

Of Law School Rankings, Disparity, and Football

CHRISTOPHER J. RYAN, JR., J.D., PH.D.*

U.S. News & World Report (USNWR) announced in February 2019 its intention to debut its new ranking measuring the scholarly impact of law schools' faculty members. In producing the ranking, USNWR has collaborated with William S. Hein & Co., Inc., which specializes in distributing legal periodicals to "link the names of each individual law school's faculty to citations and publications that were published in the previous five years and are available in HeinOnline, an online database with more than 2,600 legal periodicals." From these data, USNWR plans to create and publish a "comprehensive scholarly impact ranking of law schools." However, this ranking has yet to be printed, allowing legal academics to challenge the notion that we need it at all.

This new ranking of scholarly impact is as interesting as it is problematic. In this Article, I unpack a few of the problems inherent in the newly proposed ranking of scholarly impact. Because I am starved for sports in this COVID-19 world, I do so through the analogy of football penalties. Part I describes what rankings of law schools should do and where they fall short. Part II examines the potential effect of the proposed USNWR scholarly impact ranking, focusing on the inequalities that they are sure to perpetuate. Part III continues by discussing whom rankings of law schools are for—or whom should they be for. Finally, this Article concludes with suggestions about how scholarly impact rankings could be improved, and if not improved, ignored.

INTRODUCTION

Long before I became a member of the legal academy, I was a kid from Texas. In the Texas of my youth, the state religion was football.¹ I grew up

* Associate Professor of Law, Roger Williams University School of Law and Affiliated Scholar, American Bar Foundation. © 2020, Christopher J. Ryan, Jr. I dedicate this Article to Dad and Pop-Pop, from whom I inherited my love of football and the University of Notre Dame (at which I legitimated my fanhood by earning a master's degree), and to Ames and to Ives, who I hope will know the pleasures and none of the pains of being fourth-generation Fighting Irish fans. I also thank the attendees of the Hot Topics panel on law school rankings at the 2020 American Association of Law Schools Conference in Washington, D.C., where I gave a presentation that would become this Article, the organizers of the panel (including Beth Mertz, Rachel Moran, and Rick Lempert), and the panelists (including Bob Morse, Greg Sisk, Michael Vandenburg, and Sarah Dunaway).

¹ Although I have not lived in Texas since I went off to college and cannot verify that my fellow Texans are as fervent believers as they once were, secularization appears unlikely. See Kevin Sherrington, *In Texas, Where High School Football Is Religion, Instant Replay in the Biggest Games Is a Necessity*, DALLAS MORNING NEWS, (Dec. 13, 2017, 6:46 PM), <https://www.dallasnews.com/high-school-sports/2017/12/14/in-texas-where-high-school-football-is-religion-instant-replay-in-the-biggest-games-is-a-necessity/>

playing football year-round in suburban backyards, front yards, and—when my neighbor friends and I felt especially fearless—on concrete streets. On holidays, my family members and I inevitably found some excuse to retreat outdoors to engage in our gridiron ritual. As I grew older, I played football on school teams, including in college at Dartmouth, and I later covered the football team for the daily newspaper in the last two years of my undergraduate studies. Football was not just a part of my life; it was inseparable from any other part of my life.

Anyone who loves the game of football knows that this love cannot be lived in isolation. Even if only as a fan, one must belong to a team. I was born into mine. As a third-generation University of Notre Dame football fan, I had no choice but to be a diehard, because the years during which Bob Davie, Ty Willingham, and Charlie Weis coached the Fighting Irish left much to be desired. In fact, until the year 2000, I am sure that I knew more about Knute Rockne and the Four Horsemen—the beloved coach and the formidable backfield, respectively, of the 1924 Notre Dame team—than I did about William Rehnquist and the Other Eight. This speaks as much about my childhood priorities as it does about how the pioneers of the game of football shaped public perceptions in enduring ways.

Knute Rockne was a visionary coach, but he was perhaps an even more skilled advertiser.² Rockne's teams of the 1920s attracted the attention of the media, counting the likes of Grantland Rice—whose syndicated column and radio show made the Irish backfield famous—as fixtures in attendance at Notre Dame football games.³ The coach scheduled intersectional matches against teams all over the country not only to sharpen his players' skill by playing a diverse set of opponents but also to broaden the reach of his team's exposure beyond a singular regional market. Rockne also wrote articles published by the Associated Press and had news film producers record his speeches and lectures on football because he knew that allowing the press to do their job was good for his team.⁴ This publicity made Rockne and Notre Dame household names. In fact, it is safe to say that the subsequent success of the Irish football program, and indeed the University of Notre Dame, is owed to Rockne's having drawn the public's attention to the

[<https://perma.cc/TM2E-VTLR>] (“From the outside looking in, critics claim we go too far here in Texas, where we build \$60 million cathedrals to high school football, the official state religion.”).

² This is not to say that Rockne was a showman, although many regard him as such, or that he was motivated by self-interest. Far from it. He was “a quiet man, who doubled up in a camp chair [on the sidelines] and twirled a cigar. Nothing spectacular about him. No picturesque language, no playing to the grandstand. He left the color and publicity to his team. As he often said [to reporters], ‘Leave me out of whatever you say. Give the credit to the team.’” HARRY A. STUHLREHER, *KNUTE ROCKNE: MAN BUILDER* 43 (1931).

³ See Bob Carter, *Knute Rockne Was Notre Dame's Master Motivator*, ESPN, https://www.espn.com/classic/biography/s/Rockne_Knute.html [<https://perma.cc/U52H-FHST>] (last visited Mar. 10, 2021).

⁴ See STUHLREHER, *supra* note 22, at 43–67.

northwest corner of Indiana a century ago.

It may seem strange to begin a law review article about law school rankings and their negative externalities with an anecdote and rumination about the mythos of college football's halcyon days resonating into the present, but there is, in fact, an apt connection. Both law schools and football teams are important parts of the universities that they represent. Historically, both have been cash cows for universities' academic and athletic programs,⁵ and perceptions of their success are dependent on many of the same things. The quality of a football program depends upon its coaching, resources, roster, location, and how well it markets its brand. To a large extent, the quality of a law school is contingent upon its leadership, budget, the faculty and students at the law school, where the school is located and whom it serves, and how well it markets its brand. Also, both college football programs and law schools are subjected to rankings of their quality. College football teams exhibit a wide variation, and rankings of them—sometimes objective and sometimes subjective in nature—are important indicators to the public of a given program's quality. Rankings help or hurt a program in recruiting new athletes, and given that rankings of football teams change year-over-year, they form a measure of the team's success by the end of the season. Much of the same can be said of law schools, which also exhibit variation in quality and rely on rankings to promote their success publicly and to attract new students. Yet, law schools lack win-loss records, making it difficult to compare individual law schools to each other. But that is exactly what the most prominent law school ranking attempts to do.

U.S. News & World Report (USNWR) has been the gold standard of law school rankings for more than three decades. It benefits from the first-mover advantage because it was the first noteworthy publication to rank law schools (in 1987)⁶ and has done so systematically since 1989. Over the years, the

⁵ There is no doubt that the effects of COVID-19 will impact the financial viability of college sports programs and law schools. And historically, not all college sports programs were profitable, and neither were all law schools. But many college football programs—through ticket sales, licensing fees, TV contracts, etc.—are often universities' highest-grossing programs, and subsidize other athletic programs with the profits that they generate. See Kristi Dosh, *Does Football Fund Other Sports at College Level?*, FORBES (May 5, 2011, 9:02 PM), <https://www.forbes.com/sites/sportsmoney/2011/05/05/does-football-fund-other-sports-at-college-level>. Likewise, law schools—which operate without labs, dormitories, and other incidental costs associated with various academic disciplines and residential programs—have historically been boons to the universities with which they are affiliated, helping to increase the stature of these universities as well as their revenue. Paul Campos, *The Law-School Scam*, THE ATLANTIC (Sept. 2014), <https://www.theatlantic.com/magazine/archive/2014/09/the-law-school-scam/375069>.

⁶ See Lucia Solorzano, Maureen Walsh, Ted Gest, Ronald A. Taylor, Clemens P. Work, Deborah Kalb, Elisabeth Blaug, Sharon F. Golden, Sarah Burke, Cecilia Hiotas, David Rosenfeld & Barbara Yuill, *America's Best Professional Schools; Top Training for Top Jobs*, U.S. NEWS & WORLD REPORT, Nov. 1987, at 70.

periodical has tinkered with the methodology it uses to rank law schools, but the ranking consistently places heavy weight on the scores that a law school receives on an annual peer-assessment survey.⁷ In other words, reputational scores account for a significant portion of a law school's composite score; in the 2021 rankings—which *USNWR* confusingly published in 2020 based on 2019 data—forty percent of a law school's ranking was attributable to its peer-assessment survey.⁸

In an apparent effort to address concerns about the subjectivity of its ranking methodology, *USNWR* recently announced its intention to offer a new ranking measuring the scholarly impact of law schools' faculty members.⁹ In producing the ranking, *USNWR* will collaborate with William S. Hein & Co., Inc., which specializes in distributing legal periodicals, to “link the names of each individual law school's faculty to citations and publications that were published in the previous five years and are available in HeinOnline, an online database with more than 2,600 legal periodicals.”¹⁰ From these data, *USNWR* plans to create a “comprehensive scholarly impact ranking of law schools”¹¹ using a five-year rolling average of citations by a law school's faculty. *USNWR* has suggested that it will unveil the rankings in 2021.¹²

Although *USNWR* ostensibly aims to introduce a metric by which law schools can be more meaningfully compared, this approach is not novel and is subject to many of the same problems as other measurements of scholarly impact. This Article unpacks a few of the problems inherent in the proposed ranking of scholarly impact. Part I describes what rankings of law schools should do and where they fall short. It discusses the issue of rankings

⁷ These annual peer-assessment surveys are sent to legal academics, as well as to practicing attorneys and judges. See Robert Morse & Eric Brooks, *A More Detailed Look at the Ranking Factors*, U.S. NEWS & WORLD REPORT (Sept. 8, 2019, 9:00 PM), <https://www.usnews.com/education/best-colleges/articles/ranking-criteria-and-weights>.

⁸ See Robert Morse, Ari Castonguay & Juan Vega-Rodriguez, *Methodology: 2021 Best Law School Rankings*, U.S. NEWS & WORLD REPORT (Mar. 16, 2020, 9:00 PM), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology> (describing *USNWR*'s “Quality Assessment” metric as comprising forty percent of a law school's total score; Quality Assessment incorporates the “Peer assessment score” and the “Assessment score by lawyers and judges”).

⁹ Robert Morse, *U.S. News Considers Evaluating Law School Scholarly Impact*, U.S. NEWS & WORLD REPORT (Feb. 13, 2019, 1:00 PM), <https://www.usnews.com/education/blogs/college-rankings-blog/articles/2019-02-13/us-news-considers-evaluating-law-school-scholarly-impact>. Although *USNWR* indicated that it would integrate measures of scholarly impact within its Best Law Schools ranking methodology, it has since clarified—or backtracked—that any scholarly impact rankings would be separate from its overall Best Law Schools ranking. *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Paul Caron, *U.S. News to Publish Law Faculty Scholarship Impact Ranking in 2021*, TAXPROF BLOG (Nov. 9, 2020), https://taxprof.typepad.com/taxprof_blog/2020/11/us-news-to-publish-law-faculty-scholarly-impact-ranking-in-2021.html [<https://perma.cc/8JZG-TNV7>] (noting that *USNWR*'s goal is to publish the rankings in 2021).

stagnation, as well as the misaligned incentives inherent in rankings to which law schools have responded in order to improve their positions. Part II examines the potential impacts of the *USNWR*'s proposed scholarly impact ranking, focusing on the disparities and inequalities that it is sure to perpetuate, including undervaluing the contributions of women, faculty of color, and interdisciplinary scholars. Part III discusses whom rankings of law schools are for—and whom should they be for—and suggests that rankings of scholarly productivity are not particularly salient to law students or faculty. Finally, this Article offers suggestions for how scholarly impact rankings could be improved, or if not improved, ignored.

I hope you will forgive the extended metaphor, for I am channeling my deep-seated angst from the absence of live football in my life into this Article. And you, dear reader, are like an offensive-line coach on a tackle sled: just along for the ride. Now, the game of football is governed by rules, and these rules are enforced by penalties—yet another commonality of football and the law. Throughout this Article, I aim to discuss the problems with the proposed *USNWR* scholarly impact ranking by assigning “penalties” to the negative consequences that I believe these changes will produce. Buckle up your chin strap; here we go.

I. RANKINGS UNDER FURTHER REVIEW

A. ILLEGAL SHIFT

If you have ever perused the Internet to buy a new product, you have undoubtedly come across a ranking of that product against all other products like it. These days, rankings are ubiquitous, and given the trend in public discourse toward viewing postsecondary education as a good like any other that can be purchased on Amazon, it is perhaps inevitable that law schools—and even their faculty members' scholarly impact—have become subject to ranking. But rankings of law schools are not necessarily bad. After all, to the extent that law schools compete with one another for higher positions in rankings, the improvement realized by law schools overall can improve legal education as a whole, and not to mention, validate winning models of legal education. A rising tide lifts all boats. The problem is that rankings of law schools, now more than thirty years on, seem not to have yielded such a result.

Instead of providing a mechanism for healthy competition, rankings of law schools have created perverse incentives to which law schools have responded. An undue focus on rankings by law schools has led to their gaming the rankings—or what I call an “illegal shift.” In fact, the operating practices of several law schools can be explained as a direct response to the perverse incentives that the rankings created. For instance, as early as 1995, “disturbing discrepancies” in LSAT scores were reported to *USNWR* by

nearly thirty law schools.¹³ Additionally, for years, law schools have admitted certain second-year transfer students to whom they had previously denied admission because transfer students' credentials do not figure into—that is to say, count against—the law school in the rankings. Although this practice is perverse, it is arguably economically rational because transfer students pay full tuition at a greater rate than students who enroll as first-year students, thereby benefitting a law school's bottom line.

When employment outcomes for law school graduates began to fall nationally in the years following the 2008 recession, many law schools fudged the employment statistics that they reported to the American Bar Association and *USNWR*.¹⁴ Several law schools placed recent graduates who had not secured full-time legal employment on the law school payroll as research assistants in order to boost the school's employment figures.¹⁵ Some also created fictional categories of employment for these graduates and assigned them high-income figures to help buoy the schools' position in the rankings.¹⁶

Because a law school's rank has become a proxy for its quality, law schools can and do manipulate their performance on those metrics considered by the *USNWR* ranking methodology. There is not much standing in the way of a law school that games the rankings in any of these ways in order to keep its competitive position in the rankings. And there is no reason to believe that a ranking of scholarly impact would produce any different behavior from law schools, as Part II of this Article explores.

B. HOLDING

The *USNWR* Best Law Schools ranking methodology accounts for a host of factors such as measurable entering student credentials, acceptance rates, the amount of institutional expenses, graduate employment outcomes, and bar passage rates, though all to a lesser extent than reputation. In a sense, then, *USNWR*'s Best Law School ranking methodology is a pseudo-regression model attributing a fixed weight to each of these constructs to yield an ordinal ranking result. As mentioned, forty percent of a law school's composite score is attributable to reputation, and there are some problems with this approach. For instance, reputation might not be as salient as other considerations to many stakeholders in legal education.¹⁷ But the

¹³ Brian Z. Tamanaha, *Law Schools Fudge Numbers, Disregard Ethics to Increase Their Ranking*, DAILY BEAST (June 17, 2017, 4:45 PM), <https://www.thedailybeast.com/law-schools-fudge-numbers-disregard-ethics-to-increase-their-ranking>.

¹⁴ See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 72–73 (2012).

¹⁵ *Id.* at 72.

¹⁶ *Id.*

¹⁷ See Part III, *infra*, for a more complete discussion of stakeholders' interests in ranking law schools. For a further indictment on the use of reputational scores in the rankings, see generally Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations,*

principal problems are twofold. First, the heavy weight placed on reputation in the ranking methodology distorts the model, because reputation is related to the other variables used in the methodology. Second, and as a corollary to the first, because reputation increases the path dependency of the rankings, the rankings are less useful.

The first problem relates to the multicollinearity in measuring for something such as reputation that could inevitably contain elements of previously measured indices, including how selective admissions are at a given law school. If so, the methodology in and of itself might be mathematically flawed by measuring two or more highly correlated constructs at once while treating them as separate. That is, the high degree of correlation between reputation and many of the other constructs measured in the ranking methodology creates an amplifying effect that could erode the fixed weights assigned to these variables in the methodology. Any statistician would advise throwing out collinear variables from the model, or alternatively, specifying the model without one of the two collinear variables to more precisely measure the impact each has on the outcome.¹⁸ And the best candidate for the trash heap is usually the subjective, as opposed to the objective, variable. This begs the question: what value do subjective reputational scores have that objective, hard figures such as admissions selectivity do not?

Perhaps this is too theoretical or too mathematical of an objection to the use of reputational scores, so here is a practical objection that is also rooted in the universal language. Although a bit dated now, the peer-assessment scores from the *USNWR* rankings from calendar years 2008 to 2014 (that is, those used in the 2009–2015 Best Law School rankings) reveal that the peer-assessment scores from the five years preceding 2014 exceed a 0.986 correlation coefficient.¹⁹ Given that a correlation coefficient of 1.000 represents a perfect positive correlation, the peer-assessment scores used in

and Resource Allocation: Ways Rankings Misperceive, 81 *IND. L.J.* 229 (2006).

¹⁸ See generally Carsten F. Dormann, Jane Elith, Sven Bacher, Carsten Buchmann, Gudrun Carl, Gabriel Carré, Jaime R. García Marquéz, Bernd Gruber, Bruno Lafourcade, Pedro J. Leitão, Tamara Münkemüller, Colin McClean, Patrick E. Osborne, Björn Reineking, Boris Schröder, Andrew K. Skidmore, Damaris Zurell & Sven Lautenbach, *Collinearity: A Review of Methods to Deal with It and a Simulation Study Evaluating Their Performance*, 36 *ECOGRAPHY* 27, 28 (2013) (defining collinearity and its problems). With full recognition that the rankings are not measuring the effect of any predictor variable on the outcome variable, as would be the case with a garden variety ordinary least squares regression model, the problem of the relative stagnation that permeates the rankings is attributable in part to the ranking methodology's insistence on measuring collinear variables.

¹⁹ The data used to conduct this analysis are on file with the author. The data were sourced from the *USNWR* peer assessment scores published by the periodical and checked against the scores published on Paul Caron's TaxProfBlog postings for calendar years 2008–2014. For a further discussion of the yearly correlations between peer-assessment scores, see Christopher J. Ryan, Jr., *A Value Added Ranking of Law Schools*, 29 *U. FLA. J. L. & PUB. POL'Y* 285, 289 (2019), from which this table was lightly cribbed.

the rankings in 2014 were nearly identical to the peer-assessment scores for all prior years. This nearly perfect correlation means that the opinions of reputational reviewers are highly path-dependent and unlikely to change over time. This result highlights the second problem inherent in the ranking methodology: ranking stagnation as a function of path-dependent peer-assessment scores.

Table 1: Peer Review Score Correlations by Yearly Lags

| | PR Score 2014 | PR Score 2013 | PR Score 2012 | PR Score 2011 | PR Score 2010 | PR Score 2009 | PR Score 2008 |
|---------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|
| PR Score 2014 | 1.000 | | | | | | |
| PR Score 2013 | 0.994 | 1.000 | | | | | |
| PR Score 2012 | 0.991 | 0.991 | 1.000 | | | | |
| PR Score 2011 | 0.988 | 0.988 | 0.993 | 1.000 | | | |
| PR Score 2010 | 0.988 | 0.987 | 0.992 | 0.995 | 1.000 | | |
| PR Score 2009 | 0.986 | 0.985 | 0.987 | 0.990 | 0.992 | 1.000 | |
| PR Score 2008 | 0.984 | 0.943 | 0.947 | 0.948 | 0.952 | 0.954 | 1.000 |

The peer-assessment score has always counted for a large proportion of a law school's composite score, or overall rank. The near-immutability of peer-assessment scores, then, implies that a law school's overall rank is unlikely to change much over time, which hurts the ranking's dynamism and responsiveness to new trends or changes in a given year at a given law school. Thus, the stagnation in the reputational scores may mean that the rankings have actually become self-fulfilling, for better and for worse. Because of their lack of responsiveness to meaningful improvements or changes at law schools, the rankings may indeed be poor indicators of quality. We will therefore throw another penalty flag—this time for “holding.”

Consider the first ranking of law schools in *USNWR*'s special issue, published on November 2, 1987.²⁰ The law schools that ranked in the top sixteen of the first *USNWR* ranking are the same law schools that ranked in the top sixteen of the 2021 ranking of law schools, which *USNWR* published in March 2020.²¹ To torture the football metaphor a touch more, I have also provided the rankings of college football teams in the Associated Press (AP) Poll—which is also somewhat subjective—published on November 3, 1987,²² one day after the first *USNWR* ranking of law schools was

²⁰ See Solorzano, et al., *supra* note 6.

²¹ See *2021 Best Law Schools*, U.S. NEWS & WORLD REPORT (Mar. 2020), <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings>.

²² See *November 3, 1987 AP Football Poll*, COLL. FOOTBALL POLL ARCHIVE, <http://www.collegepollarchive.com/football/ap/seasons.cfm?appollid=630#.XsJOUz3UI> [<https://perma.cc/6HMS-626P>] (last visited Mar. 11, 2021). The AP Poll, once the gold standard in rankings of college football teams, is a poll of sportswriters and broadcasters whose votes ordinarily rank the NCAA football teams. Not unlike the peer-

published. Of the top sixteen college football teams in that ranking, eight were not ranked in the AP's last ranking of the 2019 season, which was published after bowl season on January 14, 2020.²³ In fact, five of these teams did not even qualify for bowl games because they did not have winning seasons.²⁴ In contrast to law school rankings, football rankings are considerably more dynamic.

Table 2: A Comparison of the Top Law Schools and Football Teams (1987 and 2020)

| Law School | USNWR 11/02/87 | USNWR 03/17/20 | Football Team | AP 11/03/87 | AP 01/14/20 |
|--------------|-------------------|-------------------|------------------|----------------|----------------|
| Yale | 1 | 1 | Oklahoma | 1 | 7 |
| Harvard | 1 | 3 | Nebraska | 2 | - |
| Michigan | 3 | 9 | Miami | 3 | - |
| Stanford | 4 | 2 | Fla. State | 4 | - |
| Columbia | 4 | 4 | LSU | 5 | 1 |
| UChicago | 6 | 4 | Auburn | 6 | 14 |
| Cal Berkeley | 7 | 9 | UCLA | 7 | - |
| UVA | 8 | 8 | Syracuse | 8 | - |
| NYU | 9 | 6 | Notre Dame | 9 | 12 |
| UPenn | 10 | 7 | Clemson | 10 | 2 |
| UT Austin | 11 | 16 | Georgia | 11 | 4 |
| Duke | 12 | 12 | Okla. State | 12 | - |
| Georgetown | 13 | 14 | Alabama | 13 | 8 |
| UCLA | 14 | 15 | S. Carolina | 14 | - |
| Cornell | 15 | 13 | Mich. State | 15 | - |
| Northwestern | 16 | 9 | Penn State | 16 | 9 |

Now, I realize that there are “lies, damned lies, and statistics,”²⁵ and that

assessment scores described above, this poll is arguably reputation-based, but it is informed by the win-loss records and performance of the ranked teams in any given week in which the poll is conducted.

²³ See *AP Top 25 Poll*, AP NEWS (Jan. 14, 2020), <https://apnews.com/APTop25CollegeFootballPoll> [<https://perma.cc/7JDS-AFKW>]. Because the 2020 college football season was dramatically impacted by the effects of COVID-19, and because the 2021 rankings of law schools have yet to be released, I have chosen to compare the 2020 law school rankings, published in March 2020, with the final college football rankings, published in January 2020, following the 2019 college football season.

²⁴ University of Nebraska, University of Miami, UCLA, Syracuse University, and University of South Carolina were not eligible for bowl games in 2019 because they stunk. Florida State University and Michigan State University fared marginally better, and were bowl eligible, but were not ranked in the top twenty-five at the end of the 2019 season. Oklahoma State University was ranked twenty-fifth prior to its bowl game appearance at the end of the season but fell out of the poll after its bowl game loss.

²⁵ This phrase has apocryphal origins, but was popularized by the nineteenth-century humorist Mark Twain, who mistakenly attributed it to Benjamin Disraeli. See Peter M. Lee, *Lies, Damned Lies, and Statistics*, UNIV. OF YORK, DEPT. OF MATHEMATICS, <https://www.york.ac.uk/depts/maths/histstat/lies.htm> [<https://perma.cc/Q4D5-3XY3>] (last visited Mar. 11, 2021).

my proposal here can be seen as cherry-picking. However, rankings are arguably better when they are dynamic and not static. Presumably, all of these law schools and college football programs have benefitted from their inclusion in past rankings—it helps their brands. But the fact remains that college football rankings are dynamic in a way that most current law school rankings are not but could be.

My fear is that rankings of law faculties' scholarly impact are susceptible to the same problem of stasis, or "holding," that afflicts the overall rankings of law schools. Because citation counts—or their measures of central tendency for a given law school—do not vary greatly on an annual basis, it is likely that scholarly impact rankings will fall prey to the same time invariance as other reputation-focused rankings of law schools. This concern is compounded by the proposed *USNWR* ranking's use of a five-year rolling average, among all faculty at a law school, of citations of their scholarship in law review articles included in the HeinOnline database. If so, what is the point of another law school ranking that would fall victim to time-invariance, just as the overall rankings of law schools have? I predict that scholarly impact rankings, averaged among faculty at a given law school, will highly and positively correlate with past years' rankings and are likely to remain nearly as static as *USNWR* peer-assessment scores, especially when considering a rolling five-year average, as *USNWR* proposes to do.

Both the illegal shift and holding penalties that plague the overall rankings of law schools are concerning in their own right. But because they are likely to permeate scholarly impact rankings as proposed, they are doubly problematic. Yet, you might read these concerns as fairly general in scope or even as untested hypotheses. In Part II, I will address more direct concerns with *USNWR*'s proposed scholarly impact rankings, many of which have empirical backing.

II. FIVE FLAGS ON THE FIELD OF PLAY

A. INTENTIONAL GROUNDING

Rankings of law faculty productivity and scholarly impact are not new.²⁶ To date, the primary rankings of law faculty impact—which its

²⁶ See, e.g., Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 *IND. L.J.* 83 (2006); Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 *J. LEGAL STUD.* 373 (1998); Paul J. Heald & Ted M. Sichelman, *Ranking the Academic Impact of 100 American Law Schools*, 60 *JURIMETRICS* 1 (2019); Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 *J. LEGAL STUD.* 451 (2000); James Lindgren & Daniel Seltzer, *The Most Prolific Law Professors and Faculties*, 71 *CHI.-KENT L. REV.* 781 (1996); Gregory Sisk, Nicole Catlin, Katherine Veenis & Nicole Zeman, *Scholarly Impact of Law School Faculties in 2018: Updating the Leiter Score Ranking for the Top Third*, 15 *U.*

proponents argue is a measure of the quality of the law school—consider such factors as reputational survey responses, publication counts, citation counts, and download counts.²⁷ Although some scholars have used the Westlaw database to determine citation counts, prominent efforts to measure scholarly impact have relied on the HeinOnline and SSRN repositories.²⁸ Those that use the HeinOnline database are focused on citations of a law professor's work in other law reviews on the database, whereas those that use SSRN track downloads from the SSRN repository as evidence of their scholarly impact.²⁹ Each approach has its own costs.

Downloads from the SSRN repository might be a poor proxy for impact for two reasons. Papers posted to SSRN can be downloaded and accessed by virtually anyone³⁰ and can be downloaded multiple times by the same reader on different devices.³¹ The downside of the second reason is obvious: download counts on SSRN can be inflated. But a potential drawback of the first reason is that downloading an article does not indicate the same level of engagement as citing to an article. That is, a citation to an article can be indicative of the article's quality, but a download only measures passive demand.³²

The use of HeinOnline citation counts, however, is more important to our discussion, given that the proposed *USNWR* scholarly impact rankings will be based on data furnished by HeinOnline.³³ Problematically, the use of the HeinOnline database to measure scholarly impact is also twice limited: first by the requirement that cited publications—all of which are law reviews—must be in the HeinOnline database, and second by only counting citations in that database from other *legal* scholars. Here, too, the first limitation is apparent: only law reviews in the HeinOnline database are considered as sources for citation counts. This restriction necessarily

ST. THOMAS L.J. 95 (2018); Michael Yelnosky, Faculty Productivity Study (2007) (unpublished manuscript) (on file with Roger Williams University School of Law).

²⁷ See *supra* note 26.

²⁸ Heald & Sichelman, *supra* note 26, at 4–5 (stating that using data from HeinOnline and SSRN has advantages over using data from Westlaw to develop scholarly impact rankings).

²⁹ Interestingly, scholars have noted the positive correlation between results from HeinOnline-only citations and SSRN-only downloads as measures of scholarly impact among law faculty. See *id.* at 31 (noting that there is a 0.84 correlation coefficient between HeinOnline-only citations and SSRN-only downloads).

³⁰ Yes, even the hoi polloi can read your esoteric articles, fellow law professors. Oh, the humanity!

³¹ I know this firsthand, because one of the first articles I ever posted to SSRN doubled its download count—that's right, from two to four—in a matter of minutes when my mother started to read it on her phone but switched to her computer because the iPhone screen was "just too small." You, too, can game the SSRN download counts if you send your mother links to your articles!

³² I, for one, do not subscribe to the notion that a download is a useless metric because demand for an article *is* evidence of its impact. However, it is difficult to rebut the claim that a citation is not evidence of impact of a potentially higher magnitude.

³³ See Caron, *supra* note 12.

excludes any legal scholarship that does not appear in a law review—and not just any law review, but only those on the HeinOnline database. The second limitation might seem not to be one at all but is inherently reductive, confining a legal scholar's impact to the legal field even though that scholar's work might have impact beyond the discipline of law. This limitation cuts against the contemporary trend of legal scholarship to raze academic fences in the pursuit of expanding the reach of knowledge about the law and its impacts, potentially erasing the progress that legal scholarship has made during the past several decades. Moreover, when compared with the more egalitarian metric of download counts from SSRN, citation counts in the HeinOnline database seem to create an illusory disciplinary silo when legal scholarship is more interdisciplinary than ever.

This is a form of “intentional grounding”—our first penalty flag for the proposed *USNWR* scholarly impact rankings methodology. By unduly restricting cited articles to include only those in the HeinOnline database, the universe in which real scholarly impact could take place is limited to a system of planets orbiting a dim star.³⁴ And it raises questions about whether citation counts are really proper measures of scholarly impact at all. Though citation and download counts are indeed important indicators of a revealed preference for one piece of scholarship over another, they are probably not the first things that come to mind when one is seeking to measure academic impact or quality. My concern is that measuring scholarly impact by either of these two metrics provides a modest proxy at best for faculty quality and necessarily cabins a scholar's contributions to one field alone. These are thoughts to ponder as we review four remaining penalty flags.

B. TARGETING

Scholarly impact rankings relying on citation counts have attempted to centralize individual performance through medians, means, or both at the law school level. However, generally, the individual values that are aggregated at the law school level come from cumulative lifetime citation counts of individual law professors. This undoubtedly rewards law schools with older faculty members who have a greater career span and body of work to be cited. Even a ranking of scholarly impact based on a five-year rolling average of citations within that period would privilege law schools with greater representation of senior faculty members, whose work is more likely to be cited. But in either case, a scholarly impact measurement based on citation counts, perhaps unlike one based on download counts, also ignores myriad factors such as gender, race, and especially doctrinal legal

³⁴ In addition to representing only a piece of the legal academic sky, the user interface for HeinOnline is galactically outmoded, making the database seem like it offers little more than poorly scanned .pdfs. Please bring your website into the twenty-first century, HeinOnline!

discipline.³⁵ For example, citation counts are greater, on average, for men than women and for white faculty than faculty of color.³⁶ The research of top scholars in Law & Economics, for example, is cited much more often than that of the top scholars in Trusts & Estates.³⁷ And faculty at the schools ranked in the top quartile of the *USNWR* overall rankings tend to have higher citation counts than faculty at law schools ranked outside of the top fifty-one law schools.³⁸

Adjusting for these disparities would indeed be cumbersome. But any measure of scholarly impact that does not adjust for these inequalities implicitly endorses their perpetuation. This is grounds for our next penalty flag: “targeting.” A system that relies on citation counts can create a dangerous reinforcement cycle that disparately impacts, among others, younger scholars, scholars of color, and women scholars. Moreover, the *USNWR* scholarly impact ranking would continue to reward scholarship in certain doctrinal areas to the detriment of others and hinder the diversification and present posture toward interdisciplinarity in legal scholarship.³⁹ This point tips into our next penalty flag—“ineligible receiver”—which comes in two parts.

³⁵ See Adam Chilton & Jonathan Masur, *What Should Law School Rankings Measure and How Should We Measure It: A Comment on Heald & Sichelman's Rankings*, 60 *JURIMETRICS* 61, 63 (2019).

³⁶ See *id.* at 63, 65.

³⁷ See Black & Caron, *supra* note 26, at 85 (discussing bias in favor of Law & Economics scholars); *id.* at 94 (discussing how Trusts scholars receive relatively few citations). Citation patterns, including the raw number of citations a publication receives, vary by field and publication placement even if there are no qualitative differences that distinguish the work. Many important “niche subjects” are disproportionately topics drawing on empirical research, including studies of how the law impacts individuals on the basis of their race and gender. Scholarship in these subjects generally receives fewer citations and is less likely to receive placement in a top law review than mainline legal scholarship in, for instance, the constitutional law domain, which is less likely to be influenced by empirical or other interdisciplinary methodologies. Thus, one should expect that the scholarly impact rankings will predictably shrink outreach and scope in negative ways within the legal academy by disincentivizing faculty from engaging in research on important topics that are more attenuated from the scholarship typically published in mainline law reviews, all the while reinforcing the incentives for producing scholarship in highly-cited legal domains.

³⁸ See Alfred L. Brophy, *The Relationship Between Law Review Citations and Law School Rankings*, 39 *CONN. L. REV.* 43, 50 (2006).

³⁹ In recent years, many law schools and law scholars in the United States have sought to incorporate social science into legal scholarship. The reason for this development is simple: it provides the public with relevant and sound scientific information, helps to guide law faculty as educators and policy advocates, and instills in law students an appreciation for the ways in which interdisciplinary research and expertise are likely to be relevant to their activities as lawyers. However, with law schools incentivized by their desire to score well in the new scholarly impact rankings, faculty who take the time to apply for grants, perform interdisciplinary research, and undergo a lengthy process of peer review may be harming rather than enhancing their law schools' scholarly impact ranking, no matter the quality of their work or research output.

C. INELIGIBLE RECEIVER

First, imagine a scenario in which a professor leaves the law school at which she received tenure for another law school. She brings with her a cumulative citation count that was “earned” at her former law school, but now it counts for the new law school’s scholarly impact score. One could make the argument that the citations earned at the professor’s first law school should not be eligible for transfer to the professor’s new law school. Though this result might be the fairest treatment of attribution for citation counts, no scholarly impact ranking has accounted for the reality that the professor’s new law school is the beneficiary of a citation-count windfall in this situation. If a consideration of citation counts does not already factor into how law schools base lateral hiring decisions—and it surely does, implicitly or explicitly, at many law schools—the potential for an automatic increase to a law school’s scholarly impact by poaching a highly cited scholar would surely become a *de rigueur* hiring consideration. More on that in a moment.

The first part of this penalty deals with the real possibility of law schools explicitly competing for scholars with high citation counts in order to boost their scholarly impact ranking, and the second part is concerned with the real ineligible receivers—those faculty members who are overlooked. With one notable exception, interdisciplinary legal scholars who publish in non-law journals are necessarily left out of the equation for measures of scholarly impact that rely solely on citations in law reviews.⁴⁰

Thus, legal historians who write books, legal sociologists who publish in sociology journals—and many interdisciplinary legal scholars who have published research in social science journals, science journals, humanities journals, international journals, and most peer-reviewed journals, none of which are included in the HeinOnline database—are precluded from having a meaningful scholarly impact score in a system that only counts citations in law journals. This brings us to our final two penalty flags.

D. UNSPORTSMANLIKE CONDUCT

As discussed in Part I, one of the nastiest problems with rankings of law schools is that they have created incentives for law schools to behave badly. The argument can be made, and fairly, that these negative behaviors are a direct result of the perverse incentives inherent in ranking law schools. That is, seeking to gain standing in the rankings and thus also in public perception, law schools have every incentive to inflate measures of their

⁴⁰ Only one study to date has considered the importance of legal scholars’ non-law publications and citations. See J.B. Ruhl, Michael P. Vandenberg & Sarah Dunaway, *Total Scholarly Impact: Law Professor Citations in Non-Law Journals* 5 (Vanderbilt Law Rsch. Paper No. 19-35, Oct. 8, 2019), <https://ssrn.com/abstract=3451542>.

quality. The proposed *USNWR* scholarly impact ranking presents many perverse incentives to which law schools will respond, just as they have to the perverse incentives of the overall ranking.

With respect to the points discussed under the “ineligible receiver” penalty flag, it is conceivable that if law schools focus on their position in the scholarly impact as much as they do on the overall law school ranking, several law schools will make hiring decisions based on actual or potential citations in law publications, which will likely suppress the number of jobs available to scholars in fields other than Constitutional Law, for example, as well as for interdisciplinary scholars. Moreover, because citation counts would be portable for lateral hires, law schools would have an incentive to hire senior lateral candidates instead of more junior lateral candidates, which could introduce additional externalities such as stalling efforts to diversify law faculties through new hires. The bottom line is that if rankings can be gamed, they will be. And law schools do not need yet another incentive to engage in “unsportsmanlike conduct.”

E. CLIPPING

Law professors wear many hats. They instruct the next generation of lawyers and educate current members of the bar. They serve on law school and university committees and boards for public organizations and non-profits. They frame legislation, write amicus briefs, testify before Congress, represent clients, and generate knowledge and insight with their scholarship. Occasionally, they even pretend to be epidemiologists. But all joking aside, legal academics are versatile institutional citizens whose value and impact often defies objective measurement. Simply put, citation counts in law review articles cannot fully capture the impact of each of these vital pursuits. In fact, these rankings neglect altogether amicus brief writing, congressional testimony, or even legislative drafting, all of which could rightly be included in a broad reading of legal scholarship.

As a result, scholarly impact rankings cut short the full role of law school faculty, “clipping” it to a narrowly defined subset of legal academic scholarship. In ranking law schools based on their faculty members’ citation counts, law faculty members are necessarily reduced to just one of their functions. Many law professors prioritize teaching over scholarship. There may be good individual reasons for this prioritization, and there are often institutional reasons for this prioritization as well given that some law schools privilege law teaching, regardless of its impact on their reputation. Measuring all faculty against one ruler that furthers inequalities within the legal academy hardly feels warranted.

III. THERE'S NO "I" IN TEAM

Law school rankings work best when they signal quality to stakeholders. Imagine for a moment that this signal is the broadcast of a football game that you, the stakeholder, are trying to pick up with the bunny-ear antennae on your television set, circa 1977. If you were a moderately sophisticated spectator, you would know that the picture should contain eleven players lined up on each side of the ball, play-by-play announcer Keith Jackson's staccato delivery—with just a hint of a Southern drawl—should provide insightful commentary about the play, and the field should be green. If any one of these things were amiss, you could adjust your receiver to correct the issue. But if this were your first time viewing a game of football on television, you might think that it is normal for the field to be light blue. You might not even fiddle with your antennae to change the picture, remaining satisfied with static noise—or, worse yet, a grainy broadcast of the "Price is Right"—instead of a clear signal of the football game. This analogy serves to underscore the differences among stakeholders of law schools, not only in terms of their familiarity with evaluating how law school rankings measure quality but also in terms of whether the signal is broadcast with the stakeholder group as the target audience.

Stakeholders in the enterprise of legal education have varied interests between and among them, making a one-size-fits-all approach to rankings, such as the proposed scholarly impact rankings, unhelpful. But their generally shared interests merit consideration. Arguably, prospective and current law students want to glean information from the rankings about which law schools would yield them the best prospects for gaining a good legal education, passing the bar, and embarking on a career as an attorney. And many members of these groups indeed care about the reputation of the law school they attend or seek to attend. These are the stakeholder groups for whom the rankings are most important, and yet, at present, most rankings fail to fully consider the varied interests of prospective and current law students.⁴¹

Simply put, most rankings of law schools poorly measure a law school's quality, including the rankings of scholarly impact. *USNWR's* Best Law Schools ranking has become the dominant law school ranking in part because it is inherently subjective. It tells stakeholders how a law school's quality should be measured, and law schools conform to its metrics or pay the price. *USNWR's* relatively monolithic voice in the rankings does not fully consider the preferences of current and prospective students and may not align with their understanding of quality. Its proposed measure of

⁴¹ That is why the two rankings systems that I have contributed to the literature have focused exclusively on these stakeholder groups. See Ryan, *supra* note 19; Christopher J. Ryan, Jr. & Brian L. Frye, *A Revealed-Preferences Ranking of Law Schools*, 70 ALA. L. REV. 495 (2017).

scholarly impact does not either.

In the fall of 2017, I administered a thirty-eight-question survey to students at four law schools to gauge, among other things, the students' preference for the law school that they ultimately decided to attend.⁴² Though I am bound by anonymity agreements and cannot disclose which law schools participated, I can describe the participating law schools as: a private elite law school; a public flagship law school; a public regional law school; and a private new law school. When I asked student respondents what factors were among the greatest, average, and least important considerations influencing their decision to enroll in their law school, I found that the answers that the students provided varied by the type of law school attended. For instance, at the private elite law school, almost all of the respondents ranked reputation first among their primary considerations when deciding to attend law school, even ahead of the school's excellent track record of placing graduates in the jobs that they wanted or financial aid. At the public flagship law school, reputation ranked second to financial aid considerations. Reputation was not among the top three factors of importance for students at the public regional or private new law schools. These results are likely illustrative of students' preferences at other law schools. Thus, a ranking of law schools that is built largely on reputation misses what captures the interest of most law students.

More importantly, however, faculty reputation was one of the twenty-one factors from which students could choose in answering this question. It ranked among the bottom five factors—that is, the factors that respondents considered to be least important in choosing their law school—for students at every law school that participated in the survey. At the 2020 AALS Conference, when asked why *USNWR* was creating a ranking of the scholarly impact of law faculties, *U.S. News*' Chief Data Scientist, Bob Morse, indicated that he thought that law students would be interested in it but had not conducted any research to verify this assumption.⁴³ If my survey results are any indication, scholarly impact rankings are unimportant to most law students.

⁴² For a more complete discussion of the Law School Choice Survey and its results, see generally Christopher J. Ryan, Jr., *Analyzing Law School Choice*, 2020 ILL. L. REV. 583 (2020).

⁴³ Robert Morse, Chief Data Scientist, *USNWR*, Panel Comments at the Association of American Law Schools Annual Meeting (Jan. 3, 2020). These comments are to the best of my recollection. They may or may not reflect Mr. Morse's beliefs then or now. *USNWR* has not officially stated why it is creating a ranking of the scholarly impact of law faculties.

Table 3: Top Five Factors of Greatest Consideration in Attending Law School

| Top Factor | Private Elite Law School | Public Flagship Law School | Public Regional Law School | Private New Law School |
|------------|---------------------------------------|------------------------------------|------------------------------------|---------------------------|
| 1 | Reputation (98.85) | Financial Aid (79.52) | Bar Passage (79.69) | Bar Passage (90.91) |
| 2 | Job Placement (81.29) | Reputation (77.38) | Local Career Opportunities (67.21) | Financial Aid (84.09) |
| 3 | Financial Aid (73.59) | Local Career Opportunities (56.76) | Job Placement (67.19) | Job Placement (69.57) |
| 4 | Regional Career Opportunities (60.71) | Bar Passage (56.41) | Financial Aid (62.90) | Reputation (61.36) |
| 5 | Alumni Network (45.68) | Job Placement (50.00) | Proximity to Home (55.93) | Proximity to Home (56.82) |

Now, I suspect that reputation matters to all law faculty members at some level. But I also suspect that the extent to which reputation, as proxy for scholarly impact, matters to a law faculty member varies with the faculty member's institution as well as a host of other factors—just as it did with law students in my survey. However, on average, scholarly impact rankings do not appear to elicit a positive response from law schools. In late 2019, Kaplan Test Prep polled law schools, asking whether they planned to participate in the proposed *USNWR* ranking of scholarly impact. Of the 101 law schools that responded, 24 percent said, “Yes,” 7 percent said, “No,” and 69 percent said, “Not sure.”⁴⁴ Additionally, 99 law schools responded to a question asking how much value students should place on scholarly impact rankings when deciding where to apply and enroll in law school. Only 2 percent indicated that scholarly impact was of “high value,” 33 percent placed a “moderate value” on scholarly impact, 38 percent placed a “low value” on scholarly impact, 10 percent gave “no value” to scholarly impact, and 16 percent said that they did not know.⁴⁵ If the scholarly impact rankings are not salient to law students or legal academics, one must earnestly question why and for whom these rankings are being created. If the answer to these questions is to sell more web subscriptions for *USNWR*, these rankings are likely more noise than signal anyway.

⁴⁴ Joe Patrice, *Law Schools Weigh in with Collective ‘Meh’ on New US News Rankings*, ABOVE THE LAW (Jan. 10, 2020, 3:33PM), <https://abovethelaw.com/2020/01/law-schools-weigh-in-with-collective-meh-on-new-us-news-rankings> [<https://perma.cc/23TK-8AZS>].

⁴⁵ *Id.*

CONCLUSION

I realize that I am something of a rookie, given that I have not been in the legal academy for long. However, with sincere respect and appreciation for the scholars that have valiantly attempted to measure scholarly impact to date, no measure of scholarly impact adequately addresses the multiple flags raised on the field of play. No measure of scholarly impact confronts the perverse incentives that they will create, nor do these measures consider the disparity and inequality that they will advance, particularly for legal scholars of color as well as women and early-career law faculty. In my view, measures of scholarly impact are not yet refined enough to be broadcast on a signal as strong as *USNWR*'s. And if the publication does not plan to address the concerns raised in this Article, as well as by many deans and law school faculty members, then the ranking should be disavowed, or at least ignored, by the legal academy.

That said, there is great promise in scholarly impact rankings that can be realized. A dynamic measure of scholarly impact that addresses the multifaceted academic pursuits of modern law scholars, considers interdisciplinary contributions, and accounts for the contributions of younger faculty, faculty of color, and women faculty would have great merit. I thank those who have striven to bring greater rigor to measures of quality on the basis of faculty scholarship. I sincerely hope that additional scholarship is devoted to improving measures of scholarly impact because the best rankings are those that more closely contemplate the nuance and attention to individual stakeholder preferences that more general rankings often elide.

However, let us not forget for whom rankings of law schools are most important. As academics, we tend to measure our worth by the length of our *curricula vitae*. But our publications in law reviews do little to inform the public, and especially prospective and current law students, about what an investment in legal education at our law schools means for them. Any ranking of our law schools should be made with our students in mind. Law school rankings should reflect what our students have done before they came to law school, what they do at our law schools, and what they do once they leave our halls of learning. We would do well to heed the advice of Coach Rockne, who admonished reporters seeking to put him in the limelight ahead of his team: "Tell the public about the [team] . . . They're the ones who do the work and they should get the credit. The people are interested in them, not me."⁴⁶

⁴⁶ STUHLDRER, *supra* note 2, at 43.