

RANKINGS AND DIVERSITY

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INTRODUCTION

It is October. We are guests at a regional Law School Forum, one of the eight or nine admissions fairs that the Law School Admissions Council (LSAC) organizes each year to help prospective law students learn about law schools and the admissions process. Grateful for this access, we sit in the busy break room where admissions officers and LSAC personnel grab quick cups of coffee, organize impromptu meetings, and rest weary feet and hoarse voices. We are here to observe one day of “travel season,” an important part of the admissions cycle in which schools collectively present themselves to those who will soon be deciding whether and where to apply to law school. In the grand ballroom of a downtown hotel, sharply dressed admissions directors, who represent a broad swath of accredited law schools, preside over tables where they chat up students and hand out promotional literature. The break room is a welcome backstage reprieve from the constant flow of questions. When we confide our mission—to study the impact of rankings on law schools—we are gratified by people’s enthusiastic and cooperative responses. While many of these directors deeply resent *U.S. News & World Report* (USN) rankings they are eager for this kind of research, eager to talk.

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One concern comes up often: the effect of rankings on law school diversity. Jean, an experienced administrator who had been in charge of admissions at several law schools and now works for a professional organization, put it this way¹: “[USN] rankings changed everything. It is sometimes hard to put your finger on their effects and sometimes they aren’t tangible but they have influenced almost every aspect of legal education in some way. They are omnipresent.” Jean explained that she knows several people who were fired when their ranking dropped. The ranking, she says, forces every school to pay much closer attention to their numbers. She reports that many prospective students who would once have been admitted, people whose records suggest they have a good chance of succeeding in law school, now do not get in. Finally, Jean contends that the rankings have decreased diversity “in the broadest sense of the word.”

Our research suggests that Jean is right on several counts. USN rankings *have* changed admissions practices because they affect a broad range of law schools’ constituents. This impact is often intangible, even subtle, because they indirectly reshape how we think about quality and reputation in legal education. Media rankings, which have become a prominent, fateful measure of performance and status, place enormous pressure on law schools to boost the statistics that the rankings incorporate. Prospective students, current students, faculty, administrators (including trustees and university presidents), alumni (including boards of visitors and donors), legal employers, and the media that cover education (including national and regional newspapers and news magazines, as well as journalism devoted to law and higher education) *all* attend to rankings.

Rankings not only influence individual decisions about where to apply and attend law school, but also organizational decisions such as whom to admit or hire, how to evaluate the work of subordinates, peers, or superiors, and how to think about status and specialization in the field of legal education. Rankings subtly, powerfully, and enduringly shape perceptions of ability and achievement. And, as Jean suggested, attention to rankings can have important implications for the diversity of law schools and the legal profession. Because rankings include selectivity statistics (median Law School Admission Tests (LSAT) scores, undergraduate grade point averages (UGPA), and acceptance rates account for 25% of a school’s overall rank) that reflect racial, gender, economic and geographical differences, and because the ability to perform well under duress on a timed, standardized test is a highly restrictive form of merit, efforts to improve these statistics can threaten various forms of diversity. And Jean is not alone in her

¹ All names are pseudonyms.

worries. Many of the administrators and faculty we interviewed shared this concern.

We begin with a brief overview of the meanings of “diversity” and offer a definition, a summary of how rankings are created, and the methods used in our research. Next, we discuss the actual and potential consequences of the rankings for diversity at three levels of analysis: 1) the *individual* decision-making of law school applicants; 2) the *organizational* decision-making of law schools in the admissions practices that create classes and distribute students across schools and programs; 3) and the heterogeneity of law schools as kinds of organizations with distinctive missions and niches in the *field of legal education*. We conclude by offering some strategies for mitigating the pressure that rankings place on diversity in legal education and law in the short term, and suggest the research needed to further specify the impact of rankings on diversity. This essay draws on evidence collected as part of a large, multi-method research project on the impact of USN rankings on law schools, as well as the findings of a small but growing literature on the effects of rankings on legal education.² Elsewhere we have analyzed some of these processes in more detail.³ Our aim here is not to present a detailed empirical analysis, but instead to provide an overview of our findings, report on administrators’ and faculty’s concerns about the impact of rankings on diversity, and raise questions about how to think about professional diversity.

I. THE DIVERSITIES OF DIVERSITY

“Diversity” has become part of an expansive discourse to talk about heterogeneity. The language of diversity is used by disparate groups for different purposes and has acquired many meanings. We speak, for exam-

² See Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483 (2004); Wendy N. Espeland & Michael Sauder, *Rankings and Reactivity: How Public Measures Recreate Social Worlds*, 113 AM. J. SOC. 1 (2007); W.D. Henderson & A. P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Ranking Era*, 81 IND. L. J. 163 (2006) [hereinafter Henderson & Morriss, *Migration Patterns*]; A. P. Morriss & W. D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83 IND. L. J. 791 (2008) [hereinafter Morriss & Henderson, *Measuring Outcomes*]; Michael Sauder & Wendy Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L. J. 205 (2006) [hereinafter Espeland & Sauder, *Strength in Numbers*]; Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News and World Report Rankings on the Admission Process of Law Schools*, 40 LAW & SOC’Y REV. 105 (2006); Richard Schmalbeck, *The Durability of Law School Reputation*, 48 J.LEGAL EDU. 568 (1998); Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493 (2007); Jeffrey Evans Stake, *The Interplay between Law School Rankings, Reputations, and Resource Allocations: Ways Rankings Mislead*, 82 IND. L. J. 229 (2006).

³ See Espeland & Sauder, *Strength in Numbers*, *supra* note 2.

ple, of diverse families, social groups, organizations, communities, professions, and nations. We can characterize an individual as having diverse experiences and talents or as someone who does or does not contribute to the diversity of some group. We can understand diversity as an organizational benefit, an ethical principle, or a measurable attribute.

According to the sociologist John Skrentny the origins of the current meanings of diversity in the U.S. lay in the “minority rights revolution” of the 1960s and the 1970s, a revolution that was profoundly shaped by the black civil rights movement.⁴ The “signature” and bipartisan policy of this revolution was affirmative action, which generated the new, official category of “minority,” a group in need of special, positive policies to protect them from discrimination. In order to implement and evaluate policies about groups of people there must be clear boundaries about which categories to count and how to distinguish those who do or do not belong into those categories. Consequently, federal administrators created and standardized four official categories of “minority” citizens—African Americans, Hispanics, Asian Americans and Native Americans—whose rights must be monitored and protected. After protests, political crises, and pressure from students and faculty, these categories were eventually adopted by American colleges and universities and used to monitor diversity in institutions that had for generations catered almost exclusively to white European-Americans. The official categories, whose origins Skrentny shows are rather arbitrary and contingent, are now thoroughly institutionalized within education as the taken for granted terms for representing diversity, often in the form of proportions of kinds of people. As the sociologist Mitchell Stevens puts it, “Diversity became a number.”⁵

Several general patterns in the use of diversity can be observed.⁶ First, its meanings have expanded from an early focus on racial diversity to incorporate many other forms of diversity.⁷ Second, diversity has increas-

⁴ See JOHN SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* (Harvard Univ. Press 2002) (discussing the emergence and consequence of official minority groups).

⁵ MITCHELL STEVENS, *CREATING A CLASS: COLLEGE ADMISSIONS AND THE EDUCATION OF ELITES* 154 (Harvard Univ. Press 2007).

⁶ See, e.g., Skrentny, *supra* note 4; Lauren Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001); David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. R. 1548 (2004); Stevens, *supra* note 5, at 140–83; Ellen Berry, *From Opportunities for the Disadvantaged to the Benefits of Diversity: Why Diversity Became Orthodox in Higher Education*, forthcoming *Critical Sociology* (discussing the evolving uses and meanings of diversity).

⁷ In addition to race and gender, for example, characteristics may include religion, physical abilities, sexual orientation, economic status, regional or national origins, or other attributes that may reflect

ingly supplanted language about rights or redressing racial, gender, or economic inequality. Affirmative action is now defended in the language of diversity. And, third, the benefits of diversity are often understood as extending to all members of an organization and not just to members of disadvantaged groups.⁸ The general tenor of these shifts in diversity discourse has been a move from a defense grounded in substantive normative commitments to a more instrumental, consequentialist rendering, a transformation Max Weber has analyzed deeply and extensively as versions of processes of rationalization that are characteristic of modernist, capitalist and bureaucratic projects.⁹

A key moment in this shifting understanding of diversity and its significance (as well as in admission practices) occurred in the landmark 1978 *Bakke* decision. Here, the Supreme Court ruled that although the admissions policy under review amounted to an unconstitutional quota system, the consideration of race as a positive factor in admissions was legal. In his famous swing opinion, Powell argued that diversity was a desirable goal, one that could improve the quality of education received by all students and help better prepare the nation's future leaders.¹⁰

The theme of diversity as beneficial has been embraced and elaborated by many. In one recent and influential rendering, Scott E. Page argues that diversity (a property of collectivities ranging from small groups to societies) improves performance because his simulations show that a diversity of cognitive perspectives “trumped” ability (a property of individuals) in solving problems and making predictions. Scott also argues that identity diversity—difference based on characteristics such as race, gender, social status or ethnicity—also improves group performance. But because the links between identity diversity and cognitive diversity are complex, the

enduring inequality or desired heterogeneity (i.e. cultural backgrounds, cognitive styles, forms of ability or experience).

⁸ Some scholars suggest that these changes, while making affirmative action more appealing and defensible to some groups, have diluted its meanings and deflect attention from the political imperatives to redress broader structural forms of inequality. See, e.g., Berry, *supra* note 6; Edelman et al, *supra* note 6; Wilkins, *supra* note 6.

⁹ See MAX WEBER, *ECONOMY AND SOCIETY* 24–25, 85–86 (Univ. of California Press 1978) (discussing types of rationality and the tensions among them).

¹⁰ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). See also *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding 438 U.S. 265) (ruling that the state had a compelling interest in supporting student diversity and that considering race in narrowly tailored admissions plans is constitutional).

benefits of identity diversity apply under a more restrictive set of conditions and outcomes are mixed.¹¹

Reflecting the views of our informants, we define diversity as desirable forms of heterogeneity, a mix of people, perspectives, and organizations. While we find Page's arguments compelling, we do not subordinate identity diversity to cognitive diversity in the advantages it confers because the benefits of admitting diverse students to law schools and the legal profession cannot be entirely subsumed under the relatively narrow goals of solving problems well or making good predictions. Many students and faculty, including most of those we interviewed, believe that an individual's formal and informal education is enhanced by knowing diverse students and learning from their experiences.¹² And the legal profession and the communities it serves benefits from a diverse bar. A study of Michigan law graduates found, for example, that minority law graduates are more likely to serve minority clients than their white counterparts, begin their careers in government public service or public interest law, do more pro bono work, mentor young attorneys and serve on boards of community organizations.¹³ These commitments are clearly important professional contributions that benefit many and are hard to decompose into the particular cognitive perspectives or "tools" that Page emphasizes. We also consider the diversity of organizations within a field to be a potentially important benefit, as organizational specialization can produce and sustain other useful forms of diversity. Moreover, like almost all we interviewed, we believe that a normative commitment to diversity is warranted, especially to ensure the representation of groups who have excluded and disadvantaged by histories of discrimination.

II. THE ORIGINS OF RANKINGS AND THE REACTIONS OF LEGAL EDUCATORS

Rankings are a relatively recent force in legal education. While efforts to assess and control the quality of colleges and universities for educators have a long history, media rankings of colleges and graduate programs designed for prospective students and their families only emerged in the mid-1980s. USN first ranked colleges in a feature story in 1983 based on a

¹¹ SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 1–22 (Princeton Univ. Press 2007) (discussing the benefits of diversity).

¹² *But see* ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* (Oxford Univ. Press 2007) (discussing how the benefits of diversity can be suppressed in the classroom).

¹³ Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 *LAW & SOC. INQUIRY* 395 (2000).

simple opinion survey sent to college presidents. In 1990 they expanded their rankings to include annual rankings of colleges, professional schools, and graduate programs. Initially, only the top twenty-five law schools were ranked annually but the magazine soon included all ABA accredited schools.

Law school rankings are based on four indicators: reputation, selectivity, placement, and faculty resources. Each factor is composed of several other weighted measures to create a composite score that is then scaled to create a school's overall rank.¹⁴ For example, selectivity, worth 25% of the overall rank, is based on three components: student LSAT scores count for 50% of the selectivity ranking (12.5% of the overall score), GPA represents 40% (10% overall), and a school's acceptance rate accounts for 10% of the selectivity score (2.5% overall). Initially, schools were divided into four tiers with only the top fifty presented ordinarily. USN now lists the top 100 law schools in rank order with the remaining 90 or so schools divided into tiers and listed alphabetically. USN later began separate rankings of the top ten schools in a number of areas of specialization.

For its first eleven years, USN included no direct measure of diversity in the rankings but, beginning in 2001, it began publishing a "diversity index" that ranks schools based on measures of the proportion of minority students.¹⁵ This index considers schools that enroll a large proportion of any one group, even a minority group, less diverse than a school that enrolls a mix of students. Consequently, schools, like Howard University which admits high proportions of African Americans, do not fare as well on the diversity index as schools with a broader mix of students. Notably, USN's diversity index is not factored into the overall rankings given to law schools but is presented separately, which hugely undercuts its impact. USN has not explained why diversity is excluded in the overall ranking of schools, but we suspect that the politics surrounding the idea of diversity and the potential controversy about how to fairly incorporate it into the existing ranking formula have encouraged it to be ranked separately. Because rankings are relative measures and many schools' raw scores are tightly bunched, even small shifts in ranking criteria would affect all schools, benefiting some and hurting others.

¹⁴ For more on ranking history and methods see *id.* See also sources cited *supra* note 2.

¹⁵ The groups counted include African Americans, Asian Americans, Hispanics, Native Indians, and non-Hispanic Whites. *America's Best Graduate Schools*, U.S. NEWS & WORLD REPORT, March 28, 2001.

A. METHODS AND EVIDENCE

The primary data for this study are approximately 165 in-depth, open-ended interviews with law school administrators, faculty and staff. These interviews averaged forty-five minutes and centered on the effects of rankings on law schools. We also visited seven “focus schools” to conduct interviews with persons in various offices within schools about the effects of rankings on their jobs. Other data sources included statistics on the effects that the *USN* rankings on prospective law students; seventeen short interviews with law school admissions personnel at an admissions fair; ninety-three brief interviews with prospective law students and twelve with current students; organizational documents; field work conducted in internet chat rooms and bulletin boards; media accounts; and thirty in-depth interviews with business school administrators for a comparative perspective.¹⁶

B. INDIVIDUALS MAKING DECISIONS

Sam, an articulate, successful student at a top-twenty law school, just completed his second year of law school. He is an editor of a law journal and is excited about starting a competitive internship at a well-known law firm on the West Coast. After getting an inter-disciplinary M.A and doing some soul searching, Sam decided to pursue a law degree instead of a PhD. He remembers the year he applied to law school as a stressful time. In thinking about where to apply, location was important to Sam. He applied mostly to “good schools” in New York and California. He applied to and was accepted by several schools in the Midwest and South, schools he “wasn’t excited about,” but only applied because they offered him fee waivers. Sam says he would not have gone to these schools unless he was offered a “really good deal, lots of scholarship money.” He described these schools as “not all that prestigious and not in desirable locations.” And prestige is important to Sam because it is important to the profession: “The prestige of your law school really does give you some capital later in your career. At every stage of your career, where you went to law school might help you in some way.” When asked how he defined whether or not a school is prestigious, Sam quickly replies: “U.S. News and World Report. It’s the only way to go.”

Martha took a different path to law school. Martha’s family immigrated to the U.S. from East Africa when she was a child. Her parents

¹⁶ See Espeland & Sauder, *Strength in Numbers*, *supra* note 2. For more detail on our methods see Michael Sauder & Wendy Espeland, *The Discipline of Ranking: Tight Coupling and Organizational Change*, 74 AM. SOC. REV. 63 (2009).

struggled financially and culturally, so Martha acted as her family's mediator between cultures, a role common to children of immigrants. A serious student, Martha attended a prestigious university on a generous scholarship, graduating with honors and working two or three jobs to help pay her way. Martha maintained her connections to her natal community at college through volunteer work tutoring children of new immigrants. Martha decided to apply to law school several years after graduation. She wanted, she said simply, "to help children." She was most interested in immigrant rights, especially as they affected children. Martha had terrific grades, an impressive résumé, strong if not stellar LSAT scores and glowing letters of recommendation from professors she had inspired. She applied to schools with strong programs in human rights, public interest law or good clinics. She wanted to work in a big city with a large immigrant population. With no family financial support, Martha worried about debt and considered going to law school part-time while continuing to work. Martha was admitted to a top ten law school (in their part-time program) and to full-time programs at several top thirty law schools. She was also admitted to a fourth tier school with a good reputation in her fields of interest, and was awarded a hefty scholarship. She chose the latter.

Six years out of law school, Martha is part of a bustling, if not lucrative, practice that centers on immigration and family law. She declares her decision to attend her school "one of my best decisions," saying that unlike many law students, she left law school "knowing how to practice law" because of her clinical training. It is clear that Martha is a happy lawyer. In her words, "I practice law that tries to makes a difference to families and their kids. At the end of most days, I feel pretty good about that."

C. WHERE TO APPLY AND WHERE TO GO

Sam and Martha illustrate the diversity of legal education and the profession. Sam is white, Martha black. Sam went to a top twenty law school, Martha a fourth tier school. Sam is hoping to clerk for a federal judge and then practice corporate law at a large firm, while Martha serves a poor community of mostly recent immigrants. But the experience of these accomplished people also illustrates some important constraints that rankings impose on law schools and on people's decisions about them.

Sam's interest in rankings is hardly unique. A variety of research suggests that rankings influence the decisions of many prospective students. Sauder and Lancaster's analysis of fifteen years of admissions trends, for example, shows that rankings affect where students apply to law

school and which schools they choose to attend.¹⁷ However, as Martha's example shows, there are exceptions to these patterns. Rankings tend to matter less for older applicants (who may face greater geographical or financial constraints), those who wish to practice in a particular region, especially if there are few law schools there, those aspiring to some legal specialties (e.g. family law, personal injury lawyers, real estate) or who want to practice in small firms or solo. Potential applicants most attuned to rankings are those who aspire to careers in big law firms, those deciding among schools close to tier cut off points, and those in competitive law school markets. In light of this variation, however, the evidence remains conclusive that rankings, in producing clear, precise indicators of relative status, *have* changed how students assess the quality of law schools, and this is reflected in their decisions about which law school to attend. And to the extent that applicants focus on and are swayed by a school's composite rankings in their decisions, they may be neglecting values or characteristics that matter to them, e.g. good teaching, faculty scholarship or accessibility, supportive student cultures, that are not captured or emphasized in the rankings, and reinforcing values that may be detrimental to their interests, e.g. a shrinking conception of merit and excellence. Students who aspire to attend a highly ranked school or rely on rankings to select among offers, however unintentionally, are reinforcing a constrictive notion of merit and the irrelevance of many forms of diversity not captured in the rankings: racial, economic, cultural, and broadly defined understandings of ability and accomplishment.

D. RANKINGS AND IDENTITY

Rankings also affect prospective and current law students in other, more subtle ways. Because they are well known, precise indicators of status, rankings make or make visible new kinds of distinctions. Small differences in statistics that may have formerly been irrelevant or meaningless, now matter for rankings as students try to parse the significance of the difference between being ranked sixty-fifth or sixty-ninth, or the reasons why a school may have dropped three spots. Prospective students' discussions of law schools is saturated by what we call "tier talk," often including the language of rankings to depict differences among schools, students, and—sometimes poignantly—themselves. In chat rooms, interviews and observations of admission events, students obsess over rankings and their proper influence in calculations about applications, scholarships, matricula-

¹⁷ See Sauder & Lancaster, *supra* note 2. For more evidence of the effects of rankings on student perspectives see LSAC Research Reports, <http://members.lsac.org/Public/MainPage.aspx?ReturnUrl=/Private/MainPage2.aspx>.

tion and job opportunities. In casual conversations one hears expressions such as “that’s so third tier,” or “I’m not applying out of the top tier.” Our evidence suggests that students internalize rankings as expressions of their own abilities and constraints. A student in a chat room with options limited to third tier schools posts, “I guess I’m just a TTT [third tier toilet] kind of guy.” Another law student recalled how “fun it was” to check the rankings of the schools to which acquaintances were admitted, especially if their schools “were lower than yours.” Even more worrisome are the reports of students who say that if they don’t get into a top [insert number here] law school, they plan to or have been encouraged to reconsider law school. As one African American woman who restricted her applications to law schools in the top twenty-five put it, with a hint of bravado, “What’s the point of joining a profession where your options are already so limited? Maybe that test [the LSAT] is telling you something.”

III. INSIDE LAW SCHOOLS: ADMISSIONS DECISIONS

In addition to affecting decisions about whether and where to go to law school, rankings also powerfully influence the admissions process. Decisions to accept, reject or place students into full or part-time programs shapes both the heterogeneity of the profession and students’ career trajectories. These organizational decisions determine who gets a chance to become a lawyer, as well as the composition of classes within law schools. These decisions also influence long-term professional opportunities since these are greatly affected by the status and location of one’s law school.

Admissions officers expressed their strong commitment to the importance of diversity in the profession and at their school. They understand their job as “crafting a class” that brings together a talented and disparate group of students. They speak of diversity in broad terms such as geography, age, class, veteran status, national origins, backgrounds and experiences, but all emphasized the importance of racial diversity, especially for underrepresented groups. And nearly all admissions staff reported that rankings had dramatically “changed admissions,” and one reason why they resent rankings so deeply—only a handful of the those we interviewed thought rankings improved admissions policies—is because they see rankings as constraining their discretion to admit deserving students. As one respondent said:

The most pernicious change is that I know a lot of schools who have become so driven by their LSAT profile that they’ve reduced the access of people who are non-traditional students. I think that more than anything else has been a pernicious effect. . . . Particularly, the higher echelon you are, the more worried you are that if you let your student numbers slide

to reflect your commitment to diversity, you're going to be punished in the polls for that.

A. RAISING TEST SCORES

Admissions officers describe the biggest change in admissions practices associated with rankings as a greater emphasis on “numbers,” especially test scores. Rankings, they say, have greatly increased pressures to raise median LSAT scores.¹⁸ This emphasis reflects USN weighting of LSAT scores in their algorithm, the relative scarcity of high LSAT scores compared with high UGPAs, as well as the fact that some numbers are easier to raise than others. Administrators believe they have more control over their median test scores than over more amorphous indicators such as “reputation.”¹⁹

While admissions officers agree that test scores are a useful, if limited, indicator for predicting grades in law school, most are quick to add that other factors are needed to supplement test scores and may be as good or better at predicting student success.²⁰ For example, some believe that undergraduate grades are more predictive than test scores because they better reflect ambition, persistence or creativity. Some mention the “one-day wonders” or the “splitters,” students with high LSAT scores but disappointing grades, as a potential sign of immaturity. Many have argued that a too restrictive emphasis on testing limits the breadth of skills and experiences that make for a better class and a more responsive and innovative profession.²¹

¹⁸ This trend in law schools is consistent with trends in higher education more generally, and others point to the effects of rankings, as well as demographic changes and greater competition for selective colleges as propelling this pattern. See Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOC. REV. 487 (2007).

¹⁹ In admissions, applicants' test scores are known and they are either admitted or not. Decisions are constrained by the pool, the number of seats to fill, and the aid budget but these constraints and their effects are better understood than the difficulties of trying to manipulate the (often strategic) opinions provided by respondents to USN's reputational surveys, which are drawn from unknown samples.

²⁰ See Alex M. Johnson, *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L. J. 309 (2006) (providing a detailed discussion of the relationship between LSAT scores and race). The correlation between test scores and first year grades varies by school and group and has little bearing on professional success after law school. See, e.g., Lempert et al., *supra* note 13; Lani Guinier & Susan Sturm, WHO'S QUALIFIED? 68-70 (Beacon Press 2001) [hereinafter Guinier & Sturm, *Who's Qualified?*]; Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity* 60 VAND. L. REV. 515 (2007) [hereinafter Guinier & Sturm, *Law School Matrix*] (discussing the unforeseen negative consequences for student learning due to overreliance on single metrics such as the LSAT).

²¹ See, e.g., Guinier & Sturm, *Who's Qualified*, *supra* note 20; Guinier & Sturm, *Law School Matrix*, *supra* note 20; Page, *supra* note 11; Stake, *supra* note 2; Lempert et al, *supra* note 13 (discussing the problems of over-reliance on testing in admissions).

The greater the emphasis on test scores, the more costly it seems to admit racially and economically diverse students.²² It is well known that some groups perform worse as on standardized tests as others. Generally (and it is crucial to emphasize these patterns are measures of central tendency that necessarily obscure variation), men score higher than women, whites and Asian Americans do better than African Americans, Mexican Americans and Puerto Ricans, and people living in the Northeast do better than those from the South. Studies have also found persistent class effects in standardized testing where students from wealthy or middle-class families do better than those from working-class or poor families.²³ Many administrators believe that the LSAT, more than any other admissions criteria, favors the affluent because of their backgrounds, educational experiences and access to test preparation courses. As one law professor told us: “We’re making it much more difficult for those who aren’t upper-middle class kids to get into law school. Because there is clearly a correlation between family income and how you do on that test—whether you can afford preparation on that test.” And of course, the advantages or disadvantages of race and class can interact in powerful ways.²⁴

²²As we discuss below, some argue that this reaction is misguided. As long as USN relies on the median scores, they contend, schools can maximize the median and still emphasize diversity or other characteristics among students who score below the median.

²³On group differences in LSAT scores see Linda F. Wightman, *The Consequences of Race-blindness: Revisiting Prediction Models With Current Law School Data*, 53 J. LEG. ED. 229 (2003); Lempert et al, supra note 13; Linda 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. LAW REV. 1 (1997); Linda Wightman & David Muller, *An Analysis of Differential Validity and Differential Prediction for Black, Mexican-American, Hispanic, and White Law School Students* (1990), <http://lsacnet.lsac.org/research/tr/Analysis-Differential-Validity-Prediction-Black-Mexican-American-Hispanic-White-Law-School-Students.pdf>; Linda Wightman & David Muller, *Comparison of LSAT performance among selected subgroups* (1990), available at <http://www.lsacnet.org/Research/TOC-research-reports2.htm>; Dalessandro et al., *LSAT performance with regional, gender, and ethnic breakdowns: 1993–1994 through 1999–2000 testing years* (2001), <http://lsacnet.lsac.org/research/tr/LSAT-performance-regional-gender-racial-ethnic-breakdowns-1993-1994-through-1999-2000.pdf>; William C. Kidder, *The Struggle for Access from Sweatt to Grutter: The History of African American, Latino, and American Indian Law School Admissions, 1950–2000*, 19 HARV. BLACKLETTER LAW J. 1 (2003); Lawrence J. Stricker, *Discrepant LSAT Subscores 1* (LSAC, Research Rep. No. 93-01, 1993), available at <http://www.lsacnet.org/research/tr/Discrepant-LSAT-subscores.pdf> (explaining that older students performed worse on the Analytical Reasoning section of the LSAT, which may reflect differences in test-taking speed rather than reasoning ability). See also William Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975 (2004). On test score differences among groups more broadly, see Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap, Introduction to THE BLACK-WHITE TEST SCORE GAP*, 1–51 (Christopher Jencks & Meredith Phillips eds., 1998); Alon & Tienda, supra note 18.

²⁴ For example, one study found that SAT scores explain just 2.7 of the variation in freshman college grades when controlling for students’ background. Jesse M. Rothstein, *College Performance Predictions and the SAT*, 121 J. OF ECONOMETRICS 297 (2004).

While explanations for the “test gap” among people of different backgrounds are complex and often puzzling, partly because different reasons pertain to different groups, research suggests that “cultural capital”—which would include money and time for preparing for the test, educational background, family habits, recent experience with similar testing and thinking, and access to helpful people—explains part of these differences.²⁵ The work of the psychologist Claude Steel and his colleagues is also illuminating. Test-anxiety is not evenly distributed. Their work shows that negative expectations about what testing will reveal about you as a member of some stigmatized group, what they term “stereotype threat,” can depress scores, even from people of relatively privileged economic backgrounds.²⁶

Regardless of the reasons for the test-gap, the relatively lower LSAT scores of some groups means that to the extent that the LSAT dominates understandings of “merit,” some groups cannot be well represented in law schools unless race or class is considered or a more expansive notion of merit is adapted.²⁷ Moreover, the LSAT is a poor predictor of becoming a successful lawyer. Wightman found that the graduation rates of black students who would not have been admitted to law school had the decision been restricted to these two quantitative indicators was 78%.²⁸ A study of University of Michigan law school graduates concludes that while the LSAT and UGPA are for many schools “the most prominent admissions screens, [they] have almost nothing to do with measures of achievement after law school.”²⁹

²⁵The LSAC website’s Frequently Asked Questions About Minority Status section states, “The primary reason that minority test takers perform less well on the LSAT is lack of preparation.” <http://www.lsac.org/SpecialInterests/minorities-in-legal-education-faq.asp> (last visited Nov. 11, 2009). This is not inconsistent with a cultural capital explanation if preparation is correlated with other forms of cultural capital.

²⁶ See Claude M. Steele & Joshua Aronson, Stereotype threat and the intellectual test performance of African-American, 69 J. OF PERSONALITY AND SOC. PSYCH. 797 (1995) (finding as reasons for the test-gap: “...minority group members, particularly African Americans, are more vulnerable to test anxiety than other test takers”). Moreover, research suggests the benefits of stereotypes to some groups. White men, for example, enjoy on average a 50 point boost advantage on difficult SAT-like exams that has been attributed to “stereotype lift,” an advantage that could easily mean the difference between admission and rejection at selective schools. Gregory M. Walton & Geoffrey L. Cohen, *Stereotype Lift*, 39 J. OF EXPER. SOC. PSYCH. 456, 457–61 (2003).

²⁷ Studies repeatedly show that sustained minority enrollment depends on using factors other than UGPA and LSAT scores in admission decisions. Wightman, *supra* note 23; Lempert, *supra* note 13; Wilkins, *supra* note 6; See, e.g., Guiner & Sturm, *Who’s Qualified*, *supra* note 19; Guiner & Sturm, *Law School Matrix*, *supra* note 20; Ian Ayers & Richard Brooks, *Does Affirmative Action Reduce the Numbers of Black Lawyers*, 57 STAN. L. REV. 1807 (2004–05).

²⁸ Linda F. Wightman, *Beyond FYA: Analysis of the Utility of LSAT Scores and UGPA for Predicting Academic Success in Law School*. Research Report 99-05. Law School Admission Council (2000).

²⁹ See Lempert et al., *supra* note 13, at 490.

As the scholarly literature and our informants make clear, to the extent that “merit” is narrowly defined by test scores or, to a lesser extent, grade averages, certain minority groups and less affluent students will require some form of preference to ensure they are admitted in meaningful numbers. Research is clear on this point: in law school admissions and more broadly in admissions to selective colleges and graduate and professional programs, non-token representation of groups like African American, non-white Hispanic, Native Americans, and students from poor or lower middle class families, cannot be accomplished apart from considerations of criteria other than test scores and undergraduate grade averages.

By creating strong incentives for law schools to focus more narrowly on test scores, rankings make it seem more risky to admit diverse students when those students tend to have lower test scores. Moreover, rankings ratchet up the competition for poorer students and students of color with high scores. As an administrator and law professor described it:

The [rankings] induce some constituencies—particularly the faculty—to be very anxious, to focus admissions on students with high LSAT scores. That’s probably the single most pernicious consequence of the USN survey. It puts enormous pressure on law schools to become homogeneous and to all compete for the same students.

Administrators say they often feel forced to choose between a higher median LSAT score and a more diverse student body, a decision that the rankings have made much more acute than in the past:

What I would say is that how much people are willing to take a risk in the admissions process, or how diverse they will become, or whether a school is willing to take one more student who if you take that one student puts you at a tipping point where it changes what your bottom quarter or your top quarter looks like, I think it does have that effect, absolutely. Yeah, I think it has [a homogenizing] effect.

Staff described performing “balancing acts” between goals and values that they often see as in conflict: raise or maintain rankings or cultivate diversity.

B. MERIT MONEY

Another consequence of rankings pressures on law schools is the rapid and pervasive proliferation of “merit” scholarships. This money is used to lure students with good numbers. While some of this money is directed toward students from underrepresented or disadvantaged groups, one of its core purposes is to boost median LSAT scores. Many schools rely on careful formulas that spread merit money to students with above median scores

because if the goal is to boost medians, several students with slightly above median scores produces better results than offering a large scholarship to a single student with very high scores. Money spent on merit scholarships is unavailable for other purposes, including needs-based scholarships that have traditionally been targeted to less affluent students, or programs that improve students' success in law school and after.

The extent to which rankings have amplified a "winner take all" approach in admissions, one that rewards high test scores at the expense of other forms of diversity, can exacerbate other tensions among applicants. Race, as a visible form of diversity, makes an easy target for anxious or disappointed applicants for whom other forms of diversity or advantage are less obvious. As litigation and numerous anti-affirmative action propositions have made clear, working class white applicants with strong but not stellar test scores and UGPAs sometimes deeply resent minorities admitted with "lesser" credentials translated as lower test scores or grade averages. Doing so neglects a deeper critique of how this restrictive form of merit mediates class, and disadvantages and marginalizes their potential contributions to a diverse classroom and profession. A number of deans we interviewed described how their schools have or eliminated positions in order to boost test scores and improve student-faculty ratios, two rankings criteria. If schools continue to allocate seats and funding in order to raise test scores and boost rankings, we should not be surprised that the competition among groups for these scarce resources intensifies.

C. DISTRIBUTION OF STUDENTS IN PART-TIME PROGRAMS

A final way in which rankings potentially affect admissions practices is by influencing the distribution of students into part-time and full-time programs. One strategy many schools have used to preserve diversity goals as they struggle to raise or maintain their rank is to steer students with lower numbers into part-time programs.³⁰ This strategy was effective because until this year USN rankings only considered the LSAT scores and UGPAs of full-time first year students in its calculations of selectivity. Before this change, schools could admit students with lower scores into part-time programs without being penalized in the rankings; these part-time students were often allowed to transfer into the full-time program after the first semester or first year. While some schools have distinguished part-time programs, some part-time programs have clearly become a form of

³⁰See generally http://www.elsblog.org/the_empirical_legal_studi/2008/06/transfer-studen.html and http://www.elsblog.org/the_empirical_legal_studi/2008/06/transfer-stud-1.html, in which William Henderson provides data to support the increase of part-time programs and outlines the gaming strategies involved in these practices.

tracking that threatens to stigmatize its participants and may complicate the socialization and cohesiveness of cohorts. We do not have quantitative data on the demographics of students in these part-time programs, but our interview data strongly suggest that less affluent and minority students are over-represented. Now that USN has changed its methodology to include the LSATs and UGPAs of students in part-time programs, it will be interesting to see how schools respond. If they choose to maintain their focus on LSATs and UGPAs, the diversity of their student bodies could suffer.

Rankings affect other admissions practices and outcomes. The rise of transfer students from lower to higher ranked schools can be partially attributed to the pressure to improve rankings.³¹ Highly ranked schools can optimize their selectivity scores during the admissions cycle by admitting a relatively homogenous class, but can then seek out transfer students to improve their diversity profiles. Other schools have been accused of admitting students as “conditional accepts” and then requiring them to take summer programs or wait to enroll full time until they have passed several courses. Such actions exempt these students from the selectivity statistics of the rankings. Although it is difficult to assess how common these strategies are, some evidence suggests that they are increasing.³²

Rankings have prompted schools to invest heavily in raising test scores. This threatens some forms of diversity. Students whose records show evidence of leadership, overcoming hardship, perseverance, public service, creativity, commitments to justice, or any number of other criteria related to the practice and advancement of law, must now be weighed carefully by admissions officers for what these talents and abilities will cost in terms of the rankings.

IV. THE FIELD OF LEGAL EDUCATION

Another important way in which the USN ranking has the potential to affect diversity is through its influence on the heterogeneity of law schools themselves, including their professional commitments and practices. As John Garvey wrote recently in the introduction to the 2009 AALS Annual Meeting Presidential Program,

There are powerful market and regulatory norms that push law schools toward uniformity. The ABA accreditation process uses one set of standards that it asks all institutions to conform to. The U.S. News ranking system uses another linear measure. Law firms who hire our graduates

³¹ See Henderson & Morriss, *Migration Patterns*, *supra* note 2, at 175

³² See <http://leiterlaw.school.typepad.com/leiter/2008/06/schools-that-ta.html>, in which Brian Leiter presents transfer data on his web site.

rely on simple tools like rankings as an index of quality. These forces may impede, or even frustrate, schools' efforts to cultivate their own distinctive identities.³³

By creating a very influential definition of law school quality, the rankings generate pressures for schools to conform to this definition so that they might maximize their rank. Further, by ranking schools on a single dimension, it is implied that all law schools share similar motives and goals. According to this conceptualization, difference in kind is transformed into difference in quality.

Such pressures explain why many legal educators worry that the rankings will have a homogenizing effect on the field of legal education. Many expressed concern about the effects of rankings on schools with distinctive missions—schools, for example, that aspire to provide opportunity for students who otherwise might not be admitted to law school, have commitments to religious traditions, or produce public interest lawyers for underserved communities. Our respondents fear that these schools must now decide whether to compromise these missions or risk being labeled as a “bad law school” if their rankings fall due to their commitments.

Many of the administrators we interviewed at “non-traditional” schools believed that their schools were being punished in the rankings for adhering to missions or niches that were at odds with those of elite schools. One dean at what he described as “an access university,” for instance, reported:

A student can have a very high GPA but a very low LSAT score. That student is not going to help us in the rankings. But let's assume for the moment that that student is a minority—that's the kind of student we like to admit and to give an opportunity to even though that's going to adversely impact our rankings, and even though that student is not going to pass the bar exam the first time around. And that is our mission. We are going to have to change our mission and change our thinking if we are going to take that student's place and give it to a student with a higher LSAT score, if we are going to be driven by the rankings. Our problem, and our challenge, and our opportunity is that we are poised at the top of a tier. So it is almost impossible to resist the temptation to move into that [higher] tier [and] then that becomes a self-perpetuating situation.

When asked if his school would continue to admit students with lower LSAT scores along with the higher scoring students, he replied, “It could be that for a couple of years we don't give that student the opportunity. Or

³³ See John H. Garvey, President, Association of American Law Schools, Institutional Pluralism, Presidential Address before the House of Representatives at the 2008 Annual Meeting (Jan. 6, 2008), available at <http://www.aals.org/documents/newsletter/may2008newsletter.pdf>.

we say to that student that we used to have a place for them in the day program but now we have a place for you in the night program, which is part-time and which doesn't count as much toward the rankings."

While other administrators were more adamant about not allowing the rankings to alter their schools' missions at all, they also acknowledged the cost that this commitment would incur on their rank. As one dean told us:

I say to the entering class that we are proud to be in the bottom quartile and that it's because we take chances on students and it's because our students go out and do work in public service, and so our salaries are low and our numbers are not high and that is what our mission is and that is what it should be. And if we ever got out of the fourth tier, I would be nervous; I would think that we were doing something wrong.

Staying true to one's mission might be a badge of honor, but this badge will likely carry a price in terms of one's rank.

In this way, the rankings have limited the claims that can be made for law schools about their standing in the law school community. Further, rankings create self-fulfilling prophecies by encouraging schools to become more like what rankings measure, which reinforces the validity of the measure. Rankings impose a standardized, universal benchmark of law schools that creates incentives for schools to conform to its measures. These factors all encourage the homogenization of law schools.

CONCLUSION: WHAT TO DO?

As a technology of assessment rankings redistribute attention, changing what we notice, how we assess costs and benefits, and how we understand our professional identities. Along these same lines, rankings have also changed how people think about diversity. One lesson our research suggests is that in analyzing diversity, as with most social phenomena, it is important to pay attention to the unit of analysis—how different levels of effects overlap and interact. For example, the diversity index created by USN is intended to provide prospective students with a sense of which schools are doing the best jobs of creating racially diverse classes. But these rankings punish the historically black law schools that enroll large proportions of African-Americans, even though these schools create much-needed diversity at the organizational level and contribute significantly to the diversity the profession. "Non-traditional" schools, like "non-traditional" students are forms of diversity that need to be cultivated rather than penalized for not conforming.

Our analysis also suggests important avenues for future research. Our data are well-suited for helping us understand the meanings associated with rankings and how they shape people's perceptions and practices. They are not suitable for understanding more precisely how big these effects are and how they are distributed across the population of law schools. Quantitative studies of admissions practices are needed to specify these relationships.

While we recognize the importance of many types of difference, we believe that forms of diversity that are linked to histories of oppression and exclusion—race, gender, ethnicity, class and sexual orientation—warrant special consideration and protection in admissions policies. These forms of diversity are certainly not the only ones that matter; they overlap and interact in complex ways, and we know that broad classifications obscure great differences or even striking similarities of values, opinions or abilities among different groups. Middle class black students may have more in common with middle class white students in terms of their professional ambitions than with lower class students of either race. Nonetheless, ensuring that the legal profession embodies multiple and layered forms of diversity will bring distinctive expertise and backgrounds that are especially important in representing underserved clients and communities. Given these and other benefits associated with diversity, what are some practical ways in which law schools can combat the rankings pressures that threaten diversity?

One simple strategy involves exploiting the flexibility afforded by USN measurements. Because USN uses the median LSAT in its formula for calculating overall rank—which means it only considers the exact middle score of the distribution after scores have been arranged in ascending order (that is, the score at the 50th percentile)—schools can select whom-ever they want below their median without affecting the measure used by USN. So if schools admit the top half of a class with an eye toward protecting or raising their LSAT median, they can use any criteria they want in admitting those below that score. Many schools are aware of this strategy but many do not take full advantage of it. This tactic could be made even more attractive to schools if USN published only the median and not the 25th and 75th percentiles for test scores and GPAs, as it does now. It is also important that USN not adopt a more restrictive measure of selectivity (such as using the 25th and 75th percentile scores in its formula) so that schools can continue to use this flexibility to diversify their student bodies if they so desire.

This year USN decided to include the LSATs and UGPAs of students who are admitted into part-time programs into its selectivity statistics in order to eliminate biases against schools without part-time programs. This

change is appealing because it discourages schools from gaming the rankings by relegating students with lower numbers to part time programs. Yet the enactment of this proposal eliminates this important avenue of admission for promising students with lower test scores. For this reason, we believe the risk to diversity of such a change outweighs the benefits gained by reducing gaming strategies.

A more promising (and controversial) policy would be to convince USN to include diversity as part of its overall ranking rather than as a separate indicator. This would put into practice more unequivocally the principle, espoused by most of those with whom we spoke, that diversity is fundamental to the quality of a law school and to legal education. The drawback to this recommendation is that it reinforces a mechanical notion of diversity as numbers of minorities. It would also likely to generate heated conflict among schools about how to implement it and would increase competition for underrepresented students with high scores, an already highly recruited group. Because rankings generally reinforce the advantages of schools with privileged statuses and plentiful resources, this change could very well make it harder for some schools in the bottom tiers to preserve their current levels of diversity. Yet, we believe the importance of diversity deserves to be reflected directly in the rankings that have generated all these pressures.

Finally, we recommend that schools with distinctive missions be permitted to opt out of the standardized rankings if they wish to do so. These schools could participate only in the specialty rankings or not participate at all. The threat to the heterogeneity of law schools, we believe, is a direct threat to the heterogeneity of the legal profession. Schools serving important constituencies should not be penalized for doing good work just because that work differs from USN's particular definition of a quality legal education. Rankings have produced many unanticipated and undesired consequences. It is crucial that we continue to explore the effects of rankings and that we consider these effects across different levels of organization and units of analysis.

These mitigating strategies, it must be noted, are limited and come with their own hazards. As short-term "fixes" for some negative effects of rankings, they do not fundamentally alter, and they perhaps even reinforce, the legitimacy of rankings as measures of performance. Neither do they address more fundamental problems fairness and breadth in legal education. As Sturm and Guinier suggest, rankings are part of a broad conception of success, one that is defined comparatively based on relative performances—having higher rankings and test scores, more citations or more money—and is embedded in the durable and highly competitive culture of

law school.³⁴ This “success narrative” is all encompassing, shaping all parts and practices of law schools. Yet, this conception of excellence is sometimes far removed from the stated goals of law schools and needs of communities and clients. And it excludes many who do good work and lead meaningful professional lives. Law schools must encourage the hard work of interrogating the presumptions and practices that narrow the range of excellence and define it in relative terms. Deconstructing the impact of rankings on diversity is just one step in this process.

³⁴ See Guiner & Sturm, *Who's Qualified*, supra note 20.