

Commentary

How the Blogs Saved Law School: Why a Diversity of Voices Will Undermine the *U.S. News & World Report* Rankings

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I would like to use this space to do two things: I wish to comment on the details of Dean Johnson's¹ and Dean Rapoport's² papers and then to comment more broadly on what we have learned from this symposium in general about the state and future of law school rankings.

I. THE DEANS' CONUNDRUM—COMPLICITY IN A SYSTEM THEY DESPISE

The upshot of Dean Johnson's paper, a truly insightful one, is that today's law school admissions process is being determined not by admissions officers' views of how to attract the best possible student body or by the Supreme Court's affirmative action decisions but by the editors at *U.S. News & World Report* ("*U.S. News*"). He argues that because the Law School Admission Test (LSAT) correlates so closely with law school rankings,³ schools use other criteria in their admissions decisions at their peril. The predictive power of the LSAT in the all-important *U.S. News* rankings means that schools will focus almost exclusively on this single metric rather than employing the holistic approach to admissions that the Court explicitly endorsed in *Grutter v. Bollinger*⁴, and that is likely preferred by most law schools.

There are at least two principal problems with the predominance of the LSAT (or the LSAT and undergraduate GPA) in the admissions process. First, given that underrepresented ethnic minorities historically score a full standard deviation lower than whites on the LSAT, competition for spots at the top of the *U.S. News* rankings will have the effect of largely excluding ethnic minorities from law school. Furthermore, as *U.S. News* focuses not on the median LSAT score but on the 25th and 75th percentiles, schools are additionally penalized for reaching out to students of color who, as Dean Johnson reminds us, traditionally score well below white students.⁵

As a second and wholly independent ground for encouraging broad-mindedness in admissions, Dean Johnson points out that *even those who devise the LSAT* recommend

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1. Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309 (2006).

2. Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359 (2006).

3. See generally Richard A. Posner, *Law School Rankings*, 81 IND. L.J. 13 (2006).

4. 539 U.S. 306 (2003).

5. Johnson, *supra* note 1, at 332 n.89 (quoting Linda M. Wightman, *The Consequences of Race Blindness: Revisiting the Prediction Models*, 53 J. LEGAL EDUC. 229, 245 (2003)).

against its use as an exclusive or near-exclusive predictor of law school performance.⁶ While the LSAT (coupled with undergraduate GPA) is the best known predictor of law school performance, it generally explains only about 25% of the variance in first year law school grades.⁷ Thus, important admissions criteria are being discarded in favor of a weak measure of law school performance; much is lost and nothing is gained.

While Dean Johnson's paper makes a number of important and nuanced points, I wish to focus on a point that he makes almost in passing: "[T]oday in American society just about everything is ranked, sorted, ordered, compared and judged vis-à-vis their group of peers."⁸ Rankings are simply a part of life in contemporary society: we live in a world where the average person on the street knows what last week's top-grossing movie was. Thus, even if American law schools were to attempt to subvert the *U.S. News* process through one of the means that Dean Johnson suggests—having the American Bar Association (ABA) cease to collect LSAT numbers from member schools or, more subversively, having the LSAC report to law schools non-commensurable scores for each of the prospective law students taking the LSAT—the issue of rankings will not go away. If the LSAT is destroyed as a metric through one of the methods that Dean Johnson suggests, another measure, perhaps one even more pernicious than the LSAT, will rise up to take its place. Thus, as I argue below, I believe the only path is, paradoxically, to embrace rankings, and lots of them, in order to break the stranglehold that *U.S. News* currently enjoys on the field.

In her paper, Dean Rapoport gives us some insight into the various pressures on the law school dean.⁹ She contrasts her job as a law school dean attempting to raise the standing of her school with that of the CEO trying to turn around an underachieving company; she has very few of the tools—"retooling, layoffs and firings, selling off divisions, or bankruptcy"¹⁰—available to the CEO. Rather, the dean, sharing power with a faculty of mostly tenured professors with nearly boundless job security, must resort to persuasion and cooperation in order to change the direction of her institution.

What is interesting is that Dean Rapoport chooses to engage in this tug-of-war with her faculty in the context of improving scholarly production rather than attracting students with higher LSAT scores.¹¹ She argues that the reputational survey—not LSAT scores—is the most important single component of the *U.S. News* puzzle:

Even if all of the schools in the "next 50" (from 51–100 in the rankings) were to get perfect scores on all of the objective *U.S. News* criteria, the rankings of the top

6. *Id.* at 322, 322 n.47 (quoting William P. LaPiana, Rita Solomon & Joseph Solomon, Professors, N.Y. Law Sch., A History of the Law School Admission Council and the LSAT, Keynote Address 1998 LSAC Annual Meeting, at 8–9 (May 28, 1998)).

7. *Id.* at 332 n.89 (quoting Linda M. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 32 (1997)).

8. *Id.* at 326.

9. She is also to be commended for being the only dean of an ABA-accredited law school to quote in her scholarship from THIS IS SPINAL TAP. Rapoport, *supra* note 2, at 359 n.5.

10. *Id.* at 8.

11. As Dean Johnson reminds us, because the median LSAT score is something that deans ostensibly have direct control over, raising LSAT scores is the preferred means of improving a school's *U.S. News* ranking. Johnson, *supra* note 1, at 350–54.

50 schools likely wouldn't budge. . . . The reputational scores would continue to have paramount importance.¹²

As a descriptive matter, I am not convinced that this is correct. If a school were to raise its median LSAT score significantly—say five or ten points—that would likely have a ripple effect on each of the school's other scores, including its reputation among academics and practitioners. While it is true that a school's reputational ranking is the largest single factor taken into account by *U.S. News*,¹³ the fact that the LSAT correlates so well with overall ranking must mean that changes in LSAT scores will lead to corresponding changes in reputation.

As an approach to improving a law school, however, Dean Rapoport's approach is deeply laudable.¹⁴ Rather than sending out more brochures describing her faculty's current productivity, she is actually encouraging her faculty to produce more useful scholarship; rather than trying to squeeze another LSAT point out of her applicants (a statistically meaningless change in the quality of her class) she is asking her faculty to make a greater contribution to our knowledge of the law. It is a sign of how sad the current state of affairs in legal education is that her plan to improve the quality of her school and hope that this improvement leads to higher rankings seems both novel and brave.

Both deans thus give us insight into the problem that confronts the deans of all American law schools today. Virtually none of them like the way schools are currently being ranked, but none of them can afford to buck the system on their own.¹⁵ The collective action problem presented by this reality is clear: nearly all deans would prefer to live in a world in which the *U.S. News* rankings are given less importance by current and prospective law students, by alumni, faculty, and central administration. Yet no dean can afford to refuse to cooperate with a system that all of them detest. Thus, the real question is how the harm of rankings can be mitigated, a question to which I turn in the next section of this paper.

12. Rapoport, *supra* note 2, at 368.

13. Together, the reputation score by academics and the reputation score by practitioners account for 40% of a school's overall ranking. *U.S. NEWS & WORLD REPORT, AMERICA'S BEST GRADUATE SCHOOLS* (2005), at 17, 23.

14. As Bill Henderson writes, very few deans have been willing to try anything other than improving LSAT scores as a means of improving a school's rankings. "Although many within the legal academy lament the 'overreliance on the LSAT,' law faculties have generally been unwilling to bear the consequences of taking a different path, at least by themselves. As one law school dean aptly noted, the situation has become a 'classic 'prisoners dilemma.'"' William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 *TEX. L. REV.* 975, 978 (2003–2004) (quoting Deidre Shesgreen, *Schools Look at the "Whole Person,"* *LEGAL TIMES*, Jan. 13, 1997, at 2, 17, and Terry Carter, *Rankled by the Rankings*, *ABA J.*, Mar. 1998, at 46, 49).

15. Dean Johnson gives the cautionary tale of Mercer Law School and its dean, Phillip Shelton. Dean Shelton chose not to report Mercer's statistics to *U.S. News*, believing that an agreement had been reached among law school deans not to do so. However, Dean Shelton was virtually alone in failing to cooperate with *U.S. News*, and the data that the magazine interpolated for Mercer was considerably lower than its actual scores. Johnson, *supra* note 1, at 354–55.

II. SOME GENERAL THOUGHTS ON THE INEVITABILITY OF INFORMATION DISSEMINATION

The organizers of this conference had the wisdom to invite scholars with a number of different perspectives on this problem—among those attending this conference or presenting papers are economists, social-scientists, and law school deans. As a result, we have seen the same problem—a ranking system that no one much likes and that almost everyone seems to challenge on methodological grounds—addressed from a variety of viewpoints.

Professor Sunstein argues in his paper that we ought to trust matriculating students to tell us which law schools are the best. These students (or their parents or lenders) have money to spend and obviously desire to spend it in the way that most benefits themselves:

[Students applying to law school] have every incentive to make good decisions about where to enroll. They have every incentive, moreover, to identify and to care about what factors are relevant. . . . For most students, choosing a particular law school counts among the most important decisions of their lives. They are most unlikely to decide cavalierly or foolishly. On the contrary, they are likely to acquire a great deal of information about the various options.¹⁶

Sunstein makes much of the wisdom of the crowd¹⁷—or at least the wisdom of a motivated crowd. He implies that the aggregation of the expressed preferences of those with a stake in the outcome and an incentive to come to the right conclusion is as good a measure of law school quality as might be put forward. While he acknowledges that students must make decisions based on imperfect information—their decisions, of course, will inevitably be tainted by the current, admittedly imperfect measures of law school quality—he cautiously comes out in favor of retaining expressed student preferences as a measure of law school quality.

In his remarks in response to the papers by Professors Sunstein and Posner, Russell Korobkin states that the current system of rankings is best understood as a way for students with imperfect information to make rational, low-cost choices about which law school to attend.¹⁸ He invoked the metaphor of the American tourist in Paris, trying to meet up with fellow travelers, armed only with a guidebook.¹⁹ He argued that our hypothetical American in Paris would probably go to the Eiffel Tower—it is mentioned in every guidebook and dominates the skyline. If she goes to the base of the Eiffel Tower and is patient, she will eventually meet her friend.

Similarly, it makes sense for potential law students who want to meet up with like-minded, equally qualified peers with whom they cannot efficiently interact beforehand,

16. Cass R. Sunstein, *Ranking Law Schools: A Market Test?*, 81 IND. L.J. 25, 27 (2006).

17. See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS* (2004) (arguing that aggregated opinions are generally more accurate than the opinions of any single member of the crowd).

18. Russell Korobkin, Keynote Address, *Harnessing the Positive Power of Rankings: A Response to Posner and Sunstein*, 81 IND. L.J. 35 (2006).

19. *Id.* at 42–43.

to go to the most highly-ranked school to which they can gain admission. Because these students cannot easily communicate with one another regarding where they should meet up—much like the hypothetical tourists marooned in Paris—they simply go to the place they think their peers are most likely to be.

I would like to extend Professor Korobkin's metaphor, perhaps to the breaking point. I think those of us who have engaged in much travel—either in Europe or elsewhere—have had the experience of reading in a guidebook about the perfect neighborhood bistro, the unspoiled beach, or the quaint fishing village. And what do we find when we get actually get to this idyllic spot? We find hundreds of other Americans holding the same guidebook seeking the same unspoiled, authentic, local experience. The problem, of course, is that when everyone reads the same guide they are likely to find themselves flocking to the same places.

In addition to the problems identified by Dean Johnson, there are at least two other reasons to be concerned about a single ranking heavily weighting a single characteristic. First, only one school can be ranked at the top, causing vicious competition to be that top school. This race to be the best on a single scale naturally leads to both gaming and the possibility of dishonesty. When *U.S. News* shifted from using median LSAT scores to using 25th and 75th percentiles this past year, both of these reasons were at least implicit in the decision.²⁰ Concerns that law schools were gaming the system (by admitting students just above or far below the median, for example) or being dishonest (by not accurately reporting their medians) led the magazine to collect the 25th and 75th percentile numbers that schools were already obligated to report to the ABA.

Second, and probably more important, not everyone seeks the same thing in a law school. Because there is one principal ranking system for law schools, students inevitably attempt to get into the most highly-ranked school, *regardless of whether that is the best school for them*. Much as the Eiffel Tower may not be the most interesting sight in Paris, Yale may not be the right law school for all prospective students. Yet just as few would consider going to Paris and "missing" the Eiffel Tower, few who can get into Yale would consider going elsewhere. Both tourists and law students rely on straightforward and low-cost signals to help them avoid making what they would regard as a costly mistake.

In the travel book world, this problem has been solved in part by a proliferation of guides, each aimed at a different audience. For example, the *Let's Go* series of travel books²¹ became popular because not everyone who went to Europe was seeking the three-star accommodations and meals described in the Michelin guide. Similarly, Fodor's Gay Guides were created to fill a gap in the market and offer advice on gay- and lesbian-friendly destinations and activities.

In their paper, Michael Sauder and Wendy Espeland tell us that a similar system of multiple rankings has evolved to rate the nation's business schools. They argue that a

20. See, e.g., Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES, July 31, 2005, § 4A, at 18 (quoting an editor at *U.S. News* as stating: "We wanted to go with verifiable data . . . and we heard that some schools weren't computing their median accurately.")

21. On its website, *Let's Go* describes its guides as: "Entirely researched and written by young adults for their peers, *Let's Go* is a travel guide series that accompanies the free-spirited on treks across the globe." *Let's Go Travel Guides*, About, <http://www.letsgo.com/about/> (last visited Aug. 21, 2005).

multiple ranking system for law schools like the one in place to evaluate business schools might solve many of the problems associated with the *U.S. News* rankings: "We argue that multiple rankers create a degree of ambiguity about the relative standing of schools and that this ambiguity allows schools to regain reputational control, decreases the significance of small differences and small changes, and, most importantly, undermines the validity of the rankings in some measure."²² While the authors admit that such a system runs the risk of reinforcing rankings as a valid enterprise, given the nature of the "audit culture" in which we find ourselves, rankings seem to be here to stay.²³

Such a system of multiple law school rankings would, I think, go a long way toward solving the guidebook problem with the status quo. When there is just one guide to what is best in law schools—the *U.S. News* rankings—it is rational for all schools to compete on that metric. While this might be rational, it certainly is not in the interest of most individual schools or of most prospective students. Some schools are more like Yale than others and always will be. Others do a very good job with clinical legal education, with connections to the local bench and bar, and so on. So long as these alternative means of demonstrating excellence are marginalized,²⁴ the pressure to compete on the magazine's main scale is increased.

So long as there is only one principal metric, schools will not play toward their natural strengths, and will continue to step over each other as they all attempt to excel in exactly the same way. Not only is this unproductive for many schools, it is likely to have many deleterious effects as well: because the *U.S. News* rankings measure only one principal aspect of quality—LSAT scores—schools have no incentives to recruit a diverse or particularly interesting class. Test-taking skills²⁵ are trumpeted above socio-economic- or ethnic-diversity as well as over other laudable characteristics such as public service interest, a technical background, relevant work-experience, and so on. Because only one thing matters, schools quite reasonably rely on that factor in making their admissions decisions.

A multitude of rankings would certainly help with this problem, at least to the extent it has in business schools. The rankings of business schools, we are told, vary greatly from one ranking system to another.²⁶ Different scales measure different criteria and schools are able to establish independent identities and play to their strengths rather than attempting to "out-Yale" one another. If a similar model were to appear in law schools, prospective students could get the information they truly need, and could choose their law school on the basis of their individualized interests rather than a single metric.

22. Michael Sauder & Wendy Nelson Espeland, *Strength In Numbers? The Advantages of Multiple Rankings*, 81 IND. L.J. 205, 206–207 (2006).

23. *Id.* at 5 (quoting MARILYN STRATHERN, *AUDIT CULTURES: ANTHROPOLOGICAL STUDIES, IN ACCOUNTABILITY, ETHICS AND THE ACADEMY* (2000)).

24. While *U.S. News* does maintain measures of specialty programs, such measures currently pale in importance when compared with the overall measures of law school quality.

25. As Bill Henderson has demonstrated, the LSAT truly measures only one narrow kind of test-taking skill, the time-pressured objective exam skill. See Henderson, *supra* note 14.

26. Sauder & Espeland, *supra* note 22, at 218 ("[B]ecause all of the rankers use different formulas to determine the relative standing of business schools, the rankings that they produce differ markedly from each other.").

I think such a system is laudable, and much of the discussion after the panels and in the hallways at this conference dealt with how to achieve such a result among law schools. Problems of collective action and antitrust regulation were discussed; hands were wrung. I believe, however, that we can count on the law students and the prospective law students—powered as they are with the Web and with the incentives that Professor Sunstein describes—to take care of much of this for us. In fact, they are doing much of it already. A recent search of law student blogs produced hundreds of hits.²⁷ The most recent *U.S. News* rankings were released earlier than expected when an unauthorized version of them appeared on a pre-law website.²⁸ The information that students want is becoming harder and harder to keep from them. This is good news.

Furthermore, information like that described by Patrick O'Day regarding the National Survey of Student Engagement would be another resource that would help prospective students find the kind of school most suitable to them.²⁹ Some may desire small classes, some technical training, some help in finding a job upon graduation. If future students were able to learn from current students which schools not only report that they do a good job on these criteria but actually do, they would be able to make a choice more likely to match their personal preferences. Similarly, different groups could publish their own lists of the best law schools: the American Civil Liberties Union could publish a list of those schools with the best public interest curricula, the Federalist Society could list the schools most friendly to conservative points of view, the Sierra Club could rank schools based on their training in environmental law, and so on. As the cacophony of law school totes became louder, the power of any one would necessarily be lessened.

Thus, at the risk of seeming Pollyannaish, it is not clear to me that law schools need to do anything to encourage the formation of alternative ranking systems. Such systems—more numerous, less formal, and more archaic than the status quo—are coming whether we wish them or not.

27. See, e.g., JD2B, <http://www.jd2b.com/> (last visited Aug. 21, 2005) (billing itself as a “community for law school applicants, students and grads,” the website offers links to over 60 law student blogs, law faculty blogs, several alternative law school rankings, and a wealth of other information on law schools, legal academics, and the law firm market).

28. See, e.g., Law School Discussion, <http://www.lawschooldiscussion.org/prelaw/index.php/-topic,29571.0.html> (last visited Aug. 21, 2005) (accurately reporting the 2005 *U.S. News* rankings before they became public).

29. For more information on the National Survey of Student Engagement, see National Survey of Student Engagement Homepage, <http://www.indiana.edu/~nsse/> (last visited Aug. 21, 2005).

