

## Book Review

Wendy Nelson Espeland and Michael Sauder, *Engines of Anxiety: Academic Rankings, Reputation, and Accountability*, New York, NY: Russell Sage Foundation, 2016, pp. 281, \$35, Paper.

Reviewed by Richard Abel

### **Crunched by the Numbers**

Wendy Espeland and Michael Sauder's superb book *Engines of Anxiety: Academic Rankings, Reputation, and Accountability* offers an incisive, comprehensive, and devastating account of the ways in which *U.S. News and World Report* (USN) rankings influence law schools and the institutions with which they are enmeshed. The authors conducted interviews with 131 law school administrators and faculty members (carefully distributed across the status hierarchy), observed law school forums where admissions officers make pitches to prospective students, analyzed admissions and yield statistics, and collected extensive data from electronic bulletin boards, mass media, other informants, and law school websites and publications. They make sophisticated use of sociological theories of accountability to analyze their data. Given their persuasive demonstration that USN rankings powerfully shape both legal education and the profession, this is a book that should be read by every law school teacher, administrator, and prospective, current, or past student—which means every lawyer.

I am going to use the book as an opportunity to reflect on how this happened and what it portends. Most readers will have experienced law school rankings as hegemonic: just how things are, indeed, the only way they can be. But the contemporary configuration of American law schools is just one method of preparing future lawyers. Most English lawyers qualified via apprenticeship until after World War II. Undergraduate law students in many countries today simply attend the law school closest to home so they can continue living there.<sup>1</sup> Because I attended law school in 1962-1965 and began teaching in 1969—more than 20 years before USN introduced its rankings in 1990—I am going

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1. Ekkehard Klaus sparked considerable controversy when he revealed a status ranking among German law faculties. EKKEHARD KLAUS, *DEUTSCHE UND AMERIKANISCHE RECHTSLEHRER* (1981).

to draw on my own experience to contrast an admittedly impressionistic and simplified picture of legal education then with law schools today, as detailed by Espeland and Sauder. I hope this will provoke others to collect and analyze the historical data necessary to test my speculations.

My (inevitably arbitrary) periodization makes 1970 the approximate turning point when cumulative changes began making a ranking desirable, even inevitable. These included: rapid growth in the number and size of law schools (from 144 schools enrolling 72,000 students in 1969 to 200 schools enrolling 147,400 in 2010-2011);<sup>2</sup> the availability of educational loans; gradual diversification of law students by gender (with proportions now resembling those in the larger society) and ethnicity (with proportions still not representative); institutionalization of judicial clerkships as quasi-apprenticeships; and the proliferation and growth of large law firms, provoking a salary war to attract associates. Before 1970, law schools admitted most applicants; as late as 1960, Harvard (one of the most selective) accepted one out of every two.<sup>3</sup> The same was true of the undergraduate colleges most students attended before law school. Some undergraduates still prided themselves on getting a “gentleman’s C.”

The obstacle for aspiring lawyers was not entering law school but graduating: In the decade 1949-1959, more than a third of full-time law students at ABA-approved schools and more than half of all other students failed to graduate.<sup>4</sup> Dean Griswold was said to have warned Harvard law students at orientation: “Look to your left, look to your right, one of you won’t be here next year.”

Most law students stayed close to home, where they expected to live and practice. Those working to support themselves were limited to nearby night schools (which still enrolled a fifth of all students in 1970).<sup>5</sup> Only in the largest cities did they have a choice of schools. Many states had just one law school. Tuition for in-state students at public law schools was just a few hundred dollars, a fraction of the cost for those from other states (whose numbers often were restricted).<sup>6</sup> Almost all paid full freight: There were few scholarships and no educational loans. Because people married early—men at an average age of 23—and fewer women pursued careers, many wives worked to put their

2. Compare RICHARD L. ABEL, *AMERICAN LAWYERS* 277-79 (1989) [hereinafter ABEL, *AMERICAN LAWYERS*] (Table 21: Number of Law Schools, Enrollments and Bar Admissions, 1840-1986) with ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *ENROLLMENT AND DEGREES AWARDED: 1963-2012 ACADEMIC YEARS*, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf) (last visited Apr. 3, 2017).

3. ABEL, *AMERICAN LAWYERS*, *supra* note 2, at 60.

4. *Id.* at 61.

5. *Id.* at 254 (Table 5: Full-time and Part-time Law Students, 1889-90 to 1985).

6. *Id.* at 255 (Table 6: Law School Tuition).

husbands through law school in the expectation of being supported afterward while raising children.

Most schools prepared for their own state's bar examination, which was then, as it still is, a significant barrier. State bars imposed restrictive residence requirements.<sup>7</sup> For example, Nevada's was designed to restrict competition: Because the state had no law school, the out-of-state law graduates seeking admission had to live there for six months without practicing law. Interstate transfer was difficult, especially into the most attractive jurisdictions (only about five percent of total admissions were by motion).<sup>8</sup> There were no national law firms; indeed, some states prohibited firms from listing on their letterheads lawyers not admitted to the state bar. Slow travel by train and communication by expensive long-distance telephones and telegrams limited practice across state lines.

And all but the largest clients tended to do business locally. Out-of-state lawyers often could not appear in court without being introduced by an in-state lawyer, who also had to be paid. (Similarly, an English client briefing a barrister who did not belong to the local circuit had to pay an extra 100 guineas for a Queen's Counsel and fifty for a junior, as well as a kite brief to a circuit member.<sup>9</sup> A German *Rechtsanwalt* could have an office in only one *Land* and appear in the courts of another only with a lawyer admitted there.<sup>10</sup>) Because nearly half of all lawyers were solo practitioners,<sup>11</sup> most graduates simply hung out a shingle or worked for an established lawyer in exchange for space rather than pay until they could launch their own practices. The lucky ones joined a family member or friend. Others worked for local or state government. A few secured recommendations to local firms from faculty mentors. As Jerome Carlin documented, success in practice depended on whom you knew, not what you knew.<sup>12</sup> If, as House Speaker Tip O'Neill famously declared, "all politics is local," so was law practice.

The small elite operated differently. Only six percent of ABA members belonged to firms larger than forty in 1970, and just one percent to firms larger than 100.<sup>13</sup> Even in New York City, only twelve percent of lawyers practiced in

7. *Id.* at 265 (Table 14: Residence Required Before Application, Examination, or Admission).
8. *Id.* at 263-64 (Table 13: Admissions to Bar on Motion and by Diploma Privilege, 1920-85).
9. RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* 97 (1988) [hereinafter, ABEL, *THE LEGAL PROFESSION*].
10. Erhard Blankenburg & Ulrike Schultz, *German Advocates: A Highly Regulated Profession*, in 2 *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* 124, 139 (Richard L. Abel & Philip S.C. Lewis eds., 1989).
11. ABEL, *AMERICAN LAWYERS*, *supra* note 2, at 300 (Table 37c: Distribution of Lawyers in Practice Settings (percent): Nationwide, Martindale-Hubbell, 1948-80).
12. See JEROME E. CARLIN, *LAWYERS ON THEIR OWN* 123 (1962).
13. ABEL, *AMERICAN LAWYERS*, *supra* note 2, at 303 (Table 39: Distribution of Private Practitioners by Size of Law Firm, Selected Jurisdictions Between 1960 and 1980 (percent)). The actual percentages were probably smaller, since the half of all lawyers who did not belong to the

firms of fifty or more in 1960. Those large firms hired from just a few schools, primarily Harvard, Yale, and Columbia, which in turn recruited students from a small number of elite colleges. There was no clear hierarchy among them. (I chose Columbia over Harvard and Yale because the woman I married at the end of my first year was a Swarthmore undergraduate. Her father, a Columbia law graduate, advised me against Penn, which was closer but less prestigious. Five years later I jumped at an offer to teach at Yale—only because I didn't get one from Harvard!) White-shoe firms did not hire Jews.<sup>14</sup> Elite schools were more expensive, charging five to ten times as much as others, thereby limiting entry by class background.<sup>15</sup>

Law schools did little to place graduates (I didn't even know Columbia had a careers office). Grades were important, but law schools typically divided the graduating class into just two categories by honoring the top ten percent with Order of the Coif and law review while not otherwise ranking students. As late as the 1950s, 3Ls would interview at Wall Street firms during Christmas vacation, using an old-boy network or faculty contacts.<sup>16</sup> Firms themselves were rated by Martindale-Hubbell based on peer reviews, but only in three crude categories: pre-eminent, distinguished, and notable. Large firms maintained long-term relationships with corporate and wealthy individual clients, and these relationships were often cemented by common background, family ties, and socializing. The few judicial clerkships in the U.S. Supreme Court and Courts of Appeals went to graduates of elite schools (especially those aspiring to teach), often through faculty contacts. (Without applying, I was offered a Court of Appeals clerkship but blithely turned it down to study abroad.) State Supreme Court clerkships went to graduates of schools in that state. Most lawyers, regardless of where they went to law school, worked in one sector of the legal profession throughout their careers—often in a single firm or government office, although big-firm lawyers might serve briefly in the federal government, incidentally improving their network of influential contacts.

Faculty (almost all white men) tended to have local roots, often having graduated from the school where they taught. Most had practiced locally, and many continued to do so—which had pedagogic advantages when they were preparing students for similar settings and helped them place their graduates. For many, practice was the primary source of their income and professional prestige. (This was less common at elite schools. But Milton Handler, who taught me trade regulation—and claimed to have invented the field—left the podium at the end of each morning class, handed the casebook he had written to an underling in the last row to return to Handler's law school office, and

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ABA were more likely to practice alone or in small firms.

14. Notes and Comments, *The Jewish Law Student and New York Jobs-Discriminatory Effects in Law Firm Hiring Practices*, 73 *YALE L.J.* 625 (1964).
15. ABEL, *AMERICAN LAWYERS*, *supra* note 2, at 255 (Table 6: Law School Tuition).
16. See ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* (1964).

was whisked by limousine to his midtown practice, where he spent the rest of the day. Judge Paul Hays made brief visits to the law school from the Second Circuit to teach labor law.) There was little lateral movement. (Some visited for personal reasons: Hardy Dillard from Virginia, who taught me contracts, hinted at the illicit pleasures of what he called “Babylon on the Hudson.”) Indeed, when I joined UCLA in 1974, it was said to have a no-poaching agreement with its crosstown rival USC. Here, too, elite schools operated differently, hiring their own graduates but also those who had begun teaching at feeder schools. Two at Columbia whom I remember were Curtis Berger from Buffalo and Monrad Paulsen from Minnesota.

Most rookies were granted tenure based on a single “tenure” article. Many wrote nothing more, and most of what they did produce was either casebooks for students or analyses of recent local cases and legislation for practitioners. Virtually every law school had a single law review, which published the writing of its faculty and other in-state law teachers and practitioners. Evaluations of teaching (when anyone cared) were based on assertions by faculty, who depended on student anecdote. During this period—before the consumer movement and the second wave of feminism—some of my teachers could have been role models for Harvard’s fictitious Professor Kingsfield, taking sadistic pleasure in humiliating students and reducing the few women to tears on “ladies day.”<sup>17</sup> Salary increased with seniority (Harvard retained lockstep pay longer than most); there were few endowed chairs. The dean—almost always chosen from the faculty, to which he returned—was *primus inter pares*, responsible for raising money (mostly from alumni/ae) and managing his often fractious colleagues. Because the Socratic method permitted (required?) large classes and faculty did not need expensive labs or conduct research outside the library, law schools were cash cows for the rest of the university.

All of this changed gradually, and often imperceptibly. As early as 1958, Michael Young argued that the growing dominance of meritocracy was fueling credential inflation, forcing an increasing proportion of those entering the workforce to obtain college and even higher degrees.<sup>18</sup> Furthermore, colleges and law schools, which once prided themselves on exclusivity, now competed in demonstrating “diversity.”<sup>19</sup> Women, who made up less than five percent of law students in 1967, have reached parity with men.<sup>20</sup> Despite the many challenges, affirmative action has made law schools more (though still not fully) representative of the racial and ethnic composition of the larger society. Federally subsidized educational loans and financial aid made higher

17. JOHN JAY OSBORN, JR., *THE PAPER CHASE* (1971); see also SCOTT TUROW, *ONE-L: THE TURBULENT TRUE STORY OF A FIRST YEAR AT HARVARD LAW SCHOOL* (1977).

18. MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY* (1958).

19. I discuss this for the United Kingdom in RICHARD ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM 120-58* (2003).

20. ABEL, *AMERICAN LAWYERS*, *supra* note 2, at 285 (Table 27: Women Students in ABA-Approved Law Schools, 1940-86); Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES, Dec. 17, 2016.

education accessible to students from poorer families, as the GI Bill had done for World War II veterans. The dramatic increase in educational debt greatly intensified pressure on students to maximize their incomes after graduation. Indeed, ninety-three percent of 2014 law school graduates with debt owed an average of almost \$163,000.<sup>21</sup> As a result, undergraduate enrollment increased from twenty-five percent of eighteen- to twenty-four-year-olds in 1970 to forty percent in 2015.<sup>22</sup> As I noted above, law school enrollment doubled, while the number of women law students increased more than twentyfold, from 2,906 in 1967 to 68,502 in 2009-2010. This meant that almost all the overall increase was attributable to the entry of women.<sup>23</sup> At both educational levels supply grew to meet this demand, expanding to nearly 3,000 undergraduate colleges and 200 accredited law schools.

This forced difficult decisions on both applicants and institutions. Economists have found that consumers faced with an increasing number of alternatives—brands in supermarkets, music from Spotify, movies from Netflix, channels on cable television, “news” from the Internet—devise ways to simplify their decisions.<sup>24</sup> For educational institutions, the problem was how to deal with an avalanche of applications: The most selective colleges now accept less than ten percent of applicants. Because of an increasingly universalistic ethos, undergraduate colleges could no longer rely on the particularistic criteria that had been taken for granted (although legacy still puts a thumb on the scales). Consequently, they looked for a number that purported to be an unbiased measure of academic ability. The Scholastic Aptitude Test (SAT) was introduced in 1926; by the early 1940s it was used by most private colleges and universities in the Northeast; the University of California required it in 1967; and 1,660,000 high school students took it in 2012-2013. A 1945 inquiry by the Columbia Law School admissions director seeking a better measure of applicants led to creation of the Law School Aptitude Test (LSAT), first administered in 1948. By 1966, 105 law schools were using it.<sup>25</sup> The number of annual administrations (some applicants taking it more than once) increased nearly fifty percent from 1967-1968 to 2009-2010 (from 116,000 to 171,500) before declining in response to the 2008 recession. Although the LSAT

21. Editorial, *The Law School Debt Crisis*, N.Y. TIMES, Oct. 24, 2015.

22. National Center for Education Statistics, Table 302.60: Percentage of 18-to-24-Year-Olds Enrolled in Degree Granting Institutions, by Level of Institution and Sex and Race/Ethnicity of Student: 1967 through 2012, [https://nces.ed.gov/programs/digest/d13/tables/dt13\\_302.60.asp](https://nces.ed.gov/programs/digest/d13/tables/dt13_302.60.asp) (last visited May 19, 2017).

23. Compare ABEL, AMERICAN LAWYERS, *supra* note 2, at 285 (Table 27) with ABA COMMISSION ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2011 (2011), [http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_2011.authcheckdam.pdf).

24. BARRY SCHWARTZ, THE PARADOX OF CHOICE: WHY MORE IS LESS (2004).

25. William P. LaPiana, A History of the Law School Admission Council and the LSAT (Keynote Address, 1998 LSAC Annual Meeting), [http://www.lsac.org/docs/default-source/publications-\(lsac-resources\)/history-lsac-lsat.pdf](http://www.lsac.org/docs/default-source/publications-(lsac-resources)/history-lsac-lsat.pdf).

enjoyed a monopoly for nearly seventy years, the University of Arizona Law School accepted the GRE from applicants in 2016, and Harvard joined it the following year.<sup>26</sup>

For aspiring law students, the question was where to apply and, if accepted by more than one school (as most are), where to go. Despite the long-standing stratification of law schools (which had been documented by Alfred Z. Reed in the 1920s, Jerome Carlin and Erwin Smigel in the 1960s, and John Heinz and Edward Laumann and their colleagues in the 1980s and 2000s),<sup>27</sup> the triumph of Langdell's Socratic case method meant that legal education was extraordinarily homogeneous. Having gone to Columbia and taught at Yale, UCLA, USC, NYU, Fordham, and CUNY, I came to believe that if I found myself teaching a first-year torts class in any of the 200 American law schools, I would not be able to tell where I was without looking out the window or listening for regional accents. Geographic mobility is greater in the U.S. today than in most other countries, the perk (and price) of membership in the professional class and upward socioeconomic mobility. An increasing proportion of students go away to college, often far from home. Many do not expect, or want, to return. Their equally mobile childhood friends won't be there; and anyhow they connect constantly through social media from anywhere in the world. Whereas about a third of my law school classmates were married before graduating from law school, most members of the professional class today do not form a permanent relationship until their thirties (the average age is twenty-seven and twenty-nine for *all* women and men, respectively).<sup>28</sup>

Student choice of a law school is complicated and facilitated by a combination of ignorance and indifference. Few harbor a passionate desire to be a lawyer. I usually managed to elicit embarrassed laughter by suggesting to my torts students that they were in law school because they sought a ticket to the middle class but could neither add nor stand the sight of blood. Unlike premeds, most law school applicants have not prepared in college. Some choose law only because they score well on the LSAT. And unlike those applying to graduate school, few law school applicants have strong preferences for one law school over another. They do not know what kind of law they will practice or which schools prepare better for various specializations. Few have had any significant contact with the law, and those experiences—often unpleasant (parental divorce, car accident or other injury,

26. Elizabeth Olson, *Harvard Law School, Moving to Expand Applicant Pool, Will Accept GRE*, N.Y. TIMES, Mar. 9, 2017.

27. See ALFRED Z. REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA (1928) (Bulletin No. 21 of the Carnegie Foundation for the Advancement of Teaching); CARLIN, *supra* note 12; SMIGEL, *supra* note 16; JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005).

28. Gretchen Livingston & Andrea Caumont, *5 Facts on Love & Marriage in America*, PEW RES. CTR. (Feb. 13, 2017), <http://pewresearch.org/fact-tank/2017/2/13/5-facts-about-love-and-marriage/>.

dispute with a landlord, debt collector, manufacturer or retailer, or minor criminal offense)—are unlikely to inform their choice of a legal career (except through aversion). If they have any image of lawyers, it probably is drawn from the media (“L.A. Law,” “Law & Order,” “The Practice,” “Boston Legal,” and their contemporary equivalents), which depict (inaccurately) a practice few will enter.

Few applicants can name a single faculty member at any school, much less one with whom they want to study. Those who are the first in their family to go to college or law school know even less. Information applicants glean from lawyer parents or friends probably is out of date. International students, whose numbers have increased dramatically to 13,677 in fall 2016, rarely have heard of more than a handful of elite schools.<sup>29</sup> Many more law schools now claim to be “national,” boasting of the number of states from which their students come and to which they go after graduation. Fewer public universities have quotas on out-of-state applicants—who, after all, usually pay a much higher tuition. Even if schools teach to the bar examination, it is increasingly national. For many of the same reasons, faculty increasingly are drawn from a national pool and are more likely to move laterally during their careers.

The legal job market itself has become more national as large firms increasingly practice in many states and even other countries. As firms grew rapidly, they were compelled to expand the number of law schools from which they hired. Similarly, judicial clerkships (which now include U.S. District Courts and intermediate state appellate courts) have become an essential credential for a larger proportion of graduates of elite law schools and top graduates of other law schools (another example of credential inflation); law students’ multiple applications (usually dozens) create a huge pool from which judges must choose.

If few applicants have intrinsic reasons for choosing among law schools (or even for becoming lawyers), they do share a common trait: ambition. They have been socialized from an early age to distinguish themselves through achievement: academic, athletic, cultural, social, political. Most can compare the status of their high school with that of its local competitors. They strove to get into the “best” college—for which they had a metric—and build a resumé there and in the subsequent gap year(s) to get them into the “best” law school. They have been accumulating cultural capital the way earlier generations accumulated land (in feudal society) and capital (in bourgeois society). All they need is a marker of the best, preferably one that also will distinguish them in the eyes of prospective employers.

These changes in legal education and the legal profession since 1970 created an opening, indeed an imperative need, for information to guide aspiring law students in choosing a school. And that need, of course, was not limited to legal

29. ABA Section of Legal Education and Admissions to the Bar, 2016 Standard 509 Information Report Data Overview, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2016\\_standard\\_509\\_data\\_overview.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2016_standard_509_data_overview.authcheckdam.pdf).



education; similar changes pervaded society. Espeland and Sauder themselves used Google Ngram Viewer to track the increase over two decades of the following words and phrases: rankings, transparency, accountability, audit, performance measures, and metrics (3). (It is mildly ironic that a book devoted to critical analysis of USN rankings validates that endeavor by creating its own index of indices.) And they acknowledge precursors who announced (and worried about) the advent of the “audit society.”<sup>30</sup> Peter Drucker is supposed to have said, “If it isn’t measured, it isn’t managed” (198). Social science built its legitimacy (as a science) on the premise that only what can be counted counts.<sup>31</sup> The quantitative rules in sociology, economics, psychology, and political science and has made significant inroads into anthropology, history, even literary criticism, overshadowing qualitative research and hermeneutics.

Ranking is pervasive and ancient. As far back as we have records—the Olympics in 776 BCE—athletes have competed to be first. Greek myths endowed each of the gods with superlatives; Homer lauded the greatest warriors. Mass media have made the entire world an audience for the Olympics, World Cup, Tour de France, and tennis and golf tournaments. The U.S. is transfixed, in turn, by the World Series, Super Bowl, and NCAA March Madness. Everything that moves is raced: people, cars, sailboats, horses, dogs, even turtles. Gambling gives audiences a stake in the outcome; opinions become grist for conversations among friends as well as an opening gambit with strangers. Intellectual games have spawned their own competitions: quiz shows, chess, Scrabble, crosswords, bridge, poker. “Reality” television stages bouts among cooks, hairdressers, clothing designers, and survivalists (preferably naked). We even have a president who gained celebrity by producing such shows. Individuals compete for world records: climbing mountains, crossing oceans (and, when this isn’t hard enough, doing it without oxygen or ropes, or solo or in rowboats, or by swimming—remember Lord Byron and the Hellespont).

Everything that can be compared is ranked: beauty, wealth, literature, food, drink, movies (Oscars), plays (Tonys), TV shows (Emmys), music (Grammys), architecture, art, travel. Citation counts facilitated by Google Scholar, Scopus, and Web of Science purport to measure the influence of scholarship (although they fail to indicate whether the work is being invoked for its truth or its error, originality or banality). Consumers advance their own status claims by purchasing high-ranked goods and services (you are what you own and display, illustrations of both Thorstein Veblen’s conspicuous

30. MICHAEL K. POWER, *THE AUDIT EXPLOSION* (1994); MICHAEL POWER, *THE AUDIT SOCIETY: RITUALS OF VERIFICATION* (1997); *GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS* (Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry eds., 2012); *AUDIT CULTURES: ANTHROPOLOGICAL STUDIES IN ACCOUNTABILITY, ETHICS AND THE ACADEMY* (Marilyn Strathern ed., 2000).

31. Albert Einstein said “Not everything that can be counted, counts, and not everything that counts can be counted.” I am grateful to Catherine Albiston for this reference.

consumption and Pierre Bourdieu's theory of distinction)<sup>32</sup> or affiliating themselves as fans of individual or team competitors (analogous to what Freud called the "narcissism of small differences").<sup>33</sup>

These macro competitions are reproduced in microenvironments: fraternities assigning numbers to female classmates (just as women used to be identified by a ratio of bust-to-waist-to-hips). Mental abilities are reduced to an IQ. (One of my daughters said in disgust after the first week of college that her classmates should just wear T-shirts emblazoned with their SAT scores, since that always was the first topic of conversation.) Qualitative book reviews are displaced by best-seller lists. Cities compete to be called the most livable, countries to have the smartest children, highest GNP, or happiest citizens. The Nobel Prizes have bred many emulators; the MacArthur Foundation hands out "genius" awards; learned societies endlessly multiply the honors they confer on members. Manufacturers and sellers of goods and services compete for and boast about rankings, which now extend throughout the previously haughty professions to include doctors and hospitals.

The *Guinness Book of Records*, launched in August 1955, reached the top of the British best-seller lists by Christmas. Globalized in 1998 as the *Guinness Book of World Records*, it is itself the most successful copyrighted book of all time, having sold more than a hundred million copies. It maintains a database of more than 40,000 world records, produces several dozen television shows in fourteen countries, and operates a museum. (Robert Ripley anticipated this concept with his "Champs and Chumps" column in *The New York Globe* in 1918, which became *Believe It or Not* in 1923; at its peak the column was read daily by eighty million and spawned a radio show and a book—which still is published annually). The Internet has vastly facilitated the task of compiling and disseminating records. And ranking is commercially profitable, as demonstrated by Michelin, Zagat, Yelp, Consumers Union, and Angie's List, among many others.

Ranking is particularly important for those choosing an education—what Philip Nelson called an "experience" good, which can be evaluated only *after* it is consumed.<sup>34</sup> Indeed, education may more closely resemble a "credence" good, whose worth cannot be measured even after it is experienced. USN stepped into the breach by offering its rankings, first of colleges in 1984 (an ironically appropriate date) and then six years later of law schools with an index that became its most popular (1-18). In 1990 it ranked only the top fifty law schools individually, lumping the rest in fifty-school groups; in 2004 it started ranking the top hundred; now it ranks all but the bottom fifty. It uses four categories of variables: *reputation* assessed by legal academics (25%) and

32. See THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* (1899); PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (1979).

33. SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (1962).

34. Philip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970); cf. George A. Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970) (on information asymmetries).

practitioners (15%); *selectivity* measured by LSAT (12.5%),<sup>35</sup> GPA (10%),<sup>36</sup> and acceptance rate (2.5%); *placement success* measured by percentage employed at graduation (4%) and nine months later (14%) and bar passage rate (3%); and *faculty resources* measured by expenditures per student on instruction, library and supporting services (9.75%), other services (1.5%), student-to-faculty ratio (3%), and number of volumes in the library (0.75%) (218).

To the ingrates who carp or quibble about the algorithm, USN might simply offer a riff on Lewis Carroll's *Through the Looking-Glass*:

Humpty Dumpty: When *I* use a number . . . it means just what I choose it to mean—neither more nor less.

Alice: The question is . . . whether you can make numbers mean so many different things.

Humpty Dumpty: The question is . . . which is to be master—that's all.<sup>37</sup>

If circulation (another index!) is the measure of mastery, the answer to Humpty Dumpty's question is clear. USN claimed 2.6 million unique visitors and 18.9 million page viewers the day its 2014 "Best Colleges" rankings appeared.<sup>38</sup> For me, the most striking findings by Espeland and Sauder are the complex, wide-ranging and mutually reinforcing ways USN rankings shape legal education and the profession.

First, and most obviously, USN rankings influence both law school admission decisions and student choices of where to apply and go. Long before 1990, schools (including my own) created a "predictive index" based on LSAT and GPA. But aside from establishing a notional floor (often justified by its correlation with the likelihood of passing the bar—another hurdle that has never been validated as a measure of practitioner competence),<sup>39</sup> schools faced no external pressure to maximize those numbers. Now that USN makes them almost a quarter of its ranking, the pressure is intense, especially because schools have more control over those two variables than most of the others. Schools seek to maximize LSAT and GPA in many ways. They sacrifice efforts at diversity and programs that would choose students by other criteria, for example, dedication to the public interest. They divert scarce financial aid

35. Schools that accept the GRE can admit students who might have scored lower on the LSAT without endangering their ranking.

36. Because USN does not weight GPA by undergraduate institution, law schools can maximize their median UGPA by accepting students with high grades from less elite colleges.

37. LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* (1871).

38. Steve Smith, *U.S. News Pulls Social Levers to Break Records for 'Best Colleges' Package*, MIN, Sept. 19, 2013, <http://www.minonline.com/u-s-news-pulls-social-levers-to-break-records-for-best-colleges-package/>.

39. Deborah J. Merritt, "Validity, Competence, and the Bar Exam," 2017-2 AALS News 11 (Spring 2017).

from those who need it to those who “deserve” it based on their numbers (but who tend to have the least need), intensifying the class bias of admissions.

To increase “selectivity,” schools encourage applications from those with little or no chance of success (which is both economically wasteful and psychologically demoralizing). They shrink the 1L class (whose numbers alone influence USN ranking) and encourage transfers into the 2L class of 1Ls who earned the highest grades at lower-ranked schools (especially those in the same city or region, where relocation costs are lower). The schools from which they come try to retain them by lavishing scholarship money on them, whereas they pay full freight to the schools that attract them. Transfer students often perform well at their new school; but they sacrifice the intense friendships forged during the stressful 1L year, as well as some upper-class extracurricular opportunities. And the schools from which they defect are deprived of their participation (perhaps leaving classmates and teachers demoralized by their departure).

Until 2008, when USN eliminated this ploy, schools shifted some 1L admits with lower LSATs and GPAs to part-time programs (where their numbers did not count for USN). Would these students have benefited from the full-time program? Do they feel stigmatized? Do students in the full- and part-time programs have different careers? Schools expand their LL.M. programs, whose participants (almost all foreign) do not affect USN rankings and pay full freight without requiring many additional resources, since most are simply slotted into the existing curriculum (without regard to its pedagogic value for those who already are lawyers but are unfamiliar with American culture, usually not native English speakers, and headed for careers different from domestic students).<sup>40</sup>

Students rely heavily on USN rankings to decide where to apply and enroll (a hypothesis that could be tested empirically). When do those admitted to a higher-ranked school off the wait list accept the offer? That process can extend well into the first intense weeks of law school—causing disruption, even prompting transcontinental moves—as each departure opens a place that must be filled to generate the tuition income. What do students know about law schools’ relative merits, other than rank? Do they always enroll in the highest-ranked school? If not, when and why do they enroll in a lower-ranked school? How influential is financial aid? Who applies to transfer, from and to which schools, and why? What do they know about those schools, other than rank? How do they weigh rank against the financial aid offered by each?

Second, students rightly anticipate that the rank of the school from which they graduate will influence their career prospects. It correlates with the number and prestige of firms interviewing on campus. It strongly influences the hiring of 2L summer associates, since firms have no other data besides grades and a brief perfunctory interview. That hiring decision is momentous,

40. In some U.S. jurisdictions, the LL.M. qualifies graduates to take the bar examination, passage of which can open the door to global law practice in the U.S. or their home countries at salaries often several times what they could otherwise earn.

since firms have typically made permanent offers to most summer associates. Educational debt (not dischargeable in bankruptcy), which has enabled many to attend college and law school (and allowed those institutions to raise tuition), greatly increases graduates' incentives to maximize income by joining the largest firms, which pay the highest salaries and confer their own prestige on associates.

Firms emphasize the rank of the schools from which their lawyers graduated (even those who have been practicing for years) because clients, in turn, use that metric as a proxy for quality (another instance of an experience or credence good difficult to evaluate in advance or perhaps at all). Associates also evaluate large firms based on quality of life and career prospects, e.g., Vault Law 100 rankings. Because judicial clerkships have become such a highly desirable postgraduate credential (whose market value could be measured by changes in the ratio of applicants to positions), judges are inundated with applications. Most delegate the first cut to their current clerks, who unsurprisingly also use USN rankings of applicants' schools (a factor that influenced how they got their own clerkships) to produce short lists for the judges. Subsequent employers use clerkships as a basis for their own hiring decisions, thereby reinforcing the effect of rankings.

Third, USN rankings affect faculty hiring. Other disciplines hire PhDs, who offer dissertations and references from thesis supervisors and other mentors who have worked with the candidates for years. Candidates also have received evaluations as teaching assistants. And they often seek jobs at institutions with strengths in their specializations or theoretical or methodological approaches, knowing the faculty members in their field. Rookie law school candidates, who present much less evidence of scholarship or teaching and give a "job talk" in which they must summarize difficult ideas in twenty minutes, seek positions at the highest-ranked law school to which they can aspire, knowing little of its special strengths or the identity of faculty members. And schools generally prefer graduates of the highest-ranked law schools, rarely taking a risk on those from a school ranked lower than themselves.

The number of lawyers seeking to enter law teaching has increased as large firms' billable-hour demands have risen; this is especially true for women who are or hope to become mothers (which could be measured by comparing the feminization of law teaching and practice). At the same time, the academic job market contracted dramatically in response to the 2008 recession. (All this could be studied through AALS records.) Letters of recommendation are still important but are judged by the rank of the author's school, as are letters solicited for the tenure decision. It would be interesting to compare the mix of schools attended by a law school's faculty in 1970 and today. (I would expect a shift from alumni/ae to graduates of the dozen or so most prestigious schools. In 2009, 1705 law professors were graduates of Harvard and Yale and another 2028 had graduated from Chicago, Stanford, Columbia, Michigan, Berkeley, Pennsylvania, NYU, Virginia, and Georgetown—more than half of

the 7000 faculty.)<sup>41</sup> There is much more lateral movement now (which could be measured over time). How much of this is up or down the rankings? Are so-called “look-over” visits and lateral hires influenced by whether the candidate will improve the school’s reputation, which will affect the status of faculty making the hiring decisions? Are higher-ranked schools recruiting the most productive scholars from lower-ranked schools (as transfers cream off the best 1L students, discussed above)? The competition for talent has inflated faculty salaries, increasing both the law school budget (a positive factor in USN rankings) and student debt.

Fourth, faculty seek to publish in the highest-ranked law review. This generally reflects the school’s rank, but journals also are ranked separately by USN, Google Scholar Metrics, PrawfsBlawg, Above the Law, and others. Unlike other disciplines, the principal law review at each of the 200 schools does not specialize by subject matter or theoretical or methodological perspective. Pressures to publish (on individual faculty to increase salary, status and success in a lateral move; on institutions to improve their reputations and hence their ranking), coupled with electronic submission and the permissibility of multiple submissions, leave law reviews flooded with manuscripts. Because these journals, uniquely, are student-edited and rarely peer-reviewed, the decisions by students—necessarily ignorant of the field—to accept articles are significantly influenced by the rank of the author’s school.

Fifth, law school administrators live or die by the rankings. Deans are hired (often from outside) to improve rankings, and fired when those decline—especially when schools drop down a tier. University administrators reward successful deans with more money. Deans therefore allocate resources where they can do the most for rankings—which rarely improves teaching or scholarship. (One particularly wasteful example is the glossy brochures about new hires, tenures, chairs, and lectures, which are sent to all 7000 law professors in the hope of influencing reputation but generally are discarded unread.) Admissions deans and their staffs pursue applicants and admittees with high LSATs and GPAs—and get bonuses when this improves the numbers. Career services offices divert resources from serving all graduates (women seeking to re-enter the workforce after raising children, associates denied a partnership, lawyers forced to relocate geographically or desperate to make a lateral move) to maximizing the proportion in full-time employment for which a law degree is required ten months after graduation. To do this, schools hire their own graduates as a last resort (an expensive stratagem, though one that sometimes supports public-interest organizations),<sup>42</sup> and staff credulously accept dubious evidence about missing graduates or fudge it.

Sixth, alumni/ae give money to schools that are rising in the rankings and withhold it from those that are falling. Although I lack the evidence, I believe

41. Brian Leiter’s Law School Rankings, *Where Current Law Faculty Went to Law School* (Mar. 17, 2009) [http://www.leiterrankings.com/jobs/2009job\\_teaching.shtml](http://www.leiterrankings.com/jobs/2009job_teaching.shtml).

42. To prevent such gaming, USN excluded all school-funded positions in 2016, thereby penalizing schools that fund some jobs out of a commitment to public-interest practice.

Dean John Sexton persuaded wealthy alumni/ae—like those at Wachtell Lipton, who had attended NYU at a time when Jewish quotas barred them from other schools—that he could use their donations to retroactively enhance their cultural capital by boosting NYU’s rankings—as Sexton successfully did from ninth in 1987 to fourth in 1999 (briefly overtaking his crosstown rival, Columbia). The donors’ revenge must have been sweet, since Wachtell made its money in aggressive M&A work, trouncing the white-shoe Wall Street firms that would not hire them.

As Espeland and Sauder reveal, each of these elements reinforces the others, making it more difficult for any actor in the system to disregard rankings. This creates a dynamic that constantly widens the distance between schools, thereby rigidifying the ranking. (This could be tested by looking at changes over time and how these differ along the spectrum.) Individuals and institutions endowed with cultural capital (signified and constructed by USN) parlay it into further advantages (like compound interest). And, as in any social system, those who have won while playing by the rules vehemently defend them against criticism.

How should we understand this transformation? Should we be concerned? If so, what is to be done? One way to conceptualize the shift is as a belated transition from *Gemeinschaft* to *Gesellschaft*. Talcott Parsons, following Émile Durkheim, idealized professions as communities, with all their virtues and flaws;<sup>43</sup> the English Bar exemplified these traits.<sup>44</sup> The cozy world of pre-1970s American legal education, populated by a relatively small number of white men who tended to know one another and acted unselfconsciously (indeed, unconsciously) according to particularistic criteria, has been replaced by a complex system of institutions claiming legitimacy by reference to universalistic, allegedly meritocratic, criteria and populated by a far larger and more diverse membership. Because of these changes, impersonal selection criteria have replaced personal contacts. I got my first job at Yale in 1967 after Walter Gellhorn at Columbia generously sent my CV to his friends at a dozen law schools, generating a half-dozen interviews. Today my CV would go into the AALS annual register of well over a thousand job-seekers hoping for a half-hour grilling at the AALS “meat market” that will lead to an on-campus interview (although mentors’ phone calls and e-mails can still be influential at each stage).

The contemporary process reduces some kinds of bias, while introducing others—another example of the ongoing, seemingly inexorable, march of neoliberalism that also has been transforming the legal profession (e.g., by eliminating some restrictive practices). Law schools can hardly complain about being ranked when their teachers devote considerable energy to ranking students by assigning grades based on examinations that test the number of issues correctly spotted; and students rank teachers in evaluations that typically

43. ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (Free Press 1933) (1893); see William J. Goode, *Community Within a Community: The Professions*, 22 AM. SOC. REV. 194 (1957).

44. ABEL, *THE LEGAL PROFESSION*, *supra* note 9.

reduce the instructor to a single number, assigned without agreed criteria and then aggregated into a mean calculated to a meaningless two decimal points and used without regard to the standard deviation.<sup>45</sup> (The website [www.ratemyteachers.com](http://www.ratemyteachers.com) allows students to submit and read comments, but these are not used in personnel decisions.)

However, if USN rankings seem fair payback—those who live by indices die by indices—they still raise many troubling questions. Does competition by law schools for “high-number students” (a widespread reification) improve educational quality? Does competition by faculty members and schools to scramble up the ranking ladder enhance pedagogy or scholarship?

We saw above some of the distortions USN fosters. Every competition encourages participants to game the system: doping in sports, cheating on exams, plagiarizing writing, forging art, falsifying CVs, inflating Amazon rankings or online consumer evaluations with bogus reviews. (Vitaly Borker, then owner of DecorMyEyes, improved the visibility of his online eyewear company by abusing dissatisfied customers, because Google did not distinguish between complaints and praise—a perversion of the belief that all publicity is good publicity.)<sup>46</sup> Film studios waste huge amounts of money trying to influence the Academy Awards: A week before the awards were announced, the producers of “Fences” spent well over \$1 million for eight full pages in *The New York Times* (Viola Davis won Best Supporting Actress).

Nations wage wars (violating the laws of war) and engage in arms races (evading treaty restrictions). Primary and secondary schools teach to standardized tests (and give some students advance copies or alter their scores). Undergraduates pad their resumés for law school. Law students focus single-mindedly on acing exams, especially the bar exam, and choose classes to maximize their GPAs. Law professors pander to student evaluations by teaching what students (often erroneously) believe they should be learning and maximize the number (rather than the quality) of their publications. The UK’s Research Excellence Framework privileges articles published in peer-reviewed journals over other forms of scholarship; this, in turn, has fostered an industry of flimflam artists who accept papers for bogus conferences and publish articles in bogus scholarly journals.<sup>47</sup>

What is to be done? A tiny number of schools simply opt out, pursuing higher goals at the expense of rank. CUNY accepts its rank (131) as the price of fulfilling its mission to prepare students, especially women, minorities, and those from poorer families, to serve the public interest. Northeastern (65) prides itself on its Cooperative Legal Education Program (four quarter-long internships for every 2L and 3L student). But few others are willing to follow

45. Richard L. Abel, *Evaluating Evaluations: How Should Law Schools Judge Teaching?*, 40 J. LEGAL EDUC. 407 (1990).

46. David Segal, *An Eyewear Pitch That Sounds Eerily Familiar*, N.Y. TIMES, Mar. 26, 2017.

47. Kevin Carey, *A Peek Inside the Strange World of Fake Academia*, N.Y. TIMES, Dec. 30, 2016; Gina Kolata, *A Scholarly Sting Operation Shines a Light on ‘Predatory’ Journals*, N.Y. TIMES, Mar. 22, 2017.



their lead, although they try to distinguish themselves on their websites, often citing USN rankings of their specializations. Although U.S. dental schools and Canadian law schools stymied rankings by refusing to submit data, the collective-action problem has frustrated such a response by the 200 U.S. law schools (especially since USN simply substitutes its own conservative estimates of missing data). Many have criticized the arbitrariness of the USN algorithm, which USN periodically acknowledges by making occasional modifications. Some elements are irretrievably flawed. Reputation, which accounts for forty percent, depends on the judgments of academics and practitioners who know little if anything about most of the 200 schools. Some supplying those data simply copy the previous year's published rankings; others may succumb to the temptation to game the system by downgrading close competitors. Law school budgets can be manipulated and have no demonstrated relationship to educational outcomes. Volumes in the library have no pedagogic value for students who, glued to their screens, never read them (as USN seems to recognize by weighting this only 0.75%).

Are there other measures? Should student satisfaction be an element? But is that any more indicative of pedagogic value than a patient's judgment of a doctor's bedside manner is of health care quality? Could we measure value added, as primary and secondary schools purport to do? Most students enter law school as *tabulae rasae*. But there is no consensus about what law schools should instill: knowledge of black-letter law? critical ability? multidisciplinary competence? practitioners' skills? Who would evaluate that? And when? Bar exam passage is no measure. Should graduates' earnings be the metric? (Numerous websites offer such information.)<sup>48</sup> But all these outcome measures may be as much a function of students' prior endowments (ascribed characteristics, ability and prelaw education) as they are of what the school does for them. Variation by a single rank (or even several) among 200 law schools often is based on statistically insignificant differences; but instead of grouping schools in larger categories, USN has extended individual rankings from fifty to 100 and now 150 schools. Year-to-year changes may be statistical artifacts, whose distortions could be reduced by reporting running averages across several years (which might reduce the pressure for short-termism, analogous to that exhibited by CEOs seeking to maximize quarterly profits and hence their corporation's stock value). U.S. business schools have five independent rankings, giving them the leeway to choose which to optimize. But the AALS's effort to produce an alternative to USN failed to attract consumers, although *preLaw* ranks law schools on a variety of criteria such as best value, greenest, most diverse, best for practical training, best moot courts.

Jennifer Mnookin, my dean, captured the essential dilemma in an e-mail to the UCLA Law School community in March 2017, taking satisfaction in the improvements of our rankings, both overall and for specific programs, while

48. These include USN itself as well as BUSINESS INSIDER, [www.businessinsider.com](http://www.businessinsider.com); INTERNET LEGAL RESEARCH GROUP, [www.ilrg.com](http://www.ilrg.com); PAYSCALE, [www.payscale.com](http://www.payscale.com), and FORBES, [www.forbes.com](http://www.forbes.com).

emphasizing that they “should be taken with several very large grains of salt.”<sup>49</sup> The “*U.S. News* methodology is, bluntly put, a deeply imperfect measure . . . . Nevertheless, these rankings are closely-watched and influential.” Rankings may indeed be the latest manifestation of Weber’s iron cage—a roach motel where you can check in but can never check out.

49. E-mail from Dean Jennifer Mnookin to the faculty, staff and students at UCLA School of Law: “UCLA School of Law and the 2017 U.S. News Rankings” (Mar. 15, 2017) (on file with author).