake of the thesis:

Making the ‘racism is permanent’ case has proven relatively easy for most black people who have heard it. Most though far from all whites are more resistive, running the gamut from those who are deeply troubled but unable to refute the basis of my thesis to those who angrily reject the idea, charging that I am racist for even suggesting it.¹⁹⁷

According to Bell, we have to “confront and conquer the otherwise deadening reality of our permanent subordinate status.”¹⁹⁸ This confrontation in itself provides hope. Telling the truth is uplifting, according to Bell.¹⁹⁹ Here, Bell explicitly aligns himself with existentialists and absurdists who found hope in a meaningless world such as Paulo Freire, Albert Camus, and Frantz Fanon.²⁰⁰ These writers all saw some hopelessness in their conditions but found purpose in open resistance and struggle.²⁰¹ Bell was also inspired by individuals who made it their business to risk it all and raise hell, not because they expected to win, but just because they relished the fight and used courage as a weapon.²⁰² Bell also drew on the work of Martin Luther King and the Black tradition more generally, which has an ethos of making something out of nothing for centuries despite knowing that many efforts would not likely lead to transcendent change.²⁰³

194. Bell, *supra* note 132, at 571.

195. *Id.* at 573.

196. BELL, *supra* note 132, at 12.

197. Bell, *supra* note 132, at 571.

198. *Id.* at 583.

199. *Id.*

200. *Id.* at 583–84 (first citing PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 47 (Myra Bergman Ramos trans., Bloomsbury 2014) (2000); then citing ALBERT CAMUS, *RESISTANCE, REBELLION, AND DEATH* 26 (Justin O’Brien trans., Vintage Books 1960) (1948); and then citing FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 228–29 (Grove Press, Inc. trans. 1967) (1952)).

201. *Id.*

202. *Id.* at 585.

203. *Id.* at 584–87.

Thus, there are two parts of Bell's defiance: (1) the recognition of the futility of action, but also (2) the conviction that something must be done.²⁰⁴ Legal scholarship punishes radical legal scholarship for its futility, thus misunderstanding its purpose. Regardless of whether a radical redistribution of wealth and racial justice is achieved, the radical scholar will keep on. But the legal academy seems to miss this point by forcing radical and non-normative scholars to develop solutions and proposals, often within the status quo, to make their work more palatable.²⁰⁵ Following through on these forces the radical or non-normative scholar to metaphorically choose whether they will sell their souls. To those who hold dear their radical, transformative ideas, this is akin to asking Jeremiah to say no to God.

C. HOW THE LEGAL ACADEMY DISCOURAGES RADICAL SCHOLARSHIP

The legal academy compounds and amplifies the despair of the radical legal scholar by forcing them to work within a paradigm unsuitable for their work. This section discusses how the outsized influence of economics on legal scholarship discourages the production of radical scholarship. Because economics is at the top of the social science prestige hierarchy, its methods are valued by the legal academy. But this demands that the radical scholar accept the very same capitalist system they reject. If a radical scholar were to fall in line, she would be sacrificing her commitments.

1. The Influence of Economics and Valuing of Hard over Soft

In a 2015 piece, sociologists Marion Fourcade, Etienne Orlion, and Yann Algan describe an intellectual history in which during the post-World War II period, using mathematical and statistical models was the path to establishing scientific purity.²⁰⁶ Yet since the empirical revolution of the 1990s and 2000s, this shifted toward a "hard-nosed approach to causality focused on research design and inference and often extolling the virtues of randomly controlled trials."²⁰⁷ According to this account, even as economists drifted into topics traditionally covered by other

204. *Id.*

205. See, e.g., Michael A. Livingston, *Radical Scholars, Conservative Field: Putting "Critical Tax Scholarship" in Perspective*, 76 N.C. L. REV. 1791, 1798 (1998).

206. Fourcade et al., *supra* note 73, at 92.

207. *Id.*

social science fields, the field remained insular, with economists citing other social sciences markedly less than the other way around.²⁰⁸ The confidence in their discipline makes economists less likely to feel the need to rely on other disciplines.²⁰⁹

Recently economist George Akerlof argued that his discipline rewards the “hard” over the “soft,” thereby ignoring important topics that are difficult to approach the “hard” way.²¹⁰ Here Akerlof borrows from Comte’s classification of sciences according to a hard and soft hierarchy (physics at the top and sociology at the bottom).²¹¹ He also draws on the quantitative versus qualitative distinction.²¹² In economics, scholars are biased toward the hard because it has a higher place on the scientific hierarchy, and it is rewarded.²¹³ The committees making the decisions find it much easier to pin down the hardness than the importance of research, so the reliance continues.²¹⁴ Scholars who rely on hardness also occupy the profession’s most powerful positions, further increasing the bias.²¹⁵ According to Akerlof, this bias towards hardness has several consequences: (1) bias in favor of existing ideas and paradigms; (2) overspecialization and balkanization; and (3) reliance on journal metrics and top five journal placements to evaluate candidates.²¹⁶ Because of these career pressures, young academics have little choice but to play ball. They must stay within the accepted ways of viewing and tackling problems in order to be published and be promoted.²¹⁷

This has pushed the profession away from real-world problems like foreseeing the financial crisis of 2008.²¹⁸ In focusing on a limited view of what motivates human action, economists overlooked the wide range of human motivations that sociology and cultural anthropology could have provided if not for their softness.²¹⁹ Akerlof provides several examples of how stories drove

208. *Id.* at 93–94.

209. *Id.* at 95.

210. George A. Akerlof, *Sins of Omission and the Practice of Economics*, 58 J. ECON. LITERATURE 405, 405–16 (2020).

211. *Id.* at 405.

212. *Id.*

213. *Id.* at 406.

214. *Id.*

215. *Id.* at 408.

216. *Id.* at 408–09.

217. *Id.* at 409–11.

218. *Id.* at 411–12.

219. *Id.* at 412–13.

economic events, an account that was largely ignored by economists. According to Akerlof, the Surgeon General's report in the early 1960s is one such story.²²⁰ The report made smoking "stupid" and drastically decreased the numbers of smokers.²²¹

Akerlof concludes that uniform standards should not be uniformly applied across all economic problems; instead, the field of economics should allow for flexibility of methodology.²²² He calls for a report on publications and promotions in economics, which would analyze the role of journal editors and referees and describe appropriate norms regarding criteria and methods of promotion.²²³ Importantly, he argues this would allow economists to express themselves "from the heart."²²⁴

As previously discussed, economics has prestige and power in the academy. According to Fourcade, Ollion, and Algan, the field also reoriented itself toward finance and away from government as it established a teaching base at business schools.²²⁵ This allegiance between economists and business schools brought the field higher levels of compensation and influence, but also a different politics as well.²²⁶ Since the 1980s, suspicion of the government grew markedly in the field.²²⁷ The worldview of economists is also different, which the authors partly attribute to their social entanglements and status.²²⁸ Top economists are able to influence large-scale social policies in ways other social scientists cannot.²²⁹ As a result, their interventions carry more weight.²³⁰ The confidence is a two-sided coin for economists, as it allows them to make interventions in a very difficult political environment but it can also result in impactful errors like the 2008 financial crisis.²³¹

A brief history of economics as a discipline is important because, as underscored in Part I, law seeks legitimacy from other social science fields. Economics being the king of these is the

220. *Id.* at 414.

221. *Id.*

222. *Id.* at 416.

223. *Id.*

224. *Id.*

225. Fourcade et al., *supra* note 73, at 105.

226. *Id.*

227. *Id.*

228. *Id.* at 107.

229. *Id.* at 109.

230. *Id.*

231. *Id.* at 110–11.

most common go-to discipline for legitimacy. This creates a tendency for law to be influenced by methods and opinions of economists. It also creates the likelihood that the biases found in economics, like the preference for hard over soft, will be reproduced in legal scholarship.

Britton-Purdy, Grewal, Kapczynski, and Rahman suggest just that in their 2020 article critiquing what they describe as a dominant market-centric approach of contemporary legal thought.²³² The discussion introduces what the article calls the “Twentieth-Century Synthesis”—an encompassing view of the law that elevates neoclassical economic analysis while obscuring the role of economic power and structural inequality.²³³ This pervasive framework, grounded in principles of efficiency, neutrality, and an autonomous market, “encases ‘the market’ from claims of justice and conceals it from analyses of power.”²³⁴

According to the authors, two general trends in legal scholarship converge in the Synthesis: the ascendancy of modern law and economics, a mode of legal scholarship oriented around the principle of “market supremacy,” and the concurrent elevation of economic power in public law.²³⁵ Law and economics changed legal analysis in private law to privilege questions of efficiency, externalities, and transaction costs.²³⁶ Concurrently public law scholarship moved toward “thin” versions of liberal values like freedom, while downplaying structural and economic equality.²³⁷ Courts also extended speech protections to businesses, elevating the role of economic power in that domain.²³⁸

The preference for hard over soft has also increasingly been mirrored at the most highly ranked law schools and has been moving down the ranks over time. Methodological complexity, empirical models, and statistical regressions are the norm at the most elite law schools.²³⁹ Scholarship that is technical and hard

232. See Britton-Purdy et al., *supra* note 7, at 1790, 1794–818.

233. *Id.*

234. *Id.* at 1784.

235. *Id.* at 1795–96 (describing law and economics analysis as grounded in neoclassical economics); *id.* at 1798 (citing F. Y. EDGEWORTH, *MATHEMATICAL PSYCHICS* (C. Kegan Paul & Co. ed., 1881)) (providing a formalization of the original neoclassical conception of the market).

236. *Id.* at 1798–99.

237. *Id.* at 1806–07.

238. *Id.* at 1807.

239. See, e.g., Goldsmith & Vermeule, *supra* note 58, at 165–66.

is seen as superior to scholarship that is critical or seeks to break boundaries.²⁴⁰

An analysis of my own area, tax, by Marjorie Kornhauser provides one example of how this can occur.²⁴¹ Kornhauser used her own 1987 article to track how hard and soft articles on the same tax subject face different citation prospects within tax.²⁴² Kornhauser's article, which was perceived as feminist, was cited less by tax scholars than a similarly placed article by male scholars that was seen as more economical.²⁴³ Part of the reason Kornhauser gives for the disparity is the content preference in tax:

[T]he feminist content coupled with the philosophic and rhetorical discussions place *Income Tax Rhetoric* outside the mainstream of most tax articles. Thus, *Income Tax Rhetoric* is less likely to be cited in tax articles than is *Social Welfare* simply because more tax scholars are interested in economics than rhetoric or jurisprudence.²⁴⁴

Feminist content limits citation counts in several ways. The preference for hard over soft is such that discussion of feminist theory can brand the article as "outside" of tax. Authors uncomfortable with feminism are less likely to cite the article even for its non-feminist aspect because of this branding, which overshadows everything, according to Kornhauser.²⁴⁵ Both Kornhauser's article and the harder article had a similar overall number of cites, but most of Kornhauser's were outside of tax.²⁴⁶ These non-tax articles were primarily authored by women, and the citations were with regard to her use of feminist theory.²⁴⁷

In 1998, Michael Livingston commented on the anachronistic and conservative quality of tax scholarship, which seems to "emphasize a series of rather dry and (to outsiders) technical issues, and their style of argument stresses the search for technically proficient, consensus solutions having appeal across the political spectrum."²⁴⁸ Livingston described the theoretical and

240. See Van Zandt, *supra* note 84, at 335.

241. Marjorie E. Kornhauser, *A Taxing Woman: The Relationship of Feminist Scholarship to Tax*, 6 S. CAL. REV. L. & WOMEN'S STUD. 301, 302 (1997).

242. *Id.* (citing Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987)).

243. *Id.* at 313–17 (citing Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905 (1987)).

244. *Id.* at 317.

245. *Id.*

246. *Id.* at 315.

247. *Id.* at 314.

248. Livingston, *supra* note 205, at 1791.

practical challenges critical scholars faced.²⁴⁹ Within tax, it would be difficult to find an audience because the scholarship appeared “radical, even a bit outrageous, in nature.”²⁵⁰ Not only were critical scholars rejecting the traditional focus on economic efficiency, they were also rejecting “the underlying assumption of mainstream tax policy—the existence and desirability of a capitalist, market economy”²⁵¹ Livingston added that very few radical scholars remain very long within tax.²⁵² They write a couple of pieces about the unfairness of the current tax system and then either revert to more traditional tax subjects or leave.²⁵³ While there is a more open attitude to diversity in tax scholarship today, especially among junior tax scholars, it is still the case today that soft tax scholars find more love outside of tax than within it and outside of top schools than within them. There are exceptions, like Dorothy Brown at Georgetown, but even these scholars have to build a heavy support network outside of tax.²⁵⁴

Importantly, Livingston looked at the pressures faced by critical tax scholars (and any of those who rely on nontraditional methods like consciousness-raising), who “feel pressure to squeeze their arguments into more recognizable forms of discourse, sacrificing much of their emotional energy and perhaps some of their intellectual persuasiveness in the process.”²⁵⁵ In this way, tax takes away some of the best weapons that radical scholars have at their disposal to fight inequality. Note that the problem here isn’t hostility—tax scholars are very welcoming. Rather than being attacked, Livingston underscores, the danger is being ignored:²⁵⁶

In essence, they boil down to the idea that critical scholars elevate emotion over thought and political rhetoric over balanced and reasoned analysis. Augmenting this idea—and here the special history of the tax field becomes important—is the sense that the radicals have broken

249. *Id.*

250. *Id.* at 1792.

251. *Id.*

252. *Id.* at 1795 (using Mark Kelman as an example of a scholar who critiqued conventional tax scholarship and then left).

253. *Id.*

254. See DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* 27–28 (2021) (noting how she had to reach outside of tax to be accepted in the legal academy).

255. Livingston, *supra* note 205, at 1796.

256. *Id.*

the rules of tax scholarship, making politically impractical proposals and failing to show adequate respect for previous generations of tax scholars.²⁵⁷

The devaluation of what is seen as “soft” scholarship is again playing a part here. Being ignored can be depressing in a career focused on bringing attention to one’s work. The radical scholar has financial responsibilities just like her peers. In her essay on writing authenticity, Motro emphasized how the academic engages in a calculus to please others and to survive: “She’s afraid that inviting the conversation she has been craving, asking the questions that are most compelling to her and naming the answers she discovers will jeopardize her livelihood, her status, her friendships.”²⁵⁸ The traditional route also offers material goods and power, including “awards, salary bumps, [and] recruiting calls from more prestigious schools.”²⁵⁹ Minority scholars have to both alienate themselves and give up potential power to write scholarship they deeply care about. Part of this is done through norm policing, where the message is clear that radical scholarship is not valued. “Crits”—that is, critical or radical legal scholars—were seen as departing from the mainstream, not genuflecting before authority, and as the next section explains, they were punished for it.

2. Rejection, Policing, and Scaremongering

Critical race theorists, non-normative scholars, and Marxists in the legal academy have often been marginalized by being treated as different or somehow uncivilized.²⁶⁰ Through direct critiques and unspoken signals, mainstream legal scholars expressed deep concerns about Crits.²⁶¹ The norms they were defending were clear: they wanted normative scholarship that was easier to understand and useful for judges. According to Richard Posner, “[s]ome Marxists play by different rules from those of the other normative scholars, and rather ugly ones.”²⁶² This kind of sentiment is not unusual. There have been continual complaints about Crits and their alien nature and lack of fit with traditional

257. *Id.* at 1801.

258. Motro, *supra* note 22, at 139.

259. *Id.* at 141.

260. Jonathan R. Macey, *Allan Bloom and the American Law School*, 73 CORNELL L. REV. 1038, 1042 (1987–1988) (discussing how critics of Critical Legal Studies scholars see crits as viewing law as “a lot of crap” and “bullshit on stilts”).

261. *Id.*

262. Posner, *Present Situation*, *supra* note 58, at 1127.

legal scholarship: “[b]ut this is a detail; the point is that the critics’ stance, whatever its origin or best characterization, is not that of the judge or practicing lawyer, to whom, indeed, it is more alien than the most technical economic analysis.”²⁶³

The policing works. To this day, there is some unspoken fear on the part of legal academics that they will be too strongly associated with Marxism, thus marginalizing their future work.²⁶⁴ Alan Freeman picked up on this several decades ago:

There is a strong tendency among scholars on the left, especially in the law school world, to stop short, to devote great efforts to exposing contradictions in mainstream thought or work, and then to go home. The tendency stems, I think, from a fear of being too closely associated with the Marxist tradition, a fear of being quickly categorized as a “vulgar” Marxist or naive reductionist, and thereby denounced, silenced, and denied academic credibility.²⁶⁵

Professor and former civil rights attorney, Leroy Clark, critiqued Bell’s “racism is permanent” thesis and his strategy because of its influence on young scholars: “Professor Bell’s work propagates a damaging and dampening message which must be confronted and rejected if we are to fashion our future creatively.”²⁶⁶ The lack of solutions offered by Bell and the lack of strategy to move forward is at the center of Clark’s critique: he alleges that Bell’s work “is largely devoid of strategy discussion” about legal solutions, and instead merely adds “another note being played in the music of despair.”²⁶⁷ Radical scholarship was not hopeful enough for Clark. This is a common complaint: Crit work has been criticized for making the reader feel like nothing can be done to improve the circumstances of the disadvantaged.²⁶⁸

Ultimately, the minority scholar is expected to provide comfort and hopefulness for a majority audience:

Empathetic and more generous responses are possible in an atmosphere of support, security, and a sense that advancement is possible; the greatest progress of blacks occurred during the 1960s and early

263. Posner, *Legal Scholarship Today*, *supra* note 58, at 1317.

264. See, e.g., John Henry Schlegel, *CLS Wasn’t Killed by a Question*, 58 ALA. L. REV. 967, 977 (2007) (“In post-World War II American academic life generally, anything smacking of Marxism was, and remains, a true long shot. In law it is all but a scratch.”).

265. Freeman, *supra* note 58, at 1229.

266. Leroy D. Clark, *A Critique of Professor Derrick A. Bell’s Thesis of the Permanence of Racism and His Strategy of Confrontation*, 73 DENV. U. L. REV. 23, 24 (1995).

267. *Id.* at 26.

268. *Id.* at 49 n.148.

1970s when the economy was expanding. Professor Bell's 'analysis' is really only accusation and 'harassing white folks,' and is undermining and destructive. There is no love—except for his own group—and there is a constricted reach for an understanding of whites. There is only rage and perplexity. No bridges are built—only righteousness is being sold.²⁶⁹

Despair needs to be a part of the radical scholar toolbox. One of the reasons individuals decide to act is because they are tired of current conditions. It is not the job of the radical scholar to manufacture those conditions or to oversell them, but it is completely appropriate for the radical scholar to despair at the possibility of change within the current system. Hope and despair are both a part of the equation, but hope is not created by overlooking the truth or using euphemisms.

Another example from tax helps to illustrate how the mainstream receives groundbreaking work by radical scholars. In 1998 tax professor Lawrence Zelenak published a stinging critique of critical tax scholarship.²⁷⁰ Critical tax scholarship gained prominence in the 1990s and was influenced by critical legal studies, critical race theory, feminist theory, and queer theory.²⁷¹ Critical tax scholars sought to investigate tax law's unrevealed biases and their impact on historically disempowered groups like racial minorities, women, queer, disabled, and poor individuals.²⁷² Zelenak leveled four critiques at such scholarship, including: (1) an overeagerness to find racism and sexism in tax laws; (2) a failure to recognize the diversity of thought within feminism; and (3) selection bias of the laws chosen for analysis.²⁷³ But the fourth critique is crucial to Zelenak's broadside and the current Essay:

The most serious problem is the failure to think through proposed solutions with sufficient care. The solutions are often presented as afterthoughts, with minimal consideration of whether the author's goal is best achieved through the tax system rather than through non-tax legal reform (a sort of 'tax myopia'), and with minimal consideration of whether the proposed tax solution will have the desired effects. It is unfair to criticize current law for its effects on women or blacks without

269. *Id.* at 50.

270. Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521 (1998).

271. ANTHONY C. INFANTI & BRIDGET J. CRAWFORD, *CRITICAL TAX THEORY: AN INTRODUCTION* xxi (Anthony C. Infanti & Bridget J. Crawford eds., 2009).

272. *Id.* at xxi–xxii.

273. Zelenak, *supra* note 270, at 1523.

showing a way to do better; more important, mere critique without a workable solution does nothing to better anyone's situation.²⁷⁴

Again, this is a cry for normative work and detailed proposals, requests that misunderstand a substantial amount of radical and non-normative work. Further, adding to the second-class status of critical tax scholarship was the fact that the law review centered Zelenak's critique as the subject of a symposium issue with critical tax scholars having to reply to the agenda he set.²⁷⁵ While it did allow for the authors of the scholarship to respond to his critiques directly, it set up Zelenak as the judge of scholarly quality and arbiter of what approaches should be valued.

Similarly, in the same symposium, Erik Jensen argued that work he calls New Criticism is done as a provocative, attention-seeking exercise.²⁷⁶ Jensen would prefer a traditional analysis without "loaded, offputting language."²⁷⁷ According to Jensen, discrimination that is unintentional leads to despair because there is not much that can be done about it.²⁷⁸ While this work is trendy, Jensen argues, it is divisive and unpersuasive to tax readers.²⁷⁹ Note that it is not important whether what the Crits are saying is true, but rather the value of the work is to be determined by its rejection by the majority. This kind of policing ultimately affects junior scholars who want to play it safe. It may not be worth it for risk-averse scholars to make waves or create controversy.

The current outlook for leftist radical scholarship is not rosy. As the judiciary, and specifically the Supreme Court, moves further right, radical scholarship may only decrease in value and visibility. For example, any proposal or suggestion that relies on race-conscious measures or on fundamental rights under the Fourteenth Amendment is unrealistic and likely fantastical. The summer of George Floyd has given way to a period where minorities have to protect their basic rights.²⁸⁰ It is more likely that

274. *Id.* at 1524.

275. *Introduction: Internal Revenue Code*, 76 N.C. L. REV. 1519, 1519 (1998).

276. Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753, 1753 (1998).

277. *Id.* at 1757.

278. *Id.* at 1761–62.

279. *Id.* at 1770.

280. Toluse Olorunnipa & Griff Witte, *Born with Two Strikes*, WASHINGTON POST (Oct. 8, 2022, 7:47 AM) ("If you are a Black man in America, you're going to get stopped and if there's some basis to detain you, that's probably going to happen.").

scholarship that finds compromises and purports to bring conservatives on board will be valued for the foreseeable future. If radical scholarship is to thrive in coming decades, it will have to be explicitly supported.

Radical scholarship should only be a real concern if it was the only type of scholarship produced. The crankiness and hostility by some in the legal academy would make sense if radical scholarship was all the work being done, but that's not the case. Beyond there being a diversity of thinkers in the academy, there are many moderating and status quo enforcing effects. Mentors often advise junior scholars to soften some of their claims and language.²⁸¹ As I described at the beginning of the Essay, I deleted all references to race from an essay to make it more palatable when I was on the job market. It was practical, and it may have helped me in the hiring process, but it is something I regret. Tenure letters loom as a deterrent to upsetting influential scholars in one's area of law.²⁸² If for example, the top inequality tax scholar rejects the work of critical race theorists, one will think twice about including it. The form and structure of legal scholarship can also blunt the impact of some radical ideas.²⁸³ Even the very human need to be liked moderates radical scholarship. Thus, the intense policing seems overblown. Radical scholarship only remains radical as long as it's not dominant. If it ever became dominant, there would be more critiques of it and other ideas would fill the radical vacuum, in a Hegelian dialectic fashion.

3. Discounting Future Value of Scholarship, Desire, and Long-Term Motivation

Another way radical scholarship is devalued is by the tendency to value scholarship based on short-term considerations. Because legal scholarship is supposed to be normative, senior scholars feel completely justified in valuing work by the practical nature of the proposal. Citron and West argue non-normative scholarship is criticized and, I would argue, discouraged "precisely because it is not aimed at affecting immediate court decisions or legislative enactments, [but rather] plays the long game.

281. Motro, *supra* note 22, at 123 (citing PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 47 (1991)).

282. *Id.* at 117 (discussing how the tenure process and post-tenure aftermath place you in a specific mold).

283. *Id.* at 117–18.

Its impact is felt, if it is successful, well down the road.”²⁸⁴ Legal academia and tenure committees are not sure what to do with such work.²⁸⁵ However, as Citron and West argue, lack of citation counts does not mean lack of impact.²⁸⁶ They provide several examples, including how conventional wisdom on human flourishing and capabilities has been rethought because of work by legal philosopher Martha Nussbaum.²⁸⁷ Non-normative law has also changed the way we experience law, such that a generation of students came to be more skeptical of law’s determinacy.²⁸⁸

Legal academia has a problem with discounting the future.²⁸⁹ Like human beings are prone to,²⁹⁰ the academy values work that pays off quickly or has the ability to influence current policy discussions. If there is no way to somehow make that direct connection to a change in law or policy, the work is seen as too “out there” or useless.²⁹¹ As professors from my alma mater²⁹² often ask about work that does not fit within the narrow confines of what they deem acceptable: “Why does this matter?” In their hiring practices and their focus on the quantity of articles published, universities show that playing the long game is discouraged.²⁹³ Work needs to pay off in the capitalistic university.

This is, of course, an oversimplification and an illusion. Yes, some work has some immediate payoff. But even in those cases, the vast majority of academic work shows its worth over a much longer time period. A piece that may have been hot in 2019 may be long forgotten by 2030. Scholars are often making calls on

284. Citron & West, *supra* note 19, at 14.

285. *Id.* at 2 (“Conferences, colloquia, law review symposia, and informal conversations, to say nothing of tenure meetings and hiring deliberations, are replete with debate over the nature of legal scholarship, its point, and its value.”).

286. *Id.* at 11.

287. *Id.* at 12.

288. *Id.*

289. See, e.g., John Broome, *Discounting the Future*, 23 PHIL. & PUB. AFFS. 128, 128 (1994).

290. See, e.g., David J. Hardisty, Kirstin C. Appelt & Elke U. Weber, *Good or Bad, We Want it Now: Fixed-Cost Present Bias for Gains and Losses Explains Magnitude Asymmetries in Intertemporal Choice*, 26 J. BEHAV. DECISION MAKING 348, 349 (2013) (discussing that on average, people desire to resolve gains and losses immediately).

291. Citron & West, *supra* note 19, at 10 (discussing the complaint that non-normative scholarship has no utility or impact).

292. The University of Chicago Law School.

293. Citron & West, *supra* note 19, at 14.

something (long-term impact and merit) that they are not particularly good at determining.²⁹⁴ But the bias toward the present remains.²⁹⁵

As previously discussed, allowing scholars to work on what they love not only results in more scholarship, but higher-quality scholarship as well. Scientific discoveries are often made by following long-term lines of research long after it seems perfectly reasonable to do so.²⁹⁶ There is a grit and perseverance that is required of the academic that is more achievable when one is working on something one is intrinsically motivated by.²⁹⁷ Doing what you love is not just a trite refrain or wishful thinking. It builds on intuitions that studies have supported. Individuals are more likely to continue working on complicated issues if they love the thing they are doing. This research tries to capture something important about human motivations. For too long, legal academia has focused on the incentive approach and the carrot of tenure at the expense of the motivation approach that is more durable and long-lasting.

III. SOME RECOMMENDATIONS TO PROMOTE RADICAL SCHOLAR PRODUCTIVITY

While I want to disavow the notion that this short Essay could pretend to solve a substantial and pervasive problem, I think it is important to emphasize that we are not doomed to continue this way. Radical and non-normative scholars can be just as intrinsically motivated to produce scholarship—as long as the academy gets out of the way. Ultimately, we cannot expect human beings to be heroic. We thus have to change some structures and incentives. While transformative social change is rare, changing what we value in academia is a matter of will.

294. See, e.g., Richard Smith, *Measuring the Social Impact of Research: Difficult but Necessary*, 323 BRIT. MED. J. 528, 528 (2001) (“[S]cientists would think of the original work on apoptosis (programmed cell death) as high quality, but 30 years after it was discovered there has been no measurable impact on health.”).

295. For a discussion on the present bias, see, e.g., Jess Benhabib, Alberto Bisin & Andrew Schotter, *Present-Bias, Quasi-Hyperbolic Discounting, And Fixed Costs*, 69 GAMES & ECON. BEHAV. 205, 205–23 (2010).

296. See, e.g., David J. Hardisty et al., *About Time: An Integrative Approach to Effective Environmental Policy*, 22 GLOB. ENV'T CHANGE 684 (2012) (exploring the role of time and long-term impacts in environmental studies).

297. See Ramsden, *supra* note 98, at 222.

Motro argues that scholars have a responsibility to write authentically.²⁹⁸ Allowing for instrumental or egoic consideration fails the mission of the academic.²⁹⁹ Inauthentic writing undermines community and is a bad faith exercise by threatening a robust culture of diversity.³⁰⁰ This is in line with the Mertonian norms of universalism and disinterestedness.³⁰¹ There are also psychic costs to be paid as this kind of scholarship skewed by egoic concerns is a dead end.³⁰² Writing against one's desire also compromises ideas and important parts of the process: "we skip over the crucial step of surrendering to not knowing the answer."³⁰³

I think this is correct, but it cannot be only the individual's responsibility to avoid inauthentic writing. The university has several levers at its disposal to improve the lives of radical and non-normative scholars. Tenure is treated as a major incentive, but it is a lever with diminishing power and tends to encourage quantity of production that quickly dissipates afterwards.³⁰⁴ As such, it behooves the academy to attempt sounder, long-term approaches that will allow scholars to sustain a commitment to scholarship over the course of a career. We waste the opportunity that tenure provides by using it as a hammer to browbeat junior scholars into a temporary submission, which may well work against long-term interests. Below I briefly sketch some improvements that could promote longer-term happiness and career satisfaction by radical and non-normative scholars.

A. EXPLICITLY PROMOTING A FOLLOW YOUR BLISS ATTITUDE

Let people write what they want. That has to go beyond just saying so. Radical and non-normative work has to be valued, and tenure standards need to allow for it explicitly. This means allowing for a tenure track model that incorporates the difficulties

298. Motro, *supra* note 22, at 117 ("[L]egal academics are not only justified in investing in the work we love; we have a responsibility to do so.").

299. *Id.*

300. *Id.* at 118–19, 148–149.

301. MERTON, *supra* note 104, at 270–73. *See also supra* notes 103–10 and accompanying text (emphasizing the value of academic freedom).

302. Motro, *supra* note 22, at 146.

303. *Id.* at 147.

304. *See, e.g.*, Dan N. Stone, Edward L. Deci & Richard M. Ryan, *Beyond Talk: Creating Autonomous Motivation Through Self-Determination Theory*, 34 J. GEN. MGMT. 75, 85 (2009) ("[O]ld-school motivational strategies often deliver short-term gains and create long-term problems.").

radical scholars encounter. Consider alternatives to tenure letters within small areas of law. It may well be that, for example, a tax scholar may have to receive letters from outside scholars or minority reports on their value to the academy. Consider that a scholar's "home" area or field may reject them while other parts of the university may find great value in their scholarship.

Redefining the very definition of scholarship would better accommodate radical scholarship. More than thirty years ago, Ernest Boyer advocated for a reward system that includes more flexible criteria for gaining tenure.³⁰⁵ Boyer called on universities to adopt a broader definition of scholarship, which would recognize and reward a wider range of faculty activity.³⁰⁶ The expanded definition of scholarship would include: (1) the scholarship of discovery in order to generate new knowledge through empirical research and scientific inquiry; (2) the scholarship of integration that fosters interdisciplinary connections and synthesis across academic fields; (3) the scholarship of application, in which faculty expertise is applied to practical problems in society; and (4) the scholarship of teaching, through which faculty develop state-of-the-art curricula to disseminate new knowledge, as well as engage in assessing and evaluating the outcomes of various pedagogical practices.³⁰⁷

Boyer's system would consider different publication outlets and forms of writing. This could include anything from op-eds to blogging. Twitter threads might be a part of the definition as well. The idea is not to let radical scholars "get away with something" but rather to allow for a greater variety of tools as they make their cases for tenure. Universities would also do well to break down some of the distinction between research and writing, teaching, and service. Some of the most transformative forms of work that the radical scholar performs are often discounted as service.³⁰⁸ The general thrust should be to rethink what professors do and open up standards for a wider set of individuals.

305. ERNEST L. BOYER, SCHOLARSHIP RECONSIDERED 27–28 (1990).

306. *Id.* at 16.

307. *Id.* at 16–25.

308. *See, e.g.,* Haines, *supra* note 2, at 314–15.

B. ENCOURAGING COLLABORATION

Research consistently finds that collaboration leads to greater productivity.³⁰⁹ Collaboration and co-authorship cannot be used interchangeably,³¹⁰ but co-authorship is one of the best proxies for collaboration. Over time the legal academy has become more accepting of co-authored projects, but skepticism still remains. Junior scholars are still not sure if such work will count.³¹¹ Tenure committees warn that they are unable to ascertain how much of a contribution the individual faculty member made to a co-authored work.³¹² Yet, many schools and university departments manage just that. My current department, which is attached to a business school, just asks that we describe our contribution to any co-authored project. Two are often better than one in many facets of human life, and scholarship does not have to be different given that we are dealing with big problems. Isolation can be one of the problems that plagues the academic. Co-authorship is helpful with this. It also falls in line with learning and work styles that work better for certain individuals. I see no reason to value the individual model over the collaborative one.

In all countries and all clusters of academic fields studied, international collaboration in research is strongly correlated with substantially higher research productions. Internationalization increasingly plays a stratifying role, though: More international collaboration tends to mean higher publishing rates, and those who do not collaborate internationally may be losing more than ever before in terms of resources and prestige in the

309. See, e.g., Branco L. Ponomariov & P. Craig Boardman, *Influencing Scientists' Collaboration and Productivity Patterns Through New Institutions: University Research Centers and Scientific and Technical Human Capital*, 39 RSCH. POL'Y 613, 613 (2010) (showing that academic centers promote collaboration and productivity); John Smart & Alan Bayer, *Author Collaboration and Impact: A Note on Citation Rates of Single and Multiple Authored Articles*, 10 SCIENTOMETRICS 297, 297 (1986) (suggesting a positive relationship between collaboration and quality); Sooho Lee & Barry Bozeman, *The Impact of Research Collaboration on Scientific Productivity*, 35 SOC. STUD. SCI. 673, 673 (2005) (showing that the number of peer-reviewed journal papers is strongly and significantly associated with the number of collaborators).

310. See, e.g., J. Sylvan Katz & Ben R. Martin, *What is Research Collaboration?*, 26 RSCH. POL'Y 1, 1 (1997) (showing that co-authorship is only a partial indicator of collaboration).

311. See Lee & Bozeman, *supra* note 309, at 682 (discussing the potential socially desirable limits of having many collaborators).

312. See Katz & Martin, *supra* note 310, at 3 (noting the difficulty in distinguishing between contribution to collaboration and co-authorship).

process of “accumulative disadvantage.”³¹³ Given law’s search for legitimacy and prestige, it is somewhat surprising that the legal academy has held out against trends in co-authorship.³¹⁴ But this can also be seen as a play for legitimacy, since the go solo approach seems to show, if nothing else, that legal scholars have the perseverance to write lengthy papers alone.

Scholars write several pieces for tenure. Perhaps a pre-tenure requirement should be that you write at least one article on your own. That is quite different from the current policy which seems to be that about eighty to ninety percent of your work should be solo.³¹⁵

C. REWARDING SYSTEMIC LINES OF RESEARCH

Bliss is often displayed through a persistence to investigate a topic doggedly on a deeper level. This means that sometimes scholars have big ideas that will have to be worked out over time, and the pressure for early results of research are not always wise to encourage. For instance, leading scholars like John Rawls did not publish very much at the beginning of their careers.³¹⁶ There is a push in the legal academy to publish early and often and to avoid books at all costs. It is unclear why a book counts as one publication even if it is the same length as four or five articles. If at some schools four articles are sufficient for tenure, there is no reason why a well-thought-out book should not accomplish the same.

Yes, publication is an important goal, but there should also be rewards for long-term work. Junior scholars should be able to show progress on something that they are working on long-term. The COVID-19 pandemic might be taking time away from scholars, but may also serve as an inspiration for a lot of important future work. Black Lives Matter protests might take up a lot of writing time but may inspire the radical scholar’s next book. These kinds of issues, which are deeply felt, actually spur the

313. Kwiek, *The Internationalization of Research in Europe*, *supra* note 121, at 354.

314. Christopher A. Cotropia & Lee Petherbridge, *The Dominance of Teams in the Production of Legal Knowledge*, 124 *YALE L.J.F.* 18, 22 (2014) (discussing how team authorship provides more impactful law review articles despite the fact that solo work is promoted in legal scholarship).

315. *Id.* at 20 (showing between 1990 and 2010 about eighty-six percent of scholarship was solo).

316. See Henry S. Richardson, *John Rawls*, *INTERNET ENCYCLOPEDIA OF PHIL.*, <https://iep.utm.edu/rawls> [<https://perma.cc/9GFD-5BBG>].

radical scholar to write more. The outside or untraditional activities feed to longer-term work. Research has found that faculty prefer to engage in large, long-term programs of research.³¹⁷ We should stop working against their desire and allow them to follow their bliss.

While none of the suggestions in this Part of the Essay are revolutionary on their own, they would go a long way toward encouraging traditionally risk averse law professors to write about what they love. The unifying thread here is that to have successful minority scholars we should allow them to work on issues they care about. However, to actually achieve that result, extrinsic rewards and motivations need to match the lip service of following one's bliss.

CONCLUSION: A WAY FORWARD

The challenges of producing valuable scholarship should not be underestimated. Writing and synthesizing information requires high-level brain functioning. A normal amount of stress does not interfere with and might sometimes help with this resource-intensive deliberation and work. However, too much stress can be paralyzing, and minorities have disproportionately dealt with the effects of the COVID-19 pandemic and the justice crises.³¹⁸ Crises undermine scholarship production both because they push stress to levels that interfere with high-level brain functions, and because they require a commodity that becomes scarcer during a crisis: time. Research on scholarly productivity has quite consistently revealed that the most productive scholars spend more time writing.³¹⁹ This seems intuitive and straightforward enough to understand, and immediately brings to mind who gets to spend substantial amounts of time on scholarship and who does not have the luxury to do so.

During this time of crisis, it is more important than ever to tap into the passions and intrinsic motivators that drive scholars forward. As such, it is counterproductive to ask junior scholars who came into the academy with the goal of spurring social change to keep that pent up until after tenure. Scholarship that

317. See, e.g., Citron & West, *supra* note 19, at 14–15 (discussing the value of the long game in different legal spheres like constitutional law, tort law, and legal education).

318. See, e.g., Krukowski, Jags & Cardel, *supra* note 16 (discussing how COVID affects gender roles and productivity).

319. See, e.g., Kwiek, *supra* note 12 (finding a cross-national pattern of longer working hours in all time research categories by top performers).

lines up with desire tends to be of a higher quality and less vulnerable to the dizzying array of obstacles to publishing articles. If anything, increased collaboration and encouragement of a wider diversity of output would lift all boats and would lead to more incisive and wide-ranging discussions in the academy.