

On Ranking: A Response to Mitchell Berger

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The issue of the *Journal of Legal Education* for December 2001 brought us an article by Mitchell Berger, a legal editor of Thompson Publishing Company, defending the rankings of law schools by the *U.S. News and World Report* as “useful and important.”¹ No one has questioned the *importance* of those rankings. But the assertion that they are useful should not be left unanswered.

The temptation to engage in rankings originated in 1870 with the design of President Charles Eliot to make his Harvard Law School the “best” by making it the longest and toughest. Students came from all over the United States to prove to themselves and others that they could do whatever it took to get through that three-year ordeal and past its dragons such as “Bull” Warren, the model for the fictional Professor Kingsfield. Since the days of President Eliot, there has been growing interest in the relative status of all manner of academic institutions and the status that they, by reason of their relative standing, are able to confer on their graduates.

Eliot has had only one rival as a designer of high-status law schools. That would be Charles Clark, who persuaded himself and the market in the late 1930s that the Yale Law School would be the best because it would maintain the most exclusive admissions policy, a policy he announced at a time when Yale was unable to fill its entering class. Students have since stormed the gates, in part to demonstrate to themselves and the world that they were sufficiently distinguished to earn admission to the most selective school.

Although there have been numerous predecessors in the ratings game, the task of rating law schools (and diverse other institutions) has now been claimed by *U.S. News and World Report*. That annual ranking, as explained by Mr. Berger, is based on a composite formula of measurements. The ostensible purpose of such ranking is to counsel students choosing their professional school.

Some of the information assembled by *U.S. News* is without question useful for the purpose stated. But even that information has an unfortunate tendency to gain unwarranted importance when it is put in quantified form. This

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1. Why the *U.S. News & World Report* Law School Rankings Are Both Useful and Important, 51 *J. Legal Educ.* 487 (2001).

is inevitable given the delusional impact of numbers on all our minds. For example, a single-point difference in the median score on the Law School Admission Test among a body of students is a difference unworthy of attention by law school applicants, but it counts for much in the ranking game, and the careers of law school administrators stand or fall on such trivia.

Other quantifications used in rankings are somewhat misleading to prospective students. Comparisons of starting salaries of graduates are important data, but they also reflect the local economies in different cities. The number of recent graduates still seeking employment may be indicative, but the difference between none and two or three such alumni may reflect only personal idiosyncrasies having nothing to do with the school or may reflect an admissions policy leaving some room for speculation, and it may have considerable impact on a school's ranking. Similarly, libraries are important, but measurements of libraries by books per student cannot practicably take into account the quality of a collection or its utility to those who actually use it. Technological facilities defy quantified comparisons.

Other data is absurdly "soft," such as the rankings of faculties by the impressions they make on peers. An argument can be made that the impressiveness on other academics of a portfolio of writings on arcane subjects is a negative indication of the likely utility to students seeking careers in law of the teaching done by its authors. Most sensible peers confronted with requests for evaluations of that sort will be quick to acknowledge that they do not know what they are doing, that any evaluation they may express may tell more about themselves than about the relative merits of the colleagues about whom they are asked to opine. Moreover, in law, perhaps more than in any other academic discipline, there is a large ideological element in the reaction of scholars to one another's work.

The overall ranking by *U.S. News* is a compound of such data. In part because it is a compound based on an arbitrary allocation of weights to diverse measurements some of which are themselves very questionable, the overall ranking is simply nonsense. However useful some of the underlying data might be to prospective students, that utility is undone by their composition into a single ranking. The operative purpose of the ranking is to sell magazines, and that is the only positive purpose achieved, assuming that it is a good thing for readers to buy a journal that publishes such nonsense.

But Mr. Berger urges that we should take the nonsense seriously. Alas, because prospective students, alumni, and members of governing boards (being enamored as all of us are by numbers) do so, no law school can afford to ignore the nonsense even though many of those responsible for institutional decisions recognize the rankings for what they are.

Law school deans participate in the exercise by supplying data. They must do so in self-defense. Whether the data they supply is always accurate is a question. *U.S. News* is poorly equipped to prevent a little fudging here and there. More consequentially, many small administrative decisions are made with an eye to their possible effect on data compiled for use in rankings. Like elementary school teachers who concentrate their efforts on teaching children artifices useful on standardized tests purporting to measure the achieve-

ments of teachers, deans and faculties must often administer their schools to influence their rankings.

Thus, many admissions decisions are controlled by marginal differences in LSAT scores or undergraduate grade point averages that are profoundly insignificant. Faculty may be hired to improve the teaching ratio and provide boutique instruction with funds otherwise available for other purposes such as financial aid. Indeed, I have received a credible report that one highly ranked law school protects its rating by hiring any of its graduates whom it would otherwise have to report as unemployed.

An adverse secondary effect of rankings is to reinforce the tendency of the profession, its members, and its novitiates to occupy themselves with matters of affect rather than substance. To some extent it is inevitable that those seeking or savoring professional status will assign more importance to matters of affect than can be justified in the minds of disinterested others. Yet it is a temptation to be resisted by those seeking to justify their existence by useful service to causes larger than themselves, an activity that counts for nothing in the rankings. No one has devised a way to measure the relative moral worth or even the professional ethics of a school's recent graduates.

Equally important are the adverse consequences of the elevation of the price of legal education. One form of competition seldom found among postmodern law schools is general price competition. A school with a lower tuition is "signaling" to the market that it is selling a product inferior to those charging a higher price. Selective price competition is, of course, possible; tuition receipts can be returned to selected students in the form of financial aid; schools can thereby strive to buy students who will maintain or raise the credentials of an entering class. A problem of using tuition revenue to fund a selective financial aid program is that the students receiving the aid do not always prove themselves to be more deserving than those required to pay full prices.

Virtually every quantified measure of law school quality used by *U.S. News* measures the financial resources of the school. All but a very few private universities use their law schools as a source of revenue. Law schools in public universities are subsidized in varying measures. Resource allocation decisions are therefore often made by a university officer who must choose between allowing a law school to hire an additional teacher or allowing some other perhaps more needful purchase to be made elsewhere in the university. While the fear of lower rankings tends to move university money into the professional schools at the expense of other units without regard to their relative social utility, this effect is quite insufficient to resolve the pressure created by rankings based on financial resources. Deans of law schools are now heavily invested in fundraising from alumni, an activity almost unknown to law school deans in 1960. This is an allocation of human resources compelled by the rankings. The funds raised by deans are often expended on items that their schools would be unlikely to deem necessary, or perhaps even desirable, but for the rankings.

The unstated assumption of the rankings is that the more expensive legal education is, the better. One might more easily defend the contrary assump-

tion. A wise politician cautioned in the late 1960s when the first guaranteed student loan program was established that the loans would simply result in an elevation of tuitions paid with borrowed money, without substantial effect on the real quality of the product. As he foretold, law school tuitions have multiplied on a grand scale without easily demonstrable effects on the quality of the lawyers they graduate or the social value of the services those graduates perform.

In 1960 few students borrowed money to go to law school. A tertiary consequence of the rankings has been to increase the likelihood created by loan programs that able students will mortgage their future income to gain admission to a school a few notches higher on the pecking order. This has the still further effect of forcing more law school graduates to practice more for lucre and less for love or pleasure, and to employ professional ethics that they would not practice but for their financial vulnerability.

It is illuminating to consider how *U.S. News and World Report* might rank an elite university law school that simply forswore tuition, proclaiming that it would conduct the best three-year program it could without charging for it. Classes would be large, and services other than classroom teaching would be minimal. But the university trustees might be able to proclaim that their law school was their university's contribution to the Republic, much in the tradition envisioned by the founders of American university legal education. Their graduates would be instructed to repay any indebtedness they felt to the university by serving the public interest as they might best identify that interest.

Such a reactionary institution might still attract students despite the low ranking it would be accorded by *U.S. News*. Indeed, it is possible to imagine that such an institution would be the most attractive to many of the ablest students. The dean who was permitted by her university to pursue such a program could possibly in time be ranked with Roscoe Pound and Charles Clark as among the great innovators of legal education. At least that might be so were it not for rankers who presume to measure the ineffable and successfully proclaim their measurements as truths that they are not.